

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

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

Filed on Behalf of the Petitioners,
Uniontown Newspapers, Inc., d/b/a The
Herald Standard; and Christine Haines

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

I. INTRODUCTION

The Pennsylvania Department of Corrections' ("Respondent" or the "DOC") Brief in Support of Preliminary Objection to Petition for Review makes three basic arguments, each of which lacks merit. First, contrary to the DOC's contentions, and as stated further in Petitioners' original Brief in Opposition to Preliminary Objection, the Commonwealth Court has the power, whether termed in mandamus or under the authority of the Pennsylvania Right to Know Law ("RTKL"), to provide all of the relief sought in Petitioners' Petition for Review. Second, compliance with the Office of Open Records ("OOR") Final Determination would not require the DOC to create a "new record" as it claims. Third, the responsive documents are not protected by the medical records exception to the RTKL.

The DOC has again suggested through its Brief in Support of Preliminary Objection that it *could* provide the requested information, thus complying with Petitioners' RTKL request and the

OOR Final Determination, but apparently has no intention of redacting relevant records to make a full and proper production consistent with the OOR Final Determination. The DOC makes no attempt to justify its stance; it simply says “no”. (See DOC Brief in Support of Preliminary Objection, the “DOC Brief”, at 5, 9). The DOC also suggests that it *could*, but will not, identify the relevant information because that would amount to creating a new record, which it is not required to do under the RTKL (see DOC Brief, at 5, 9-10). Given the fact that the DOC has possession of responsive documents that it has been ordered by the OOR to produce, its current refusal to produce the same is legally untenable, and its Preliminary Objection, therefore, should be overruled.

II. LEGAL ARGUMENT

A. The DOC’s Compliance with the OOR Final Determination Would Not Require it to Create a “New Record”.

The DOC correctly argues that it is not required to “create a record” that does not otherwise exist in response to Petitioners’ RTKL request (see DOC Brief, at 5, 9):

When responding to a request for access, 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, format or organize the record.

65 P.S. § 67.705. “That provision precludes a requester from being able to ‘shanghai’ government employees to create a record when one does not exist and take them away from carrying out their normal responsibilities. However, this section does not permit an agency to avoid disclosing existing public records by claiming, in the absence of a detailed search, that it does not know where the documents are.” Pennsylvania State Police v. McGill, 83 A.3d 476, 481 (Pa. Commw. Ct. 2014). Petitioners in this case are not attempting to “shanghai” government employees or distract them from their usual duties. Instead, Petitioners are attempting to obtain information that the DOC admits exists in records in its possession subject to redaction, and regarding an important issue of

public debate. For each of the following reasons, the DOC must produce relevant records that it admits are in its possession, in accordance with the OOR Final Determination.

First, the DOC has consistently reiterated that the information requested by Petitioners exists, but would require a more detailed search that the DOC refuses to perform: “the only way to provide the requested information would be by reviewing medical records” (DOC Brief, at 5; see also DOC Brief at 8-9). Therefore, the “new record” exception is not even implicated in this case, as the DOC asserts, because the information sought already exists (see also Sect. II(B)-(C), infra).

Second, drawing information from a database does not constitute creation of a new record. See, e.g., McGill, 83 A.3d at 481 (“drawing information from a database does not constitute creating a record”); Com., Dep’t of Envtl. Prot. v. Cole, 52 A.3d 541, 548 (Pa. Commw. Ct. 2012) (“In short, to the extent requested information exists in a database, it must be provided; an agency cannot claim otherwise under Section 705 [the new record exception] of the Right-to-Know Law.”). The DOC possesses, controls, and/or has access to some sort of database or document repository with “thousands of medical files,” which it now refuses to search in response to Petitioners’ RTKL request (see DOC Brief, at 9). Drawing specific information from this larger universe of documents, as requested by Petitioners, simply does not invoke the “new record” exemption of Section 67.705.

Third, to the extent that the DOC’s manner of recordkeeping is hindering it from complying with the OOR Final Determination, it cannot rely on Section 67.705 as a defense: “A requestor cannot control how an agency catalogues or organizes such files. As such, an agency’s failure to maintain the files in a way necessary to meet its obligations under the RTKL should not be held against the requestor. To so hold would permit an agency to avoid its obligations under the RTKL simply by failing to orderly maintain its records.” Com., Dep’t of Envtl. Prot. v. Legère, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012). That is precisely the result that the DOC is

seeking from this Court: to avoid its obligation because its files are apparently not organized in an orderly fashion at present.

Therefore, the DOC cannot rely on Section 67.705's "new record" defense under the RTKL, and the DOC should be compelled to fully comply with the OOR Final Determination.

B. The Medical Records Exception to the RTKL Also Does Not Exempt the DOC's Compliance with the Final Determination.

The DOC admits that it could provide information relevant to Petitioners' RTKL request through a review of its medical records database (see DOC's Brief, at 5, 9-10). The DOC argues, however, that medical records are exempt from disclosure under the RTKL, and that the RTKL does not require the DOC to redact records (see *id.*). Both statements are false as applied to this case.

The RTKL contains a series of express exemptions from disclosure. See 65 P.S. § 67.708(b). All records in the possession of a Commonwealth agency, such as the DOC, are presumed public and subject to disclosure from the outset. *McGill*, 83 A.3d at 479. "The burden of proving that a record of a Commonwealth agency . . . is exempt from public access shall be on the Commonwealth agency . . . receiving a request by a preponderance of the evidence." 65 P.S. § 67.708(a). In the DOC's Brief in Support of Preliminary Objection, the DOC argues that "the [Petitioners' RTKL] request does not ask for medical records, *nor could it . . .*" (DOC's Brief, at 9) (emphasis added). The DOC further claims that "under the RTKL a medical record is exempt . . . *copying an inmate's medical record, and redacting it would also be contrary to the RTKL.*" (DOC's Brief, at 9) (emphasis added).

The RTKL does provide a limited medical records exemption, which the DOC is apparently referring to in its Brief in Support of Preliminary Objection:

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). The DOC claimed the medical records exception in response to Petitioners' original RTKL request, but the OOR held that the 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 [medical records] exemption." (Petition for Review, at Exhibit A, OOR Final Determination, at 2, 7-8).

Moreover, not only has the DOC failed to support or establish the exemption, but the exemption simply does not apply. Exemptions to the RTKL "must be narrowly construed due to the remedial nature of the RTKL, which is designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions." McGill, 83 A.3d at 479. Section 67.708(b)(5) does not impose a blanket exception for all medical records, but instead exempts records that could reveal individual health information. Petitioners never requested any record with "individual" or "information that would disclose individually identifiable health information". In fact, Petitioners expressly stated their contrary intention: "I am not seeking identifying information, only the types of reported contracted illnesses and the number of inmates or staff members with those illnesses." (Petitioners' RTKL request, attached to Petition for Review, at Exhibit C).

If an agency determines that a record contains both information that is subject to disclosure and information that is not, "the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted." 65 P.S. § 67.706 (emphasis added). See also

Advancement Project v. Pennsylvania Dep't of Transp., 60 A.3d 891, 894 (Pa. Commw. Ct. 2013) (“an agency cannot deny access to a record that contains non-disclosable information if that information can be redacted”). Here, the DOC’s database of medical records likely contains personal identifying health information, which is not subject to disclosure, along with unprotected information relevant to Petitioners’ request, including general diagnoses without personally identifying information. Petitioners would gladly accept medical records redacted of all “information that would disclose individually identifiable health information.” Petitioners’ RTKL request was clear: it merely sought certain diagnosis information of inmates and staff, not any identification of the individual to whom the diagnosis corresponds (see Petitioners’ RTKL request, attached to Petition for Review as Exhibit C). The DOC has admitted that a review of the medical records and redaction are possible, but, in the DOC’s view, are too burdensome for the DOC to undertake (DOC Brief, at 9, apparently objecting to a “search [of] thousands of medical files and redact[ion of] a medical record to avoid any identifying information.”), which is not a defense to disclosure (see Sect. II(C), infra).

Therefore, to the extent that the DOC is ordered to produce portions of medical records to comply with Petitioners’ RTKL request, the DOC cannot rely upon the medical records exemption to block Petitioners’ access *in toto*. Instead, the DOC is under an express duty to redact personal identifying information from the records, and grant Petitioners access to the rest.

C. The DOC’s Apparent “Undue Burden” Defense is Improper under RTKL.

To the extent that the only way that the DOC can comply with Petitioners’ RTKL request and OOR Final Determination is through the review, redaction and production of individual medical records (but see Sect. II(A), supra), it still cannot escape compliance based upon the alleged burden of “search[ing] thousands of medical files and redact[ing] a medical record to avoid any identifying information.” (See DOC Brief, at 9).

The RTKL, 65 P.S. § 67.708(b), sets forth the various exemptions from disclosure under the RTKL. Notably, an undue burden defense (often asserted in civil discovery exchanges) is absent from the list. Instead, this Court has clearly stated that “[t]here is simply nothing in the RTKL that authorizes an agency to refuse to search for and produce documents based on the contention it would be too burdensome to do so.” Legere, 50 A.3d at 266. See also Carcy v. Pennsylvania Dep’t of Corr., 61 A.3d 367, 372-73 (Pa. Commw. Ct. 2013) (“a burden on an agency attendant to gathering responsive records does not pertain to sufficiency of a request or render it non-specific.”). The mere fact that the DOC might be required to review records in order to fully respond to the RTKL request, and comply with the OOR Final Determination, is simply not a cognizable defense to production under the RTKL, especially when compared to Petitioners’ and the public’s right of access to the vital information at issue in this case. This is especially true where, as here, much of the burden likely stems from the DOC’s own, internal lack of organization. Legere, 50 A.3d at 265 (“an agency’s failure to maintain the files in a way necessary to meet its obligations under the RTKL should not be held against the requestor. To so hold would permit an agency to avoid its obligations under the RTKL simply by failing to orderly maintain its records.”).

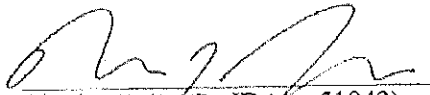
Therefore, none of the alleged defenses to disclosure suggested in the DOC’s Preliminary Objection, or its Brief in Support of Preliminary Objection, are sufficient to avoid its obligations under the RTKL and the OOR Final Determination. These defenses were similarly raised at the OOR, but the OOR Final Determination clearly held that no such exemptions from disclosure under the RTKL were established by the DOC.

III. CONCLUSION

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

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

Respectfully submitted,



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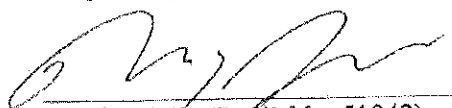
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Reply Brief in Further Opposition to Respondent's Preliminary Objection to Petition for Review filed on behalf of the Petitioners, The Herald Standard and Christine Haines, was served upon the following parties via United States Mail on this 13th day of May, 2015:

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Respectfully submitted,



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From: Smith, Melissa P.
Sent: Thursday, May 14, 2015 9:41 AM
To: Englert, John P.
Cc: Scharding, Catherine M.; Guido, Diane M.; Smith, Kathleen D.
Subject: General Corporate/364320.19

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John

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May 14, 2015

VIA FEDERAL EXPRESS

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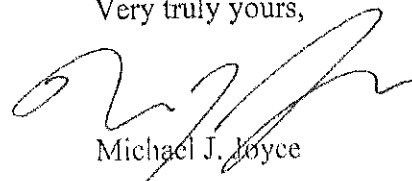
Re: Uniontown Newspapers, Inc., d/b/a The Herald Standard; and Christine Haines v. Pennsylvania Department of Corrections (66 M.D. 2015)

Dear Chief Clerk Krimmel:

Enclosed, please find paper copies of Petitioners' Reply Brief in Further Opposition to Respondent's Preliminary Objection, which were electronically filed on May 13, 2015.

Please feel free to contact me if you have any questions, or require additional information.

Very truly yours,



Michael J. Joyce

Enclosures

cc: Kathleen A. Higgins, Esq. (Office of Open Records) (via U.S. Mail) (w/ enc.)
Chase Defelice (Department of Corrections) (via U.S. Mail) (w/ enc.)