

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

No. 66 M.D. 2015

PA DEPARTMENT OF CORRECTIONS,

Respondent

PRELIMINARY OBJECTION TO
PETITION FOR REVIEW

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

I. BACKGROUND

1. Petitioner is the Uniontown Newspapers, Inc., The Herald Standard, and Christine Haines. *See* Petition for Review (PFR), ¶¶ 7-10.

2. Respondent is the Pennsylvania Department of Corrections (Department). *Id.*, ¶ 11.

3. Petitioner seeks to enforce a Final Determination issued by the Office of Open Records (OOR) against the Department. *Id.* at Exhibit A.

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

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

Id., ¶ 16 and Exhibit C.

5. On September 26, 2014, the Agency Open Records Officer (AORO) filed an interim response extending the final response to October 31, 2014. *Id.*, ¶ 18.

6. On October 16, 2014, the Department denied the request. *Id.*, ¶ 19.

7. On or about October 30, 2014, Ms. Haines appealed the denial to the OOR. *Id.*, ¶ 21.

8. On or about November 4, 2014, the Department issued a response to the appeal with a declaration from Director of Bureau of Health Care Services Christopher Oppman, arguing that the records were part of a noncriminal investigation. *Id.* Exhibit at J.

9. On December 1, 2014, the OOR ordered the records be made available to Ms. Haines. *Id.* at ¶ 22, Exhibit A.

10. Neither party appealed the Final Determination to the Commonwealth Court.

11. On December 31, 2014, undersigned counsel provided the records in the Department's possession that were responsive to Ms. Haines request. *Id.*, ¶ 26.¹

12. Admittedly, all the records Ms. Haines requested were not provided. *Id.* at ¶ 26.

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

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

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

14. The Department's position is that a portion of the responsive records exist, and they were provided to Petitioner, but the remaining responsive records do not exist, and never did exist.

15. Petitioner's position is that the Department has the records, but does not want to provide them.

16. Petitioner posits that the Department has a "database, but the collection of same 'is not required.'" *Id.*, ¶ 40, citing Exhibit H.

17. The Department has not asserted that the records exist, but they are in a database, but rather has stated "[w]e do not have any such records that are that specific beyond going through every medical record." *Id.*, Exhibit H.²

18. Further, Petitioner submits that Director Oppman's first declaration indicates the Department is in possession of *all* of the responsive records. *Id.*, ¶ 38.

19. Moreover, Petitioner submits the subsequent declaration of Director Oppman is merely an "attempt to silence" the Petitioner. *Id.*, ¶ 43.

20. Admittedly, the first declaration of Director Oppman was poorly worded and was not intended to suggest that the Department possessed *all* of the records within the very broad request. However, the Department is aware of how

² The Department requests the Court to exercise Judicial Notice, pursuant to Pa. R. Evid. 201, and reference the Department's public website, which illustrates the current inmate population at SCI Fayette is 2,056 inmates.

<http://www.cor.pa.gov/Administration/Statistics/Documents/current%20monthly%20population.pdf>.

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

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

II. DEMURRER

22. A preliminary objection in the nature of a demurrer admits as true all well and clearly pleaded material, relevant factual averments, and all inferences fairly deducible there from. *Barndt v. Pennsylvania Department of Corrections*, 902 A.2d 589 (Pa. Cmwlth. 2006).

23. In determining whether a preliminary objection based on a demurrer should be sustained, a court "need not accept as true conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion." *Silo v. Ridge*, 728 A.2d 394, 398 (Pa. Cmwlth. 1999) (citing *Giffin v. Chronister*, 151 Pa. Cmwlth. 286, 289, 616 A.2d 1070, 1072 (1992)).

24. When ruling on a demurrer, a court may sustain the objections and dismiss the case only when such relief is clear and no doubt exists that the law will

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

25. Petitioners' filed a petition for review, which undersigned counsel interprets as a petition seeking mandamus relief, or alternatively, for enforcement of the OOR order.

26. Mandamus is proper to "compel the performance of a ministerial duty and will not be granted in doubtful cases." *Doxsey v. Pa. Bureau of Corrections*, 674 A.2d 1173, 1174 (Pa. Cmwlth. 1996).

27. Mandamus lies only where the petitioner "demonstrates a clear legal right to relief, a correspondingly clear duty on the part of the party against whom mandamus is sought, and the want of any other adequate remedy." *Id.* See also *Equitable Gas Company v. City of Pittsburgh*, 507 Pa. 53, 58, 488 A.2d 270, 273 (1985) (also finding that the petitioner must show "an immediate, specific, well defined and complete legal right to the thing demanded") (citing *Purcell v. City of Altoona*, 364 Pa. 396, 72 A.2d 92 (1950)).

28. Mandamus is not proper to establish legal rights; it is only appropriately used to enforce those rights that have already been established. See *Waters v. Department of Corrections*, 97 Pa. Commw. 283, 286, 509 A.2d 430, 432 (1986).

29. The mandamus remedy is available where there is not dispute of material fact. *Monroeville v. Effie's Ups and Downs*, 315 A.2d 342 (Pa. Cmwlth. 1974).

30. If, as the Petitioner claims, the records requested existed, Petitioner would have a clear right to those records based on the Final Determination from the OOR.

31. However, if, as the Department claims, the records do not exist, Petitioner does not have a clear right to the records because impossibility is a defense to an enforcement action. *Commonwealth v. United States Steel Corp.*, 325 A.2d 324 (Pa. Cmwlth. 1974).

32. There is a material fact at issue, i.e. whether the remaining responsive records exist.

33. Under the RTKL 65 P.S. § 67.705, Creation of Record, "an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain formant or organize the record." 65 P.S. § 67.705.

34. In email correspondence attached to the PFR, the Department explains that the records can only be gleaned from reviewing medical records, which

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

35. Admittedly, Director Oppman's first declaration gives the impression that the Department possesses every record requested by Ms. Haines; however, that was not the intent of the declaration. This can be seen by the records provided, the email communications with Ms. Haines, the Department's press release, and the second declaration from Director Oppman. *See PFR*, Exhibits H, I, and K.

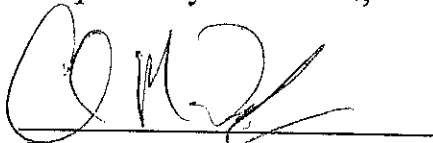
36. Since there is a material fact at issue, peremptory mandamus relief is not available to Petitioner.

III. CONCLUSION

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

Respectfully submitted,

By:



Chase M. Defelice
Assistant Counsel
Attorney I.D. No. PA 209135
Pennsylvania Department of Corrections
Office of Chief Counsel
1920 Technology Parkway
Mechanicsburg, PA 17050
(717) 728-7763

Dated: March 9, 2015

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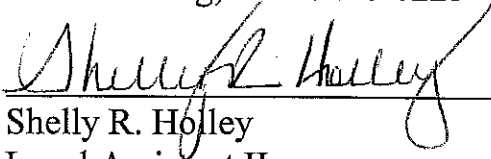
CERTIFICATE OF SERVICE

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

Service by first-class mail
Addressed as follows:

Charles Kelly, Esq.
Saul Ewing
One PPG Place, Suite 3010
Pittsburgh, PA 15222

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


Shelly R. Holley
Legal Assistant II
Pennsylvania Department of Corrections
Office of Chief Counsel
1920 Technology Parkway
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(717) 728-7763

Dated: March 9, 2015



March 9, 2015

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

RECEIVED

MAR 09 2015

OFFICE OF OPEN RECORDS

Re: *Uniontown Newspapers, Inc. et al. v. Pa. DOC*
No. ~~319 M.D. 2013~~ 66 MD 8015

Dear Mr. Krimmel:

Please find enclosed for filing in the above-captioned matter: preliminary objections and an order. I have enclosed copies of each document to be time-stamped and returned to me by way of the messenger.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'C.M. Defelice', with a stylized flourish at the end.

Chase M. Defelice
Assistant Counsel

Enclosures

cc: Charles Kelly, Saul Ewing LLP, One PPG Place, Suite 3010, Pittsburgh, PA 15222, (w/enclosures)
Kathleen A. Higgins, Esq., Office of Open Records, Commonwealth
Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA 17120-0225
File

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ORDER

AND NOW, this _____ day of _____, 2015, upon consideration of the Respondents' *Demurrer*, and Petitioner's response, if any, it is **HEREBY ORDERED, ADJUDGED, and DECREED** that said *Demurrer* is **SUSTAINED** and this Court declines to grant peremptory mandamus or enforcement relief on the present stat of the record.

BY THE COURT:

J.