IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Prison Legal News,

Petitioner

v.

Pennsylvania Department of Corrections,

Respondent

PA Office Of Open Records
Docket No. AP 2009-0174

No.

PETITION FOR REVIEW OF FINAL DETERMINATION OF STATE AGENCY

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Philadelphia Bar Association
Lawyer Referral
And Information Service
One Reading Center
Philadelphia, Pennsylvania 19107
(215) 238-6333
TTY (215) 451-6197

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notification. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defenses o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademas, la corte puede decider a favor del demandante y require que usted cumpla con todas las provisiones de esta demanda. Usted puede perer dinero o sus propiedades u otros derechos importantes para usted.

Lieva esta demanda a un abogado inmediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagar tal servicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede conseguir asistencia legal.

Asociacion de Licenciados
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Prison Legal News, Petitioner v. Pennsylvania Department of Corrections, Respondent PA Office Of Open Records Docket No. AP 2009-0174	No.

PETITION FOR REVIEW OF FINAL DETERMINATION OF STATE AGENCY

1. This petition for review is filed pursuant to Pennsylvania's Right to Know Law (RTKL), 65 P.S. § 67.1301, which provides:

> Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a Commonwealth agency, a legislative agency or a judicial agency issued under section 1101(b) [FN1] or the date a request for access is deemed denied, a requester or the agency may file a petition for review or other document as might be required by rule of court with the Commonwealth Court. The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole. The decision shall clearly and concisely explain the rationale for the decision.

2. On February 6, 2009, Petitioner *Prison Legal News* (PLN) submitted a RTKL request to Respondent Pennsylvania Department of Corrections (DOC) seeking the production of public records that detailed claims, settlements or verdicts of over $1000 against the DOC, its employees, agents or facilities.

3. In addition to defining the scope of records requested, the PLN's letter requested that the records be provided in electronic format, and that the DOC waive any reproduction fees because the document request is in the public interest.

4. On February 17, 2009, the DOC responded to PLN's request in writing. The DOC's letter stated that PLN's request "implicates a rough estimate of at least 35,000 pages of materials" and demanded prepayment of $8,750.00 prior to processing the request. The DOC made that estimate, however, without determining that the supposed 35,000 pages were actually subject to production – or, indeed, without making any determination about what it would produce.

5. By separate letter dated February 27, 2009 (after further correspondence from PLN), the DOC stated that it was denying PLN's request for a fee waiver, PLN's request for production of documents in electronic form, and PLN's request for production of a spreadsheet or other compilation of the information sought. The DOC stated that the documents were not maintained in electronic form, nor did a compilation of the information exist. The DOC did not provide any reason for its denial of a fee waiver. The DOC's February 27 letter also notified PLN of its right to appeal the DOC's decision to the Pennsylvania Office of Open Records within 15 days.

6. PLN timely appealed to the Office of Open Records (OOR) on March 7. In its appeal, PLN noted that the DOC had not objected to the public nature of the documents sought. Therefore, PLN objected to (1) the DOC's estimate of the number of records sought; (2) the size of the fee request from DOC, including the imposition of a $0.25 per page fee; (3) the DOC's denial of PLN's request for a fee waiver; and (4) the DOC's refusal to provide the records in electronic form. As part of this last objection, PLN noted that the DOC had not considered the possibility of any alternative means of converting the records into electronic format, such as allowing a representative of PLN to scan the records using private equipment.

7. In its response to PLN's appeal letter, the DOC claimed, for the first time, that the DOC had not yet determined whether the information requested by PLN was subject to production and reserved the right to deny PLN the documents requested.

8. On April 13, 2009, the OOR issued a Final Determination, Docket no. AP 2009-174, in which it denied PLN's appeal with respect to the waiver of fees, the DOC's fees, including its use of a $0.25 per page copying fee, and the DOC's refusal to provide the documents in question in electronic format. The OOR did not hold a hearing and accepted the DOC's assertions without question, providing no more findings nor reasoning than the DOC had provided for these decisions. In particular, the OOR upheld the DOC's demand for fees despite the DOC's reservation of the right to later demand production of the documents that formed the basis of the fee demand. The

Final Determination did disallow retrieval costs that the DOC first advanced during the appeal, and stated that if PLN were willing to provide its own scanning equipment, the DOC must allow that and produce the documents for scanning within 30 days. That Final Determination is attached hereto.

9. On May 5, the DOC filed a "Motion for Reconsideration" with the OOR, arguing that the OOR could not order production of the records because DOC had never determined the extent to which it would grant or deny the request for records.

10. On May 8, 2009 – more than 90 days after receiving PLN's initial request – the DOC sent PLN a letter stating that it would deny PLN's request with respect to large numbers of documents. The DOC subsequently notified the OOR about its partial denial of PLN's records request.

11. PLN asks this Court to review the determinations below and hold that they are inconsistent with the DOC's obligations under the RTKL because the DOC's estimate of the number of records sought is unreasonable and inconsistent with law; the fees requested by the DOC are unreasonable and inconsistent with law; the DOC's denial of PLN's request for a fee waiver is unreasonable and inconsistent with law; and the DOC's refusal to provide the records in electronic form is unreasonable and inconsistent with law.

12. In addition, PLN asks this Court to find that the determinations below violate Pennsylvania law and PLN's rights under the Constitutions of the United States of America and the Commonwealth of Pennsylvania in that they permit

the DOC to assess fees and deny fee waivers without adequate findings or reasons for its action and with no limitations on the DOC's discretion. Moreover, the OOR's findings of fact with regard to the DOC's assessment of fees, refusal to provide documents in electronic form and refusal to grant a fee waiver are not supported by substantial evidence.

13. Wherefore, Petitioner requests that this Court review the determinations below and hold that the DOC has acted unreasonably and illegally. Petitioner asks this Court to order that the DOC produce the documents requested in full, either electronically or without fee, and grant such other relief as appropriate, including a reasonable attorney fee.

Respectfully submitted,

Dated: May 13, 2009.

Mary Catherine Roper
Identification No. 71107
AMERICAN CIVIL LIBERTIES UNION
P.O. Box 40008
Philadelphia, PA 19106
voice (215) 592-1513
fax (215) 592-1343

VERIFICATION

I, Mary Catherine Roper, verify that the facts set forth in the foregoing petition are true and correct to the best of my knowledge and belief. I understand that my statements are made subject to the penalties of Pa. Const. Stat. § 4904, which relates to unsworn falsification to authorities.

Dated: May 13, 2009.

Mary Catherine Roper

CERTIFICATE OF SERVICE

I, Mary Catherine Roper, hereby certify that on this date I served a copy of the foregoing Petition for Review upon the following person by first class mail, which service satisfies the requirements of Pa. R.A.P. 121:

Andrew J. Filkosky, Agency Open Records Officer
Pennsylvania Department of Corrections
Right-to-Know Law Office
55 Utley Drive
Camp Hill, PA 17011-8028

Terry Mutchler, Executive Director
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120

Dated: May 13, 2009.

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pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF:	:	
PAUL WRIGHT,	:	
Complainant	:	
v.	:	**Docket No: AP 2009-0174**
DEPARTMENT OF CORRECTIONS,	:	
Respondent	:	

INTRODUCTION

Mr. Paul Wright, on behalf of *Prison Legal News*, filed a right-to-know request with the Department of Corrections ("DOC"), pursuant to the Right to Know Law ("RTKL"), 65 P.S. §67.101, *et. seq*,. Mr. Wright sought details about claims and settlements in the amount of $1,000 or greater for the period of January 1, 2001 through December 31, 2008. The DOC granted Mr. Wright's RTK request, and required prepayment as the cost of copies exceeded $100.00. Mr. Wright objected to the cost and timely appealed to the Office of Open Records ("OOR").

For the reasons set forth below, the appeal is granted in part and denied in part.

FACTUAL BACKGROUND

On February 6, 2009, Mr. Wright mailed a RTK request to the DOC seeking the following:

> Public records containing details about any claims, settlements or verdicts against State of Pennsylvania for $1000.00 or more involving the Department of Corrections (DOC), its employees or agents, or any of its facilities. For each payment made, please include a copy of the tort claim or complaint, or any other document that discloses the facts underlying the incident leading to the settlement or verdict. Also, include any settlement agreement, general release, verdict or court order obligating the county to pay the claimant or plaintiff. Finally, please include a copy of the check paid to the claimant or plaintiff. The time period for the above request is from January 1, 2001 through December 31, 2008.

Mr. Wright requested the DOC to provide the documents electronically and requested a waiver of fees "as the information being sought will further the advancement of public understanding of DOC operations. *Prison Legal News* is a non-profit media entity reporting on criminal justice news and issues.

Andrew Filkosky, Agency Open Records Officer for the DOC responded on February 17, 2009 who stated as follows:

> Your request requires prepayment in order to be processed. The Department requires prepayment before providing access when the estimated cost to fulfill a request exceeds $100. 65 P.S. §67.1307(h). DOC estimated cost of fulfilling your request is $8,750.00 ($.25 per page).

Mr. Filkosky stated that upon payment, the DOC would process the request further and either bill him for the difference if the actual amount exceeded the estimate or refund him if the opposite were true.

On February 20, 2009, Mr. Wright wrote to Mr. Filkosky again asking that he reconsider the requirement of prepayment in light of Prison Legal News v. Lappin, 436 F.Supp. 2d 17 (D.D.C. 2006). He states that his request for production in an electronic

format was not addressed and would reduce the quoted cost. Finally, he asked that DOC prepare a spreadsheet listing all claims and verdicts paid during the time period in his request "so that I may further narrow my request for documents."

Mr. Filkosky responded on February 27, 2009 and stated that the requested records do not exist in electronic format and cited language in the RTKL that relieves agencies of any responsibility to create records, 65 P.S. §67.705. The response was the same for the requested spreadsheet as it is not a record the DOC maintains. Mr. Wright's request for a fee waiver was denied.

Mr. Wright timely appealed to the OOR. He challenges the estimate, although this is based only upon his belief that the records could not be as voluminous as the DOC reported. He argues that the cost is not reasonable as required by the RTKL, that he should receive a waiver of fees and cites the RTKL stating that records should be provided in the medium requested "if the public record exists in that medium." He further states that Mr. Filkosky did not allow for any alternative means of converting the records into electronic format "such as sending a representative of PLN to the location where the records are kept to identify the records responsive to our request for copying or we could bring our own portable scanner if need be."

Theron R. Perez, Esquire, Assistant Counsel to the DOC responded to the appeal on behalf of DOC. She argues that the request for prepayment was proper in accordance with section 67.1307 which "allows agencies to assess an estimated prepayment charge if the fees are expected to exceed $100... This spares agencies from the burden of compiling actual documents pursuant to a voluminous request only to have the requester

withdraw the request once they realize the expense." In response to Mr. Wright's challenge regarding the estimate, she writes:

> "... the Department litigates in a variety of forums on a variety of issues including different types of employment claims, inmate claims, contract claims and administrative compliance issues. Without individually reviewing each case, it is impossible to know the actual number of pages for each complaint and settlement agreement or judgment. Nonetheless, it is conservatively estimated that the Department must pay $1000.00 or more as a result of a settlement agreement, judicial decree or order on approximately 175 cases per year. Mr. Wright has requested that the Department produce the settlement agreement or judicial determination, the complaint and the cancelled check for any such case over a period of 8 years. On its face, the request ostensibly implicates 1400 cases... the Agency Open Records Officer consulted with appropriate staff to provide a good faith estimate in this matter. It is estimated that the settlement agreements are generally about 10 pages in length. Complaints for each case are estimated to be an average of about 15 pages each. Accordingly, it is estimated that each case would encompass about 25 pages of material. By plugging in these numbers, the Department estimated that Mr. Wright's request implicates about 35,000 pages of material (8 years X 175 cases X 25 pages = 35,000). This does not even take into account the request for the cancelled check."

Ms. Perez reports that she discovered after receiving this appeal that cancelled checks are not in the possession of the DOC and reside in the Department of Treasury and provides information on where to submit a request. The DOC states that, in addition to the fees quoted above, there is an estimated cost of $6636.00 for the DOC to be able to access the files from its third-party contracted archive vendor and handling charges of $1044. In support thereof, she submitted a pricing schedule from Iron Mountain, a storage company. This was raised for the first time in response to Mr. Wright's appeal and never mentioned until he proposed bringing a copier to perform his own duplication of records.

Regarding the fee waiver, the DOC argues that there is no obligation to do so and the RTKL allows agencies discretion. Perez affirms Mr. Filkosky's statement that the records requested are not available in electronic format.

The DOC is amenable to Mr. Wright's suggestion of sending a representative to identify responsive records and use of a private copier or scanner, but points out that it could take weeks. It proposes the following: "If Mr. Wright is willing to commit in writing to this undertaking, the Department asks for thirty days to compile responsive records, as well as for the provision of archival fees..."

LEGAL ANALYSIS

Pursuant to section 67.503(a), the OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). The DOC is a Commonwealth agency subject to the RTKL, 65 P.S. §67.301. There is no argument regarding the status of the records requested as public records.

1. The DOC is not Required to Waive Copying Costs

Mr. Wright cited a federal case interpreting the Freedom of Information Act ("FOIA") as the basis for his contention that the DOC should waive copy fees. However, FOIA has language quite different from the RTKL: "Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester," 5 USCS § 552(4)(a)(iii) (emphasis added). The RTKL is permissive: "[a]n agency may waive the fees for duplication of a record..., 65 P.S. 67.1307(f) (emphasis added). In Prison Legal News v. Lappin, 436 F.Supp. 2d 17 (D.D.C. 2006), cited by Mr. Wright, the Court considered only the language of FOIA, which is inapplicable here.

2. Twenty-five Cents Per Page is Reasonable

The DOC has established the number, type and volume of claims, litigation and settlements that it estimates are responsive to Mr. Wright's request. It charges $.25 per page, as established by the OOR in its published fee schedule. Mr. Wright's issue with the estimate is the number of pages and not the per page charge, although he does seek waiver of costs as set forth above. The estimate provided by DOC is reasonable given the number of cases it processes each year and the typical length of the documents requested.

3. Records not Available Electronically are not Required to be Converted

The DOC contends that "... the records encompassed by Mr. Wright's request are archived in paper format....If, in the course of processing this request, any responsive documents are found in an electronic format, they will be produced in accordance with the requester's preference. However, as a general matter, the requested records are available only in paper format and will be produced in that format, 65 P.S. 67.701(a) ("A record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists"). The DOC has complied with the requirements of the RTKL.

4. Archive and Handling Charges are not Permissible

The DOC estimates $6636.00 for "access" to files from its archive vendor and "handling charges" of $1044 and submitted a pricing schedule from Iron Mountain, a storage company. It does not more fully define handling charges. DOC claims this surcharge as necessarily incurred cost, but was not mentioned in its original response to Mr. Wright. DOC submitted a "Records Management Program Pricing Schedule" from

Iron Mountain that has a menu of services including "temporary removal of items from or return of items to storage." Retrieval service may be "regular" or "rush" and the charges are by the cubic foot.

It is the view of the Office of Open Records that this is not a proper charge to pass along to a requester in accordance with the RTLK, which specifies and enumerates the types of fees that may be charged and states clearly that, "[e]xcept as otherwise provided by statute, no other fees may be imposed unless the agency necessarily incurs costs for complying with the request, and such fees must be reasonable." The search and retrieval argument has previously and soundly addressed by Pennsylvania courts. In York Newspapers, Inc. v. City of York, 826 A.2d 41 (Pa. Cmwlth. 2003), the Court determined that it is not proper to charge overtime for an employee to search and retrieve documents, York Newspapers, Inc. v. City of York, 826 A.2d 41 (Pa. Cmwlth. 2003). Similarly so, it is therefore not appropriate to levy those fees, paying a third party for the same services. To do so, would circumvent the purpose of the RTKL and limit public access. Although *York* was decided under the previous RTKL, the new law is even more precise with respect to permissible charges.

5. The DOC Must Permit Inspection and Copying

The RTKL states: "Unless otherwise provided by law, a public record, legislative record or financial record shall be accessible for inspection and duplication in accordance with this act, 67 P.S. §701 (emphasis added). There is no requirement that Mr. Wright agree to incur an expense for archived documents when they are required to be accessible for inspection and copying. As previously decided by OOR *Zubey-Department of Environmental Protection,* AP 2009-0141, the OOR determined that an agency does have

an obligation under this law to photocopy and mail public records. However, here, the parties agreed that Mr. Wright would be permitted to bring his own copier or scanner, and therefore DOC must honor that agreement. Additionally, as outlined above, DOC cannot charge him for search and retrieval of documents, a fee not permitted by the RTKL or approved by the OOR, which holds the authority pursuant to the statute to set fees.

CONCLUSION

For the foregoing reasons, this appeal is **denied in part and granted in part.** The DOC shall provide Mr. Wright with access to the requested documents within 30 days and permit him to make copies using his own equipment. If Mr. Wright decides not to proceed in this manner, the estimated copying charges are reasonable and the DOC is permitted to require prepayment. The DOC is not required to waive its copying costs, nor is it required to convert paper documents into electronic records.

The parties are advised that this is a final determination. Within thirty (30) days of the mailing date of this determination, it may be appealed to the Commonwealth Court of Pennsylvania. In the event of an appeal for judicial review, all parties must be served with notice of the appeal. The Office of Open Records shall be served notice in accordance with Section 1301and have an opportunity to respond to any appeal for judicial review.

The parties are advised that this Final Determination will be posted on the Office of Open Records website at: http://openrecords.state.pa.us

FINAL DETERMINATION ISSUED ON: April 13, 2009

APPEALS OFFICER
Dena Lefkowitz, Esq.