

**M.D. Allocatur Dkt.**

7 7 9 2018

**Filed in Supreme Court**

**NOV 28 2018**

**Middle**

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

No. \_\_\_\_\_ MAL Allocatur Dkt. 2018

Uniontown Newspapers, Inc., d/b/a The Herald Standard;  
and Christine Haines,

Respondents

v.

Pennsylvania Department of Corrections,  
Petitioner

**RECEIVED**

**DEC 12 2019**

OFFICE OF OPEN RECORDS

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**PETITION FOR ALLOWANCE OF APPEAL OF THE PENNSYLVANIA  
DEPARTMENT OF CORRECTIONS**

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Appeal from the Order of the Commonwealth Court of Pennsylvania dated and entered October 29, 2018 at No. 66 M.D. 2015, granting a Fee Petition as to a portion of the fees claimed relative to the Petition for Enforcement of an Office Open Records decision

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Dated: November 28, 2018

**Received in Supreme Court**

**NOV 28 2018**

**Middle**

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

Pennsylvania Department of Corrections,	:	
	:	
Petitioner,	:	
v.	:	No. ____ MAL Alloc. Dkt. 2018
Uniontown Newspapers, d/b/a/The Herald	:	
Standard: and Christine Haines,	:	
	:	
Respondents	:	

**ORDER**

**NOW**, Petitioner's Petition for Allowance of Appeal is hereby **GRANTED**.

The issues on appeal are delineated as follows:

I. Where RTKL Sections 65 P.S. §67.1304 and §67.1305 premise the award of sanctions and attorney fees on a finding of bad faith and willful and wanton behavior, can a court impose those penalties based on a finding that the RTKL responder failed to personally and independently assess the universe of documents sought, instead relying on the statement of Bureau functionaries that all otherwise responsive records are part of a noncriminal investigation, when any duty to independently and personally assess is not clearly delineated in either the statute or the case law?

II. Can an agency's mere misinterpretation of an RTKL request justify an award of sanctions and penalties under the RTKL?

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J.

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### **Appendices:**

- A. October 29, 2018 Opinion and Order
- B. March 23, 2018 Opinion and Order
- C. December 19, 2016 Opinion and Order
- D. May 28, 2015 Order overruling the Department's Preliminary Objections
- E. December 7, 2015 Opinion and Order denying Requestor's Motion for Judgment on the Pleadings
- F. Initial Right to Know request dated September 25, 2014
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- H. Final Determination of the Office of Open Records dated December 1, 2014
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## **Jurisdictional Statement**

There is conflicting law regarding the basis for this appeal. Appellate jurisdiction of this matter is vested in the Pennsylvania Supreme Court either under Section 723(a) of the Judicial Code, 42 Pa. C.S. §723(a) (providing for direct appeals from final orders of matters originally commenced in the Commonwealth Court) or, alternatively, under Section 724 of the Judicial Code, 42 Pa. C.S. §724(a) (providing for allowance of appeal from matters within the appellate jurisdiction of the Commonwealth Court and Superior Court). Support for a direct appeal is found in the opinion of the Commonwealth Court at *Capinski v. Upper Pottsgrove Township*, 164 A.3d 601 (Pa. Cmwlth. Ct. 2017), in which the court construed an enforcement proceeding regarding a decision of the Office of Open Records (“OOR”) as being subject to an appeal as of right to this court.

For this reason Petitioner, the Department of Corrections (“Department”) initially filed both types of appeals as to the March 23, 2018 opinion and order at *Uniontown Newspapers, Inc. v. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Cmwlth. 2018) (Exhibit B). This Court originally accepted the notice of appeal; however, on September 4, 2018 the Court issued an order at No. 20 MAP 2018 indicating that the matter would be treated as a petition for allowance of appeal and transferred it to the allocator docket. It was assigned Docket No. 561 MAL Allocatur Dkt. 2018. The Order permitted the Department to file a conforming petition for allowance of appeal within thirty days, and the Department complied with this Order.

To the extent that the Department has a pending petition for allowance of appeal at Docket No. 561 MAL Allocatur Dkt. 2018 and to the extent that the Department is now seeking to appeal the October 29, 2018 opinion and order of the Commonwealth Court as discussed below, this petition for allowance of appeal incorporates those issues raised at Docket No. 561 MAL Allocatur Dkt. 2018 to ensure that all issues are preserved for review.

### **Reference to Opinions**

This is an appeal from an October 29, 2018 final order of the Commonwealth Court (Exhibit A) that granted a portion of the fees as sought by Uniontown Newspapers, Inc., d/b/a The Herald Standard and Christine Haines (“Respondents”) in their fee petition relative to the enforcement action filed by Respondents concerning a decision of the OOR. The Respondents filed the fee petition pursuant to the findings and conclusion that the Department committed bad faith under the Right to Know Law (“RTKL”) in the single judge opinion of March 23, 2018. *Uniontown Newspapers, Inc. v. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Cmwlth. 2018). In *Uniontown Newspapers, Inc. v. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Cmwlth. 2018), the March 23, 2018 Order required the Department to produce certain records that the Commonwealth Court deemed responsive to the Respondents’ RTKL request, with penalties of up to five hundred dollars a day for any delay beyond twenty (20) days; granted a request for civil penalties; and established a deadline for Respondents to notify the Commonwealth Court of its intent to pursue attorneys’ fees and submit any documentation upon which

Respondents would rely.

Accordingly, Respondents filed a petition for attorney fees ("Fee Petition") Judge Simpson held a hearing on the reasonableness of the attorney fees, and he awarded Petitioners a portion of the fees that they requested, \$118,458.37, on October 29, 2018.

In addition to appealing the findings and conclusion that the Department acted in bad faith, thus constituting the basis for the Fee Petition, this appeal also incorporates issues decided in the Commonwealth Court's December 19, 2016 opinion and order (Exhibit C), as well as issues decided in the Commonwealth's March 23, 2018 opinion and order (Exhibit B). Copies of all opinions and orders are attached hereto as Exhibits A-E.

### **Text of Order**

The Orders are lengthy and are attached hereto, along with the supporting opinions, as Exhibits A through C.

### **Questions Presented for Review**

- I. Where RTKL Sections 65 P.S. §67.1304 and §67.1305 premise the award of sanctions and attorney fees on a finding of bad faith and willful and wanton behavior, can a court impose those penalties based on a finding that the RTK responder failed to personally and independently assess the universe of documents sought, instead relying on the statement of Bureau functionaries that all otherwise responsive records are part of a noncriminal investigation, when any duty to independently and personally assess is not clearly delineated in either the statute or the case law?**

**Suggested Answer: No.**

**Answered below in the affirmative.**

**II. Can an agency's mere misinterpretation of an RTK request justify an award of sanctions and penalties under the RTKL?**

**Suggested Answer: No.**

**Answered below in the affirmative.**

**Statement of Case**

This matter has its genesis in an article titled "No Escape: Exposure to Toxic Coal Waste at SCI-Fayette" and published in September 2014 by the Abolitionist Law Center. The report correlated ill health for SCI Fayette inmates to nearby toxic coal waste. In response, the Department undertook an investigation ("No Escape Investigation"), as did the Pennsylvania Department of Health. On September 25, 2014, apparently in response to this article, Respondents sent the following RTKL request, Exhibit F, to the Department through Ms. Haines:

I am seeking documentation of illnesses contracted by inmates and/or staff member at SCI-Fayette. I am not seeking identifying information, only the types of reported contracted illnesses and the number of inmate 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 of SCI-Fayette with the health at other state correctional facilities, that would also be helpful.

The Department's Agency Open Records Officer responded (*See Exhibit G*), denying the request and citing various statutory exemptions, notably, for purposes here, the one concerning non-criminal investigations. *See* 65 P.S. 67.708(b)(17). Respondents appealed that response to the OOR. The OOR

disagreed that any statutory exemptions applied and directed the Department to provide “all responsive records...within 30 days.” *See* Exhibit H. In support of its Final Determination, the OOR stated that the Department “has not asserted that records are being withheld pursuant to this noncriminal investigation exemption, and has not provided any evidence on appeal to explain why these records fall under this exemption.” The Department did not appeal this Final Determination.

Thereafter, the Department provided the following records to the Requester: 1) “statistics of inmates diagnosed with pulmonary and gastrointestinal ailments from 2010-2014, including a comparison across institutions;” 2) “comparisons of natural death and cancer deaths;” and 3) a spreadsheet of SCI-Fayette cancer deaths, by type of cancer, from 2003-2013, including comparison by institution from 2010-2013. *See* Commonwealth Court opinion of 12/19/16/ at p. 4. After receiving additional clarification from the Requester, the Department provided copies of a press release; an analysis of SCI-Fayette drinking water; an investigative summary produced by the Department’s Medical Director, Dr. Noel; a redacted copy of a medical record review conducted by Assistant Medical Director Dr. Ginchereau; a list of cancer patients at SCI-Fayette (with names redacted); statistics regarding oncology treatment of SCI-Fayette inmates from November 2014; and the Department of Health’s investigative results. *See* Commonwealth Court opinion of 12/19/16/ at p. 5.

Respondents, apparently believing that Petitioner had not disclosed all responsive records, filed a Petition for Enforcement with the Commonwealth

Court. The Department filed preliminary objections, which Judge Brobson overruled. *See* Exhibit D. Following the Department's Answer and New Matter, Respondents filed a motion for judgment on the pleadings, which Judge Oler denied. *See* Exhibit E. The parties then engaged in discovery and filed cross-motions for summary relief.

Judge Simpson denied Respondents' motion for summary relief without prejudice to allow the enforcement action to proceed for further fact finding as to whether all responsive records had been disclosed. The judge granted in part and denied in part the Department's cross-motion. The Judge granted the Department's motion in support of its position that it had no duty to provide redacted individual inmate medical records and no duty to create new records after the request was filed. The Judge denied the Department's cross-motion to the extent it asserted that the Department had complied with the OOR Final Determination. The court withheld ruling on whether statutory sanctions should be imposed and directed the parties to submit stipulated facts on various points it identified in the order.

The parties submitted stipulations as directed. In August 2017, Judge Simpson conducted a hearing. In addition to the testimony of the Editor for the Respondent Newspaper, the court heard testimony from the Department's then-Director of its Bureau of Health Care Services ("Bureau"), Mr. Oppman; its RTKL Officer, Mr. Filkosky; and Department Counsel assigned to the OOR appeal of this case, Mr. Defelice.

Critical to this appeal are the Judge's findings with regard to the Department's initial response to the request for records. The Judge held that Mr. Filkosky received the request and forwarded it to Bureau representative, Ms. Montag, and that Ms. Montag advised Mr. Filkosky that the Department, along with the Department of Health, were involved in the No Escape Investigation and that "all responsive records related to the No Escape Investigation." The Judge then went on to find that Mr. Filkosky determined, based solely upon Ms. Montag's representation, that all responsive records would be related to the No Escape Investigation, and thus exempt under the non-criminal investigation exemption in the statute. *See Commonwealth Court opinion of 3/23/18 at p. 9.*

The court then went on to conclude that because Mr. Filkosky relied on Ms. Montag's statement and did not, himself, obtain and then independently assess the records, he acted in bad faith. *See Commonwealth Court opinion 12/23/18 at p. 9.* It is this conclusion, which is based on a duty the court found that is not expressly stated in the RTKL, relevant portions of which are attached hereto as Exhibit H, or any court decision and which, the Department contends was not reasonably apparent, that underlies this Petition. Further, Mr. Defelice, in arguing the applicable exemption before the OOR, also did not obtain and review the records, relying on the position of then-Director Oppman. Therefore, this challenge also incorporates that action.

**Statement of Reasons for Allowance  
of Appeal under Pa. R.A.P. 1114**

**A. This is a question of first impression.**

The Commonwealth Court's indication that Agency Open Records Officers hold a specific duty to independently assess potentially responsive records presents a question of first impression. The Commonwealth Court's underlying decision imposes a significant independent analytical duty on a RTKL responder, at least in cases involving internal agency investigations. Such an overarching obligation neither appears in the text of the RTKL, nor has it been previously set forth in jurisprudence. As such, the decision has a major impact on the way RTKL requests are handled, especially in larger agencies, such as the Department, which has 15,000 employees and 27 separate Institutions. In addition, the applicability of penalties and sanctions for failure to assess, at least in the first instance, is of major import not only to the Department, but also to all government entities that answer RTKL requests. As concerns the Department, it receives more RTKL requests than any other state agency and, because it houses inmates, investigations are routine. Therefore, the jurisprudence of this Commonwealth would be well served if this Court were to address the parameters of the Agency Open Records Officer's duty to investigate in conjunction with the applicability of sanctions.

To be clear, the Department acknowledges that this Court has recognized, in *Bowling v. Office of Open Records*, 621 Pa. 133, 75 A.3d 453 (2013), that sanctions

and attorney fees can be awarded in RTKL cases. However, such an award is premised on willful or wanton disregard, an unreasonable interpretation of law, or a frivolous appeal (the last of which does not apply here since the Department did not appeal the ORR decision). As set forth in 65 P.S § 67.1304:

### **Court costs and attorney fees**

(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 (emphasis added).<sup>1</sup>

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<sup>1</sup> It should be noted that, in general, successful attorney fee petitions involve bad conduct, *see generally*, 42 Pa. C.S. §2503, which Petitioner asserts does not exist here for the reasons explained above.

Judge Simpson, finding that Section 1304(a) is ambiguous, reasoned that the term “final determination” can be construed as constituting the “final determination of the appeals officer,” issued pursuant to Chapter 11 of the RTKL, or the “receiving agency’s final determination denying access.” See Commonwealth Court opinion of 10/29/18 at p. 6. Judge Simpson stated, “The issue before a Chapter 13 Court in analyzing Section 1304(a) is whether attorney fees are reserved for when the Court reverses an *appeals officer’s* determination, or as opposed to when a receiving agency’s determination is reversed.” *Id.* at p. 8. Enlisting principles of statutory interpretation, Judge Simpson articulated “several reasons Section 1304(a) of the RTKL should not be construed as requiring the reversal of an appeals officer’s determination by a court. Foremost, such an interpretation is unreasonable and would yield an absurd result.” *Id.*

However, Judge Oler, in ruling upon the Respondents’ motion for judgment on the pleadings, noted that it was not clear that Respondents were entitled to court costs and attorney fees under the RTKL “Section 1304 states that a requester may be entitled to attorneys’ fees and costs in those instances where a court reverses the determination of the OOR appeals officer, or when the court grants access to records after a deemed denial by the agency. Neither situation is present here. This matter appears in the Court’s original jurisdiction and not as an appeal from an OOR determination. In addition, our research failed to discover any case law addressing the imposition of court costs and attorneys’ fees in original

jurisdiction proceedings seeking compliance with an OOR determination.” Commonwealth Court opinion of 12/7/15 at p. 11. Accordingly, this is a case of first impression.

The Department submits that, where the basis for the finding of bad faith is premised upon failure to perform a duty not readily discernible from either the statute or the case law, there cannot be, as a matter of law, wanton or willful disregard or an unreasonable interpretation of the law such as to support sanctions.

In addition, to the extent the bad faith finding and attendant sanction is premised on Mr. Filkosky’s and/or Mr. Defelice’s misinterpretation of or reliance upon the limitations in the request itself, this is also an improper basis. It cannot be gainsaid that the request was far from clear. The Judge spent several pages setting forth what each party believed the request entailed and then interpreted it to include only some of the records. *See* Commonwealth Court opinion of 12/19/16 at pp. 9-11, 13-15. Further, because the Judge acknowledged that the parties could not agree on what was even requested, much less whether various exemptions applied, and then was required to interpret the request himself in the context of construing his disclosure order, it is indisputable that the request itself was unclear. Given that it was, the mere fact that the Judge in the final instance did not agree with the Department’s interpretation is not a basis upon which to premise a finding of bad faith.

**B. This is a matter of great public importance.**

Imposing sanctions in a case such as this, where the law is not clear with respect to what government functionaries must do in responding to a RTKL request, does not serve the public interest. Despite the absence of any bad conduct by governmental officials, the taxpayers bear the ultimate burden of the fines and attorney fees that Judge Simpson ordered to be paid to Respondents. There should be no such burden when the law was not clear.

**C. There is a conflict with another intermediate appellate court on what is “wanton and willful” for purposes of sanctions.**

In *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644, 650 (Pa. Cmwlth. 2006), the Commonwealth Court upheld an award of sanctions under the RTKL, concluding that the conduct in issue was wanton and willful. It wrote:

The [School] District was well aware that the Settlement Agreement was a ‘public record’ under the RTKL and that the [Requestor] was interested in learning the terms of the Settlement Agreement. Nevertheless, upon receiving the [Requestor’s] request for disclosure, the District attempted to prevent such disclosure by requiring Plaintiff-students, as a condition of settlement, to petition the District Court to seal the Settlement Agreement. The District then claimed that the Settlement Agreement was not a ‘public record’ because it was sealed by order of court.

*Newspaper Holdings* clearly described conduct that is manipulative and devious. By analogy, Section 2503 of the Judicial Code, 42 Pa. C.S. §2503, empowers a court to award counsel fees against a party whose conduct is dilatory, obdurate, vexatious, arbitrary or in bad faith. As stated in *Appeal of Affected and*

*Aggrieved Residents*, 325 Pa. Super. 8, 16, 472 A.2d 619, 623 (1984), “arbitrary” has been defined as “based on random or convenient selection or chance rather than on reason or nature. . . .” “Vexatious” has been defined as “instituted without sufficient grounds and serving *only* to cause annoyance. . . .” “Bad faith,” as that term has been defined, is “fraud, dishonesty, or corruption.” (Citations omitted)

The conduct at issue here was not of the same sort. Yet, an unknown duty to independently examine records has been treated as though it were a deceptively evil action that merits the same type of sanction. As such, there is conflict not only between *Newspaper Holdings* and this case, but also between general appellate jurisprudence applying sanctions and the Commonwealth Court’s ruling here.

### **Conclusion**

**WHEREFORE**, Petitioner hereby requests that this Court grant this Petition for Allowance of Appeal and permit the appeal.

Respectfully submitted,

Office of General Counsel

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Dated: November 28, 2018

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

Pennsylvania Department of Corrections,

Petitioner,

v.

Uniontown Newspapers, d/b/a/The Herald  
Standard: and Christine Haines,

Respondents

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: No. \_\_\_ MAL Alloc. Dkt. 2018  
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**CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY**

I certify that this filing complies with the provisions of the "Public Access Policy of the Unified Judicial System of Pennsylvania Case Records of the Appellate and Trial Courts" that require filing confidential information and documents differently than non-confidential information and documents.



Maria G. Macus

Dated: November 28, 2018

# EXHIBIT A

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Uniontown Newspapers, Inc., d/b/a	:	
The Herald Standard; and Christine	:	
Haines,	:	
	:	
Petitioners	:	No. 66 M.D. 2015
	:	
v.	:	Heard: July 31, 2018
	:	
	:	
Pennsylvania Department of	:	
Corrections,	:	
	:	
Respondent	:	

BEFORE: HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: October 29, 2018**

Before me is Uniontown Newspapers, Inc., d/b/a The Herald Standard's (Requester) petition for attorney fees as part of its enforcement action against the Department of Corrections (DOC) for violating the Right-to-Know Law (RTKL)<sup>1</sup> (Fee Petition). Requester's Fee Petition relied on my findings and conclusion that DOC committed bad faith under the RTKL. See Uniontown Newspapers, Inc. v. Dep't of Corr., 185 A.3d 1161 (Pa. Cmwlth. 2018) (single j. op.) (Bad Faith Opinion).<sup>2</sup> Pursuant to Section 1304(a) of the RTKL, 65 P.S. §67.1304(a), following a trial as to reasonable attorney fees, and based on the record and the challenges DOC raised, I award Requester **\$118,458.37**, a portion of the fees claimed. This award is limited to fees supported by the record and corresponds to Requester's successful advocacy.

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

<sup>2</sup> As it was ancillary to our appellate jurisdiction under Chapter 13 of the RTKL, the Supreme Court dismissed the Department of Corrections' (DOC) direct appeal. See Order, 9/4/18 (Pa., No. 20 MAP 2018). DOC then petitioned for allowance of appeal, which is pending at 561 MAL 2018.

## **I. Background**

Because the background is adequately set forth in the published Bad Faith Opinion, I incorporate it by reference and adopt the short forms used therein.

Pursuant to the Bad Faith Opinion, Requester submitted notice of its intent to seek attorney fees under the RTKL and the Costs Act, 42 Pa. C.S. §2503. It appended summaries of legal invoices to its Fee Petition. I then scheduled a hearing limited to the attorney fee issue, requesting evidence as to what constitutes “reasonable attorney fees” under the RTKL. See Pa. Cmwlth. Order, 6/28/18.

At the hearing, Requester presented testimony by one fact witness (Publisher) regarding its payment of legal invoices for services performed. Publisher testified Requester engaged Saul Ewing Arnstein & Lehr LLP (Saul Ewing) as its counsel for the purpose of enforcing OOR’s Disclosure Order. Publisher testified as to his review and payment of fees and costs set forth in legal invoices corresponding to 2015, 2016, 2017 and 2018, through June 30, 2018 (collectively, Legal Invoices). The Legal Invoices were admitted into evidence in redacted form, as well as under seal in unredacted form. The Legal Invoices document the time spent and work performed by Charles Kelly, Esquire, (Attorney Kelly), a partner at Saul Ewing, and Michael Joyce, Esquire (Attorney Joyce), an associate at the same firm.

Attorney Kelly and Attorney Joyce represented Requester throughout this litigation. With its post-trial brief, Requester submitted affidavits executed by Attorney Kelly and Attorney Joyce as to their experience, hourly rates, and opinions as to the reasonableness of their fees (collectively, Counsel Affidavits).

In his affidavit, Attorney Kelly attested he represented newspapers and media companies for nearly 30 years on several issues, including open records. See Kelly Affidavit at ¶6. Attorney Kelly served as counsel for Requester since 2000. As lead counsel, Attorney Kelly supervised Attorney Joyce's work. Also, as the responsible attorney, he reviewed the Legal Invoices. Attorney Kelly did not bill Requester his regular hourly billable rate, which ranged from \$565.00 in 2015 to \$635.00 in 2018. Rather, Requester paid a discounted hourly rate of \$450.00 in 2015 and 2016, and \$500.00 in 2017 and 2018. As to the reasonableness of these rates, he stated: "[i]n my experience, my hourly rates are on-par with, or oftentimes lower than, the hourly billing rates of my peers with similar experience." Id. at ¶21.

Attorney Joyce attested he practiced at Saul Ewing for five years, with a primary focus on commercial litigation. See Joyce Affidavit at ¶4. He also has a niche practice counseling "newspapers and media companies on a variety of topics, including First Amendment and defamation issues." Id. at ¶5. This enforcement litigation constitutes his first experience with respect to the RTKL. Notably, Attorney Joyce does not indicate when he graduated law school or when he became licensed as an attorney. Id.

Attorney Joyce's hourly billable rate was \$295.00 in 2015, \$320.00 in 2016, \$350.00 in 2017, and \$375.00 in 2018. He attests that these are his standard, as opposed to discounted rates, and that Requester paid the invoices for his services billed at these rates. The only evidence as to the reasonableness of his rates is his statement: "In my experience, my hourly rates are on-par with, or oftentimes lower than, the hourly billing rates of my peers with similar experience." Id. at ¶12.

Requester submitted no evidence as to the reasonableness of the fees claimed, other than the Counsel Affidavits. Requester also submitted no evidence of its fees in July or August 2018 when it submitted its post-trial brief.<sup>3</sup>

DOC submitted its post-trial brief challenging the fees claimed to the extent the fees related to matters on which Requester did not prevail.

## **II. Legal Basis for Award of Attorney Fees**

The legal basis for awarding attorney fees in a RTKL enforcement action filed against a Commonwealth agency presents an issue of first impression.

Before considering the statutory sources Requester cited as grounds for recovering attorney fees, I confirm this Court's jurisdiction to award attorney fees for bad faith incident to our appellate jurisdiction in Chapter 13 of the RTKL, 65 P.S. §§67.1301-67.1305. See Uniontown Newspapers, Inc. v. Dep't of Corr., 151 A.3d 1196, 1202 (Pa. Cmwlth. 2016) (Summary Relief Opinion) (citing Dep't of Env'tl. Prot. v. Cromwell Twp., Huntingdon Cty., 32 A.3d 639 (Pa. 2011) ("enforcement proceedings lie in ... appellate jurisdiction ..."); Pa. Human Relations Comm'n v. Scranton Sch. Dist., 507 A.2d 369 (Pa. 1986)). The statutory scheme presumes an appeal of an agency's denial of access pursuant to Chapter 11 of the RTKL, 65 P.S. §67.1101.

Here, Requester was successful in its Chapter 11 appeal. Premised on that success, Requester enlisted this Court's ancillary appellate jurisdiction to enforce OOR's final determination in its favor. Id.

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<sup>3</sup> In its post-trial brief Requester attempts to invoke the common law remedy of contempt. As Requester gave no notice that it sought such relief prior to trial, I do not consider it.

First, I carefully analyze the statutory basis for reasonable attorney fees contained in Section 1304(a) of the RTKL, 65 P.S. §67.1304(a).

#### **A. Section 1304(a) of the RTKL**

Section 1304(a) of the RTKL, 65 P.S. §67.1304(a) “allows a court to award attorney fees if the court reverses a final determination or grants access when either: (1) an agency acted with willful or wanton disregard of the right to access in bad faith; or, (2) an agency’s denial was not based on a reasonable interpretation of law.” Dep’t of Educ. v. Bagwell, 131 A.3d 638, 660-61 (Pa. Cmwlth. 2015) (emphasis added). Section 1304(a) of the RTKL provides in full:

(a) **Reversal of agency determination**.— If a court reverses the final determination of the appeals officer or grants access after a request for access was deemed denied,<sup>4</sup> 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.

Id. (underscore added). The heading of Section 1304(a), “Reversal of agency determination,” and phrasing in subsection (a)(2) indicates reversal of the receiving agency’s determination denying access. 65 P.S. §67.1304(a)(2) (emphasis added).

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<sup>4</sup> Attorney fees are recoverable when an access request is deemed denied. Under the RTKL, “deemed denied” means a failure to respond within a statutory deadline. McClintock v. Coatesville Area Sch. Dist., 74 A.3d 378 (Pa. Cmwlth. 2013).

Significantly, the term “final determination” is used as to the final determination of the appeals officer, and of the receiving agency in the same section. Using the term “final determination” two different ways renders the meaning of “final determination” in Section 1304(a) ambiguous. Although it may be construed as the final determination an appeals officer issues under Chapter 11 of the RTKL, it may also fairly be construed as referring to the receiving agency’s determination denying access. Because the meaning of this term is crucial to the provision, and it is capable of two possible constructions, Section 1304(a) is ambiguous. See Office of Governor v. Donahue, 59 A.3d 1165 (Pa. Cmwlth. 2013), aff’d, 98 A.3d 1223 (Pa. 2014). Accordingly, I enlist principles of statutory interpretation to aid my construction. See Statutory Construction Act of 1972, 1 Pa. C.S. §§1501-1991.

“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” Pa. Gaming Control Bd. v. Office of Open Records, 103 A.3d 1276, 1284 (Pa. 2014) (quoting 1 Pa. C.S. §1921(a)). In ascertaining legislative intent, the provision at issue is to be read “together and in conjunction” with the remaining statutory language, “and construed with reference to the entire statute.” Id. at 1285.

Further, “[i]t is presumed ‘[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.’” McGrath v. Bureau of Prof’l & Occ. Affairs, 146 A.3d 310, 316 (Pa. Cmwlth. 2016) (quoting 1 Pa. C.S. §1922(1)). The Courts “presume ... that the General Assembly intends the entire statute to be effective and certain.” Bowling v. Office of Open Records 75 A.3d 453, 466 (Pa. 2013).

“[W]hen the General Assembly replaced the [former RTKA] in 2009 with the current RTKL, it ‘significantly expanded public access to governmental records ... with the goal of promoting government transparency.’” Pa. State Police v. Grove, 161 A.3d 877, 892 (Pa. 2017) (citation omitted); Bowling, 75 A.3d at 457 (the RTKL “significantly broadened access to public records.”). Courts “are obliged to liberally construe the [RTKL] to effectuate its salutary 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.’” Dep’t of Pub. Welfare v. Eiseman, 125 A.3d 19, 29 (Pa. 2015) (citation omitted).

Relevant here, the attorney fees provision under the current RTKL mirrors the equivalent provision under the former RTKA<sup>5</sup> in some material respects. The RTKA fees provision, also titled “Reversal of agency determination,” stated:

If a court reverses an agency’s final determination the court may award reasonable attorney’s fees and costs of litigation or an appropriate portion thereof, to a requester if the court finds either:

- (1) the agency willfully or with wanton disregard deprived the requester of access to a public record subject to access 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.

Section 6 of the Act of June 29, 2002, 65 P.S. §66.4-1(a)(repealed). Like the fees provision in the RTKA, Section 1304(a) of the RTKL applies to the requester only. Also, it provides this remedy when the receiving agency deprived a requester of access “willfully or with wanton disregard.” Id.

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<sup>5</sup> Act of June 21, 1957, P.L. 390, as amended, 65 P.S. §§66.1-66.9, repealed by, Section 3102(2)(ii) of the RTKL, 65 P.S. §67.3102(2)(ii). For clarity, I refer to the prior law as the RTKA.

However, the current RTKL added “bad faith” as another basis for recovering attorney fees. The current RTKL also changed the term “agency’s final determination” in subsection (a)(1) to “appeals officer’s final determination.” Compare 65 P.S. §66.4-1(a) (repealed), with 65 P.S. §65.67.1304(a)(1).<sup>6</sup>

The issue before a Chapter 13 Court in analyzing Section 1304(a) is whether attorney fees are reserved for when the Court reverses an *appeals officer’s* determination, as opposed to when a receiving agency’s determination is reversed. There are several reasons Section 1304(a) of the RTKL should not be construed as requiring the *reversal* of an *appeals officer’s* determination by a court. Foremost, such an interpretation is unreasonable and would yield an absurd result.

Construing Section 1304(a)(1) to require *reversal* of an appeals officer’s determination would penalize a requester for prevailing in its Chapter 11 appeal. That is because when an appeals officer recognizes a requester’s access rights in the administrative proceeding, *reversing* that appeals officer’s determination would be adverse to the requester.

If a *court’s* reversal of an appeals officer’s final determination is a prerequisite for requester’s recovery under Section 1304(a), the agency accused of bad faith may preclude this remedy by electing not to appeal the final determination to a Chapter 13 Court. Thus, the most egregious of agency conduct, and the denials of access recognized as improper during the Chapter 11 appeal, could go unchecked.

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<sup>6</sup> Presumably this change was to account for the statutory appeal process under Chapter 11 of the RTKL, through which a requester challenges an agency’s determination.

Consider the current case. DOC disregarded its disclosure duties during each stage of the RTKL process and did not comply with the appeals officer's final determination in Requester's favor. Because it obtained the Disclosure Order, Requester had no interest in this Court reversing the appeals officer's final determination. However, DOC elected to not appeal, yet did not discover or disclose all responsive records until after years of litigation. Requester here advocated the public interest in a matter of public health affecting a captive population. Its recovery of fees should not turn on whether a noncompliant agency appealed to this Court.

In the context of "bad faith," if an agency denied access improperly, it is more likely that an appeals officer would decide disclosure in a requester's favor. Presuming an agency committed bad faith, and disregarded the RTKL process at each stage as DOC did here, then on appeal, a Chapter 13 Court is more likely to *affirm* an appeals officer's determination in a requester's favor than to reverse it.

Further, a requester's access to fees should not hinge on the outcome of an appeals officer's determination. In defining this Court's role under Chapter 13, our Supreme Court held: "Section 1304[a](1) and (2) establish that the determination of the appeals officer is to be given no deference ..." for the counsel fees and penalty phase. Bowling, 75 A.3d at 470. Thus, an appeals officer's determination should not constrain a Chapter 13 Court's ability to award attorney fees to a requester pursuant to Section 1304(a)(1) of the RTKL after making a finding of bad faith.

Taking a cue from our highest court,<sup>7</sup> I also look to cases construing the RTKA for guidance in construing the fees provision. This Court construed the fee provision in the RTKA to require reversal of an *agency's* final determination. See Parsons v. Pa. Higher Educ. Assist. Agency (PHEAA), 910 A.2d 177 (Pa. Cmwlth.) (*en banc*), appeal denied, 917 A.2d 316 (Pa. 2006). That construction is equally appropriate under the RTKL.

In light of the prior provision and the ambiguity of the current provision, this Court construes Section 1304(a)(1) of the RTKL as permitting recovery of attorney fees when the receiving agency determination is reversed, and it deprived a requester of access to records in bad faith. Bagwell. This construction gives effect to the legislative intent for the RTKL to provide more transparency than the RTKA. It provides an impetus for an agency to comply with an appeals officer's final determination in a requester's favor and provides an incentive to requesters to litigate access and bad faith. Moreover, a fee award holds an agency accountable for its conduct during the RTKL process, as well as for its determination denying access.

Here, this Court found that DOC, the receiving agency, denied access willfully and with knowing disregard of Requester's rights to access, and otherwise acted in bad faith.<sup>8</sup> See Bad Faith Opinion. This Court also enforced the reversal of

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<sup>7</sup> Our Supreme Court relied on case law construing the RTKA when construing the current RTKL. See, e.g., Dep't of Pub. Welfare v. Eiseman, 125 A.3d 19 (Pa. 2015) (citing Sapp Roofing Co. v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 12, 713 A.2d 627, 629 (1998) (plurality)); see also PSEA v. DCED, 148 A.3d 142 (Pa. 2016) (relying on Sapp Roofing and PSU v. SERB, 935 A.2d 530 (Pa. 2007) as upholding a privacy right in certain personal identifiers).

<sup>8</sup> This is the first time a requester asked this Court to apply Section 1304(a) to a request for counsel fees based on a Commonwealth agency's bad faith in the context of an enforcement action. That this Court previously quoted the part of Section 1304(a) stating, "If a court reverses the final

DOC's denial. Accordingly, Requester qualifies for an award of reasonable attorney fees under Section 1304(a)(1) of the RTKL, 65 P.S. §67.1304(a)(1).

## 2. Costs Act

The Costs Act, 42 Pa. C.S. §2503(7), permits recovery for attorney fees when the relevant statutory scheme does not so provide. See Newspaper Holdings, Inc. v. New Castle Area Sch. Dist., 911 A.2d 644, 649 n.13 (Pa. Cmwlth. 2006). Because the RTKL, through Section 1304(a), allows recovery of reasonable attorney fees, I do not address whether Requester is entitled to fees under the Costs Act.<sup>9</sup>

### B. "Reasonable Attorney Fees"

As fact-finders, "Chapter 13 [C]ourts may award attorneys' fees to ... requesters or [impose] civil penalties upon agencies after the court has made relevant factual findings supporting such awards ... or penalties." Bowling, 75 A.3d at 458.

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determination of the appeals officer" does not elevate that phrase to a prerequisite for recovery. See, e.g., City of Phila. v. Ali (Pa. Cmwlth., No. 2385 C.D. 2014, filed November 12, 2015), 2015 WL 7200945 (unreported). Before now, this Court had not held a trial on bad faith that established a Commonwealth agency's bad faith. Cases where this Court recognized the receiving agency did not perform its Chapter 9 duties, and thus disregarded a requester's access rights, involved local agencies, where a common pleas court served as the Chapter 13 Court. Chambersburg Area Sch. Dist. v. Dorsey, 97 A.3d 1281 (Pa. Cmwlth. 2014) (receiving agency did not disclose responsive records until served with discovery such that it withheld 3,500 records during each stage of RTKL process); Staub v. City of Wilkes-Barre & LAG Towing, Inc. (Pa. Cmwlth., No. 2140 C.D. 2012, filed October 3, 2013), 2013 WL 5520705 (unreported) (this Court affirmed trial court order awarding attorney fees when receiving agency did not confirm nonexistence of records with third party contractor in possession of records).

<sup>9</sup> The Costs Act permits fees when a litigant engages in bad faith, defined as vexatious, obdurate or dilatory conduct. Berg v. Georgetown Builders, Inc., 822 A.2d 810 (Pa. Super. 2003). Requester bore the burden to prove existence of one of these conditions. Id.

In Requester's estimation, fees following the Summary Relief Opinion (\$114,359.61) are recoverable under the Costs Act based on DOC's delay in withholding records after this Court specified its duty to disclose certain categories of records. See Pet'rs' Post-trial Br. at 14.

This Court made the requisite findings as to attorney fees recoverable under Chapter 13 incident to our jurisdiction over Chapter 11 appeals. Id.; see Scranton Sch. Dist.

Having concluded attorney fees are recoverable under Section 1304(a)(1) of the RTKL, I consider the extent to which the fees claimed here, \$215,190.75, qualify as “reasonable attorney fees” thereunder. 65 P.S. §67.1304(a)(1).

In construing “reasonable attorney fees” under the RTKL, I am guided by precedent construing that term generally. “To determine the reasonableness of attorney’s fees and costs it is necessary to look at the amount of work performed, the character of services rendered, the difficulty of the problems involved, and the professional skill and standing of the attorney in the profession.” Twp. of S. Whitehall v. Karoly, 891 A.2d 780, 784 (Pa. Cmwlth. 2006) (citing In re Trust Estate of LaRocca, 246 A.2d 337 (Pa. 1968)). The amount of a fee award also depends on the following factors: the importance of the litigation; amount of money or value of the right involved; the degree of responsibility incurred; the results counsel obtained; and the client’s ability to pay a reasonable fee for services rendered. LaRocca. Courts may also consider the nature and length of this litigation, the responsibilities of the parties in affecting its length, and competitiveness of the rate and the time expended. Arches Condo. Ass’n v. Robinson, 131 A.3d 122 (Pa. Cmwlth. 2015).

There is no requirement that a trial court do a line-by-line analysis of a legal invoice to determine its reasonableness. Twp. of Millcreek v. Angela Cres Trust, 142 A.3d 948 (Pa. Cmwlth. 2016). A fact-finder “[is] not required to delineate

with specificity ... every reason for every disallowance of every aspect of the fee request.” In re Appeal of Silverman, 90 A.3d 771, 785 (Pa. Cmwlth. 2014).

When a statute explicitly authorizes fees, courts also consider the purpose of the statutory scheme and whether a fee award promotes the statutory purpose. Dep’t of Env’tl. Res. v. PBS Coals, Inc., 677 A.2d 868 (Pa. Cmwlth. 1996) (analyzing intent of fee-shifting provisions). The purpose of Section 1304 fee awards is to restore litigants to the position they were in prior to filing a petition for review. Office of the Dist. Att’y of Phila. v. Bagwell, 155 A.3d 1119 (Pa. Cmwlth. 2017) (in contrast to deterrent purpose of Section 1305 civil penalties).

In addition, attorney fees are recoverable under Section 1304(a) to protect the public right to disclosure. In issuing this award, I am cognizant of its effect on the public fisc because agencies burdened with these fees are funded by tax dollars. Nonetheless, I also discern the importance of allowing recovery of attorney fees when parties engage in litigation that benefits the public by enforcing the statute. This public benefit is only achieved, however, when the party litigating the matter pursues avenues that yield favorable results.

### **B. Findings & Fee Award**

The following attorney fees are substantiated and recoverable as “reasonable attorney fees” under Section 1304(a) of the RTKL:

Invoice	Litigation Stage/Activity	Amount Awarded
Jan. – July 2015 (Ex. A)	Pleadings (incl. Enforcement Pet. & Defending Prelim. Obj.)	\$26,797.50 <i>full recovery</i>
Aug. – Nov. 2015 (Ex. A) & May – Dec. 2016 (Ex. B)	Dispositive Motions (Judgment on the Pleadings & Summ. Relief Petitions)	\$0 (JOP); \$11,803.33 (Summ. Relief) <i>partial recovery</i>
Dec. 2015 – May 2016	Initial Discovery Phase	\$8,180.33 <i>partial recovery</i>
Jan. – June 2017 (Ex. C)	Stipulation & Addit'l Discovery	\$32,815.00 <i>full recovery</i>
July – Oct. 2017 (Ex. C)	Pre-Trial & Trial (Liability)	\$36,462.21 <i>partial recovery</i>
March – June 2018 (Ex. D); <i>no invoice for July trial</i>	Pre-Trial & Trial (Damages)	\$2,400.00 <i>partial recovery; excl. publish motion &amp; appeal</i>

Based on the evidence submitted, DOC's challenges, and in light of the complexity involved in the first-of-its-kind enforcement proceeding under the RTKL, I award Requester \$118,458.37 in attorney fees.

In deriving this award, I considered the factors discussed above, including the nature and complexity of this litigation, the parties' responsibilities in affecting its duration, the rates billed and the time expended. Arches Condo. Ass'n. In addition, I considered the purpose of the statutory scheme and the public policy ramifications of a fee award under Section 1304(a)(1) of the RTKL against an agency funded by the public. Accordingly, I apportion the fees claimed based on the results Requester achieved on the public's behalf.

Requester bore the burden of proof and persuasion as to reasonableness of the fees claimed. In support of its Fee Petition, Requester submitted Publisher's testimony, the Legal Invoices (in redacted and unredacted form), and Counsel Affidavits. I credit Publisher's testimony that the amount of fees and costs set forth in the Legal Invoices were incurred and paid. Counsel Affidavits also support the work performed and the amount of time spent and billed to Requester.

But the standard for recovery under Section 1304(a) of the RTKL is not all attorney fees and costs if incurred and paid; it is only "reasonable attorney fees." Other than the Counsel Affidavits, Requester submitted no evidence as to the reasonableness of the time spent or of counsel's hourly rates.<sup>10</sup> Nonetheless, unless there is insufficient evidence (*i.e.*, amounts without explanation) to support the fees claimed, I only reduce the fees based on the challenges DOC raised.<sup>11</sup> Karoly.

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<sup>10</sup> In a fee petition submitted pursuant to the RTKA, the media requester submitted evidence in the form of legal invoices as to the time expended and the hourly rates for the attorneys handling the litigation. See Parsons v. PHEAA (Pa. Cmwlth., No. 1239 C.D. 2006, filed February 8, 2008) (single j. op.) (approving fee award of \$48,233.77; excluding fees related to Supreme Court appeal). In addition, it submitted an affidavit of independent counsel, (an executive of the Pennsylvania Newspapers Association), as to the reasonableness of the rates and the complexity of the litigation based on her experience in the relevant legal market. Based on that record, this Court found the discounted hourly rates of Craig Staudenmaier of \$125 in 2006 and \$140 thereafter, and that of his 8-year associate of \$80 in 2006 and \$115 thereafter, were reasonable. Id.

Requester did not submit equivalent evidence as to the reasonableness of its counsel's rates.

<sup>11</sup> The paucity of evidence warrants further mention. The only evidence to support the reasonableness of Attorney Joyce's hourly rates here is his statement in his affidavit that it is reasonable in his opinion based on his experience level. See Joyce Affidavit at ¶12. However, the Joyce Affidavit does not detail his experience level to enable this Court to assess his opinion. It states only that he was in practice at Saul Ewing for 5 years. That means when he worked on this case in 2015, he may have been a second-year associate billing at \$295 per hour. Also, this was his first RTKL case.

However, DOC did not contest the reasonableness of the hourly rates in its post-trial brief, or with evidence like a market survey as to other Pittsburgh firms and their rates, or an affidavit of a third party practicing in the relevant market. Had DOC objected to the reasonableness of Attorney

Here, DOC challenged Requester's recovery of fees as to matters upon which Requester did not prevail. Because DOC did not otherwise object to the reasonableness of the fees claimed (e.g., as to time spent or hourly rates), DOC waived any challenge to the reasonableness of counsel's rates. Karoly.

Mindful of the effect on the public fisc and the quality of the evidence before me, I decline to award fees corresponding to matters where Requester did not prevail. Thus, I reduce and apportion the fees accordingly. I also exclude any fees and costs that are unsupported by the record or that relate to unnecessary filings.

### **1. Insufficient Evidence/Unsupported Fees**

#### **(a) Costs**

In its fee petition, Requester seeks costs related to the litigation. Although Requester bore the burden of proof, it submitted no evidence as to the reasonableness of the costs (almost \$7,500, \$3,000 of which related to travel) claimed. The Legal Invoices and Requester's witness establish only the amount of costs incurred and their payment. This is insufficient to permit their recovery under Section 1304(a) of the RTKL. Because there is no evidence as to the reasonableness of costs, Requester did not establish grounds for their recovery.

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Joyce's hourly rate, or to the sufficiency of the evidence submitted in support of its reasonableness, further scrutiny would have been warranted.

The Legal Invoices reflect Attorney Joyce's work as follows: 61 hours in 2015 billed at \$295/hour, which at partial recovery corresponds to \$12,242.50 of the fee award; 141.9 hours in 2016 at \$320/hour, which at partial recovery corresponds to \$15,136.00 of the fee award; 161.7 hours in 2017 at \$350/hour, which at partial recovery corresponds to \$15,632.33 of the fee award; and 27.4 hours in 2018 at \$375/hour, which, after excluding work on the motion to publish and premature appeal, corresponds to \$1,087.50 of the fee award. Had the fee award been reduced by Attorney Joyce's billings based on the lack of evidence as to their reasonableness (\$44,098.33), the total award would have been \$74,360.04.

### **(b) Timekeeper John A. Marty**

Similarly, Requester did not submit any proof to support recovery of fees billed by timekeeper John A. Marty. The record is unclear whether he is an attorney, and his experience level is not described. Indeed, other than the Legal Invoices, there is no evidence supporting recovery of fees from *any* timekeepers other than Attorney Kelly and Attorney Joyce. Because the record is devoid of any evidence as to the reasonableness of timekeeper John A. Marty's fees, billed at \$250 per hour, his fees are excluded from the fee award.

### **2. Unnecessary Filings**

I also reduce attorney fees by time that was not relevant or reasonably expended in the scope of an enforcement action designed to access public records. Specifically, I exclude fees corresponding to preparation and filing of the motion to publish the Bad Faith Opinion. Filing the motion did not advance the litigation and was not necessary to effectuate this Court's opinion. Further, such a motion could have been filed by another, like the Office of Open Records (OOR). I deem the attorney fees corresponding to the motion to publish unreasonable. Because it is unclear how much time is attributable to the motion to publish as separate from other tasks described in the Legal Invoices, I exclude entries pertaining to the motion to publish reflected in the March and April 2018 invoices from my fee calculation and award.

In addition, attorney fees related to DOC's appeal of this Court's Bad Faith Opinion to our Supreme Court are likewise excluded. The necessity for a response before issuance of a final order by this Court, and when the Supreme Court

had not noted its jurisdiction or accepted the appeal, is unclear. Accordingly, attorney fees related to opposing DOC's appeal set forth in the April and May 2018 invoices are excluded.

### **3. Apportionment based on Level of Success**

Section 1304(a)(1) of the RTKL explicitly authorizes apportionment of fees. DOC argued the award should exclude any amounts corresponding to matters on which Requester did not prevail. Based on my review of the Legal Invoices, and in particular, the work described therein, I apportion fees in accordance with the level of success Requester attained.

#### **a. Pleading Stage**

The pleading stage corresponds to Requester's preparation of the Enforcement Petition and its defense against DOC's preliminary objections. Requester's Enforcement Petition was one of the first attempts to enforce a final determination issued by OOR in this Court. As such, it was a matter of first impression, involving a novel procedure and substantive matters of some complexity. Further, the Enforcement Petition withstood preliminary objections, and in that manner was successful as a pleading.

I find that all fees described in the Legal Invoices encompassing January 2015 through July 2015 relating to the preparation of the Enforcement Petition, and defense against DOC's preliminary objections are reasonable. Therefore, these fees totaling **\$26,797.50** are fully recoverable under the RTKL.

## **b. Dispositive Motions**

### **(i) Judgment on the Pleadings**

In October 2015, Requester filed a motion for judgment on the pleadings on which it did not prevail. In so doing, Requester expended considerable time on matters that did not advance the ends it sought to attain. The utility of such a motion was questionable, as the parties disputed the construction of the Request and the records subject to disclosure remained undefined. As a consequence, judgment in its favor would have been incapable of enforcement. The Legal Invoices (Ex. A) reflect a total of 33.8 hours related to the judgment on the pleadings, corresponding to the following fees: \$90.00 (8/15); \$2,740.00 (9/15); \$2,473.00 (10/15); \$4,350.00 (11/15); and \$2,844.50 (12/15). For the foregoing reasons, none of these fees related to the preparation of the motion for judgment on the pleadings are awarded.

### **(ii) Summary Relief**

Requester filed a summary relief petition. In response, DOC filed its own petition for summary relief. The parties briefed and argued the summary relief petitions, resulting in our Summary Relief Opinion.

Requester's summary relief petition was comprised of three primary arguments. This Court deemed unavailing its arguments that DOC was required to allow access to inmate medical files or create a record representing DOC medical staff's review of those records. Moreover, additional discovery was necessary to establish DOC's noncompliance, and we reserved judgment as to DOC's bad faith.

Ultimately, Requester did not prevail on its summary relief petition; additional facts were necessary to establish its claims, requiring additional discovery and associated fees. For this reason, I conclude it is not entitled to the \$42,895.00 (May 2016 to December 2016) in claimed fees corresponding to its preparation of its summary relief petition and response to DOC. Because it did not prevail on its primary arguments, I award one third of the claimed fees as follows: \$3,413.33 (5/16); \$1,515.67 (6/16); \$1,048.33 (7/16); \$2,250.67 (8/16);<sup>12</sup> \$1,451.33 (9/16); \$53.33 (10/16); \$1,964 (11/16); \$106.67 (12/16). This portion totals \$11,803.33.

### **c. Discovery**

#### **(i) Initial Discovery**

From December 2015 through May 2016, Requester engaged in discovery following its unsuccessful motion for judgment on the pleadings. Discovery included two depositions and written discovery, including interrogatories and requests for production. The Legal Invoices in Exhibit B reflect 71.1 hours in attorney time corresponding to the following fees: \$1,065.00 (12/15); \$154.00 (1/16); \$410.00 (2/16); \$3,267 (3/16); \$17,095 (4/16); \$2,550.00 (5/16).<sup>13</sup>

This stage of discovery, prior to the summary relief phase, is deemed only partially successful based on the ends achieved. Accordingly, I apportion these

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<sup>12</sup> I agree that fees attributable to an amendment to comply with court rules are not recoverable. DOC Post-trial Br. at 11 n.3. As a result, fees corresponding to Attorney Joyce's 2.6 hours at \$320/hour over two days (\$832.00) are excluded from the 8/16 bill before apportioning it.

<sup>13</sup> I already determined that \$3,413.33 was recoverable from the May 2016 invoice as attributable to the summary relief petitions.

fees based on the level of success Requester attained in the summary relief phase. These apportioned fees total **\$8,180.33**. See Tr. Ex. A (Dec. 2015), B.

**(ii) Post-Summary Relief Discovery & Stipulations**

In January through June of 2017, Requester's counsel drafted stipulations and discovery and prepared for a status conference in response to this Court direction. Based on the Legal Invoices, and the submission, and the means of advancing the litigation, I find these fees are reasonable. Therefore, these fees totaling **\$32,815.00** are awarded in full as follows: \$7,270.00 (1/17); \$105.00 (2/17); \$8,065.00 (3/17); \$630.00 (4/17); \$3,730.00 (5/17); \$13,015.00 (6/17).

**d. Pretrial, Trial and Post-trial (Liability Phase)**

I deem the fees corresponding to pretrial preparation and additional discovery in the amount of \$8,190.00 (7/17), reasonable and fully recoverable.

Although Requester largely prevailed in the liability phase of trial, I disagreed with one of its three main arguments that DOC committed bad faith in misconstruing the Request. Also, I was unpersuaded that DOC should have placed a litigation hold on the information contained in PTrax when it received the Request. DOC's failure to retain that information, while perhaps misguided, was not bad faith. As a result, I apportion the fees claimed by one third as to the Request argument, and by one ninth as to PTrax as follows: \$21,458.33 (8/17); \$194.44 (9/17); \$6,619.44 (10/17). Thus, I award **\$36,462.21** as to the liability phase.

**e. Pre-trial, Trial & Post-trial (Damages Phase)**

In 2018, Requester did not incur attorney fees until March. The Legal Invoices (Exhibit D) reflect that most of the time expended from March through June 2018 pertained to the motion to publish and DOC's appeal of this Court's Bad Faith Opinion to the Supreme Court. After excluding time entries for those matters, I award fees in the amount of **\$2,400.00** corresponding to the damages phase of trial.<sup>14</sup>

**III. Conclusion**

For the foregoing reasons, I grant Requester's Fee Petition in part, and award attorney fees pursuant to Section 1304(a) of the RTKL, 65 P.S. §67.1304(a), in the apportioned amount of \$118,458.37. DOC is directed to pay the fee award within 30 days.

  
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ROBERT SIMPSON, Judge

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<sup>14</sup> In its post-trial brief, Requester represents the total fees as of August 1, 2018 were \$215,190.75. It is unclear whether this figure includes fees related to the damages trial on July 31, 2018. Also, after that date, counsel prepared post-hearing briefs and Counsel Affidavits supporting the fees claimed. Although Requester submitted the Counsel Affidavits in late August, it did not submit any invoices detailing the fees related to the damages phase of trial or post-trial briefing. Because there is no evidence as to fees in July or August 2018, those fees are not recoverable.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Uniontown Newspapers, Inc., d/b/a :  
The Herald Standard; and Christine :  
Haines, :  
Petitioners : No. 66 M.D. 2015  
v. :  
Pennsylvania Department of :  
Corrections, :  
Respondent :

**DECISION**

AND NOW, this 29<sup>th</sup> day of October, 2018, Petitioners' fee petition is **GRANTED** as to a portion of the fees claimed, and I hereby **AWARD \$118,458.37** in fees pursuant to Section 1304(a)(1) of the Right-to-Know Law (RTKL).<sup>15</sup> Accordingly, the Pennsylvania Department of Corrections (DOC) is **ORDERED** to pay reasonable attorney fees as set forth in the accompanying opinion to Petitioners within 30 days. This fee award is in addition to the \$1,500 civil penalty<sup>16</sup> imposed in this Court's decision in Uniontown Newspapers, Inc. v. Department of Corrections, 185 A.3d 1161 (Pa. Cmwlth. 2018) (single j. op.), pet. for allow. of appeal pending, (Pa., No. 561 MAL 2018, filed September 28, 2018).

As this **DECISION** is entered ancillary to a statutory appeal, it is intended to be a final order, and no post-trial practice is contemplated.

  
ROBERT SIMPSON, Judge

<sup>15</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §67.1304(a)(1).

<sup>16</sup> Section 1305(a) of the RTKL, 65 P.S. §67.1305(a).

Certified from the Record

OCT 29 2018

And Order Exit

# EXHIBIT B

Uniontown Newspapers, Inc., d/b/a  
The Herald Standard; and Christine  
Haines,

V.

Respondent

Heard: August 28, 2017

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

## **I. Background**

### **A. Overview**

On September 25, 2014, Requester sent an email seeking diagnosis data of inmates at State Correctional Institution (SCI)-Fayette, based in part on its proximity to a fly ash dump in Fayette County (Request).<sup>2</sup> Jt. Ex. 3. It also sought information comparing illnesses of SCI-Fayette inmates with inmates at other SCIs.

Weeks before DOC received the Request, the Abolitionist Law Center published a report, “No Escape: Exposure to Toxic Coal Waste at [SCI-] Fayette,” correlating ill health of SCI-Fayette inmates to toxic coal waste (No Escape Report). See Jt. Ex. 2. In response, DOC coordinated with the Department of Health (DOH) to investigate the claims in the No Escape Report (No Escape Investigation). Then-Director of DOC’s Bureau of Health Care Services, Christopher Oppman (Oppman), oversaw the No Escape Investigation, which was led by Dr. Paul Noel and Dr. Eugene Ginchereau.

During the No Escape Investigation, DOC and DOH consulted multiple sources of illness information. The sources included: causes of inmate deaths (Mortality Lists); a database that tracked inmates treated for cancer (Oncology Database); reports of inmate medications prepared by DOC’s pharmacy contractor (Pharmacy Contractor Reports); and, records showing inmates enrolled in Chronic Care Clinics, tracked via the PTrax database (collectively, Inmate Illness Sources).

DOC received the Request after the No Escape Investigation was underway. DOC assumed the Request related to the No Escape Investigation.

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<sup>2</sup> The Request expressly did “not see[k] identifying information,” like names. Jt. Ex. 3.

After invoking a 30-day extension, DOC denied the Request in its entirety, citing seven exceptions under Section 708(b) of the RTKL, 65 P.S. §67.708(b), as well as the attorney-client privilege and deliberative process privilege. DOC Open Records Officer Andrew Filkosky (Filkosky) issued the denial.

Requester appealed to OOR. During the appeal, DOC asserted only Section 708(b)(17), 65 P.S. §67.708(b)(17) (relating to noncriminal investigations). In support, DOC submitted Oppman's declaration under penalty of perjury that "the records requested ... are presently part of a noncriminal investigation that was started by [DOC] and now includes [DOH]." Jt. Ex. 6 (2014 Oppman Verification at ¶4). Oppman also attested: "[DOC] has generated the records [Requester] requests." *Id.* at ¶6. Chase DeFelice (DeFelice), in-house counsel for DOC, handled the appeal.

OOR was unpersuaded that the records requested were investigative. Thus, OOR ordered DOC to disclose "all responsive records" within 30 days. Jt. Ex. 8 (OOR Final Determination, dated December 1, 2014). DOC did not appeal.

On December 31, 2014, DeFelice timely disclosed 15 pages of records to Requester (2014 Disclosure). Jt. Ex. 12. The 2014 Disclosure consisted of charts depicting the following: the number of patients with pulmonary conditions in all SCIs (from Chronic Care Clinic records); the number of inmates with cancer in all SCIs (2010-13); inmate cancer deaths by institution (2010-13); inmate cancer deaths at SCI-Fayette (2003-13); the number of inmates treated by Pharmacy Contractor for pulmonary ailments (2010-14); and, the number of inmates treated by Pharmacy Contractor for gastrointestinal ailments (2010-14). *Id.*

In January 2015, Requester asked DOC to verify the completeness of the 2014 Disclosure. DeFelice advised additional review was needed first “to see if other records existed that were responsive.” DOC’s New Matter at ¶80. After undertaking additional review, DOC disclosed a memo from Dr. Ginchereau to Dr. Noel and an email from Dr. Noel about the No Escape Investigation. Jt. Ex. 21 at H & I.

The next day, DOC disclosed cancer patient tracking charts from the Oncology Database for DOC as of November 2014, and for SCI-Fayette as of January 2015. *Id.* at K & L (collectively with the records described immediately above, 2015 Disclosure). At that time, Oppman verified that DOC had no other records of SCI-Fayette inmate illnesses “by type and quantity[,] and comparison of illness rates at other [SCIs].” *Id.* at M (2015 Oppman Verification).

In February 2015, within six weeks of the 2014 Disclosure, Requester filed the instant petition for enforcement, seeking statutory sanctions for bad faith (Petition). To obtain all responsive records, and to assess DOC’s alleged bad faith, Requester enlisted this Court’s fact-finding function under Chapter 13 of the RTKL.

DOC filed preliminary objections to the Petition. After this Court overruled the preliminary objections, DOC filed an answer and new matter. Requester then filed a motion for judgment on the pleadings, which this Court denied.

Requester deposed Oppman and Dr. Noel in April 2016 to determine how DOC maintained potentially responsive records, and what records remained outstanding. Thereafter, the parties submitted cross-motions for summary relief.

In December 2016, this Court issued the Summary Relief Opinion. The Summary Relief Opinion identified five types of records as responsive to the Disclosure Order: No Escape Investigation-related records (created by investigators such as Dr. Noel), plus the four Inmate Illness Sources consulted during the No Escape Investigation (Mortality Lists, Pharmacy Contractor Reports, Oncology Database, and Chronic Care Clinic records, via PTrax). The Summary Relief Opinion also directed the parties to file a stipulation as to the disclosure status of these five types of records.

In 2017, the parties engaged in discovery. In March 2017, in response to discovery requests, DOC disclosed all Mortality Lists and additional data from the Oncology Database (2017 Disclosure). See Jt. Ex. 21 at Q & P. The parties then filed a stipulation (Stipulation) reflecting that Pharmacy Contractor Reports and Chronic Care Clinic records remained outstanding. See Jt. Ex. 21 at A-Q.

In August 2017, I held a hearing, where I admitted the parties' joint exhibits. During the hearing, Requester presented the testimony of Michael Palm, Executive Editor of *The Herald Standard*, regarding the genesis of the Request. As to DOC's conduct, the parties also presented the testimony of Oppman and DeFelice. Oppman testified about his role in the No Escape Investigation, and his role in responding to the Request. DeFelice testified about his role in gleaning responsive records during litigation, and DOC's attempted compliance with the Disclosure Order. Additionally, DOC presented the testimony of Filkosky, who testified about his role as Open Records Officer handling the Request during the request stage.

In October 2017, the parties submitted proposed findings of fact and conclusions of law. The matter is now ready for disposition.

## **B. Findings**

I credit the testimony of the witnesses based on their demeanor and their responsiveness. To the extent their testimony is inconsistent, I consider Oppman's testimony most persuasive based on the quality of his recollection and his directness. Oppman also had the most familiarity with the records requested. In weighing his trial testimony, I also considered his deposition testimony and his two verifications. Based on the credited evidence and admissions, I make the following narrative findings.

### **1. No Escape Investigation**

The purpose of the No Escape Investigation was to evaluate the No Escape Report's allegations about SCI-Fayette inmates' ill health, which focused on cancer, pulmonary, and gastrointestinal diseases. During the No Escape Investigation, Oppman served as the liaison to DOH. He also conferred with physicians like Dr. Noel, who made clinical findings based on their review of inmate medical files and the four Inmate Illness Sources.

Of the Inmate Illness Sources, DOC had direct access to Mortality Lists, the Oncology Database, and Chronic Care Clinic records, but not to medication data maintained by Pharmacy Contractor. As part of the No Escape Investigation, DOC asked Pharmacy Contractor to prepare reports of inmate medications corresponding to pulmonary and gastrointestinal ailments. DOC did not request reports relating to other illnesses.

In reviewing Chronic Care Clinic records, investigators consulted the online database, PTrax, which tracked inmate treatment in each of DOC's 13 clinics.<sup>3</sup> Of significance, PTrax is a "live" database that changes daily. Notes of Testimony (N.T.), 8/28/17, at 58. At a minimum, PTrax shows the number of inmates enrolled in a specific clinic at a specific time. However, a clinic may encompass multiple diagnoses, e.g., the pulmonary clinic treats conditions ranging from asthma to lung disease. Id. at 33. The No Escape Investigation focused on the pulmonary clinic.

Based on the Inmate Illness Sources and DOC's clinical review of inmate medical files, DOH reported its findings. Jt. Ex. 21 at N (DOH Report, 12/29/14). Because it was created subsequent to the Request, the DOH Report was not a responsive record subject to OOR's Disclosure Order. Nonetheless, DOC sent the DOH Report to Requester after it initiated enforcement proceedings.

## **2. Request & RTKL Process**

The Request sought data of inmates' diagnoses, by type of illness and the number of inmates afflicted, at SCI-Fayette and other SCIs. The Request was not limited to certain illnesses; however, Requester noted a "particular interes[t]" in cancer or respiratory ailments. Jt. Ex. 3. Relevant here, the Request did not reference either the No Escape Report or the No Escape Investigation. Nevertheless, "[DOC] assumed ... [Requester] w[as] looking for" the results of the No Escape Investigation. N.T. at 50. Other than timing, DOC had no reason to believe the Request related to the No Escape Investigation.

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<sup>3</sup> DOC's chronic care clinics correspond to the following chronic conditions: HIV/AIDS; cardiovascular; tuberculosis; endocrine; dialysis; diabetes; hypertension; pulmonary; seizure; infectious disease; neurology; psychiatry; and, nephrology. Jt. Ex. 21, Stip. at III(A)(2).

### a. Request Stage

Generally, when DOC receives a RTKL request, the open records officer or legal liaison sends an internal email identifying custodians of potentially responsive records, including appropriate instructions for responding. Jt. Ex. 19 (Policy). When a record custodian receives the request, **“there must be no disposal of potentially responsive records** (no deletion of partially responsive e-mails, etc.), ... notice of the RTKL request should be considered the equivalent of a litigation hold.” Jt. Ex. 1 (RTKL Procedures,<sup>4</sup> 2/2/12) (bold in original); see N.T. at 78.

Record custodians are required to deliver responsive records to an open records officer “as soon as possible to allow adequate time for review and redaction and for the legal bases for redactions and other denials to be incorporated into the final response letter.” Jt. Ex. 19, Policy, Part IV(E). The open records officer must retain all potentially responsive records obtained from the custodian “until further notice” regardless of a record retention schedule permitting disposal. Id. at Part IV(K)(19).

At all relevant times, Filkosky served as DOC’s Open Records Officer, and Maria Macus Bryan, Esquire, served as legal liaison.

Here, Filkosky read the Request. After identifying DOC’s Bureau of Health Care Services (Health Care Bureau) as the custodian of potentially responsive

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<sup>4</sup> Filkosky testified he was governed by the Policy (Jt. Ex. 19); however, he disclaimed any knowledge of the RTKL Procedures (Jt. Ex. 1). Notes of Testimony (N.T.), 8/28/17, at 129. DOC’s legal liaison produced the RTKL Procedures in discovery when asked for a copy of DOC’s “process” for responding to RTKL requests. Id. Thus, I infer that the RTKL Procedures govern the legal liaison and record custodians, whereas the Policy governs the open records officer.

records, Filkosky merely forwarded the Request by email, without any instructions. The Health Care Bureau did not respond in writing. Rather, one of its representatives, Cathy Montag,<sup>5</sup> advised Filkosky in person that DOC and DOH were involved in the No Escape Investigation and that all responsive records related to the No Escape Investigation. Based solely on her representation, Filkosky concluded that all responsive records would be related to the No Escape "[I]nvestigation, other than inmates' medical files." N.T. at 128.

Significantly, Filkosky did not receive any potentially responsive records from DOC's Health Care Bureau. N.T. at 128. Without understanding the records involved, he relied on DOC's Health Care Bureau's assessment that any responsive records related to the No Escape Investigation. Filkosky also did not discern what records were allegedly investigative either to document their content or to assess any exemptions. N.T. at 135. Filkosky issued DOC's denial under Section 903 of the RTKL without reviewing any records. N.T. at 128.

Accordingly, DOC did not perform its duties during the request stage in several material respects. In short, DOC neglected to: perform a good faith search; obtain records from sources consulted during the No Escape Investigation; review all potentially responsive records; and, assess the content of responsive records before withholding access.

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<sup>5</sup> Oppman testified about his interactions with DeFelice, who became involved during the appeal stage. N.T. at 46. Oppman did not mention Filkosky. Filkosky interacted with Cathy Montag from the Bureau of Health Care Services that Oppman directed at the time. N.T. at 127. Filkosky did not mention Oppman. I infer from the testimony that Oppman was not directly involved in responding to the Request during the request stage.

### **b. Appeal Stage**

DeFelice handled the appeal before OOR. DeFelice gave Oppman the Request, asking him to pull information from the No Escape Investigation. N.T. at 46. Based on his familiarity with inmate health records, Oppman was the person “in the best position to respond to [the Request].” Id. at 41.

Before the Request, Oppman responded to few RTKL requests; he received no RTKL training. N.T. at 29. Oppman confirmed that no one at DOC’s Health Care Bureau searched for records in response to the Request. Id. at 50. Instead, DOC presumed the Request related to the No Escape Investigation. Id. Notably, however, Oppman did not believe Requester was aware of the No Escape Investigation. Id. at 42.

During the appeal stage, DeFelice did not discern what information was consulted during the No Escape Investigation to assess its investigative content. Id. at 93-94. DeFelice was also unfamiliar with how the Health Care Bureau maintained responsive records when he prepared a verification for Oppman’s signature (2014 Oppman Verification) to establish all responsive records related to the No Escape Investigation.

The 2014 Oppman Verification was the only evidence DOC submitted to OOR during the appeal stage, and it pertained only to the noncriminal investigation exception. Therein, Oppman attested that DOC generated records as part of the No Escape Investigation. Jt. Ex. 6. However, Oppman clarified during the hearing that the term “generated,” in context, also referred to the four types of

records *consulted* during the No Escape Investigation (Inmate Illness Sources), which existed independently. N.T. at 44. The Inmate Illness Sources were not themselves investigative in nature.

Ultimately, OOR deemed the 2014 Oppman Verification insufficient, and it determined “all responsive records” to the Request were public. Jt. Ex. 8 (Final Determination at 9). As a result, information contained in the Inmate Illness Sources, and records DOC generated during the No Escape Investigation that included inmate illness data, were subject to mandatory disclosure within 30 days. Id.

### **c. Post-Appeal**

In the 2014 Disclosure, DOC timely disclosed five charts consisting of some information contained in the Inmate Illness Sources. However, although the Request was not limited to specific diseases, the 2014 Disclosure was limited to two illness types (cancer and pulmonary conditions), except that the Pharmacy Contractor Reports also included gastrointestinal ailments. Further, the 2014 Disclosure did not include information contained in the Oncology Database, which showed the number of inmates treated for cancer. N.T. at 94.

Requester challenged the completeness of the 2014 Disclosure, and it asked DeFelice to confirm that no other responsive records existed. In particular, Requester emphasized the press release regarding the No Escape Investigation results revealed DOC’s Health Care Bureau “maintain[ed] an extensive database of all current cancer patients in [SCIs].” Jt. Ex. 13. However, DOC did not disclose any data from the Oncology Database to Requester. N.T. at 94 (DOC “admitted that [the

Oncology Database] was not provided on December 31<sup>st</sup> ... because [DeFelice] didn't have it.”).

A week after the deadline for compliance with the Disclosure Order passed, DeFelice was uncertain whether DOC performed a thorough search for all responsive records. See DOC's New Matter at ¶80. Only then did DeFelice search Dr. Noel's files. At that time, he discovered records showing data from the Oncology Database. N.T. at 94. He also discovered the memo from Dr. Ginchereau and an email from Dr. Noel, which were also responsive to the Request. These three records were disclosed to Requester in January 2015, and comprised the 2015 Disclosure.

After this additional search, DOC confirmed there were no additional responsive records in the 2015 Oppman Verification. However, this verification was inaccurate in that it did not account for responsive records related to *all* illnesses. Because DOC only disclosed records related to cancer and pulmonary disease, the 2015 Disclosure was incomplete.

#### **d. Enforcement Stage**

Believing more responsive records existed, Requester filed its Petition. As further explained in the Summary Relief Opinion, “all responsive records” includes the four Inmate Illness Sources that pre-existed the No Escape Investigation. The Inmate Illness Sources are not limited to cancer, pulmonary, and gastrointestinal ailments. The Request, both on its face and as construed by OOR, was not so limited. Therefore, DOC did not comply with the Disclosure Order.

Prior to the enforcement stage, DOC recognized that Mortality Lists, the Oncology Database, Chronic Care Clinic records, and Pharmacy Contractor Reports were responsive to the Request. When this Court confirmed in the Summary Relief Opinion that such records were responsive without limitation on illness type, DOC still withheld responsive records.

DOC did not disclose the entire Oncology Database until the parties engaged in discovery in March 2017. It also withheld all Mortality Lists until it provided the 2017 Disclosure. DOC did not explain this delay.

As of June 2017, DOC did not determine whether Pharmacy Contractor could generate inmate medication reports corresponding to diseases other than pulmonary and gastrointestinal. DOC did not ask Pharmacy Contractor for such inmate medication reports.

Also, DOC did not obtain or disclose Chronic Care Clinic records, through PTrax or otherwise, that corresponded to diseases other than pulmonary. There are 12 other clinics, the data from which would show the number of inmates treated for certain conditions at a given time. N.T. at 34.

To date, DOC did not disclose “all responsive records.”

## **II. Bad Faith under the RTKL**

The core purpose of the RTKL is ensuring access to agency records. The RTKL “is remedial legislation 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. Cmwlth. 2010) (en banc), aff’d, 75 A.3d 453 (Pa. 2013); Office of Dist. Att’y of Phila. v. Bagwell (Phila. DA), 155 A.3d 1119, 1130 (Pa. Cmwlth. 2017) (“the RTKL is remedial in nature ...”).

In the RTKL context, “bad faith” does not require a showing of fraud or corruption. The lack of good faith compliance with the RTKL and an abnegation of mandatory duties under its provisions rise to the level of bad faith. Phila. DA (affirming trial court’s award of \$500 civil penalty for bad faith); Chambersburg Area Sch. Dist. v. Dorsey, 97 A.3d 1281 (Pa. Cmwlth. 2014) (agency failure to review responsive records was grounds from which fact-finder could discern bad faith); Staub v. City of Wilkes-Barre & LAG Towing, Inc. (Pa. Cmwlth., No. 2140 C.D. 2012, filed October 3, 2013), 2013 WL 5520705 (unreported) (affirming attorney fee award for agency failure to confer with contractor before responding to request). The RTKL reserves bad faith determinations for disposition by Chapter 13 Courts. Bowling v. Office of Open Records, 75 A.3d 453 (Pa. 2013).

The RTKL requires an agency to make a good faith effort to find and obtain responsive records before denying access. Dorsey. “[A]n agency [may not] avoid disclosing existing public records by claiming, in the absence of a detailed search, that it does not know where the documents are.” Pa. State Police v. McGill, 83 A.3d 476, 481 (Pa. Cmwlth. 2014) (emphasis added). Where an agency did not perform a search of its records under the RTKL until the matter was in litigation, the agency denied access in willful disregard of the public’s right to public records. Parsons v. Pa. Higher Educ. Assist. Agency (PHEAA), 910 A.2d 177 (Pa. Cmwlth.)

(en banc), appeal denied, 917 A.2d 316 (Pa. 2006) (agency failure to review records before a hearing on denial showed willful violation of former Right-to-Know Law).<sup>6</sup>

A requester bears the burden of proving an agency committed bad faith. Uniontown Newspapers. Evidence of bad faith is required. Barkeyville Borough v. Stearns, 35 A.3d 91 (Pa. Cmwlth. 2012). After-discovered records are a type of evidence from which a court may discern bad faith. Dorsey. Evidence of an agency's failure to perform its mandatory duties, including a failure to search its records prior to a denial of access, may suffice. Dorsey; accord PHEAA.

### **A. Bad Faith Allegations**

Requester claims three grounds for DOC's bad faith under the RTKL: (1) narrow construction of the Request; (2) failure to search records in good faith as required by the RTKL; and, (3) noncompliance with OOR's Disclosure Order.

#### **1. Construction of the Request**

As the Request did not mention the No Escape Investigation or the No Escape Report, DOC had no apparent basis, other than coincidental timing, for assuming the Request sought only records related to the No Escape Investigation. N.T. at 42. However, Requester did not show that DOC's error in construction rose to the level of bad faith.

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<sup>6</sup> Act of June 21, 1957, P.L. 390, as amended, 65 P.S. §§66.1-66.9, repealed by, Section 3102(2)(ii) of the RTKL, 65 P.S. §67.3102(2)(ii).

Requester submitted no evidence that it communicated with DOC during the request or appeal stages about the parameters of the Request.<sup>7</sup> Filkosky, who forwarded the Request to DOC's Health Care Bureau, "didn't interpret the [R]equest." N.T. at 141. He accepted the Health Care Bureau's assertions that the Request related to the No Escape Investigation without question.

Nevertheless, in these circumstances, the evidence manifests no attempt to construe the Request in any particular manner. Thus, the construction of the Request alone does not evince bad faith. The primary problem revealed during the hearing was that DOC did not give any specific, *separate* consideration to the Request at all.

## **2. Noncompliance with RTKL**

### **a. Request Stage - Good Faith Search**

Chapter 9 of the RTKL sets forth an agency's mandatory duties during the request stage. 65 P.S. §§67.901-.905. Section 901 of the RTKL

mandate[s] that '[u]pon receipt of a written request for access to a record, an agency shall make a *good faith* effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request.' 65 P.S. §67.901.

Phila. DA, 155 A.3d at 1130 (italics in original; bold and underline added).

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<sup>7</sup> Moreover, while agencies are encouraged to contact requesters to assess the parameters of a RTKL request during the request stage, and to resolve access disputes without litigation, such communications must be documented to ensure there is a consistent record for subsequent reviewers in case the attempt to avoid litigation is unsuccessful.

Upon receipt of a request, an open records officer “must make a good faith effort to determine whether: (1) the record is a public record; and, (2) the record is in the possession, custody, or control of the agency.” Breslin v. Dickinson Twp., 68 A.3d 49, 54 (Pa. Cmwlth. 2013) (citing Barkeyville Borough, 35 A.3d at 96). Section 901 also includes the duty to perform a reasonable search for records in good faith. Dep’t of Labor & Indus. v. Earley, 126 A.3d 355 (Pa. Cmwlth. 2015). As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession. Breslin.

When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors. Breslin; Staub. Under Section 506(d) of the RTKL, 65 P.S. §67.506(d), “the agency is required to take reasonable steps to secure the records from the [contractor] and then make a determination if those records are exempt from disclosure.” Staub, slip op. at 6, 2013 WL 5520705 at \*2.

After obtaining all potentially responsive records, an agency has the duty to review the records and assess their public nature under Sections 901 and 903 of the RTKL. Breslin; PHEAA. It is axiomatic that an agency cannot discern whether a record is public or exempt without first obtaining and reviewing the record.

Here, DOC did not make a good faith effort to determine whether it had possession or control of responsive records upon receipt of the Request. Critically, it did not perform any search for records in response to the Request. N.T. at 48, 83.

DOC's failure to search records in its possession for responsive records during the request stage constitutes bad faith. Dorsey (remand to trial court to assess bad faith when agency discovered 3,500+ pages of records after the appeal stage). Like the agency in Dorsey, DOC did not learn about responsive records until well into the litigation. An agency's failure to locate responsive records until motivated by litigation evinces bad faith, meriting consideration by a fact-finder. Id.

Presuming DOC believed that the Request sought only records related to the No Escape Investigation, DOC breached its duty to obtain all potentially responsive records from its Health Care Bureau and all other records custodians upon receipt of the Request. Like the agency in Staub, DOC did not contact Pharmacy Contractor to obtain potentially responsive records during the request stage.

Here, DOC did not attempt to discern what records purportedly related to the No Escape Investigation until the appeal stage. DOC did not document the sources of potentially responsive records, such as the four Inmate Illness Sources. As a result, DOC was unaware what records its Health Care Bureau deemed responsive, and yet investigative. Without obtaining or reviewing any records, DOC denied access to responsive public records. DOC's failure to comply with Section 901 prior to issuing its "denial" under Section 903 constitutes bad faith. PHEAA.

DOC also did not preserve all potentially responsive records during the request stage. N.T. at 130-36. During the hearing, DOC admitted that information in

the Inmate Illness Sources was responsive to the Request. N.T. at 44-45. Other than data corresponding to the pulmonary clinic, *id.* at 35, DOC did not preserve any PTrax records showing the number of inmates admitted in each clinic as of the date of the Request.

However, I do not find that DOC's failure to "freeze" or hold the live-updating PTrax database for the Chronic Care Clinics amounted to bad faith. Primarily, I view DOC's RTKL Procedures as precluding knowing disposal of potentially responsive records, such as deleting emails or subjecting records to a predictable, periodic purge consistent with an agency-wide records retention policy. Here, I am not persuaded that there was a knowing decision regarding the PTrax database, which may change daily. Moreover, I am not persuaded that it is appropriate to expect an instantaneous litigation hold on specialized records of this type. Rather, an agency must be afforded a reasonable amount of time to set in place a litigation hold; a few hours is not a reasonable amount of time under these circumstances.

#### **b. Appeal Stage - OOR**

Before OOR, DOC represented that it possessed responsive records, but that those records "related to the [No Escape] Investigation." Jt. Ex. 6 (2014 Oppman Verification). Although he prepared the 2014 Verification for Oppman's signature, DeFelice did not understand what documents purportedly related to the No Escape Investigation. The 2014 Oppman Verification did not describe the records to which it pertained. Further, there is no evidence that DOC reviewed potentially responsive records before litigating their investigative nature before OOR.

DOC's submissions to OOR representing that records were exempt, without reviewing the records, is not sustainable. At a minimum, during the appeal stage, DOC should have assessed what potentially responsive records were kept where, and reviewed those records before submitting verifications to OOR attesting to their content or completeness. By contesting access during the appeal, without obtaining all records and assessing the records' public nature, DOC acted in bad faith.

### **3. Noncompliance with Disclosure Order**

As to noncompliance with OOR's Disclosure Order, DOC bore the burden to prove it provided "all responsive records." Accord Earley (agency must show it reasonably searched records to establish nonexistence of responsive records). DOC did not meet this burden.

DOC was delinquent in waiting until *after* the date for compliance with the Disclosure Order passed to confirm whether it performed a comprehensive search for all potentially responsive records. DOC's New Matter at ¶80. At that point, it discovered additional records in the Oncology Database. Thus, even when misconstruing the Request as limited to cancer and pulmonary disease, DOC still did not compile all responsive records within 30 days of the Disclosure Order.

As explained above, all of the data of inmate illnesses contained in the four Inmate Illness Sources were responsive to the Request. This Court's Summary Relief Opinion confirmed that the data subject to disclosure under the Disclosure Order were not limited by type of illness (cancer, pulmonary or gastrointestinal ailments). Also, this Court noted any records "DOC created ... prior to the Request

date from its review of inmate medical files when conducting the [No Escape] Investigation ... are responsive,” as well as emails. Summ. Relief Op. at 16, n.7 & 8; 151 A.3d at 1207, n.7 & 8. Yet, DOC did not compile “all responsive records” as this Court explained the phrase in 2016.

Notwithstanding our Summary Relief Opinion, DOC did not disclose all Mortality Lists and the Oncology Database until months later. Jt. Ex. 21, Stip. at II(4). Indeed, as of March 2017, DOC had not determined the accessibility of inmate medication records from Pharmacy Contractor for conditions other than pulmonary and gastrointestinal diseases. It did not assess Pharmacy Contractor’s reporting capabilities until June 2017. See Jt. Ex. 18 (Affidavit).

Almost three years after receiving the Request, DOC contacted Pharmacy Contractor to obtain potentially responsive records. DOC then learned that Pharmacy Contractor prepared the Reports at its request, extrapolating from raw dispensing data and synthesizing the data into a useful format for comparison. Id. Records from Pharmacy Contractor showing inmate medications for other than pulmonary and gastrointestinal ailments, in whatever form such information exists, remain outstanding.

In sum, DOC violated the Disclosure Order when it did not disclose “all responsive records” within 30 days. DOC’s violation evinced a lack of good faith when DOC did not discern the sources of or review all potentially responsive records

before the compliance deadline.<sup>8</sup> Also, because of DOC's failure to preserve all potentially responsive records, certain Chronic Care Clinic records are no longer available. Due to the nature of PTrax, this cannot be cured by late disclosure.

Enforcement proceedings should not be necessary to ensure an agency's compliance with its statutory duties. DOC's delay in complying with the Disclosure Order was unreasonable. Once this Court issued the Summary Relief Opinion, there was no excuse for further delay. Yet, DOC forced Requester to expend time and resources to discern what responsive records remained undisclosed. Under these circumstances, DOC's persistent denial of access constitutes bad faith.

## **B. Relief**

### **1. Undisclosed Responsive Records**

To avoid further confusion, DOC is ordered to disclose "all responsive records" to Requester within 20 days.<sup>9</sup> "All responsive records" include the Inmate Illness Sources consulted in the No Escape Investigation, but without limitation as to illness type, as well as No Escape Investigation-related records investigators (such as Dr. Noel) created before DOC received the Request.

DOC has not verified the completeness of its disclosures to date to conform to the evidence and findings by this Court. As part of its compliance obligations, DOC is ordered to do so.

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<sup>8</sup> This was after the 30-day appeal period in Section 1301(a) of the RTKL, 65 P.S. §67.1301(a), expired. As a result, Requester could not appeal the alleged incompleteness of DOC's 2014 Disclosure.

<sup>9</sup> This 20-day timeframe does not apply to records of Pharmacy Contractor as further explained below.

As to Pharmacy Contractor Reports, DOC has the duty to obtain information corresponding to inmate medications in the form in which Pharmacy Contractor maintains it. Staub. Pulling information from a database is not creating a record. Dep't of Env'tl. Prot. v. Cole, 52 A.3d 541 (Pa. Cmwlth. 2012).

However, DOC is not required to compile the information Pharmacy Contractor provides in any specific format, including the format Pharmacy Contractor specially-created as to pulmonary and gastrointestinal diseases, already timely disclosed to Requester. Such formatting would amount to creation of a record under Section 705 of the RTKL, 65 P.S. §67.705.

Pharmacy Contractor attested it provides innumerable reports for DOC. Jt. Ex. 18 at ¶10. Although none state specific diagnoses, reports that “document the number of patients being treated with a particular Therapeutic class of drug” are within the scope of the Request. Id. at ¶11. Accordingly, DOC shall obtain and disclose records of inmate medications within 30 days, accompanied by a detailed affidavit explaining its attempt to obtain these records from Pharmacy Contractor.

As to PTrax, I find that information in PTrax as it existed on the day of the Request is no longer recoverable. See N.T. 58; see also Jt. Ex. 21, Stip. III(A). To ensure the most complete information is made available, DOC shall describe the type of Chronic Care Clinic records reviewed during the No Escape Investigation, and confirm whether information showing the number of inmates with chronic illnesses, other than pulmonary, remains available. DOC shall disclose such records, accompanied by an affidavit verifying their completeness, within 20 days.

## 2. Sanctions

In its Petition, Requester sought civil penalties under Section 1305(a) of the RTKL, 65 P.S. §67.1305(a).<sup>10</sup> Section 1305(a) provides: “A court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith.” *Id.* (emphasis added).

“[T]he purpose of Section 1305 of the RTKL is ... to penalize conduct of [an] agency and to provide a deterrent in the form of a monetary penalty in order to prevent acts taken in bad faith in the future.” *Phila. DA*, 155 A.3d at 1141 (affirming \$500 penalty). “Section 1305 of the RTKL is directed wholly to the agency charged with a mandatory duty under the RTKL to provide requesters access to public records within the agency’s custody and control.” *Id.* at 1140.

The RTKL vests Chapter 13 Courts with jurisdiction to assess whether an “agency withheld requested records willfully, wantonly, or unreasonably.” *Bowling*, 75 A.3d at 470. Accordingly, this Court has the authority to assess a Commonwealth agency’s compliance with the RTKL, and to impose statutory sanctions, including civil penalties. *Phila. DA*.

The current record supports civil penalties. Because the statute caps the penalty amount, and there is evidence demonstrating DOC’s bad faith, it is unnecessary to hold a hearing as to the amount of penalties. *Phila. DA*.

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<sup>10</sup> In the fact-finding phase, Requester also sought penalties in the amount of \$500 per day under Section 1305(b) of the RTKL, 65 P.S. §67.1305(b), for DOC’s noncompliance with the Disclosure Order. Such penalties are reserved for noncompliance with a court order.

Here, the maximum statutory civil penalty is warranted based on DOC's noncompliance throughout the RTKL process, as described above. The amount corresponds to the degree of noncompliance, and the repercussions of that noncompliance.

The evidence shows DOC did not conduct a thorough search for responsive records until *after* the appeals process concluded. Only after the deadline to appeal the Disclosure Order expired did DOC attest that it provided all responsive records in the 2015 Oppman Verification. Moreover, the 2015 Oppman Verification was inaccurate because DOC still did not disclose data for *all* inmate illnesses.

The duration that DOC withheld public records also weighs in favor of imposing the maximum civil penalty. DOC received the Request in September 2014. DOC made piecemeal, incomplete disclosures in 2014, 2015, and 2017. The 2014 and 2015 Disclosures were limited to cancer, pulmonary disease, and gastrointestinal disease, and excluded some cancer records as DOC withheld the Oncology Database.

In December 2016, this Court confirmed that "all responsive records" subject to the Disclosure Order included No Escape Investigation-related records and the four Inmate Illness Sources (Mortality Lists, Oncology Database, Pharmacy Contractor Reports, and PTrax) without limitation as to type of illness. Summ. Relief Op. Yet, DOC continued to withhold responsive records, and to limit them by illness type.

Although DOC identified additional records in discovery, the 2017 Disclosure was again incomplete. DOC has not complied with the Disclosure Order to date. Thus, DOC delayed access to public records for three years.

I award the maximum penalty to deter DOC and other agencies from disregarding their statutory duties under the RTKL. Ultimately, DOC's failure to perform the steps required upon receiving the Request precluded access to public records. It also resulted in years of litigation to obtain responsive records that DOC should have assessed and reviewed upon receipt of the Request.

### **III. Conclusion**

For the foregoing reasons, I conclude DOC committed bad faith so as to warrant statutory penalties in the maximum amount of \$1,500 pursuant to Section 1305(a) of the RTKL, 65 P.S. §67.1305(a).

In the event Requester intends to pursue its request for attorney fees, under either the RTKL or another statute, it shall so advise the Court in writing within thirty (30) days. Requester shall also submit documentation for its claim at that time.

  
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ROBERT SIMPSON, Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Uniontown Newspapers, Inc., d/b/a	:	
The Herald Standard; and Christine	:	
Haines,	:	
Petitioners	:	No. 66 M.D. 2015
	:	
v.	:	
	:	
Pennsylvania Department of	:	
Corrections,	:	
Respondent	:	

**ORDER**

**AND NOW**, this 23<sup>rd</sup> day of March, 2018, after hearing and upon review of the parties' submissions, the Pennsylvania Department of Corrections (DOC) is **ORDERED to DISCLOSE** to Uniontown Newspapers, Inc., d/b/a *The Herald Standard*, through reporter Christine Haines (Requester), **ANY and ALL RESPONSIVE RECORDS**, not previously disclosed, without limitation as to illness type, contained in the following sources as described in the foregoing opinion: Mortality Lists; the Oncology Database; and Chronic Care Clinic records (including PTrax) as of the closest date to the request date, that remain recoverable. DOC **SHALL DISCLOSE** these records to Requester **no later than twenty (20) days** from the date of this Order. Failure to comply with this court-ordered disclosure may subject DOC to penalties up to \$500 per day pursuant to Section 1305(b) of the Right-to-Know Law (RTKL),<sup>11</sup> 65 P.S. §67.1305(b).

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<sup>11</sup> Act of February 14, 2008, P.L. 6.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Uniontown Newspapers, Inc., d/b/a  
The Herald Standard; and Christine  
Haines,

Petitioners

v.

Pennsylvania Department of  
Corrections,

Respondent

No. 66 M.D. 2015

Argued: November 15, 2016

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE P. KEVIN BROBSON, Judge

**OPINION**  
**BY JUDGE SIMPSON**

**FILED: December 19, 2016**

Before this Court are cross-motions for summary relief involving enforcement of a final determination the Office of Open Records (OOR) issued pursuant to the Right-to-Know Law (RTKL).<sup>1</sup> Christine Haines, on behalf of Uniontown Newspapers, Inc., d/b/a *The Herald Standard*, (Requester) appealed to OOR when the Department of Corrections (DOC) denied her request for de-identified diagnosis data of inmates at State Correctional Institution (SCI)-Fayette. OOR rejected DOC's defenses, ordering disclosure of "all responsive records." DOC did not appeal. Arguing DOC withheld responsive records, Requester asks this Court to compel their disclosure and seeks statutory sanctions, including attorney fees and penalties, for bad faith. DOC counters that sanctions are not merited because it disclosed responsive records, albeit days after the deadline in OOR's order.

<sup>1</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

Because there is a dispute as to whether DOC provided all responsive records, we grant summary relief in part to DOC as to withholding inmate medical files and as to creation of a record, and deny summary relief as to its compliance. We deny summary relief to Requester, allowing the enforcement action to proceed for further development of the record as to *whether* and *when* DOC disclosed all responsive records in accordance with OOR's mandate. As the extent of DOC's noncompliance is unclear at this stage, penalties for bad faith are premature.

## **I. Background**

### **A. Facts**

In September 2014, the Abolitionist Law Center published its report, "No Escape: Exposure to Toxic Coal Waste at [SCI-] Fayette," correlating ill health of SCI-Fayette inmates to nearby toxic coal waste ("No Escape" Report). Pet'rs' Br. in Support, Ex. 6. In response, DOC undertook an internal investigation into the charges (Investigation). Director of DOC's Bureau of Health Care Services, Christopher Oppman (Director Oppman), oversaw the DOC Investigation. Drs. Paul Noel and Eugene Ginchereau spearheaded the Investigation.

On December 31, 2014, DOC issued a press release regarding the records reviewed during its Investigation and the results (Press Release). DOC noted the Department of Health (DOH) was conducting its own investigation, which was not yet final. DOH prepared its own report regarding its investigation and findings (DOH Investigative Results), submitted to DOC on February 3, 2015. DOC provided information to DOH, such as by email, including inmates' health data, to assist DOH's investigation.

## B. Procedural History

Before the investigations were completed, and inspired by the "No Escape" Report, Requester submitted a request to DOC on September 25, 2014, seeking (with emphasis added):

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.

(Request). See Pet'rs' Br. in Support at Ex. 3. After invoking an extension, DOC issued a denial, citing several exceptions in the RTKL.<sup>2</sup> Requester appealed to OOR.

Before OOR, DOC limited its argument to the medical records exception in Section 708(b)(5) of the RTKL, 65 P.S. §67.708(b)(5), and the noncriminal investigation exception in Section 708(b)(17) of the RTKL, 65 P.S. §67.708(b)(17). In support, DOC submitted a declaration of Director Oppman as to the investigative nature of responsive records (OOR Declaration). Requester countered that aggregated data,<sup>3</sup> lacking any individual identifiers, is not protected.

<sup>2</sup> Under Section 708(b) of the RTKL, DOC cited the security exceptions in 65 P.S. §67.708(b)(1)(ii) (personal security) and 65 P.S. §67.708(b)(2) (public safety); the investigative exceptions in 65 P.S. §67.708(b)(16) (criminal investigations) and 65 P.S. §67.708(b)(17) (noncriminal investigations); 65 P.S. §67.708(b)(5) (medical records); 65 P.S. §67.708(b)(6) (personal identifiers); 65 P.S. §67.708(b)(10) (predecisional deliberations); and, 65 P.S. §67.708(b)(12) (work papers).

<sup>3</sup> "Aggregated data" is defined as: "A tabulation of data which relate to broad classes, groups or categories so that it is not possible to distinguish the properties of individuals within those classes, groups or categories." Section 102 of the RTKL, 65 P.S. §67.102.

Reasoning that DOC did not prove either exception, OOR directed disclosure of "all responsive records ... within [30] days" (Disclosure Order).<sup>4</sup> See Haines & The Herald Standard v. Dep't of Corr., OOR Dkt. AP 2014-1695 (filed December 1, 2014) (Final Determination). As to Section 708(b)(17), OOR determined DOC did not show it performed an investigation attendant to its duties; rather, the investigation was ancillary and primarily performed by DOH. As to Section 708(b)(5), OOR concluded the exception did not apply. OOR noted "[DOC] 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." *Id.* at 7. Because Requester stated "she is not seeking any identifying information," *id.*, the medical records exception did not apply on its face, and DOC did not meet its burden. OOR also explained de-identified information is not protected by the Health Insurance Portability and Accountability Act (HIPAA), which pertains only to covered entities. 45 C.F.R. §164.502(a). Importantly, DOC did not appeal.

After the deadline in the Disclosure Order passed, on January 6 or 7, 2015, DOC disclosed the following: statistics of inmates diagnosed with pulmonary and gastrointestinal ailments from 2010-2014, including a comparison across institutions; comparisons of natural death and cancer deaths; and, a spreadsheet of SCI-Fayette cancer deaths, by type of cancer, from 2003-2013, including comparison by institution from 2010-2013. DOC also submitted a declaration that it provided all responsive records, Post-Final Determination (FD) Declaration, 1/7/15). Pet'rs' Br. in Support at Ex. 9.

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<sup>4</sup> As DOC did not maintain staff health records, only inmate records were before OOR.

Subsequently, DOC disclosed the following: the Press Release; water analysis at SCI-Fayette; Dr. Noel's investigative summary; a redacted copy of Dr. Ginchereau's medical record review; a redacted list of cancer patients at SCI-Fayette (unspecified date); statistics regarding oncology treatments from November 2014; and, the DOH Investigative Results. DOC Br. in Support at 9.

Requester filed a petition for review asking this Court to compel DOC to disclose responsive records pursuant to the Disclosure Order. Requester also seeks attorney fees and civil penalties, alleging DOC committed bad faith.

DOC filed preliminary objections, which this Court overruled. Then, Requester filed a motion for judgment on the pleadings, which this Court denied. See Uniontown Newspapers v. Dep't of Corr. (Pa. Cmwlth., No. 66 M.D. 2015, filed December 7, 2015) (single j. op.). Senior Judge Oler held judgment on the pleadings was inappropriate because there was an issue of material fact as to whether DOC's interpretation of the Request was reasonable or whether DOC narrowed its response in bad faith.

In April 2016, Requester deposed Director Oppman and Dr. Noel as to DOC's maintenance of inmate diagnosis data, and how they obtained that data during the Investigation, and provided the data to DOH for its investigation.

The parties filed cross-motions for summary relief. Although both parties submit there are no disputes of material fact, they disagree as to whether DOC produced *all* responsive records in compliance with the Disclosure Order.

There are no stipulations identifying the records provided to date with particularity. Requester described records in Exhibit 16 to her brief in support of summary relief that remain outstanding, and which she claims are responsive to the Request.

### C. Contentions

Requester seeks judgment in her favor that DOC did not comply with the Disclosure Order because DOC did not provide a complete response or perform a good faith search as required by Section 901 of the RTKL, 65 P.S. §67.901. She asserts DOC has a duty to disclose inmate medical files in redacted form. In addition, as source material for the Investigation and DOH's Investigative Results, Requester contends disclosure of inmate medical files is in the public interest, such that DOC should have exercised its discretion to release them.

In opposition, DOC counters that it disclosed responsive records based on its interpretation of the Request. DOC refutes that inmate medical files are subject to the Request, which sought aggregated data. DOC challenges the allegations of bad faith as grounds for sanctions when it disclosed all responsive records. DOC maintains it cooperated with Requester throughout the process, providing records not comprised in the Request, like DOH's Investigative Results.

In its motion for summary relief, DOC alleges it disclosed all records responsive to the Request. DOC contends its construction of the Request as limited to illnesses inmates contracted at SCI-Fayette is reasonable. It asserts inmate medical files are not sought by the Request, and are exempt in their entirety. DOC also claims Requester did not identify any responsive records that remain undisclosed.

## II. Discussion

We are asked to discern DOC's compliance with the Disclosure Order. Requester argues responsive records remain outstanding, whereas DOC counters that it complied. In this posture, we do not question OOR's resolution of the merits. Com. v. Derry Twp., 351 A.2d 606, 610 (Pa. 1976) (failure to appeal agency order "foreclosed any attack on its content or validity in ... enforcement proceedings").

In an enforcement action, Requester invokes jurisdiction ancillary<sup>5</sup> to our appellate jurisdiction under the RTKL. See Dep't of Envtl. Prot. v. Cromwell Twp., Huntingdon Cnty., 32 A.3d 639 (Pa. 2011) ("enforcement proceedings lie in ... appellate jurisdiction; they are not appealable as of right under 42 Pa. C.S. §723(a)"); Pa. Human Relations Comm'n v. Scranton Sch. Dist., 507 A.2d 369 (Pa. 1986).

Relevant here, the RTKL vests this Court with jurisdiction to assess an agency's compliance by empowering "Chapter 13 courts" with the *exclusive* authority to impose sanctions in the form of attorney fees or civil penalties for denials of access after "ma[king] relevant factual findings." Bowling v. Office of Open Records, 75 A.3d 453, 458 (Pa. 2013); see Sections 1304 and 1305 of the RTKL, 65 P.S. §§67.1304, 67.1305. As a party to the underlying proceeding, Requester may seek enforcement of OOR's Disclosure Order through a petition to enforce. See, e.g., Dep't of Aging v. Lindberg, 469 A.2d 1012 (Pa. 1983) (a party other than issuing agency may seek enforcement of agency's order).

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<sup>5</sup> We may grant relief in the nature of mandamus in our ancillary jurisdiction. Avis Rent A Car Sys., Inc. v. Dep't of State, State Bd. of Vehicle Mfrs. Dealers & Salespersons, 507 A.2d 893 (Pa. Cmwlth. 1986).

### A. Legal Standard

Applications for summary relief are governed by Pa. R.A.P. 1532(b). It provides: “[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear.” *Id.* “An application for summary relief may be granted if a party’s right to judgment is clear and no material issues of fact are in dispute.” *Leach v. Turzai*, 118 A.3d 1271, 1277 n.5 (Pa. Cmwlth. 2015) (*en banc*), *aff’d*, 141 A.3d 426 (Pa. 2016). “In ruling on application[s] for summary relief, we ... enter judgment only if there is no genuine issue as to any material facts and the right to judgment is clear as a matter of law.” *Cent. Dauphin Sch. Dist. v. Dep’t of Educ.*, 598 A.2d 1364, 1366-67 (Pa. Cmwlth. 1991).

An appellate court may grant relief in order to enforce OOR’s final determinations. *See, e.g., Wishniefsky v. Dep’t of Corr.* (Pa. Cmwlth., No. 582 M.D. 2014, filed July 8, 2015) (permitting relief in the nature of mandamus); *Crockett v. Se. Pa. Transp. Auth.* (Pa. Cmwlth., No. 2295 C.D. 2011, filed September 11, 2012) (same).

### B. Requester’s Motion for Summary Relief

#### 1. Compliance

Requester bears the burden to prove that DOC did not comply with OOR’s order directing DOC to disclose “all responsive records” within 30 days. Notably, the language of the Disclosure Order, not that of the Request, is before us. The operative term there is “all responsive records,” meaning records OOR deemed within the Request. Without confirming the composition of “responsive records,” this Court is not in a position to compel disclosure or punish noncompliance.

### a. Scope of Request

Neither a party nor OOR may refashion the Request in the interest of providing responsive records. Dep't of Labor & Indus. v. Heltzel, 90 A.3d 823, 833 (Pa. Cmwlth. 2014) (en banc). A party's construction of a request such that there are no responsive records, other than those that are clearly protected, is improper. See Carey v. Dep't of Corr. (Carey II) (Pa. Cmwlth., No. 1348 C.D. 2012, July 3, 2013) (unreported); see also Carey v. Dep't of Corr. (Carey I); 61 A.3d 367 (Pa. Cmwlth. 2013), accord Shuler v. Dep't of Corr. (Pa. Cmwlth., No. 237 C.D. 2016, filed Nov. 1, 2016) (unreported), 2016 WL 6441187 (remanding to OOR to assess whether DOC provided all responsive records to request seeking records other than the privileged document DOC identified).

OOR's construction of the Request in the Final Determination governs our disposition of whether DOC complied with the Disclosure Order. Wishnefsky. DOC's interpretation of the Request pertains only to whether its denial of access reflects bad faith. As such, OOR's reasoning in the Final Determination is crucial.

#### (i) Subject Matter

OOR construed the Request as one for data, without any identifying information. Final Determination at 3, 7. OOR found "[DOC] has not established that the Request seeks exempt medical records." Id. at 9. Indeed, the Request does not seek inmate medical files. Requester argued she sought "aggregated data, which is not subject to the majority of exemptions cited by [DOC]." Id. at 3. Based on the Final Determination, OOR construed the Request as seeking data of SCI-Fayette inmates' diagnoses, by type of ailment and number of inmates afflicted.

In contrast to OOR's construction, DOC construed the Request to require review of inmate medical files: "to determine (1) whether the inmate has cancer or a respiratory ailment[;] (2) when the inmate was diagnosed with cancer or a respiratory ailment[;] and[,] (3) whether the inmate was at SCI[-]Fayette when he was diagnosed with cancer or a respiratory ailment." DOC Br. in Op. at 34. In other words, DOC construed the Request as seeking data on inmates first diagnosed while at SCI-Fayette. As a result, DOC argued the Request required the reviewer to make a medical judgment tying an inmate's diagnosis to the institution. Id.

Throughout this enforcement proceeding, DOC emphasized the phrase "contracted at." DOC's construction of the Request as seeking only data of inmates who "contracted" ailments during their incarceration at SCI-Fayette, has some basis in the language of the Request; however, in an enforcement action, we focus on the unappealed Final Determination and the language of the Disclosure Order. Derry Twp.; Wishnefsky. DOC's construction is too limited given OOR's reasoning in the Final Determination.

In particular, OOR repeated that Requester did not seek identifying information. Final Determination at 7-9. Also, OOR did not focus on the word "contracted" in the Request. Id. Thus, there is no support for DOC's conclusion that it was ordered to disclose only information about inmates who first "contracted" a disease while at the specific facility.

Further, DOC's construction is inconsistent with the declaration Director Oppman submitted to OOR acknowledging that DOC had responsive

records to which the noncriminal investigation exception applied. Specifically, he attested “[DOC] has generated the records that [Requester] requests; however, those records were created as part of an investigation that [DOH] is conducting.” OOR Declaration at ¶6 (emphasis added) (Pet’rs’ Br. at Ex. 8). OOR rejected DOC’s noncriminal investigative defense, and it is “those records” that must be disclosed.

Because the parties misplace emphasis on their interpretations of the Request, as opposed to OOR’s construction in the Final Determination, we are unable to grant summary relief in Requester’s favor as to DOC’s noncompliance. Nonetheless, so as to address DOC’s claim for summary relief, we reject DOC’s narrow response, and we hold inmate diagnoses data, particularly as to types of illness and number of inmates so diagnosed, are comprised in the Disclosure Order.

#### (ii) Request Date

Because it is apparent the parties did not regard the Request date as relevant, we underscore that DOC may only be culpable for failing to disclose records that existed as of the date of the Request. Records post-dating the Request are not “responsive” regardless of their relevance to the subject matter.

Under Section 705 of the RTKL (relating to creation of a record), “the standard is whether such a record is in existence and in possession of the Commonwealth agency at the time of the right-to-know request.” Paint Twp. v. Clark, 109 A.3d 796, 805 (Pa. Cmwlth. 2015) (emphasis added) (citation omitted). However, compiling records from a database is not “creation of a record.” Dep’t of Env’tl. Prot. v. Cole, 52 A.3d 541 (Pa. Cmwlth. 2012).

The Request date (9/25/14) defines the universe of responsive records, as DOC only has a duty to disclose records created on or before September 25, 2014. DOC had no obligation to disclose records created after the Request date, such as the Press Release, 12/31/15, or the DOH Investigative Results,<sup>6</sup> as their creation date excludes them from the confines of "responsive records." Consequently, the Disclosure Order only encompasses records that existed as of the Request date.

#### **b. Types of Responsive Records**

Requester identifies three types of responsive records DOC withheld in violation of the Disclosure Order: (i) records pre-existing the Investigation; (ii) Investigation-related records; and, (iii) inmate medical files. We review each in turn.

##### **(i) Pre-existing Investigation**

Requester asserts that DOC deliberately withheld responsive records that were not involved in its Investigation. Specifically, Requester identifies five sources of records: (1) a database of treatment at Chronic Care Clinics, which may be isolated by institution (PTrax); (2) a database of cancer patient inmates, including historical data (Oncology DB); (3) inmate grievances logged with the Bureau of Health Care Services (Grievances); (4) mortality lists by facility, showing cause of death (Mortality Lists); and, (5) reports from DOC's pharmacy contractor, showing number of inmates treating for pulmonary and gastrointestinal medications (Contractor Reports). Pet'rs' Br. at 28-31. Notably, DOC did not disclaim that such records were responsive, or that it disclosed records from these five sources.

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<sup>6</sup> DOC's point that Requester sought records after issuance of the Final Determination is well-taken, and such records were gratuitously provided. Requester may submit another request for records created after the date of the Request.

Other than the Grievances, all of these records are fairly comprised within the Disclosure Order such that DOC had a duty to disclose them. Indeed, the submissions reflect that a Mortality List was disclosed, as well as a redacted copy of the Oncology DB for a limited period. However, it is not possible to discern at this stage whether DOC disclosed *all* responsive pre-existing Investigation records.

### **(ii) Investigation-related Records**

Requester contends DOC withheld responsive records described in Director Oppman's OOR Declaration and deposition pertaining to the Investigation. Requester identifies emails between DOH and DOC related to their investigations. Such emails, if containing inmate diagnosis data, qualify as "responsive records."

Adding complexity to this Court's task, neither party is definitive about when records were created during the Investigation. Since the Investigation began prior to the Request date, and continued thereafter, it is important to determine the date of investigative records. The DOH Investigative Results show DOC reported inmate diagnoses to DOH that formed the basis for DOH's findings. These records are at the crux of the Request, and it is these records, notwithstanding their alleged investigative content, that – if existing as of the date of the Request – DOC had a duty to disclose within 30 days of OOR's order.

### **(iii) Inmate Medical Files**

Requester also claims DOC has a duty to disclose inmate medical files, in redacted form to remove identifiers, because they were the source material for the data. We disagree for two reasons.

One, inmate medical files are not fairly comprised within the Request. Repeatedly, Requester disclaimed any interest in individual medical files, emphasizing that the Request pertained to data or reports in aggregate form. OOR's reasoning in the Final Determination relied on the Requester's disinterest in individual medical files, and emphasized that Requester sought data. Requester now claims entitlement to redacted medical files because the physician deponents explained they contain diagnoses information. Requester may not change her Request in subsequent legal proceedings. Heltzel; Pa. State Police v. Office of Open Records (George), 995 A.2d 515 (Pa. Cmwlth. 2010) (noting parties may limit a request by stipulation).

Moreover, diagnosis information located in multiple inmate medical files does not constitute data of inmates' diagnoses by type unless DOC compiles the information from each file. DOC has no duty to perform research in response to a RTKL request to compile the diagnoses data sought. Dep't of Corr. v. Disability Rights Network of Pa., 35 A.3d 830 (Pa. Cmwlth. 2012). That is tantamount to creation of a record, contrary to Section 705 of the RTKL, 65 P.S. §67.705.

Two, an individual's medical file is exempt under Section 708(b)(5) of the RTKL. Section 708(b)(5) specifically exempts the following:

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) (emphasis added). However, medical incident/injury *reports* are not protected under Section 708(b)(5) of the RTKL. See Dep't of Corr. v. St. Hilaire, 128 A.3d 859 (Pa. Cmwlth. 2015). DOC may be required to redact information from *reports*, as distinguished from inmates' *medical files*. Id. An inmate's medical file is exempt, and not subject to redaction. Williams v. Dep't of Corr. (Pa. Cmwlth., No. 2068 C.D. 2015, filed June 13, 2016) (unreported).

Further, individual medical files, protected under Section 708(b)(5), are one type of record to which Requester's aggregated data defense does not apply. Section 708(d) of the RTKL provides: "The exceptions set forth in [Section 708(b)] shall not apply to aggregated data maintained or received by an agency, except for data protected under subsection[s] (b)(1), (2), (3), (4), or (5)." 65 P.S. §67.708(d) (emphasis added). Therefore, information protected by Section 708(b)(5) remains protected.

### c. Summary

In sum, there is a dispute of material fact as to whether DOC provided "all responsive records" as mandated by OOR's Disclosure Order. From the submissions, it appears that some Investigation-related records and records pre-existing the Investigation remain outstanding. As to those records, we deny Requester's motion for summary relief without prejudice, so the enforcement action may proceed to further develop the record as to the status of these records.

As to inmate medical files, we deny Requester's motion for summary relief with prejudice, and we grant DOC's motion for summary relief to the extent

it seeks judgment that it is not required to disclose inmate medical files, even in redacted form, or to create new<sup>7</sup> records compiling data from those inmate files.

In the interest of limiting the matters that may be the subject of stipulations or further fact-finding, we determine some of the records Requester identified in Exhibit 16 to her brief are not comprised within the Disclosure Order. As such, DOC has no duty to disclose them.<sup>8</sup>

## 2. Bad Faith

Requester also asks this Court to award attorney fees and costs, and to impose civil penalties based on DOC's noncompliance and bad faith. Bad faith may constitute grounds for an award of attorney fees under Section 1304(a) of the RTKL, 65 P.S. §67.1304, or for the imposition of civil penalties under Section 1305 of the RTKL, 65 P.S. §67.1305. Evidence of bad faith is required. Barkeyville Borough v. Stearns, 35 A.3d 91 (Pa. Cmwlth. 2012).

Here, Requester claims three bases for bad faith: (1) DOC's untimely disclosure beyond the 30-day deadline in OOR's order; (2) DOC's failure to perform a good faith search of records as required by Section 901 of the RTKL; and, (3) DOC's continued nondisclosure of responsive records.

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<sup>7</sup> In the event DOC created any records prior to the Request date from its review of inmate medical files when conducting the Investigation, those records are responsive, and are not excluded under Section 705 of the RTKL, 65 P.S. §67.705 (creation of a record).

<sup>8</sup> For example, drafts of the Press Release that do not contain data of inmate diagnoses are not responsive records. Emails exchanged during the Investigation are responsive *only to the extent they contain diagnoses data*. Grievances were not addressed in the Final Determination; therefore, grievances are not contemplated in the Disclosure Order.

As to untimeliness, there is no dispute DOC provided responsive records a few days after the 30-day deadline. Although untimeliness may merit a finding of bad faith, such a short lapse by itself may be *de minimis*.

As to compliance with Section 901 of the RTKL, DOC was required to make a good faith effort to determine whether it had possession, custody or control of responsive records. 65 P.S. §67.901; Chambersburg Area Sch. Dist. v. Dorsey, 97 A.3d 1281 (Pa. Cmwlth. 2014) (remanding to trial court to assess bad faith when school district discovered additional 3,500+ pages of records after first remand to trial court; trial court erred in not supplementing record as to bad faith). An agency's failure to perform a good faith search in response to a RTKL request may be grounds for bad faith. Id.

At this stage, the submissions suggest DOC did not comply with Section 901.<sup>9</sup> DOC discovered responsive records during the Investigation, as opposed to when it received the Request, raising the question as to the thoroughness of its initial search. Also, DOC's narrow construction of its duty under the Disclosure Order appears self-serving, similar to its responses in appeals whereby it construed a request as seeking a record that is clearly exempt. See, e.g., Carey II; Shuler.

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<sup>9</sup> Requester alleges Director Oppman admitted during deposition that he did no search in response to the Request. However, his testimony is less than clear because the questions pertained to both the search performed for records in response to the Request, and to the Investigation. Also, Requester's position presumes Director Oppman bore responsibility for responding to the Request.

As to compliance with OOR's Disclosure Order, it is evident that DOC did not disclose responsive records that pre-existed the "No Escape" Report, the Request date, and that were created as part of its Investigation. The deposition testimony revealed that DOC maintains inmate diagnosis data in PTrax and the Oncology DB, and that DOC receives Contractor Reports pertaining to types of inmate illnesses. These records fall within the Disclosure Order. Yet, it appears that these records remain undisclosed.

Nonetheless, bad faith is a matter of degree, implicating the extent of noncompliance. As the extent of DOC's noncompliance is unclear, we decline to make findings of bad faith at this time. Further, the duration DOC withheld responsive records may also weigh in favor of awarding civil penalties. Accordingly, we reserve judgment on sanctions until after disposition of the merits.

### **C. DOC's Motion for Summary Relief**

In its motion for summary relief, DOC claims it is entitled to judgment in its favor because it reasonably construed the Request, and it provided all responsive records within its possession. Accordingly, its conduct does not warrant sanctions. DOC also argues it has no duty to provide inmate medical files, or to create a record compiling the diagnosis data from those files.

As explained above, we reject DOC's contention that it reasonably construed the Request. DOC misplaced its focus on the language of the Request, when its compliance is judged by the parameters of the Disclosure Order in the enforcement stage.

In addressing Requester's cross-motion, we explained our reasons for granting judgment in DOC's favor that it has no duty to disclose inmate medical files or to create new records by compiling the diagnoses data contained in medical files.

Although additional fact-finding is necessary to determine Requester's entitlement to relief, it is clear on the present submissions that DOC is not entitled to judgment in its favor that it complied with the Disclosure Order.

To establish that it provided all responsive records, DOC submitted the Post-FD Declaration. Therein, Director Oppman attested "[DOC] as [sic] previously provided records to [Requester] regarding this [R]equest." *Id.* at ¶4 (Pet'rs' Br. at Ex. 9). Without describing or enumerating the records provided to Requester, and without explaining when the records were provided, Director Oppman states, "[b]eyond the records previously provided to [Requester], [DOC] 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 ¶6 (emphasis added).

As the responding agency, DOC bears the burden of proving that no additional responsive records exist. *Hodges v. Dep't of Health*, 29 A.3d 1190 (Pa. Cmwlth. 2010); *Moore v. Office of Open Records*, 992 A.2d 907 (Pa. Cmwlth. 2010). "[A]n agency may satisfy its burden of proof that it does not possess a requested record with either an unsworn attestation by the person who searched for the record or a sworn affidavit of nonexistence of the record." *Hodges*. In similar

cases, DOC has provided either sworn or unsworn affidavits in order to satisfy its burden of proving it does not possess requested records. See Sturgis v. Dep't of Corr., 96 A.3d 445 (Pa. Cmwlth. 2014). In the absence of any competent evidence that the agency acted in bad faith or that the agency records exist, "the averments in [an agency's] affidavits should be accepted as true." Smith Butz, LLC v. Pa. Dep't of Env'tl. Prot., 142 A.3d 941, 945 (Pa. Cmwlth. 2016) (quoting McGowan v. Dep't of Env'tl. Prot., 103 A.3d 374, 382-83 (Pa. Cmwlth. 2014)).

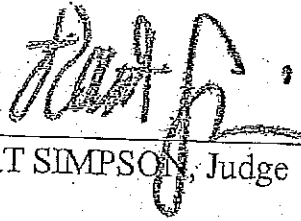
Because DOC narrowly construed the Disclosure Order, and because its declarations track its narrow construction, DOC did not establish it provided all responsive records. As such, DOC is not entitled to judgment in its favor. Leach. Moreover, there is some evidence of bad faith and other valid grounds to discount DOC's declarations. Accordingly, we deny DOC's request for summary relief as to its compliance.

### III. Conclusion

There is a genuine issue of material fact as to whether DOC provided all responsive records because DOC did not disclose responsive records that pre-existed the Investigation and the Request (i.e., PTrax, Oncology DB, Contractor Reports). Further, both parties disregarded the importance of the Request date. As a result, there is no indication when the Investigation-related records (such as emails) were created. To limit the issues for trial, the Court requests stipulations within the next 90 days as to what documents DOC provided, the creation date of the provided documents (if known), and when the documents were provided, so as

to limit fact-finding to only the pre-existing records and Investigation-related records that are outstanding.

To allow full development of the record, this matter shall proceed through trial, at which Requester bears the burden of proving DOC's noncompliance and bad faith. To the extent DOC contends no responsive records exist beyond those already produced in response to the Disclosure Order, DOC bears the burden of proving this defense.

A handwritten signature in dark ink, appearing to read "Robert Simpson", is written over a horizontal line.

ROBERT SIMPSON, Judge

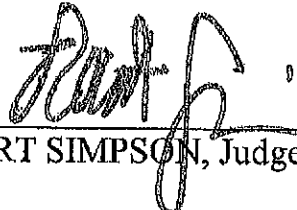
**Within twenty (20) days, DOC SHALL SUBMIT** sworn statement(s) by individuals with personal knowledge attesting to the completeness of the above-ordered disclosure, including the availability of Chronic Care Clinic records through PTrax or otherwise.

As to inmate medication information, **DOC SHALL OBTAIN and DISCLOSE** records from its pharmaceutical contractor (Pharmacy Contractor) showing the number of inmates on therapeutic classes of medications, unlimited as to disease type, **within thirty (30) days**. Inmate medication information **SHALL BE OBTAINED** in the format in which it exists, without reformatting or extrapolation; however, inmate identifiers, including names, shall be redacted or otherwise removed prior to disclosure. Pharmacy Contractor **IS NOT REQUIRED** to convert inmate medication information into the same format as the previously disclosed Pharmacy Contractor Reports (relating to pulmonary and gastrointestinal diseases). The inmate medication information disclosure shall be accompanied by sworn statements by persons with knowledge as to Pharmacy Contractor's records, including the compilation process. In the event DOC does not obtain responsive records from Pharmacy Contractor within the prescribed timeframe, **DOC SHALL SUBMIT** sworn statement(s) detailing its efforts to obtain the information, unlimited as to disease type, from Pharmacy Contractor **within thirty (30) days**, including when the records are anticipated.

**AND**, Requester's request for civil penalties under Section 1305(a) of the RTKL, 65 P.S. §67.1305(a), is **GRANTED**. The maximum civil penalty in the

amount of \$1,500 is imposed against DOC and in favor of Requester. Counsel **SHALL FILE** a verified statement of the payment **within thirty (30) days**.

**AND FURTHER**, as to Requester's request for attorney fees, **within thirty (30) days**, Requester **SHALL ADVISE** the Court in writing of its intent to pursue attorney fees, and also **SUBMIT** any documentation upon which it will rely. Thereafter, this Court may issue a briefing schedule and/or schedule a hearing.

  
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ROBERT SIMPSON, Judge

**Certified from the Record**

**MAR 23 2018**

**and Order Exit**

# EXHIBIT C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Uniontown Newspapers, Inc., d/b/a  
The Herald Standard; and Christine  
Haines,

Petitioners

No. 66 M.D. 2015

v.

Pennsylvania Department of  
Corrections,

Respondent

**ORDER**

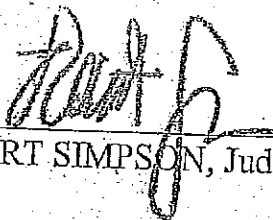
AND NOW, this 19<sup>th</sup> day of December, 2016, it is **ORDERED** and **DECREED** as follows:

Petitioners' motion for summary relief is **DENIED**, without prejudice to allow the enforcement action to proceed for further fact-finding regarding Respondent's disclosure of "all responsive records," narrowed to exclude inmate medical files, even in redacted form, or creation of new records from inmate medical files, and limited to: (1) the five types of pre-existing Investigation records described in the accompanying opinion; and, (2) the Investigation-related records, including but not limited to those records to which Director Oppman referred in his submission to the Office of Open Records (OOR);

Respondent's motion for summary relief is **GRANTED IN PART**, as to the disclosure of inmate medical files and creation of a record claims; and **DENIED IN PART**, as to its compliance with OOR's order.

AND, because the extent of Respondent's noncompliance is not yet determined, this Court reserves judgment as to imposing statutory sanctions until disposition of the merits;

AND FURTHER, the parties are directed to submit stipulated facts identifying the records disclosed, date of record (if known) and the date of disclosure, and identifying the "Investigation-related" records to which Director Oppman referred in the OOR submissions; as well as stipulated facts identifying with more detail the 5 categories of pre-existing Investigation records, so that it is clear what remains outstanding by category within 90 days of this order.

  
ROBERT SIMPSON, Judge

Certified from the Record

DEC 19 2016

and Order Exit

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# EXHIBIT D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Uniontown Newspapers, Inc., d/b/a  
The Herald Standard; and  
Christine Haines,

Petitioners

v.


Pennsylvania Department of  
Corrections,

Respondent

No. 66 M.D. 2015

ORDER

NOW, this 28<sup>th</sup> day of May, 2015, following oral argument via telephone on Respondent's preliminary objections and Petitioner's answer thereto, it is hereby ordered that Respondent's preliminary objections are **OVERRULED**. The Department of Corrections is directed to file an answer to the Petition for Review within twenty (20) days of the date of this Order.

  
P. KEVIN BROBSON, Judge

Certified from the Record

MAY 28 2015

And Order Exit

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# EXHIBIT E

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Uniontown Newspapers, Inc., d/b/a  
The Herald Standard; and Christine  
Haines,

Petitioners

v.

Pennsylvania Department of  
Corrections,

Respondent

No. 66 M.D. 2015

Argued: November 6, 2015

BEFORE: HONORABLE J. WESLEY OLER, JR., Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE OLER

Filed: December 7, 2015

Union Newspapers, Inc., d/b/a The Herald Standard, and Christine Haines (collectively Petitioners) seek judgment on the pleadings in this original jurisdiction matter against the Pennsylvania Department of Corrections (DOC). Petitioners seek an order directing the DOC to produce records pursuant to a final order of the Office of Open Records (OOR), finding the DOC willfully and wantonly disregarded Petitioners' right to know request and deprived them of access to public records, and awarding Petitioners attorney's fees and costs for the DOC's bad faith violation of the Right To Know Law (Law).<sup>1</sup>

Petitioners contend that their right to relief is clear based on OOR's December 1, 2014 final decision, the DOC's failure to appeal the OOR decision,

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<sup>1</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §67.101-67.1304.

and purported admissions by DOC. For the reasons that follow, we will deny Petitioners' motion for judgment on the pleadings.

The petition for review alleges as follows. Petitioner Haines, a reporter for the Herald Standard, filed a right-to-know request with the DOC. The request stated:

I am seeking documentation of illnesses, contracted by inmates and/or staff members at [the State Correctional Institution (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.

Pet. for Review, at ¶16 (emphasis in original). The petition for review alleges the right-to-know request is narrowly tailored and sought records from around August 2003 to present. Petitioners allege that they requested "identification of the types of cancer, e.g., lung cancer, throat cancer, colon cancer, for each cancer contracted during the relevant period," *Id.* at ¶17. After invoking the Law's 30-day extension provision, the DOC denied Petitioners' request on October 16, 2014.<sup>2</sup> *Id.* at ¶19. According to Petitioners, it is notable that the DOC did not deny the request on the ground that responsive documents do not exist. *Id.* at ¶20.

Petitioners appealed the DOC's denial of their records request to the OOR. *Id.* at ¶21. The OOR issued a December 1, 2014 final determination granting

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<sup>2</sup> According to the petition for review, the DOC invoked the following exemptions: the non-criminal investigation exemption; the personal security exemption; the public safety/protected activity exemption; the medical records exemption; the personal identification exemption; the internal deliberations exemption; the deliberative process privilege exemption; the attorney client exemption; and the personal work product of public officials or agency employees exemption. *See generally* Section 708(b) of the Law, 65 P.S. §67.708(b).

Petitioners' appeal and directing the DOC to provide "all responsive records" within 30 days. The DOC did not appeal OOR's decision and, according to Petitioners, it has not complied with the order. *Id.* at ¶¶24, 25.

The petition for review alleges that the DOC has produced limited, nonresponsive documents that do not cover the entire time period for which records were sought with the exception of the period 2010-2013. *Id.* at ¶26. Petitioners allege the DOC's response misses the mark: "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 of 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)." *Id.* at ¶30 (emphasis in original).

Petitioners allege that they have not received documents reflecting the illnesses contracted and reported, with particular focus on the specific, various cancers diagnosed and specific respiratory ailments diagnosed and reported. *Id.* at ¶31. Rather, the DOC has produced aggregate statistical data of cases treated, on a generic basis. *Id.* at ¶33. In order to generate this information, according to the petition for review, the DOC must have drawn the information from a base of documents reflecting specific diagnosed conditions or diseases that could ultimately be lumped under a general category. *Id.* at ¶34. The DOC has refused to comply with Petitioners' repeated requests for a listing of diagnoses. *Id.* at ¶35. The petition for review identifies the following documents as disclosed by DOC: (1) a document titled "Fayette Deaths 2003-2013" (Pet. for Review, at ¶27, Ex. E); (2) a document titled "PA DOC Cancer Patients" (Pet. for Review, at ¶28, Ex. F); and (3) graphs for the number of patients treated for pulmonary and gastrointestinal disorders per 1000 for the years 2010-2014 (Pet. for Review, at ¶29, Ex. G).

Petitioners aver that the DOC has admitted, perhaps inadvertently, that the documents and information exist in a readily obtainable and extensive database

that the DOC maintains in the normal course of business. *Id.* at ¶36. *See also id.* at ¶37 (quote from a DOC December 31, 2014 press release; ¶38 (the DOC's alleged admission in November 2014 that it had documents reflecting "each diagnosis" of "illness contracted at SCI-Fayette, by type and quantity.")). Petitioners allege that the DOC did not oppose the request on the basis that the records do not exist but that the DOC maintain that the records were part of a non-criminal investigation. *Id.* at ¶39.

Moreover, according to Petitioners, the DOC has provided one document reflecting the specific diseases contracted and reported by inmates, thus reflecting the DOC's understanding of the extent of its obligation to produce responsive documents and establishing that DOC possesses the relevant information. *Id.* at 42. Petitioners contend that now, contrary to its prior position, the DOC responds the documents do not exist. *Id.* at ¶43.

The petition for review further alleges that the DOC has not only failed to comply with OOR's order, but did so in bad faith and in an improper manner. The DOC has no right to violate OOR's final determination especially in light of the fact the DOC did not appeal the December 1, 2014 adjudication. *Id.* at ¶46. The DOC may not willfully or wantonly disregard its obligations under the Law and in doing so, the DOC is liable for Petitioners' attorneys' fees, costs of litigation, and civil penalties. *See* Section 1305 of the Law, 65 P.S. §67.1305.

In response, the DOC denies that the information responsive to the request is available. The DOC contends that it has not provided the statistics requested because they do not exist and it does not have a duty under the Law to create a record.

After the close of the pleadings, Petitioners filed the instant motion.

## I. Standards for Judgment on the Pleadings

Pennsylvania Rule of Appellate Procedure 1532(b) provides that the Court may, upon application, enter judgment if the right of the applicant is clear. Pa. R.A.P. 1532(b). The Note to Rule 1532 explains that the relief sought under Rule 1532(b) is similar to the relief envisioned by the Pennsylvania Rules of Civil Procedure regarding judgment on the pleadings and summary judgment. Pa. R.A.P. 1532, Note. When ruling on a motion for judgment on the pleadings, the Court must view all of the opposing party's allegations as true, and only those facts that the opposing party has specifically admitted may be considered against the opposing party. *Tulio v. Beard*, 858 A.2d 156 (Pa. Cmwlth. 2004); *Parish v. Horn*, 768 A.2d 1214 (Pa. Cmwlth. 2001), *aff'd per curiam*, 800 A.2d 294 (Pa. 2002). The Court may consider only the pleadings themselves and any documents properly attached thereto. *Tulio*, 858 A.2d at 158; *Parish*, 768 A.2d at 1215.<sup>3</sup> We may grant a motion for judgment on the pleadings only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of

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<sup>3</sup> Petitioners attached to their Petition for Review: (1) OOR's December 1, 2014 adjudication (Exhibit A); (2) an Abolitionist Law Center paper entitled "No Escape: Exposure of Toxic Coal Waste at State Correctional Institution Fayette (Exhibit B); (3) a copy of the right to know request (Exhibit C); (4) an October 16, 2014 email from Andrew Filkosky, DOC's Open Records Officer, acknowledging the receipt of the request, indicating the DOC's earlier invocation of the 30-day extension period, and identifying the various exemptions from disclosure (Exhibit D); (5) a two-page document entitled "Fayette Deaths 2003-2014, listing the correctional institution, the date of death, and cause of death. The document indicates that there were no deaths at SCI-Fayette in the years 2003-2006. There is no code indicating what the abbreviations NASHU and CA mean (Exhibit E); (6) a document entitled "PA DOC Cancer Patients 2011-2014", which identifies various SCIs, and provides the ADP (undefined) and indicates whether inmates are under treatment, under surveillance, or refused treatment, were paroled or are deceased (Exhibit F); (7) charts identified as "Number of Patients treated for Pulmonary per 1000 patients in census by SCI for the years 2010-2014, and the same for patients treated for gastrointestinal for the years 2010-2014 (Exhibit G); (8) an email chain between Ms. Haines and Chase M. Defelice, Assistant Counsel for the Office of General Counsel (Exhibit H); (9) a December 31, 2014 DOC "Review of Environmental/Medical Allegations at the State Correctional Institution at Fayette" (Exhibit I); (10) a November 4, 2014 letter to Kathleen Higgins, OOR Appeals Officer from Chase Defelice in support of the DOC's position before OOR, including a November 4, 2014 affidavit by Christopher Oppman, Director of the DOC's Bureau of Health Care Services (Exhibit J); and (11) Mr. Oppman's November 7, 2014 affidavit (Exhibit K).

law. *Tulio; Parish*. If the plaintiff files a motion for judgment on the pleadings, the Court may consider the complaint, the answer, and any new matter contained in the defendant's action. *Bata v. Central-Penn Nat'l Bank of Phila.*, 224 A.2d 174 (Pa. 1966); *Kroiz v. Blumenfeld*, 323 A.2d 339 (Pa. Super. 1974); *see also* 6 *Standard Pennsylvania Practice 2d*, §31:35 (West's 2009).

## **II. Discussion**

### **A. Merits of Judgment on the Pleadings**

Petitioners' motion for judgment on the pleadings alleges that Petitioners are entitled to the request relief because (1) the DOC had made a number of admissions supporting the motion; (2) the DOC lacks any legally recognized defense to production of the requested documents, including undue burden; (3) the DOC would not be required to create a new record as it admits to the existence of the requested records; and (4) the DOC cannot rely on the medical records exception in the Law as a basis for refusing to disclose the records.

In their brief in support of judgment on the pleadings, Petitioners set forth what they believe to be the legal issues in this matter: whether the DOC is required to review its repository of medical records for information related to Petitioners' request, to redact personal identification information of inmates, and to produce the remaining information relating to Petitioners' request and whether they are entitled to attorneys' fees, costs and penalties.

On the first issue, Petitioners submit that the DOC made several admissions: that it keeps records regarding inmate deaths, each inmate has a paper medical record, the only way to provide additional responsive documents is to review each paper medical record, and the DOC retains inmate medical records for a period of ten (10) years. Petitioners also point to a public information release wherein DOC acknowledged that it maintains a database of all current cancer patients at state correctional facilities.

In addition to the DOC's "admissions," Petitioners argue that the mere fact that the DOC has to review medical records in order to fully respond to their request and to comply with OOR's determination is not a cognizable defense; an agency's defense that a request is overly burdensome is not a defense at all. Petitioners also state that the DOC is not required to create a new record. They contend that DOC has admitted the records exist but refused to perform a review of its medical records. The Law's provision that an agency is not required to create a new record is not implicated here because the records already exist, and the information sought "can be gleaned" from a review of the DOC's larger repository of medical records. Finally, Petitioners maintain that the medical records exemption from disclosure under the Law does not apply because Petitioners never requested any individual's health information, and, if such records contain information that is both subject to disclosure and information that is not, the agency has a duty to redact the exempt portion of the record. According to Petitioners, the DOC's repository of medical records "most likely" contains identifying health information that is also subject to disclosure.

The DOC responds that outstanding issues of fact remain that preclude judgment on the pleadings. The DOC asserts that it interpreted Petitioners' request for statistics or aggregate data showing the types of ailments diagnosed at SCI-Fayette, and it maintains that it has provided all responsive records in its possession, custody and control. It asserts that Petitioners believe the DOC has a duty to search inmate medical records and then generate statistics or aggregate data for each. Petitioners did not request individual medical records, and DOC is not required to redact any inmate's medical records. The DOC also argues that, to the extent Petitioners seek to obligate the DOC to review all inmate records and correlate that data obtained therefrom, this constitutes the creation of a new record. Under the Law, an agency is not required to create a new record.

Petitioners made the following request:

I am seeking documentation of illnesses, contracted by inmates and/or staff members at [the State Correctional Institution (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.

Pet. for Review, at ¶16 (emphasis in original).

In light of the language of the request, we conclude it is a question of fact as to whether the DOC's interpretation of the request as one seeking statistical data is reasonable or whether the DOC attempted to narrow its response in bad faith. The request seeks "only the types of reported contracted illnesses," "the number of inmates or staff members with those illnesses," "the various types of cancers reported ... as well as respiratory ailments reported," and "information comparing the health at SCI-Fayette with the health [of inmates or staff] at other state correctional institutions." The type of information is amenable to statistical analysis, and the fact finder may conclude that the DOC provided responsive documents to the request or, to the contrary, that there are additional documents that may also be responsive that the DOC should have disclosed.

Petitioners have not shown a clear right to relief for a second reason. Section 708(d) provides as follows:

**Aggregated data.** The exceptions set forth in subsection (b) (relating to exceptions of public records) shall not apply to aggregated data maintained or received by an agency, *except for data protected under subsection (b)(1), (2), (3), (4), or (5).*

65 P.S. §67.708(d) (emphasis added). The term “aggregate data” is defined in section 102 of the Law as “[a] tabulation of data which relate to broad classes, groups, or categories so that it is not possible to distinguish the properties of individuals within those classes, groups or categories.” 65 P.S. §67.102.

It thus appears that agencies are required to disclose statistical data or other types of reports generated by the agency, except data and reports protected from disclosure under several subsections of Section 708(b). Subsection (5) in turn protects from disclosure, in relevant part, a record of an individual’s medical, psychiatric or psychological history, including an evaluation, consultation, *diagnosis* or treatment. Petitioners suggest that the DOC can “glean” information responsive to its request by reviewing inmate medical records. Section 708(d) can be read as limiting to some extent the tabulation of that information for purposes of disclosure since the source of the information is found in medical records.

Finally, Petitioners imply the DOC has an obligation to redact inmate medical records for identifying information. Their argument, at least arguably, does not track the language of Section 708(b)(5) of the Law. That section exempts from disclosure a record of an individual’s medical, psychiatric or psychological history or disability status, including evaluations, consultations, prescription, diagnosis and treatment; it does not require an agency to redact a record of identifiable information. Rather, the section exempts from disclosure any other information or record that would disclose individually identifiable health information.

For these reasons, we cannot conclude that Petitioners have shown a clear entitlement to relief at this early stage of the proceedings.

**B. Request for Attorneys’ Fees and Costs Pursuant to Section 1304 of the Law**

In their motion for judgment on the pleadings, Petitioners request "reimbursement of attorneys' fees and litigation costs, along with civil penalties levied against the DOC *pursuant to the [Law]*" due to the DOC's "bad faith, willful and wanton disregard of its duties under the [Law], and other improper conduct ... established in the pleadings in this matter" thus entitling Petitioners to "the monetary relief *permitted by the [Law]*, including reimbursement of litigation costs." Pet'rs' Mot. for Judgment on the Pleadings, at ¶¶ 7, 8 (emphasis added); *see also* Pet'rs' Br. in Support of Judgment on the Pleadings, at ¶¶ 48, 59.

Section 1304 of the Law, 65 P.S. §67.1304, provides, with added emphasis:

**(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 the law.

**(b) Sanctions for frivolous requests or appeal.-** 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 the applicable rules of court.

In addition to the above reasons for denial of judgment on the pleadings, it is not clear that Petitioners are entitled to court costs and attorneys' fees. Section 1304 states that a requester may be entitled to attorneys' fees and costs in those instances where a court reverses the determination of the OOR appeals officer, or when the court grants access to records after a deemed denial by the agency. Neither situation is present here. This matter appears in the Court's original jurisdiction and not as an appeal from an OOR determination. In addition, our research failed to discover any case law addressing the imposition of court costs and attorneys' fees in original jurisdiction proceedings seeking compliance with an OOR determination. Thus, we cannot conclude that Petitioners are entitled to attorneys' fees and costs as a matter of law.<sup>4</sup> *Cf. Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644 (Pa. Cmwlth. 2006) (upholding imposition of attorneys' fees and costs in matter brought under the former Right to Know Law); *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177 (Pa. Cmwlth. 2006) (same).

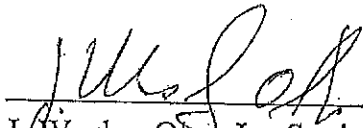
On the other hand, Section 1305(a) of the Law does not appear to be restricted to appeals. That section provides that a "court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith." 65 P.S. §67.1305(a). A party's alleged bad faith is a question for the fact finder. *See generally Birth Center v. St. Paul Cos., Inc.*, 787 A.2d 376 (Pa. 2001); *Klinger v. State Farm Mut. Auto. Ins. Co.*, 895 F. Supp. 709 (M.D. Pa.

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<sup>4</sup> Similarly, an agency that does not promptly comply with a court order issued pursuant to the Law may be subject to a civil penalty of not more than \$500 per day until the record is provided. 65 P.S. §67.1305(b). In this case, however, Petitioners do not allege that the DOC has failed to comply with a court order.

1995). Accordingly, Petitioners' right to the imposition of a penalty under Section 1305(b) of the Law is also not clear.

For all of the above reasons, Petitioners' Motion for Judgment on the Pleadings is denied.

  
J. Wesley Oler, Jr., Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Uniontown Newspapers, Inc., d/b/a  
The Herald Standard; and Christine  
Haines,

Petitioners

v.

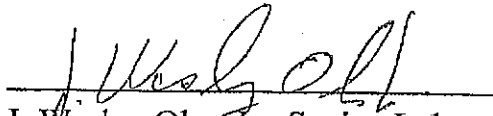
Pennsylvania Department of  
Corrections,

Respondent

No. 66 M.D. 2015

**ORDER**

NOW, December 7, 2015, upon consideration of the "Motion for Judgment on the Pleadings" filed on behalf of petitioners Uniontown Newspapers, Inc., d/b/a The Herald Standard, and Christine Haines, and after oral argument on the issue by Charles Kelly, Esq., on behalf of petitioners, and Maria Macus, Esq., on behalf of respondent Department of Corrections, the Motion for Judgment on the Pleadings is denied.

  
J. Wesley Oler, Jr., Senior Judge

**Certified from the Record**

**DEC - 7 2015**

**and Order Exit**

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# EXHIBIT F

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

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# EXHIBIT G

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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 Right-to-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. Cmwlth. 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 *Bergeron v. Department of Labor and Industry*, 720 A.2d 500 (Pa. Cmwlth. 1998); *Weaver v. Department of Corrections*, 702 A.2d 370 (Pa. Cmwlth. 1997).
- The 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. J. 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. Cmwlth. 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. Cmwlth. 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, 4<sup>th</sup> 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/or/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](http://www.cor.state.pa.us)

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION  
ATTORNEY WORK PRODUCT

*The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any use of this information other than by the intended recipient is prohibited. If you receive this message in error, please send a reply e-mail to the sender and delete the material from any and all computers. Unintended transmissions shall not constitute waiver of the attorney-client or any other privilege.*

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



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

IN THE MATTER OF

CHRISTINE HAINES AND THE  
*HERALD STANDARD*,  
Requester

v.

PENNSYLVANIA DEPARTMENT OF  
CORRECTIONS,  
Respondent

Docket No.: AP 2014-1695

### 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." *SW/B 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 HIPAA. *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. *Optis 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

*Kathleen A. Higgins*

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)

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# EXHIBIT I

KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

Purdon's Pennsylvania Statutes and Consolidated Statutes  
Title 65 P.S. Public Officers (Refs & Annos)  
Chapter 3A. Right-to-Know Law (Refs & Annos)  
Chapter 5. Access

65 P.S. § 67.502

§ 67.502. Open-records officer

Effective: January 1, 2009

Currentness

(a) Establishment.—

- (1) An agency shall designate an official or employee to act as the open-records officer.
- (2) For a legislative agency other than the Senate or the House of Representatives, the open-records officer designated by the Legislative Reference Bureau shall serve as the open-records officer. Notwithstanding paragraph (1), a political party caucus of a legislative agency may appoint an open-records officer under this section.

(b) Functions.—

- (1) The open-records officer shall receive requests submitted to the agency under this act, direct requests to other appropriate persons within the agency or to appropriate persons in another agency, track the agency's progress in responding to requests and issue interim and final responses under this act.
- (2) Upon receiving a request for a public record, legislative record or financial record, the open-records officer shall do all of the following:
  - (i) Note the date of receipt on the written request.
  - (ii) Compute the day on which the five-day period under section 901<sup>1</sup> will expire and make a notation of that date on the written request.
  - (iii) Maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been fulfilled. If the request is denied, the written request shall be maintained for 30 days or, if an appeal is filed, until a final determination is issued under section 1101(b)<sup>2</sup> or the appeal is deemed denied.

(iv) Create a file for the retention of the original request, a copy of the response, a record of written communications with the requester and a copy of other communications. This subparagraph shall only apply to Commonwealth agencies.

Credits

2008, Feb. 14, P.L. 6, No. 3, § 502, effective Jan. 1, 2009.

Notes of Decisions (4)

Footnotes

1 65 P.S. § 67.901.

2 65 P.S. § 67.1101.

65 P.S. § 67.502, PA ST 65 P.S. § 67.502

Current through 2018 Regular Session Act 11

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KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

Purdon's Pennsylvania Statutes and Consolidated Statutes  
Title 65 P.S. Public Officers (Refs & Annos)  
Chapter 3A. Right-to-Know Law (Refs & Annos)  
Chapter 7. Procedure

65 P.S. § 67.708

§ 67.708. Exceptions for public records

Effective: January 1, 2009  
Currentness

(a) Burden of proof.--

- (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.
- (2) The burden of proving that a legislative record is exempt from public access shall be on the legislative agency receiving a request by a preponderance of the evidence.
- (3) The burden of proving that a financial record of a judicial agency is exempt from public access shall be on the judicial agency receiving a request by a preponderance of the evidence.

(b) Exceptions.--Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

(1) A record, the disclosure of which:

- (i) would result in the loss of Federal or State funds by an agency or the Commonwealth; or
- (ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.

(2) A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority.

(3) A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include:

(i) documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act;

(ii) lists of infrastructure, resources and significant special events, including those defined by the Federal Government in the National Infrastructure Protections, which are deemed critical due to their nature and which result from risk analysis; threat assessments; consequences assessments; antiterrorism protective measures and plans; counterterrorism measures and plans; and security and response needs assessments; and

(iii) building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.

(4) A record regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security.

(5) 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.

(6)(i) The following personal identification information:

(A) A record containing all or part of 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.

(B) A spouse's name, marital status or beneficiary or dependent information.

(C) The home address of a law enforcement officer or judge.

(ii) Nothing in this paragraph shall preclude the release of the name, position, salary, actual compensation or other payments or expenses, employment contract, employment-related contract or agreement and length of service of a public official or an agency employee.

(iii) An agency may redact the name or other identifying information relating to an individual performing an undercover or covert law enforcement activity from a record.

(7) The following records relating to an agency employee:

(i) A letter of reference or recommendation pertaining to the character or qualifications of an identifiable individual, unless it was prepared in relation to the appointment of an individual to fill a vacancy in an elected office or an appointed office requiring Senate confirmation.

(ii) A performance rating or review.

(iii) The result of a civil service or similar test administered by a Commonwealth agency, legislative agency or judicial agency. The result of a civil service or similar test administered by a local agency shall not be disclosed if restricted by a collective bargaining agreement. Only test scores of individuals who obtained a passing score on a test administered by a local agency may be disclosed.

(iv) The employment application of an individual who is not hired by the agency.

(v) Workplace support services program information.

(vi) Written criticisms of an employee.

(vii) Grievance material, including documents related to discrimination or sexual harassment.

(viii) Information regarding discipline, demotion or discharge contained in a personnel file. This subparagraph shall not apply to the final action of an agency that results in demotion or discharge.

(ix) An academic transcript.

(8)(i) A record pertaining to strategy or negotiations relating to labor relations or collective bargaining and related arbitration proceedings. This subparagraph shall not apply to a final or executed contract or agreement between the parties in a collective bargaining procedure.

(ii) In the case of the arbitration of a dispute or grievance under a collective bargaining agreement, an exhibit entered into evidence at an arbitration proceeding, a transcript of the arbitration or the opinion. This subparagraph shall not apply to the final award or order of the arbitrator in a dispute or grievance procedure.

(9) The draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment thereto prepared by or for an agency.

(10)(i) A record that reflects:

(A) 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.

(B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.

(ii) Subparagraph (i)(A) shall apply to agencies subject to 65 Pa.C.S. Ch. 7 (relating to open meetings) in a manner consistent with 65 Pa.C.S. Ch. 7. A record which is not otherwise exempt from access under this act and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 shall be a public record.

(iii) This paragraph shall not apply to a written or Internet application or other document that has been submitted to request Commonwealth funds.

(iv) This paragraph shall not apply to the results of public opinion surveys, polls, focus groups, marketing research or similar effort designed to measure public opinion.

(11) A record that constitutes or reveals a trade secret or confidential proprietary information.

(12) Notes and working papers prepared by or for a public official or agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.

(13) Records that would disclose the identity of an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

(14) Unpublished lecture notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related material and scholarly correspondence of a community college or an institution of the State System of Higher Education or a faculty member, staff employee, guest speaker or student thereof.

(15)(i) Academic transcripts.

(ii) Examinations, examination questions, scoring keys or answers to examinations. This subparagraph shall include licensing and other examinations relating to the qualifications of an individual and to examinations given in primary and secondary schools and institutions of higher education.

(16) A record of an agency relating to or resulting in a criminal investigation, including:

(i) Complaints of potential criminal conduct other than a private criminal complaint.

(ii) Investigative materials, notes, correspondence, videos and reports.

(iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised.

(iv) A record that includes information made confidential by law or court order.

(v) Victim information, including any information that would jeopardize the safety of the victim.

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.

(B) Deprive a person of the right to a fair trial or an impartial adjudication.

(C) Impair the ability to locate a defendant or codefendant.

(D) Hinder an agency's ability to secure an arrest, prosecution or conviction.

(E) Endanger the life or physical safety of an individual.

This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b) (relating to accident prevention investigations).

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

(i) Complaints submitted to an agency.

(ii) Investigative materials, notes, correspondence and reports.

(iii) A record that includes the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L. 1559, No. 169),<sup>1</sup> known as the Whistleblower Law.

(iv) A record that includes information made confidential by law.

(v) Work papers underlying an audit.

(vi) 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.

(B) Deprive a person of the right to an impartial adjudication.

(C) Constitute an unwarranted invasion of privacy.

(D) Hinder an agency's ability to secure an administrative or civil sanction.

(E) Endanger the life or physical safety of an individual.

(18)(i) Records or parts of records, except time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings.

(ii) This paragraph shall not apply to a 911 recording, or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure.

(19) DNA and RNA records.

(20) An autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or a copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotape of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmortem examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner. This exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death.

(21)(i) Draft minutes of any meeting of an agency until the next regularly scheduled meeting of the agency.

(ii) Minutes of an executive session and any record of discussions held in executive session.

(22)(i) The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to the following:

(A) The leasing, acquiring or disposing of real property or an interest in real property.

(B) The purchase of public supplies or equipment included in the real estate transaction.

(C) Construction projects.

(ii) This paragraph shall not apply once the decision is made to proceed with the lease, acquisition or disposal of real property or an interest in real property or the purchase of public supply or construction project.

(23) Library and archive circulation and order records of an identifiable individual or groups of individuals.

(24) Library archived and museum materials, or valuable or rare book collections or documents contributed by gift, grant, bequest or devise, to the extent of any limitations imposed by the donor as a condition of the contribution.

(25) A record identifying the location of an archeological site or an endangered or threatened plant or animal species if not already known to the general public.

(26) A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).

(27) A record or information relating to a communication between an agency and its insurance carrier, administrative service organization or risk management office. This paragraph shall not apply to a contract with an insurance carrier, administrative service organization or risk management office or to financial records relating to the provision of insurance.

(28) A record or information:

(i) identifying an individual who applies for or receives social services; or

(ii) relating to the following:

(A) the type of social services received by an individual;

(B) an individual's application to receive social services, including a record or information related to an agency decision to grant, deny, reduce or restrict benefits, including a quasi-judicial decision of the agency and the identity of a caregiver or others who provide services to the individual; or

(C) eligibility to receive social services, including the individual's income, assets, physical or mental health, age, disability, family circumstances or record of abuse.

(29) Correspondence between a person and a member of the General Assembly and records accompanying the correspondence which would identify a person that requests assistance or constituent services. This paragraph shall not apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbying disclosure).

(30) A record identifying the name, home address or date of birth of a child 17 years of age or younger.

(c) **Financial records.**—The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17). An agency shall not disclose the identity of an individual performing an undercover or covert law enforcement activity.

(d) **Aggregated data.**—The exceptions set forth in subsection (b) shall not apply to aggregated data maintained or received by an agency, except for data protected under subsection (b)(1), (2), (3), (4) or (5).

(e) **Construction.**—In determining whether a record is exempt from access under this section, an agency shall consider and apply each exemption separately.

#### Credits

2008, Feb. 14, P.L. 6, No. 3, § 708, effective Jan. 1, 2009.

Notes of Decisions (244)

#### Footnotes

1 43 P.S. § 1421 et seq.


65 P.S. § 67.708, PA ST 65 P.S. § 67.708

Current through 2018 Regular Session Act 11

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 KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

Purdon's Pennsylvania Statutes and Consolidated Statutes  
Title 65 P.S. Public Officers (Refs & Annos)  
Chapter 3A. Right-to-Know Law (Refs & Annos)  
Chapter 9. Agency Response

65 P.S. § 67.901

§ 67.901. General rule

Effective: January 1, 2009

Currentness

Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request. All applicable fees shall be paid in order to receive access to the record requested. 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.

#### Credits

2008, Feb. 14, P.L. 6, No. 3, § 901, effective Jan. 1, 2009.

#### Notes of Decisions (18)

65 P.S. § 67.901, PA ST 65 P.S. § 67.901

Current through 2018 Regular Session Act 11

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Purdon's Pennsylvania Statutes and Consolidated Statutes  
Title 65 P.S. Public Officers (Refs & Annos)  
Chapter 3A. Right-to-Know Law (Refs & Annos)  
Chapter 13. Judicial Review

65 P.S. § 67.1304

§ 67.1304. Court costs and attorney fees

Effective: January 1, 2009

Currentness

(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.

**Credits**

2008, Feb. 14, P.L. 6, No. 3, § 1304, effective Jan. 1, 2009.


**Notes of Decisions (13)**

65 P.S. § 67.1304, PA ST 65 P.S. § 67.1304

Current through 2018 Regular Session Act 11

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 KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

Purdon's Pennsylvania Statutes and Consolidated Statutes  
Title 65 P.S. Public Officers (Refs & Annos)  
Chapter 3A. Right-to-Know Law (Refs & Annos)  
Chapter 13. Judicial Review

65 P.S. § 67.1305

§ 67.1305. Civil penalty

Effective: January 1, 2009  
Currentness

(a) Denial of access.--A court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith.

(b) Failure to comply with court order.--An agency or public official who does not promptly comply with a court order under this act is subject to a civil penalty of not more than \$500 per day until the public records are provided.

**Credits**

2008, Feb. 14, P.L. 6, No. 3, § 1305, effective Jan. 1, 2009.

**Notes of Decisions (1)**

65 P.S. § 67.1305, PA ST 65 P.S. § 67.1305

Current through 2018 Regular Session Act 11

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# EXHIBIT J

## Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 66 MD 2015

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November 26, 2018



## CAPTION

Uniontown Newspapers, Inc., d/b/a  
The Herald Standard; and Christine Haines,  
Petitioners  
v.  
Pennsylvania Department of Corrections,  
Respondent

## CASE INFORMATION

Initiating Document: Petition for Review

Case Status: Active

Case Processing Status: November 20, 2018 Awaiting Answer

Journal Number: 21-11-2016

Case Category: Miscellaneous Case Type(s): Enforcement Proceeding

## CONSOLIDATED CASES

## RELATED CASES

## COUNSEL INFORMATION

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Pro Se: No

IFP Status:

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Phone No: (412) 209-2500

Fax No:

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Law Firm: Saul Ewing, LLP  
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Fax No:

## Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 66 MD 2015

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November 26, 2018



## COUNSEL INFORMATION

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Pro Se: No

IFP Status:

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 Pittsburgh, PA 15222-5419  
 Phone No: (412) 209-2532

Fax No:

Petitioner Haines, Christine

Pro Se: No

IFP Status:

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Fax No:

Attorney: Kelly, Charles  
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 1 Ppg Pl Ste 3010  
 Pittsburgh, PA 15222-5419  
 Phone No: (412) 209-2532

Fax No:

Respondent Department of Corrections

Pro Se: No

IFP Status:

Attorney: Macus, Maria Gerarda  
 Law Firm: Pennsylvania Department of Corrections  
 Address: 1920 Technology Parkway  
 Mechanicsburg, PA 17050-8507  
 Phone No: (717) 728-7763

Fax No:

## FEE INFORMATION

Fee Dt	Fee Name	Fee Amt	Receipt Dt	Receipt No	Receipt Amt
02/06/2015	Miscellaneous Docket Filing Fee	65.50	02/10/2015	2015-CMW-H-000297	65.50

## Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 66 MD 2015

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November 26, 2018



## AGENCY/TRIAL COURT INFORMATION

Order Appealed From: Notice of Appeal Filed:  
 Order Type:  
 Documents Received: February 6, 2015

Court Below:  
 County: Division:  
 Judge: OTN:  
 Docket Number: AP 2014-1695 Judicial District:

## ORIGINAL RECORD CONTENT

Original Record Item	Filed Date	Content Description
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Date of Remand of Record:

## BRIEFING SCHEDULE

## Petitioner

Haines, Christine  
 Amended Brief

Due: August 16, 2016 Filed: August 11, 2016

## Brief

Due: May 14, 2015 Filed: April 7, 2015  
 Due: Filed: October 5, 2015  
 Due: July 28, 2016 Filed: July 8, 2016  
 Due: September 22, 2016 Filed: September 22, 2016  
 Due: August 20, 2018 Filed: August 17, 2018

## Reply Brief

Due: Filed: May 13, 2015  
 Due: October 7, 2016 Filed: September 26, 2016

The Herald Standard  
 Amended Brief

Due: August 16, 2016 Filed: August 11, 2016

## Brief

Due: May 14, 2015 Filed: April 7, 2015  
 Due: Filed: October 5, 2015  
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Uniontown Newspapers, Inc.  
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## Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 66 MD 2015

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November 26, 2018



## BRIEFING SCHEDULE

## Petitioner

Uniontown Newspapers, Inc.

## Brief

Due: May 14, 2015	Filed: April 7, 2015
Due:	Filed: October 5, 2015
Due: July 28, 2016	Filed: July 8, 2016
Due: September 22, 2016	Filed: August 22, 2017
Due: August 20, 2018	Filed: August 17, 2018

## Reply Brief

Due:	Filed: May 13, 2015
Due: October 7, 2016	Filed: September 26, 2016

## DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
February 6, 2015	Petition for Review Filed			
	Uniontown Newspapers, Inc.		Petitioner	
	Haines, Christine		Petitioner	
	The Herald Standard		Petitioner	
	Document Name: moved from 133 CD 2015 (originally pacfiled)			
February 20, 2015	Notice Exited			02/20/2015
	Commonwealth Court Filing Office			
March 9, 2015	Preliminary Objections			
	Defelice, Chase M.	Department of Corrections	Respondent	
April 7, 2015	Answer to Preliminary Objections			
	Joyce, Michael Joseph	Haines, Christine	Petitioner	
	Joyce, Michael Joseph	The Herald Standard	Petitioner	
	Joyce, Michael Joseph	Uniontown Newspapers, Inc.	Petitioner	
	Kelly, Charles	The Herald Standard	Petitioner	
	Kelly, Charles	Haines, Christine	Petitioner	
	Kelly, Charles	Uniontown Newspapers, Inc.	Petitioner	
April 7, 2015	Petitioner's Brief Filed			
	Joyce, Michael Joseph	Haines, Christine	Petitioner	
	Joyce, Michael Joseph	The Herald Standard	Petitioner	
	Joyce, Michael Joseph	Uniontown Newspapers, Inc.	Petitioner	
	Document Name: In opposition to respondents P.O.'s to PFR			

## Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 66 MD 2015

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## DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
April 9, 2015	Order Filed Oler, J. Wesley, Jr.			04/10/2015
	Document Name: pet. having filed a brief in opposition to PO's, resp.'s shall file a brief in support of PO's (2 Comment: copies) by 4/30/15. Petitioner may, but is not required to, file a brief in reply to respondent's brief (2 copies) on or before May 14, 2015. Argument on respondent's preliminary objections is set for May 28, 2015 at 10:00 a.m. The argument shall be conducted by telephone call to the offices of counsel of record, and shall originate from the chambers of a designated judge of the Commonwealth Court sitting in Harrisburg. CELL PHONES MAY NOT BE USED.			
April 30, 2015	Respondent's Brief Filed Defelice, Chase M.	Department of Corrections	Respondent	
	Document Name: In support of P.O.'s to the PFR			
May 13, 2015	Petitioner's Reply Brief Filed Joyce, Michael Joseph	Haines, Christine	Petitioner	
	Joyce, Michael Joseph	The Herald Standard	Petitioner	
	Joyce, Michael Joseph	Uniontown Newspapers, Inc.	Petitioner	
	Document Name: Reply Brief in Opposition to POs			
May 28, 2015	Order Filed Brobson, P. Kevin			05/28/2015
	Document Name: following oral argument via telephone on resp.'s PO's and pet.'s answer thereto, Comment: it is hereby ordered that resp.'s PO's are overruled. The DOC is directed to file an answer to the PFR within 20 days of the date of this Order.			
June 17, 2015	Praeipie for Withdrawal of Appearance Defelice, Chase M.	Department of Corrections	Respondent	
June 17, 2015	Entry of Appearance Macus, Maria Gerarda	Department of Corrections	Respondent	
June 17, 2015	Answer and New Matter Macus, Maria Gerarda	Department of Corrections	Respondent	
	Document Name: To the PFR			
July 13, 2015	Answer to New Matter Joyce, Michael Joseph	Haines, Christine	Petitioner	
	Joyce, Michael Joseph	The Herald Standard	Petitioner	
	Joyce, Michael Joseph	Uniontown Newspapers, Inc.	Petitioner	
	Kelly, Charles	The Herald Standard	Petitioner	
	Kelly, Charles	Haines, Christine	Petitioner	
	Kelly, Charles	Uniontown Newspapers, Inc.	Petitioner	
	Document Name: Petitioners' Reply to Respondent's New Matter to PFR			

## Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 66 MD 2015

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November 26, 2018



## DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
October 5, 2015	Motion for Judgment on the Pleadings			
	Joyce, Michael Joseph	Haines, Christine	Petitioner	
	Joyce, Michael Joseph	The Herald Standard	Petitioner	
	Joyce, Michael Joseph	Uniontown Newspapers, Inc.	Petitioner	
	Kelly, Charles	The Herald Standard	Petitioner	
	Kelly, Charles	Haines, Christine	Petitioner	
	Kelly, Charles	Uniontown Newspapers, Inc.	Petitioner	
October 5, 2015	Petitioner's Brief Filed			
	Uniontown Newspapers, Inc.		Petitioner	
	Haines, Christine		Petitioner	
	The Herald Standard		Petitioner	
	Document Name: Brief in Support of Motion for Judgment on Pleadings			
October 21, 2015	Answer Filed			
	Macus, Maria Gerarda	Department of Corrections	Respondent	
	Document Name: to Motion for Judgment on the Pleadings.			
October 21, 2015	Respondent's Brief Filed			
	Macus, Maria Gerarda	Department of Corrections	Respondent	
October 22, 2015	Order Filed			10/23/2015
	Pellegrini, Dan			
	Document Name: argument on pets.' motion for judgment on the pleadings and the answer in opposition thereto,			
	Comment: is set for November 6, 2015, at 10:00 a.m. The argument shall be conducted by telephone call to the offices of counsel of record, and shall originate from the chambers of a designated judge of the Commonwealth Court sitting in Harrisburg. CELL PHONES MAY NOT BE USED.			
December 7, 2015	Memorandum Opinion Filed			12/07/2015
	Oler, J. Wesley, Jr.			
	Document Name: Memorandum Opinion (13pgs)			
	Comment: Upon consideration of the "Motion for Judgment on the Pleadings" filed on behalf of petitioners Uniontown Newspapers, Inc., d/b/a The Herald Standard, and Christine Haines, and after oral argument on the issue by Charles Kelly, Esq., on behalf of petitioners, and Maria Macus, Esq., on behalf of respondent Department of Corrections, the Motion for Judgment on the Pleadings is denied.			
July 8, 2016	Motion for Summary Judgment			
	Joyce, Michael Joseph	Haines, Christine	Petitioner	
	Joyce, Michael Joseph	Uniontown Newspapers, Inc.	Petitioner	
	Joyce, Michael Joseph	The Herald Standard	Petitioner	
	Kelly, Charles	The Herald Standard	Petitioner	
	Kelly, Charles	Haines, Christine	Petitioner	
	Kelly, Charles	Uniontown Newspapers, Inc.	Petitioner	

## Miscellaneous Docket Sheet

Commonwealth Court of Pennsylvania

Docket Number: 66 MD 2015

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November 26, 2018



## DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
July 8, 2016	Petitioner's Brief Filed Joyce, Michael Joseph Kelly, Charles Joyce, Michael Joseph Joyce, Michael Joseph Kelly, Charles Kelly, Charles	The Herald Standard The Herald Standard Haines, Christine Uniontown Newspapers, Inc. Haines, Christine Uniontown Newspapers, Inc.	Petitioner Petitioner Petitioner Petitioner Petitioner Petitioner	
Document Name: Brief in Support of Motion for Summary Judgment				
July 13, 2016	Order Filed Cohn Jubelirer, Renee			07/14/2016
Document Name: upon review of pets.' motion for summary judgment, which we shall treat as an application				
Comment: application for special relief pursuant to Pa. R.A.P. 1532, and brief in support thereof, petitioners shall file additional copies of their supporting briefs ( 4 copies total) within fourteen (14) days of the date of this order. Respondent shall file and serve its brief ( 4 copies) in opposition to petitioners' motion for summary judgment no later than August 8, 2016. Upon the filing of all briefs, the Chief Clerk shall submit the motion for summary judgment to a panel of this Cami for disposition without oral argument, unless otherwise ordered.				
August 1, 2016	Petitioner's Brief Not Accepted - Directed to File Amended Brief Per Curiam			08/02/2016
Document Name: it appearing that petitioners have filed a brief that does not comply with the Pennsylvania				
Comment: Rules of Appellate Procedure because the brief lacks:				
a. lacks a certificate of compliance with word count limits as required by Pa. R.A.P. 2135; and				
b. the lettering in the brief and reproduced record is smaller than 14 point in the text. Pa. R.A.P. 124(a)(4).				
THEREFORE, it is hereby ordered:				
1. Petitioners' brief is not accepted.				
2. Petitioners shall file an amended brief (4 copies) that conforms to the requirements of Chapter 21 of the Pennsylvania Rules of Appellate Procedure on or before August 16, 2016, or petitioners' brief will be stricken and petitioners' application for special relief will be dismissed.				
August 2, 2016	Respondent's Brief Filed Macus, Maria Gerarda	Department of Corrections	Respondent	
Document Name: Brief in Support of Respondent's Cross-Motion for Summary Judgment				
August 2, 2016	Application for Relief Macus, Maria Gerarda	Department of Corrections	Respondent	
Document Name: Respondent's Cross-Motion for Summary Judgment				
August 8, 2016	Answer Filed Macus, Maria Gerarda	Department of Corrections	Respondent	
Document Name: Response to Pets.' Motion for Summary Judgment.				

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## DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
August 8, 2016	Respondent's Brief Filed Department of Corrections		Respondent	
	Document Name: Respondent's Brief in Opposition of Petitioner's Motion for Summary Judgement			
August 11, 2016	Petitioner's Amended Brief Filed Uniontown Newspapers, Inc. Haines, Christine The Herald Standard		Petitioner Petitioner Petitioner	
	Document Name: Amended Brief in Support of Motion for Summary Judgment			
August 23, 2016	Order Filed Quigley, Keith B.			08/24/2016
	Document Name: resp. having filed a cross-motion for summary judgment with a brief in support			
	Comment: petitioners shall file a brief in opposition to the cross-motion for summary judgment (4 copies) on or before September 22, 2016. Upon the filing of petitioners' brief, the cross-motions for summary judgment will be submitted to a panel of this Court for disposition on the briefs filed by the parties, without oral argument, unless otherwise ordered.			
August 31, 2016	Application for Relief Joyce, Michael Joseph Joyce, Michael Joseph Joyce, Michael Joseph Kelly, Charles Kelly, Charles Kelly, Charles	Haines, Christine Uniontown Newspapers, Inc. The Herald Standard The Herald Standard Haines, Christine Uniontown Newspapers, Inc.	Petitioner Petitioner Petitioner Petitioner Petitioner Petitioner	
	Document Name: Motion for Leave to File Reply for Further Support of Summary Judgment and or			
	Comment: Oral Argument.			
September 22, 2016	Answer Filed Joyce, Michael Joseph Joyce, Michael Joseph Joyce, Michael Joseph Kelly, Charles Kelly, Charles Kelly, Charles	Haines, Christine Uniontown Newspapers, Inc. The Herald Standard The Herald Standard Haines, Christine Uniontown Newspapers, Inc.	Petitioner Petitioner Petitioner Petitioner Petitioner Petitioner	
	Document Name: for Application for Summary Relief.			
September 22, 2016	Petitioner's Brief Filed Joyce, Michael Joseph Joyce, Michael Joseph Joyce, Michael Joseph	Haines, Christine Uniontown Newspapers, Inc. The Herald Standard	Petitioner Petitioner Petitioner	
	Document Name: In opposition to respondents cross-motion for summary judgment			

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## DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 22, 2016	Order Filed Brobson, P. Kevin			09/23/2016
	Document Name: Upon consideration of petitioners' motion for leave to file reply in further support of Comment: summary judgment, to which no response has been filed, the motion is granted. Petitioners shall file a reply brief (4 copies) on or before October 7, 2016. Upon consideration of petitioners' motion for oral argument, to which no response has been filed, the motion is granted. The Chief Clerk is directed to list argument on the parties' cross-motions for summary relief on the Court's Pittsburgh argument list during the week of November 14, 2016.			
September 23, 2016	Tentative Session Date Krimmel, Michael			
	Document Name: November 2016 (Pittsburgh)			
September 26, 2016	Petitioner's Reply Brief Filed Joyce, Michael Joseph Joyce, Michael Joseph Joyce, Michael Joseph	Haines, Christine Uniontown Newspapers, Inc. The Herald Standard	Petitioner Petitioner Petitioner	
October 5, 2016	Argument Scheduled Krimmel, Michael			10/05/2016
	Document Name: Tue., 11/15/16 at 1:00 p.m. Before a Panel of Judges sitting in the Supreme Court Room Comment: Eighth Floor, City-County Building, Pittsburgh, PA. Case No. 21.			
December 19, 2016	Opinion Simpson, Robert E.			12/19/2016
	Document Name: Opinion (23 pages) : Petitioners' motion for summary relief is DENIED, without prejudice Comment: to allow the enforcement action to proceed for further fact-finding regarding Respondent's disclosure of "all responsive records," narrowed to exclude inmate medical files, even in redacted form, or creation of new records from inmate medical files, and limited to: (1) the five types of pre-existing Investigation records described in the accompanying opinion; and, (2) the Investigation-related records, including but not limited to those records to which Director Oppman referred in his submission to the Office of Open Records (OOR); Respondent's motion for summary relief is GRANTED IN PART, as to the disclosure of inmate medical files and creation of a record claims; and DENIED IN PART, as to its compliance with OOR's order. AND, because the extent of Respondent's noncompliance is not yet determined, this Court reserves judgment as to imposing statutory sanctions until disposition of the merits; AND FURTHER, the parties are directed to submit stipulated facts identifying the records disclosed, date of record (if known) and the date of disclosure, and identifying the "Investigation-related" records to which Director Oppman referred in the OOR submissions; as well as stipulated facts identifying with more detail the 5 categories of pre-existing Investigation records, so that it is clear what remains outstanding by category within 90 days of this order.			
March 20, 2017	Stipulation Filed Joyce, Michael Joseph Joyce, Michael Joseph Joyce, Michael Joseph Kelly, Charles Kelly, Charles Kelly, Charles Macus, Maria Gerarda	Haines, Christine Uniontown Newspapers, Inc. The Herald Standard The Herald Standard Haines, Christine Uniontown Newspapers, Inc. Department of Corrections	Petitioner Petitioner Petitioner Petitioner Petitioner Petitioner Respondent	

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## DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
April 13, 2017	Order Filed Simpson, Robert E.			04/17/2017

Document Name: upon consideration of the parties Joint Stipulations filed 3/20/17, which reveal

Comment: remaining disputes, we enter the following ORDER:

1. Status/Pre-trial Conference. A status/pre-trial conference shall be held at 10 a.m., prevailing time on Tuesday, June 27, 2017, in Courtroom 3001, the Pennsylvania Judicial Center, 601 Commonwealth Avenue, Harrisburg, Pennsylvania. At that time, the parties shall identify outstanding issues, including the necessity for additional discovery, or for extending deadlines set forth herein.
2. Status Reports. Each party shall file a status report regarding any outstanding issues to be addressed during the status conference by or before June 19, 2017; the status reports shall also address the status of the discovery.
3. Discovery. Non-expert discovery shall be completed by July 24, 2017. Any party proposing to present expert testimony shall supply the Court and opposing counsel a written, signed report from the witness(es) consistent with the substantive requirements of Pa. R.C.P. No. 4003.5 by July 24, 2017. Extensions of these discovery deadlines shall be granted only for good cause shown.
4. Motions Practice. Discovery motions, including protective orders, shall be filed in sufficient time that they may be resolved by July 24, 2017. Motions in limine, if any, shall be filed no later than August 21, 2017, and shall be addressed at or before trial.
5. Pre-trial Statements. The parties shall file pre-trial statements in accordance with Pa. R.C.P. No. 212.2, to include at a minimum, a statement of the case and disputes to be resolved at trial, names of witnesses to be presented, with anticipated subjects of testimony, list of exhibits to be presented at trial, the anticipated time needed to present each party's case in chief, and any additional stipulations regarding disclosures as of the date of filing. Because the issue at trial is limited to Respondent's alleged noncompliance with the Right-to-Know Law (1) and related bad faith, the timeline for filing the statements shall be as follows: Petitioners' statement shall be due July 31, 2017, and Respondent's statement shall be due August 7, 2017.
6. Trial. A trial on noncompliance and bad faith shall be held during the week of August 28, 2017.
7. Briefs. The parties are permitted to file pre- and post-trial briefs. Parties' pre-trial briefs shall be filed no later than August 23, 2017; parties' post-trial briefs, with proposed findings of fact and conclusions of law, shall be filed within 30 days of the close of the record.
8. Post-trial Practice. Post-trial practice shall be consistent with Pa. R.C.P. No. 227.1.

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

June 19, 2017	Status Report Filed		
	Joyce, Michael Joseph	Haines, Christine	Petitioner
	Joyce, Michael Joseph	Uniontown Newspapers, Inc.	Petitioner
	Joyce, Michael Joseph	The Herald Standard	Petitioner
	Kelly, Charles	The Herald Standard	Petitioner
	Kelly, Charles	Haines, Christine	Petitioner
	Kelly, Charles	Uniontown Newspapers, Inc.	Petitioner

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## DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
June 19, 2017	Status Report Filed Macus, Maria Gerarda	Department of Corrections	Respondent	
June 28, 2017	Order Filed Simpson, Robert E.			06/29/2017
Document Name: following a status/pre-trial conference with the parties, having confirmed their availability, Comment: we enter the following ORDER: The trial on noncompliance and bad faith is scheduled for Monday, August 28, 2017, starting at 9:00 A.M., prevailing time, in Courtroom 3001, the Pennsylvania Judicial Center, 601 Commonwealth Avenue, Harrisburg, Pennsylvania. If necessary, it shall continue on Tuesday, August 29, 2017, starting at 10:30 AM, prevailing time, at the same location. This trial schedule is firm and shall not be delayed absent exigent circumstances. All other provisions in Scheduling Order I, including deadlines, remain in effect.				
July 31, 2017	Pre-trial Statement Joyce, Michael Joseph Joyce, Michael Joseph Joyce, Michael Joseph Kelly, Charles Kelly, Charles Kelly, Charles	Haines, Christine Uniontown Newspapers, Inc. The Herald Standard The Herald Standard Haines, Christine Uniontown Newspapers, Inc.	Petitioner Petitioner Petitioner Petitioner Petitioner Petitioner	
August 4, 2017	Pre-trial Statement Macus, Maria Gerarda	Department of Corrections	Respondent	
August 22, 2017	Petitioner's Brief Filed Uniontown Newspapers, Inc. The Herald Standard		Petitioner Petitioner	
Document Name: Pre-Trial Brief				
August 31, 2017	Order Filed Simpson, Robert E.			08/31/2017
Document Name: Scheduling Order III - Following the evidentiary hearing as to the alleged bad faith of Respondent Comment: under the Right-to-Know Law, we amend paragraph 7 of Scheduling Order I as follows: Post-hearing briefs and proposed findings of fact and conclusions of law shall be filed within 21 days of the lodging of the hearing transcript on the docket; All other provisions in Scheduling Order I, including deadlines, remain in effect.				
September 18, 2017	Transcript Lodged Court Reporter			
Document Name: Proceeding held August 28, 2017.				
September 18, 2017	Exhibit Haines, Christine The Herald Standard		Petitioner Petitioner	
Document Name: Joint Trial Exhibit Binder - Exhibits 1-20				

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## DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
September 28, 2017	Transcript Filed Court Reporter Document Name: Proceeding held August 28, 2017.			
October 9, 2017	Filed - Other Joyce, Michael Joseph Joyce, Michael Joseph Joyce, Michael Joseph Kelly, Charles Kelly, Charles Kelly, Charles Document Name: Proposed Finding of Fact and Conclusions of Law.	Haines, Christine Uniontown Newspapers, Inc. The Herald Standard The Herald Standard Haines, Christine Uniontown Newspapers, Inc.	Petitioner Petitioner Petitioner Petitioner Petitioner Petitioner	
October 10, 2017	Filed - Other Macus, Maria Gerarda Document Name: Findings of Fact and Conclusions of Law.	Department of Corrections	Respondent	
October 10, 2017	Exhibit Macus, Maria Gerarda Document Name: Exhibit A to Findings of Fact and Conclusions of Law.	Department of Corrections	Respondent	
October 10, 2017	Exhibit Macus, Maria Gerarda Document Name: Exhibit B to Findings of Fact and Conclusions of Law.	Department of Corrections	Respondent	
October 10, 2017	Exhibit Macus, Maria Gerarda Document Name: Exhibit C Findings of Fact and Conclusions of Law.	Department of Corrections	Respondent	
October 10, 2017	Exhibit Macus, Maria Gerarda Document Name: Exhibit D Findings of Fact and Conclusions of Law.	Department of Corrections	Respondent	
October 10, 2017	Respondent's Brief Filed Macus, Maria Gerarda Document Name: Post-Trial brief	Department of Corrections	Respondent	

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## DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
March 23, 2018	Memorandum Opinion Filed Simpson, Robert E.			03/23/2018
<p>Document Name: Memorandum Opinion (29 pages) : AND NOW, this 23rd day of March, 2018, after hearing and upon</p> <p>Comment: review of the parties' submissions, the Pennsylvania Department of Corrections (DOC) is ORDERED to DISCLOSE to Uniontown Newspapers, Inc., d/b/a The Herald Standard, through reporter Christine Haines (Requester), ANY and ALL RESPONSIVE RECORDS, not previously disclosed, without limitation as to illness type, contained in the following sources as described in the foregoing opinion:</p> <p>Mortality Lists; the Oncology Database; and Chronic Care Clinic records (including PTrax) as of the closest date to the request date, that remain recoverable. DOC SHALL DISCLOSE these records to Requester no later than twenty (20) days from the date of this Order. Failure to comply with this court-ordered disclosure may subject DOC to penalties up to \$500 per day pursuant to Section 1305(b) of the Right-to-Know Law (RTKL), 65 P.S. §67.1305(b). Within twenty (20) days, DOC SHALL SUBMIT sworn statement(s) by individuals with personal knowledge attesting to the completeness of the above ordered disclosure, including the availability of Chronic Care Clinic records through PTrax or otherwise. As to inmate medication information, DOC SHALL OBTAIN and DISCLOSE records from its pharmaceutical contractor (Pharmacy Contractor) showing the number of inmates on therapeutic classes of medications, unlimited as to disease type, within thirty (30) days. Inmate medication information SHALL BE OBTAINED in the format in which it exists, without reformatting or extrapolation; however, inmate identifiers, including names, shall be redacted or otherwise removed prior to disclosure. Pharmacy Contractor IS NOT REQUIRED to convert inmate medication information into the same format as the previously disclosed Pharmacy Contractor Reports (relating to pulmonary and gastrointestinal diseases). The inmate medication information disclosure shall be accompanied by sworn statements by persons with knowledge as to Pharmacy Contractor's records, including the compilation process. In the event DOC does not obtain responsive records from Pharmacy Contractor within the prescribed timeframe, DOC SHALL SUBMIT sworn statement(s) detailing its efforts to obtain the information, unlimited as to disease type, from Pharmacy Contractor within thirty (30) days, including when the records are anticipated. AND, Requester's request for civil penalties under Section 1305(a) of the RTKL, 65 P.S. §67.1305(a), is GRANTED. The maximum civil penalty in the amount of \$1,500 is imposed against DOC and in favor of Requester. Counsel SHALL FILE a verified statement of the payment within thirty (30) days. AND FURTHER, as to Requester's request for attorney fees, within thirty (30) days, Requester SHALL ADVISE the Court in writing of its intent to pursue attorney fees, and also SUBMIT any documentation upon which it will rely. Thereafter, this Court may issue a briefing schedule and/or schedule a hearing.</p>				
April 12, 2018	Letter Department of Corrections		Respondent	
Document Name: Declaration of Dr. Paul Noel in compliance with Memorandum Opinion.				
April 19, 2018	Application for Relief			
	Joyce, Michael Joseph	Haines, Christine	Petitioner	
	Joyce, Michael Joseph	Uniontown Newspapers, Inc.	Petitioner	
	Joyce, Michael Joseph	The Herald Standard	Petitioner	
	Kelly, Charles	The Herald Standard	Petitioner	
	Kelly, Charles	Haines, Christine	Petitioner	
	Kelly, Charles	Uniontown Newspapers, Inc.	Petitioner	
Document Name: Pets.' Notice of Intent to Pursue Attorney Fee Shifting.				

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## DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
April 19, 2018	Application to Publish Opinion Joyce, Michael Joseph Joyce, Michael Joseph Joyce, Michael Joseph Kelly, Charles Kelly, Charles Kelly, Charles	Haines, Christine Uniontown Newspapers, Inc. The Herald Standard The Herald Standard Haines, Christine Uniontown Newspapers, Inc.	Petitioner Petitioner Petitioner Petitioner Petitioner Petitioner	
April 19, 2018	Affidavit Filed Macus, Maria Gerarda	Department of Corrections	Respondent	
April 23, 2018	Notice of Appeal to PA Supreme Court Filed Department of Corrections Document Name: 561 MAL 2018		Respondent	
May 31, 2018	Order Granting Application to Publish Opinion Per Curiam Document Name: Mem. Op. filed 3-23-18 shall be designated Opinion and shall be reported.			05/31/2018
June 27, 2018	Hearing Scheduled Simpson, Robert E. Document Name: A hearing is scheduled for Tuesday, July 31, 2018, at 10 a.m., prevailing time, Comment: in Courtroom Number 3002, Third Floor, Pennsylvania Judicial Center, Harrisburg, Pennsylvania. A court reporter shall be present. Proposed exhibits shall be pre-marked and provided to opposing counsel in advance of the hearing. Both parties' post-hearing briefs shall be due within 20 days thereafter. The parties shall address the grounds for fees and costs under Section 1304 of the Right-to-Know Law, and otherwise under Pennsylvania law, including 42 Pa. C.S. §2503, and shall connect the amount of the fees to the appropriate statutory basis.			06/28/2018
August 6, 2018	Exhibit Court Reporter Document Name: Pets.' Exhibits A, B, C, D; Hearing held 7/31/18; Judge Simpson			
August 6, 2018	Sealed Exhibit Court Reporter Document Name: Sealed Pets.' Exhibits A, B, C, D; Hearing held 7/31/18; Judge Simpson			
August 17, 2018	Petitioner's Brief Filed Joyce, Michael Joseph Joyce, Michael Joseph Joyce, Michael Joseph Document Name: Post-hearing brief	Haines, Christine Uniontown Newspapers, Inc. The Herald Standard	Petitioner Petitioner Petitioner	
August 20, 2018	Respondent's Brief Filed Macus, Maria Gerarda Document Name: Post-hearing brief	Department of Corrections	Respondent	

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## DOCKET ENTRY

Filed Date	Docket Entry / Filer	Representing	Participant Type	Exit Date
October 29, 2018	Affirmed Simpson, Robert E.			10/29/2018
Document Name: Memorandum Opinion (23 pages) Petitioners' fee petition is GRANTED as to a portion of the fees				
Comment: claimed, and I hereby AWARD \$118,458.37 in fees pursuant to Section 1304(a)(1) of the Right-to-Know Law (RTKL). Accordingly, the Pennsylvania Department of Corrections (DOC) is ORDERED to pay reasonable attorney fees as set forth in the accompanying opinion to Petitioners within 30 days. This fee award is in addition to the \$1,500 civil penalty imposed in this Court's decision in Uniontown Newspapers, Inc. v. Department of Corrections, 185 A.3d 1161 (Pa. Cmwlth. 2018) (single j. op.), pet. for allow. of appeal pending, (Pa., No. 561 MAL 2018, filed September 28, 2018).				
As this DECISION is entered ancillary to a statutory appeal, it is intended to be a final order, and no post-trial practice is contemplated.				
November 2, 2018	Application for Stay Macus, Maria Gerarda	Department of Corrections	Respondent	
Document Name: This Court's October 29, 2018 Order.				
November 6, 2018	Application to Publish Opinion			
	Joyce, Michael Joseph	Haines, Christine	Petitioner	
	Joyce, Michael Joseph	Uniontown Newspapers, Inc.	Petitioner	
	Joyce, Michael Joseph	The Herald Standard	Petitioner	
	Kelly, Charles	The Herald Standard	Petitioner	
	Kelly, Charles	Haines, Christine	Petitioner	
	Kelly, Charles	Uniontown Newspapers, Inc.	Petitioner	
November 19, 2018	Order Denying Application for Stay Simpson, Robert E.			11/20/2018
Document Name: Motion to stay is denied without prejudice. In the event DOC timely files a petition for allowance				
Comment: of appeal as to the final decision of 10-29-18, this court may reconsider such a stay.				

## SESSION INFORMATION

Journal Number: 21-11-2016  
 Consideration Type: Oral Argument - Panel  
 Listed/Submitted Date: November 15, 2016

## Panel Composition:

The Honorable Renee Cohn Jubelirer	Judge
The Honorable Robert E. Simpson	Judge
The Honorable P. Kevin Brobson	Judge

## DISPOSITION INFORMATION

Final Disposition:	Yes	Judgment Date:	
Related Journal No:		Disposition Author:	Simpson, Robert E.
Category:	Decided	Disposition Date:	October 29, 2018
Disposition:	Affirmed		

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## DISPOSITION INFORMATION

Disposition Comment: claimed, and I hereby AWARD \$118,458.37 in fees pursuant to Section 1304(a)(1) of the Right-to-Know Law (RTKL). Accordingly, the Pennsylvania Department of Corrections (DOC) is ORDERED to pay reasonable attorney fees as set forth in the accompanying opinion to Petitioners within 30 days. This fee award is in addition to the \$1,500 civil penalty imposed in this Court's decision in Uniontown Newspapers, Inc. v. Department of Corrections, 185 A.3d 1161 (Pa. Cmwlth. 2018) (single j. op.), pet. for allow. of appeal pending, (Pa., No. 561 MAL 2018, filed September 28, 2018).

As this DECISION is entered ancillary to a statutory appeal, it is intended to be a final order, and no post-trial practice is contemplated.

Dispositional Filing:  
Filed Date:

**Memorandum Opinion**  
10/29/2018 12:00:00AM

Filing Author:

Simpson, Robert E.

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

Pennsylvania Department of Corrections,	:	
	:	
Petitioner,	:	
v.	:	No. ____ MAL Alloc. Dkt 2018
Uniontown Newspapers, d/b/a/The Herald	:	
Standard: and Christine Haines,	:	
	:	
Respondents	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I deposited in the U.S. Mail a true and correct copy of the foregoing Petition for Allowance of Appeal to be served upon the following person(s) in the manner indicated below:

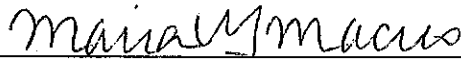
Service by first-class mail  
addressed as follows:

Michel Joseph Joyce Esq.  
Charles Kelly Esq.  
Saul Ewing LLP  
1 PPG Place Ste. 3010  
Pittsburgh, PA 15222-5419

Pa Supreme Court Prothonotary  
Pennsylvania Judicial Center  
601 Commonwealth Ave.  
Suite 4500  
P.O. Box 62575  
Harrisburg, PA 17106

Commonwealth Court Prothonotary  
Pennsylvania Judicial Center  
601 Commonwealth Ave.  
Suite 2100  
P.O. Box 69185  
Harrisburg, PA 17106

Hon. Robert Simpson  
Commonwealth Court of Pa  
601 Commonwealth Ave.  
Suite 2100  
P.O. Box 69185  
Harrisburg, PA 17106

  
\_\_\_\_\_  
Maria G. Macus, Assistant Counsel

Dated: November 28, 2018