IN THE SUPREME COURT OF PENNSYLVANIA

Nos. 76 & 77 MAP 2019

UNIONTOWN NEWSPAPERS, INC., D/B/A THE HERALD STANDARD; AND CHRISTINE HAINES,
Appellees,
v.
PENNSYLVANIA DEPARTMENT OF CORRECTIONS,
Appellant

APPELLANT'S BRIEF

(Appeal by allowance from the Orders of the Commonwealth Court of Pennsylvania at No. 66 M.D. 2015, issued on March 23, 2018 and October 29, 2018, imposing sanctions)

Respectfully submitted,

Office of General Counsel
GREGORY G. SCHWAB
General Counsel

TIMOTHY A. HOLMES
Acting Chief Counsel
Pennsylvania Department of Corrections

By: Debra Sue Rand
Assistant Counsel
Attorney I.D. No. 41661
Pennsylvania Department of Corrections
1920 Technology Parkway
Mechanicsburg, Pa 17050
(717) 728-7763

Dated: November 20, 2019

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STATEMENT OF JURISDICTION

This Court having granted a petition for allowance of appeal at Nos. 561 MAL 2018 and 779 MAL 2018, it has appellate jurisdiction over this matter pursuant to Section 724(a) of the Judicial Code, 42 Pa. C.S. § 724(a).

ORDERS OR OTHER DETERMINATIONS IN QUESTION

ORDER

AND NOW, this 29th 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). 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.

ROBERT SIMPSON, Judge

ORDER

AND NOW, this 23rd 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), 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.

ROBERT SIMPSON, Judge

STATEMENT OF SCOPE AND STANDARD OF REVIEW

Where, as here, the issues for review are purely legal ones involving statutory interpretation, this Court exercises a *de novo* standard of review and a plenary scope of review. *Bowling v. Office of Open Records*, 75 A.3d 453, 466 (Pa. 2013).

STATEMENT OF QUESTION INVOLVED

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.

II. **Did the Commonwealth Court properly construe the statutory language of 65 P.S. §67.1304 as authorizing an award of attorney fees when a court reverses a final determination of an agency rather than when a court reverses the final determination of the appeals officer?**

Suggested Answer: No.

STATEMENT OF CASE

This is an appeal by allowance from the March 23, 2018 and October 29, 2018 orders of the Commonwealth Court that granted relief in an enforcement petition filed by Respondents Uniontown Newspapers, Inc. d/b/a *The Herald Standard* and Christine Haines ("Appellees" herein) concerning a decision of the Office of Open Records ("OOR"). Specifically, the March 23, 2018 Order required Appellant herein, the Pennsylvania Department of Corrections ("Department"), to produce certain records the Commonwealth Court deemed responsive to a Right to Know request with penalties of up to five hundred dollars a day for any delay beyond 20 days, granted Appellees' request for civil penalties, and established a deadline for Appellees to notify the court of its intent to pursue attorneys' fees and submit any documentation upon which it would rely. Appellant's Brief, Ex. B. The October 29, 2018 Order granted the attorney fee petition, reducing the amount sought from $215,190.75 to $118,458.37. Appellant's Brief, Ex. A. This appeal also incorporates issues decided in the Commonwealth Court's December 19, 2016 Opinion and Order adjudicating cross motions for summary relief.

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. *See* Reproduced Record ("RR") 28a-58a. The report correlated ill health for State Correctional Institution ("SCI") at Fayette inmates to nearby toxic

coal waste. *Id.* In response to the article, 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, Appellees filed a Right to Know request with the Department through its reporter, Ms. Haines. RR 60a.

The Department's Agency Open Records Officer ("AORO"), Mr. Filkosky, responded, denying the request and citing various statutory exceptions, notably, for purposes here, the one concerning non-criminal investigations. *See* Section 708 of the Right-to-Know Law ("RTKL"), Act of February 14, 2008, P.L. 6, 65 P.S. §67.708(b)(17). RR 62a-64a. Appellees appealed that response to the OOR. The OOR disagreed that any statutory exceptions applied and, by order issued December 1, 2014, directed the Department to provide "all responsive records…within 30 days." RR 25a. In support of its ruling, 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." RR 23a. The Department did not appeal this final decision.

Thereafter, the Department provided the following records to Ms. Haines: 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. Appellant's Brief, Ex. C, p. 4; RR 761a-762a. Shortly after receiving additional clarification from Appellees, 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. Appellant's Brief Ex. C, p.5; RR 513a-611a; 762a.

Appellees, believing that the Department had not disclosed all responsive records, filed a Petition for Enforcement with the Commonwealth Court. The Department filed preliminary objections, which Judge Brobson overruled. Appellant's Brief, Ex. E. Following the Department's answer and new matter, Appellees filed a motion for judgment on the pleadings that Judge Oler denied. Appellant's Brief, Ex. D. The parties then engaged in discovery and filed cross-motions for summary relief.

Judge Simpson denied Appellees' Motion for Summary Relief without prejudice to allow the enforcement action to proceed for further fact finding as to whether the Department had disclosed all responsive records. Appellant's Brief, Ex. C. The Judge granted in part and denied in part the Department's cross motion. *Id.*

He granted the Department's motion in support of its position that it had no duty to provide redacted individual inmate medical files and no duty to create new records after the request was filed. *Id.* The Judge denied the Department's motion to the extent it asserted that the Department had complied with the OOR order. *Id.* The court withheld ruling on whether it should impose statutory sanctions and directed the parties to submit stipulated facts on various points it identified in the Order. *Id.*

The parties submitted stipulations as directed. In August 2017 Judge Simpson conducted a hearing. In addition to the testimony of the Editor for Appellees' newspaper, the Court heard testimony from the Department's then-Director of its Bureau of Health Care Services ("Bureau"), Mr. Oppman; the AORO; and Department Counsel assigned to the OOR level appeal of the case, Attorney Defelice.

Critical to the issued before this Court are Judge Simpson's findings concerning the Department's initial response to the request for records. The Judge found that the AORO received the request and forwarded it to Bureau representative Ms. Montag, and that Ms. Montag advised the AORO 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." Appellant's Brief, Ex. B p. 9. The Judge then went on to find that the AORO 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 RTKL. *Id.*

The court then concluded that because the AORO relied on Ms. Montag's statement and did not, himself, obtain and then independently assess the records, he acted in bad faith. It is this conclusion that forms the basis for this appeal. Further, Attorney Defelice, in arguing the applicability exemption before the OOR, also did not obtain and review the records, relying on the opinion of then-Director Oppman. Appellant's Brief, Ex. B p. 10. The court also found this an act of bad faith. Therefore, that action is also incorporated within this challenge. Finally, the Judge found that the delay in releasing certain records after the disposition of the cross motions for summary relief also constituted bad faith.

The Department filed a petition for allowance of appeal from Judge Simpson's March 23, 2018 opinion and order.

Thereafter, Appellees filed the fee petition, which the Judge Simpson granted, reducing the fees as specified above. Appellant's Brief, Ex. A. The Department moved to stay the payment of fees pending disposition of the allocator petition. The court denied the request until the Department filed a petition for allowance of appeal from the final order imposing the fees. It did so and, upon renewed request, the judge granted the stay.

On September 24, 2109, this Court granted the consolidated allocator petitions.

SUMMARY OF ARGUMENT

There is no legal basis for an award of sanctions based on the conduct of the AORO in this case. The RTKL statute imposes specific duties on ***the AORO***. These are to receive requests, direct those requests to other appropriate persons within the agency or another agency, track the agency's progress in responding to requests and issue interim and final responses. The statute also imposes on ***the agency*** a duty to act in good faith to determine if the records requested are public records as defined in the act. Here, the AORO performed the duties statutorily assigned to him. Contrary to the court's ruling, the AORO's reliance on other knowledgeable agency personnel to perform the assessment of the records function *statutorily assigned to it*, did not constitute bad faith such as to justify an award of sanctions under the RTKL. Further, to impose such a duty on an AORO is impractical as it would require that individual to be able to analyze substantively every record an agency keeps no matter how highly specialized the material might be. Moreover, the RTKL statute only authorizes such sanctions where a court reverses the decision of the OOR, an event that never occurred here. And, contrary to the court's opinion, the RTKL is not ambiguous merely because it imposes this limitation on sanctions. The Costs Act is available in enforcement proceedings to be certain that agencies do not willfully flaunt their responsibilities under the statute.

Because of the limitation in the statute that requires reversal of the OOR decision for imposition of sanctions under the RTKL, there is also no legal basis for an award of sanctions based on the conduct of the attorney representing the Department before the OOR or Director Oppman.

Finally, on this record, there is no basis for sanctions under the Costs Act and, therefore, no need for a remand. This is because the facts as found by the Judge do not, as a matter of law, establish that Department personnel acted in a matter that was dilatory, obdurate, vexatious, arbitrary or in bad faith.

ARGUMENT

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, a court cannot 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.

The pertinent provision of the statute that directs what an AORO is to do upon receiving a Right to Know request is Section 502 of the RTKL. It states:

> **Establishment**.---
>
> (a) An agency shall designate an official or employee to act as the open-records officer.
>
> (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.

65 P.S. § 67.502.[1] (Emphasis added).

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[1] This Section of the statutes also directs as follows:

> (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.

In addition, Section 901 of the RTKL imposes on ***the agency*** a duty to act in good faith. It states, "[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.

Here, the initial RTKL request read:

> 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 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

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(ii) Compute the day on which the five-day period under section 901 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) 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.

> facilities, that would also with the health at other state correctional facilities, that would be helpful.

Initially, it is submitted that this request was confusing and unclear as is evidenced by the fact that what the Department believed the request was seeking was different from what the OOR thought and Judge Simpson had a third view. Specifically, the Judge spent several pages setting forth what each party believed the request entailed and then interpreted it to include only some of the items requested. Appellants' Brief, Ex. C. Further, the Judge acknowledged that the parties could not agree on what was even requested, much less whether various exceptions applied. As such, the Judge was required to interpret the request himself in the context of construing his disclosure order. Therefore, the posture of the case indicates that the request itself was unclear. This essential lack of clarity and 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 and precludes an assessment of sanctions.

Despite the lack of clarity in the request, however, the record indisputably shows that the AORO, in compliance with Section 502, did direct the request to an appropriate person, Ms. Montag, an employee of the Department's Bureau of Health Care Services in its Central Office location. When Ms. Montag opined that the information sought was the subject of an ongoing investigation, the AORO communicated that information to Ms. Haines, as Section 502 mandates.

Despite the AORO's adherence to the law, Judge Simpson found that the AORO was at fault for not performing his own record search, physically obtaining the records in issue, and reviewing and assessing their content. The Judge also made the same determination regarding Attorney Defelice, when he acted as the Department's legal counsel in the appeal to the OOR. Because Attorney Defelice is not the AORO, his situation will be addressed separately under the second issue.

First, there is nothing in Section 502 or any other section of the RTKL that states that performing an independent record search, physically obtaining the records, reviewing them and assessing their content is part of an AORO's duty. That duty is placed on "the agency" under Section 901. Ms. Montag, who was familiar with the records, was part of the agency at the time in question.[2] RR 1255a-1256a.

Appellant acknowledges that there are two cases from the Commonwealth Court that touch on the precise issue here. In *In re Silberstein*, 11 A.3d 629, 633-634 (Pa. Cmwlth. 2011), that court stated that in making good faith determination of whether a requested record is a public record, the AORO, after inquiring of its public officials, whether they are in possession, custody or control of a requested

[2] The specific degree of her familiarity with the documents sought is not of record because no one could have anticipated it would be an issue until the court issued the final sanctions decision. However, the judge wrote in his opinion that the AORO relied on the Department's "*Health Care Bureau's assessment*" that any responsive records related to the investigation. Appellant's Brief, Ex. B.

record that could be deemed public, then has a "*duty and responsibility to determine whether the record is public, whether the record is subject to disclosure, or whether the public record is exempt from disclosure.*" *In re Silberstein*, 11 A.3d 629, 633-634 (Pa. Cmwlth. 2011). (Emphasis added). There is no further discussion of this point. This language was later quoted with approval in *Mollick v. Twp. of Worcester*, 32 A.3d 859, 874 (Pa. Cmwlth. 2011).[3] However, neither case actually concerned a claim by the requestor that *the AORO* had duty to determine if the record is public, subject to disclosure or exempt. Thus, the statement quoted above is gratuitous. Moreover, the court simply made the statement without specific language in the statute to support it. To be clear, the Department emphasizes that what is key here is not whether a requestor is entitled to receive this assessment; it certainly is. The crucial point is *who must perform the assessment*, a matter on which Section 502, which sets forth the duties of the AORO, is silent. While an AORO *could* perform these functions, the fact that in this case the Department chose to have someone from its Medical Bureau do so, is not a statutory violation of Section 502. This position is supported by the language in Section 901 that "*the agency*" is to perform a good faith effort to determine if the record sought is a public record that can be released.

[3] Both *Silberstein* and *Mollick* were local agency cases and, thus, no Commonwealth agency could have taken an appeal.

In addition to the fact that Section 502 imposes no duty on the AORO to second guess the subject matter experts' assessment of responsive records, Judge Simpson's construction of the statute presents significant administrative problems. First, to perform his or her own independent search, an AORO would need to know every possible place the records could exist. For an agency the size of the Department,[4] no one person could ever have that body of knowledge for every possible type of record a requester might seek. Second, to require the AORO to physically obtain (as opposed to directing that records be held and not destroyed) a copy of every record requested in cases where the agency's position is that exemptions apply would result in the duplication and at least temporary retention of thousands of documents that may never even be released. Third, to review and assess the records for responsiveness, instead of relying on the assessment of those employees who are familiar with them to do so, is more than just time consuming,[5]

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[4] This Court is asked to take judicial notice of the Department's official public website at www.cor.pa.gov. It shows that it currently has 24 state correctional facilities, a central office location, a training academy, a boot camp and numerous community corrections centers. Further, it employs approximately 15,000 employees and houses approximately 48,000 inmates.

[5] While burdensomeness itself is not a defense to a RTKL *request*, it certainly is a factor that can be considered in interpreting what the statute means. To require an AORO to perform such a review for an agency as large as the Department, which get thousands of requests annually, would have significant fiscal consequences for the Department and ultimately the taxpayers as either additional AOROs would need to be hired or other employees "deputized" to perform this type of assessment. Moreover, imposing such a burden on a small local agency could have different, but

it may be impossible. For example, in the record before this Court is a document titled "Active Number of Patients on Vaccine" (RR 1458a-1469a), which Judge Simpson eventually directed be produced. There are similar documents concerning diabetes (RR 1520a-1521a), thyroid (1470a-1481a) and numerous other medical conditions. To the layperson it would not be readily apparent whether these documents indicate that these illnesses were contracted at SCI-Fayette or that they could be indicia of cancer or respiratory ailments.

Taking a broader view, other types of highly technical documents would also require specialized training in order to perform meaningful assessment as to whether they are potentially responsive records. For example, the Department of Environmental Protection likely has highly specialized microbiology reports pertaining to water quality, the Department of Transportation likely has highly specialized engineering reports pertaining to road construction and the Public Utility Commission likely has highly specialized energy transmission reports. That is not to say that some documents *would* be obvious to the layperson, for example meeting minutes. But, to have a blanket rule requiring an AORO to perform a substantive assessment is simply unworkable. In summary, the statute, for good reason, does not impose this duty upon the AORO and neither should the courts.

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equally compelling, insurmountable administrative obstacles because, while the requests may be fewer in number, the number of AOROs available to respond would be far more limited than those of large state agencies.

II. The Commonwealth Court did not properly construe the statutory language of 65 P.S. §67.1304 as authorizing an award of attorney fees when a court reverses a final determination of an agency rather than when a court reverses the final determination of the appeals officer.

Section 1304 of the RTKL, 65 P.S §§ 67.1304 provides:

> **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).

In holding that this provision authorized fees and costs in this case, where the court did ***not*** reverse a decision of the OOR, Judge Simpson concluded that this

provision was ambiguous and required construction. Appellant's Brief, Ex. A, pp. 8-11. He then reasoned that because the term "final determination" is used with reference to both the appeals officer and the agency that was subject to the RTKL request the statute contains an ambiguity. *Id.* While it is true that that term is used in two places to address different determinations, each use is clear in and of itself. Section (a) permits the imposition of costs and attorney fees if the court reverses "the final determination *of an appeals officer*."[6] Section a(2) clearly refers to the final determination of the agency in answering the request. There is nothing ambiguous about this.

Section 1921(b) of The Statutory Construction Act of 1972, 1 Pa. C.S. §1921(b), provides that "[w]hen the words of a statue are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." Section 1304(a) of the RTLK clearly limits court costs and fees imposed to two instances --- reversal of the appeals officer or grant of a deemed denial. There is no dispute that Judge Simpson did not reverse the appeals officer because no

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[6] The appeals officer for a Commonwealth agency, such as the Department, is defined as a person designated under Section 503(a) of the RTKL, 65 P.S. §67.503(a). *See* 65 P.S. §67.102. Section 503(a) pertinently states that the OOR shall designate an appeals officer for all Commonwealth agencies and local agencies. The duties of an appeals officer are then set forth in Section 1102 of the RTKL, 65 P.S. §67.1102, and include holding a hearing on a RTKL appeal and issuing a final determination on behalf of the OOR. Thus, it is clear that the appeals officer is an employee of the OOR, not of the agency responding to the request.

appeal was ever taken from her decision. And, this case does not involve a deemed denial. Because neither situation exists here, the court erred in imposing sanctions under Section 1304(a).

Because there is no ambiguity, the Judge should not have resorted to principles of statutory construction. However, he did so and went on to opine that the seeming restriction in the statute allowing fees only where there is a reversal of the appeals officer's decision, produces an absurd result because it penalizes a requester who is successful before the OOR. Appellant's Brief, Ex. A, p. 10. The Judge reasoned that if the agency loses before the OOR and does not appeal, as occurred here, it can neutralize the requester's ability to obtain sanctions, allowing egregious agency conduct to go unchecked. *Id.*

Respectfully, the Judge's analysis misapprehends the law because it ignores the fact that a sanctions remedy already exists for an enforcement proceeding, which is the nature of the case at bar, under Section 2503 of the Judicial Code, 42 Pa. C.S. §2503 (Costs Act). Therefore, the Judge was incorrect in concluding that no remedy exists to curtail bad behavior on the part of an agency responding to a RTKL request where no appeal from the OOR decision is taken.

While a sanction provision exists, however, Appellant asserts that costs and attorney fees are not properly awarded on the facts found here.[7] Section 2503 of the Costs Act pertinently states:

> The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:
>
> ...
>
> (7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.
>
> ...
>
> (9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

The behavior in issue does not fall under either of these categories.

A. The Conduct Was Not Dilatory, Obdurate or Vexatious Under Section 2503(7) of the Costs Act.

Conduct is "dilatory" for purposes of this statute when the record shows that "[c]ounsel displayed a lack of diligence that delayed proceedings unnecessarily and caused additional legal work." *In re Estate of Burger*, 852 A.2d 385 (Pa. Super.

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[7] The judge did not reach this issue because he awarded fees under Section 1304. Because he found the facts, however, no remand to consider this issue is needed as it is one of law. Thus, this Court can decide it on appeal. *See* Section 706 of the Judicial Code, 42 Pa. C.S. §706. Moreover, deciding this purely legal question would further the interests of judicial economy. *See, e.g., Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 435 n. 12 (Pa. 2001). ("Inasmuch as our review is plenary and this question presents an issue of interpreting the Contract, we will address it, rather than remand, in the interests of judicial economy and efficiency.")

2004), *affirmed*, 587 Pa. 164, 898 A.2d 547 (2006). Conduct is "obdurate" where it a party is "hardened in feelings," "stubbornly persistent," and "resistant to persuasion." *South New Castle Borough v. Fiello*, 36 Pa. D. & C.4th 353 (C.P. Lawrence 1997)). Finally, litigation is "vexatious" when filed without sufficient grounds in law or fact and if its sole purpose is to cause annoyance. A suit is vexatious so as to support an award of attorney fees if brought without legal or factual grounds and if the action served the sole purpose of causing annoyance. *Miller v. Nelson*, 768 A.2d 858 (Pa. Super.2001), *petition for allowance of appeal denied*, 782 A.2d 547 (2001).

In this case, the Judge cited two reasons for his decision to impose sanctions. The first concerned his finding that the AORO, and later Attorney Defelice, did not perform a search, or obtain and personally review the investigatory records. The second concerned failure to disclose responsive records after the 2014 OOR order was interpreted by Judge Simpson in his 2016 opinion. None of that conduct is within the purview of that anticipated in Section 2503(7) of the Costs Act.

1. The AORO

As explained above, the AORO promptly made an inquiry and Ms. Montag provided a response to the request. RR 1255a-1256a. That is what the statute required. No proceedings were delayed. Similarly, the AORO was not resistant to persuasion. Indeed, no one even attempted to persuade him to change his position.

Finally, his conduct was not vexatious. He cited to legal exceptions in the statute when issuing the denial letter and the mere fact that they may have been narrowed by Attorney Defelice in the response to the appeal to the OOR does not, in and of itself, indicate vexatious conduct. Further, because no duty to search and assess is placed on the AORO in the statute, the failure to perform that function personally, as opposed to relying on other agency personnel to do so, cannot be a basis for sanctions. At a bare minimum, it would constitute a denial of due process to impose sanctions on persons for failing to perform "duties" when there is no notice in the statute that these specific persons are required to perform such duties.

2. Attorney Defelice/Director Oppman

As noted previously, the Judge concluded that in responding in the appeal to the OOR Attorney Defelice should also have performed his own record search, physically obtained the records in issue, and reviewed and assessed their content. Attorney Defelice did not do so but, instead, made an inquiry of Director Oppman. RR 1208a; 1375a. That communication then resulted in the November 4, 2014 affidavit filed with OOR that no responsive records existed.

It is unfortunate that it was not until the April 2016 deposition of Director Oppman that it was discovered that some records that would ultimately be determined by the court to be responsive were identified, *but* many were disclosed much earlier in time. However, this omission was not because Attorney Defelice

failed to make an inquiry. He did make one. RR 633a. Further, at the time when Attorney Defelice made the inquiry, the Department was interpreting the request more narrowly that Judge Simpson interpreted it. To elucidate, the first sentence of the request reads, "I am seeking documentation of illnesses *contracted* by inmates and/or staff members *at SCI-Fayette*." (Emphasis added). Department officials read this request as seeking information on illnesses ***contracted at SCI-Fayette*** and the remaining request as further refining that sentence. Judge Simpson acknowledged that this reading "has some basis in the language of the request," (Appellant's Brief, Ex. C, p. 10), but explained that once the OOR issued its opinion, its construction of the request controlled. The judge stated that that construction was that the request sought data of SCI-Fayette inmates' diagnoses by type of aliment and number of inmates afflicted. *Id.* at p. 11. However, the behavior of the agency officials (both the inquiry of Attorney Defelice and the response to him and resultant affidavit of Director Oppman) must be viewed in the context of what they believed was being sought at the time they were responding. Sanction cannot be imposed merely because they failed to foresee that the OOR/court would later construe the request differently. Given the lack of clarity in the request and the fact that none of these four types of records indicated where these medical conditions had been contracted, both Attorney Defelice and Director Oppman had a basis for believing the

documents were non-responsive.[8] And, indeed, the Judge declined to find that the narrow construction amounted to bad faith. *Id.* Thus, there is no basis to conclude that their conduct was dilatory, obdurate or vexatious.

The Judge also found that Attorney Defelice did not ascertain how the Department's Bureau of Health Care maintained its records. Again, nothing in the statute requires that he do so and merely because he relied on Medical Bureau officials who would have a better understanding of the unique recordkeeping done in that Bureau does not mean that he acted in dilatory, obdurate or vexatious manner.

B. The Conduct Was Not Arbitrary, Vexatious or In Bad Faith Under Section 2503(9) of the Costs Act.

"Arbitrary" conduct is that which is based on "random or convenient selection rather than reason or nature." *Twp. of Lower Merion v. QED, Inc.*, 762 A.2d 779, 782 (Pa. Cmwlth. 2000). There is not one shred of evidence in the record that *Uniontown* was singled out for disparate treatment. "Vexatious conduct" is defined above and the arguments set forth, *supra*, pertaining to Section 2503(7) also apply to Section 2503(9). Finally, for purposes of the counsel fees statute, "bad faith" is defined as "fraud, dishonesty or corruption." *Springfield Township v. Gonzalez*, 632 A.2d 1353 (Pa. Cmwlth. 1993), *petition for allowance of appeal denied*, 538 Pa. 618,

[8] The same applies to the emails generated by Drs. Noel and Gingereau during the Department's own investigation.

645 A.2d 1321 (1994). There is simply no evidence in the record that such deplorable conduct occurred here.

For purposes of comparison, *Newspaper Holdings, Inc. v. New Castle Area Sch. Dist.*, 911 A.2d 644, 650 (Pa. Cmwlth. 2006), provides an excellent example of bad faith in the RTKL context. There, the Commonwealth Court upheld an award of sanctions, 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 was manipulative and devious. There is nothing even remotely similar on the record here. Neither the AORO's reliance on Ms. Montag nor Attorney Defelice's reliance on Director Oppman, who himself relied on the legal interpretation of the request submitted to him by Attorney Defelice, can be realistically labeled as fraud, dishonesty or corruption.

The second basis the judge gave for imposing sanctions was failure to disclose records after he issued his summary relief opinion. To understand why this legal

conclusion is wrong it is necessary to examine the documents identified in the summary relief opinion and the exact language of the court's order.

The order indicated that summary judgment was "**DENIED** without prejudice to allow the enforcement action to ***proceed for further fact-finding regarding Respondent's disclosure of "all responsive records***" … limited to: (1) the five types of pre-existing Investigation records described in the accompanying opinion;[9] and, (2) the Investigation-related records, "including but not limited to those records to which Director Oppman referred in his submission to the …OOR." Appellant's Brief, Ex. C. (Latter emphasis added.).

Concerning the pre-investigation records, although the opinion says that other than the inmate grievances, these records are fairly comprised within the OOR's disclosure order, it does not actually order the Department to disclose them at that juncture. Further, with regard to the investigation-related records, the court could not have ordered disclosure since it was still unclear what these records were and when they were created.

Given this context, and while it might have been more judicious to disclose records, at least for the pre-existing investigation category at that point, the Department ***at that time*** was under no clear obligation to disclose those records.

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[9] They were: PTrax, oncology database, inmate grievances, mortality lists and contractor pharmacy reports.

Therefore, the Department did not act in bad faith, *i.e.*, with fraud, dishonesty or corruption, *Springfield Township*, by delaying until the proceedings were complete. Indeed, when the court issued its March 2018 opinion and order making it clear *for the first time* that disclosure should not have been delayed while enforcement proceedings concerning other documents were ongoing, the Department provided documents within the twenty-day time frame the court then ordered. Therefore, there is no basis for attorney fees under Section 2503(9) of the Costs Act.

C. Civil Penalties

Section 1305 of the RTKL, §67.1305, 65 P.S. §67.1305, permits the imposition of a civil penalty of up to $1,500 if the agency fails to disclose in bad faith. Given the above discussion, that penalty is unwarranted here.

CONCLUSION

Based on the foregoing reasoning, this Court should reverse the orders of the Commonwealth Court finding that Appellant violated the RTKL and imposing sanctions.

Respectfully submitted,

GREGORY G. SCHWAB
General Counsel

TIMOTHY A. HOLMES
Acting Chief Counsel
Pennsylvania Department of Corrections

By: /s/Debra Sue Rand
Debra Sue Rand
Assistant Counsel
Attorney I.D. No. 41661
Pennsylvania Department of Corrections
1920 Technology Parkway
Mechanicsburg, PA 17050
(717) 728-7763

Dated: November 20, 2019

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Uniontown Newspapers, Inc., d/b/a The Herald Standard; and Christine Haines, Appellees,	:	
v.	:	No. 76 MAP 2019
Pennsylvania Department of Corrections, Appellant	:	
	:	
Uniontown Newspapers, Inc., d/b/a The Herald Standard; and Christine Haines, Appellees,	:	
v.	:	No. 77 MAP 2019
Pennsylvania Department of Corrections, Appellant	:	

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby 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 from non-confidential information and documents.

/s/Debra Sue Rand
Debra Sue Rand

Dated: November 20, 2019

IN THE SUPREME COURT OF PENNSYLVANIA
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Uniontown Newspapers, Inc., d/b/a The Herald Standard; and Christine Haines, Appellees,	:	
v.	:	No. 76 MAP 2019
Pennsylvania Department of Corrections, Appellant	:	
	:	
Uniontown Newspapers, Inc., d/b/a The Herald Standard; and Christine Haines, Appellees,	:	
v.	:	No. 77 MAP 2019
Pennsylvania Department of Corrections, Appellant	:	

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATION

I hereby certify pursuant to Pa. R.A.P. 2531(a)(1) that this Brief complies with the word-count limit of this Rule that permits a Principal Brief exceeding thirty (30) pages as long as it does not exceed 14,000 words. I have relied upon the word-count feature of the word-processing system used to prepare the Brief. Under that feature, this Brief contains 7691 words.

/s/Debra Sue Rand
Debra Sue Rand

Dated: November 20, 2019

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)[1] (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).[2] 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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[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101–67.3104.

[2] 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.[3]

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 Envtl. 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.

[3] 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,[4] 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).

[4] 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[5] 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.

[5] 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).[6]

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.

[6] 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,[7] 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.[8] See Bad Faith Opinion. This Court also enforced the reversal of

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[7] 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).

[8] 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.[9]

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).

[9] 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 Envtl. 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 *full recovery*
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) *partial recovery*
Dec. 2015 – May 2016	Initial Discovery Phase	$8,180.33 *partial recovery*
Jan. – June 2017 (Ex. C)	Stipulation & Addit'l Discovery	$32,815.00 *full recovery*
July – Oct. 2017 (Ex. C)	Pre-Trial & Trial (Liability)	$36,462.21 *partial recovery*
March – June 2018 (Ex. D); *no invoice for July trial*	Pre-Trial & Trial (Damages)	$2,400.00 *partial recovery*; excl. publish motion & appeal

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.[10] 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.[11] Karoly.

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[10] 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.

[11] 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.

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);[12] $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).[13]

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

[12] 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.

[13] 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.[14]

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.

ROBERT SIMPSON, Judge

[14] 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 29th 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).[15] 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[16] 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

[15] Act of February 14, 2008, P.L. 6, 65 P.S. §67.1304(a)(1).

[16] Section 1305(a) of the RTKL, 65 P.S. §67.1305(a).

EXHIBIT B

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: August 28, 2017
Pennsylvania Department of Corrections,	:	
Respondent	:	

BEFORE: HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: March 23, 2018**

Before me, in the fact-finding stage, is the enforcement action filed by Uniontown Newspapers, Inc., d/b/a *The Herald Standard*, through reporter Christine Haines (Requester) seeking sanctions for the Department of Corrections' (DOC) violations of the Right-to-Know Law (RTKL).[1] On cross-motions for summary relief, this Court held DOC did not fully comply with the Office of Open Records' (OOR) final determination that ordered disclosure of all records responsive to Requester's RTKL request (Disclosure Order). Uniontown Newspapers, Inc. v. Dep't of Corr., 151 A.3d 1196 (Pa. Cmwlth. 2016) (Summary Relief Opinion). Because we could not discern the extent of DOC's noncompliance, and whether it amounted to bad faith warranting sanctions, the parties developed the record. Based on the parties' submissions, and after a hearing, I find some of DOC's noncompliance constitutes bad faith that merits statutory sanctions.

[1] 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).[2] 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.

[2] 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.[3] 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.

[3] 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,[4] 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

[4] 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,[5] 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.

[5] 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 31st ... 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).[6]

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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[6] 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.[7] 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).

[7] 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.[8] 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.[9] "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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[8] 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.

[9] 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 Envtl. 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).[10] 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.

[10] 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.

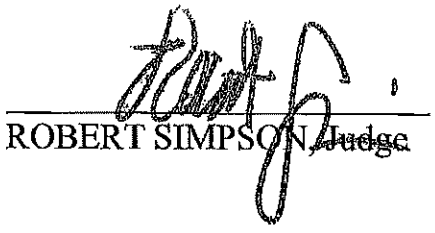
Although DOC identified additional records in discovery, the 2017 Disclosure was again incomplete. DOC has not complied with the Disclosure Order to date. Thus, DOC delayed access to public records for three years.

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.



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 23rd 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),[11] 65 P.S. §67.1305(b).

[11] Act of February 14, 2008, P.L. 6.

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.

ROBERT SIMPSON, Judge

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
	:	Argued: November 15, 2016
v.	:	
	:	
Pennsylvania Department of Corrections,	:	
Respondent	:	

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).[1] 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.

[1] 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.[2] 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,[3] lacking any individual identifiers, is not protected.

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[2] 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).

[3] "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).[4] 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.

[4] 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[5] 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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[5] 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., Wishnefsky 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 Envtl. 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,[6] 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.

[6] 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[7] 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.[8]

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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[7] 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).

[8] 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.[9] 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.

[9] 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 Envtl. Prot., 142 A.3d 941, 945 (Pa. Cmwlth. 2016) (quoting McGowan v. Dep't of Envtl. 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.

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 19th 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

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 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).[1]

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,

[1] 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.[2] *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

[2] 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.[3] 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

[3] 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.[4] *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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[4] 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

EXHIBIT E

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

ORDER

NOW, this 28th 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

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Uniontown Newspapers, Inc., d/b/a The Herald Standard; and Christine Haines, Appellees,	:	
v.	:	No. 76 MAP 2019
Pennsylvania Department of Corrections, Appellant	:	
	:	
Uniontown Newspapers, Inc., d/b/a The Herald Standard; and Christine Haines, Appellees,	:	
v.	:	No. 77 MAP 2019
Pennsylvania Department of Corrections, Appellant	:	

CERTIFICATE OF SERVICE

I hereby certify that on this day I served a true and correct copy of the foregoing Appellant's Reproduced Record upon the following person(s) by depositing same in the U.S. Mail addressed as follows:

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

/s/Linda Fantom
Linda Fantom
Administrative Officer I
Pennsylvania Department of Corrections
1920 Technology Parkway
Mechanicsburg, PA 17050

Dated: November 20, 2019