



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

May 13, 2009

Theron R. Perez
Assistant Counsel
Pennsylvania Department of Corrections
Governor's Office of General Counsel
55 Utley Drive
Camp Hill, PA 17011

RE: *Docket No. 2009-174*

Dear Ms. Perez:

We are responding to your Motion for Reconsideration in the above-referenced matter.

This agency does not yet have a procedure for accepting or processing such a motion. In the absence of a procedure by which this office may entertain such a motion, and until such time as the OOR amends its Interim Guidelines or promulgates and finally adopts regulations providing for such a motion, we suggest that your agency provide the records to the requestor as directed, with an explanation of why some of the requested records cannot be provided or were redacted. The requestor would then have the choice to submit a new and separate Right-to-Know request for the withheld documents or the un-redacted version of the documents, which would trigger new response periods and appeals rights.

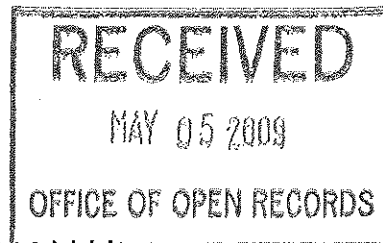
We are in the process of drafting proposed final regulations and hope to have them in the review process at the Independent Regulatory Review Commission by year's end.

Very truly yours,

A handwritten signature in black ink, appearing to read 'M V W' followed by a long horizontal stroke.

Corinna Vecsey Wilson
Chief Counsel

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
OFFICE OF CHIEF COUNSEL
55 UTLEY DRIVE
CAMP HILL, PA 17011
(717) 731-0444



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NUMBER OF PAGES, INCLUDING COVER SHEET: 13

HARD COPY TO FOLLOW: YES NO

DATE: May 5, 2009

FAX NUMBER: (717) 425-5343

URGENT: YES NO

NAME: Dena Lefkowitz, Esquire

MESSAGE:

Attached please find a copy of a Motion for Reconsideration. Thank you.

SENT BY: Theron Perez, Assistant Counsel

FAX NUMBER: (717) 975-2217
E mail: tperez@state.pa.us



PENNSYLVANIA DEPARTMENT OF CORRECTIONS
GOVERNOR'S OFFICE OF GENERAL COUNSEL
55 UTLEY DRIVE
CAMP HILL, PENNSYLVANIA 17011
(717) 731-0444

May 5, 2009

Dena Lefkowitz, Esquire
Appeals Officer
Pennsylvania Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

RE: *Docket No. 2009-174*

Dear Ms. Lefkowitz:

Enclosed please find a Motion for Reconsideration in the above-referenced matter. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Theron R. Perez', written over a printed name and title.

Theron R. Perez
Assistant Counsel

Enclosures

cc: Paul Wright

Department the opportunity to file a final response granting and/or denying access to the requested records.

I. Upon disposition of an appeal of an agency's interim response, the agency should be permitted to provide a final agency response.

On February 9, 2009, the Department received a request, (DOC RTKL # 120-09, attached hereto as Exhibit A) from the Complainant for various documents containing details about any claims, settlements or verdicts against State of Pennsylvania for \$1000.00 or more involving the Department, its employees or agents, or any of its facilities from January 1, 2001 through December 31, 2008. Exhibit A, p. 1. On February 17, 2009, the Department provided an interim response to the Complainant by letter stating that the request required pre-payment before it would be processed any further. (See Response Letter for Request # 120-09, attached hereto as Exhibit B). The Complainant filed an appeal (Attached hereto as Exhibit C) with OOR contesting, *inter alia*, the fees implicated by the interim response. OOR issued a final determination by mail in this matter on April 20, 2009 and directed that the Department provide the Complainant with access to requested documents within 30 days. See Final Determination, p. 8.

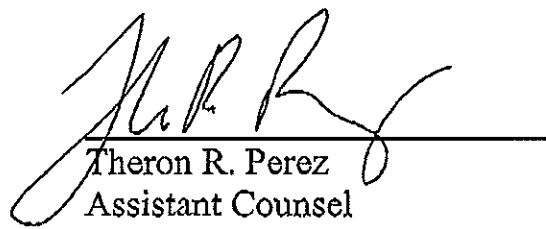
The law permits an agency to provide an interim response to a requester in order to obtain statutorily applicable fees. 65 P.S. § 67.902(a)(6). The Department's original response to the Complainant clearly stated that prepayment would be

required before his request would be processed further. *See* Exhibit B; 65 P.S. § 67.902(a)(6); 65 P.S. § 67.1307(h). No determination was ever made with regard to whether the specific records implicated by the request were granted or denied under the law.

OOR issued a final determination by mail in this matter on April 20, 2009 and directed that the Department provide the Complainant with access to "requested" documents within 30 days. *See* Final Response, p. 8. Accordingly, the Department was not afforded an opportunity to review the documents implicated by the request and provide a final agency decision to grant or deny the requested records. 65 P.S. § 67.903. Upon further review of the documents implicated by the request, it has become apparent that some of the requested records are not accessible under the law.

Accordingly, the Department respectfully requests that the Office of Open Records reconsider its Final Determination and amend it to allow the Department the opportunity to immediately file a final agency response.

Respectfully submitted,



Theron R. Perez
Assistant Counsel
Department of Corrections
55 Utley Drive
Camp Hill, PA 17011
(717) 731-0444

PRISON LEGAL NEWS

Dedicated to Protecting Human Rights

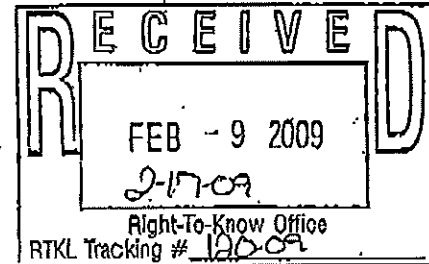
P.O. Box 2420, West Brattleboro, VT 05303 — 802-257-1342

www.prisonlegalnews.org

pwright@prisonlegalnews.org

February 6, 2009

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



RE: Claims, Settlements, and Verdicts Records Request

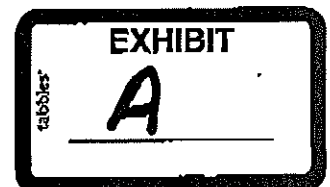
Dear Mr. Filkosky:

This is a request for documents pursuant to the Pennsylvania's "Right-to-Know Law," Act of June 21, 1957, P.L. 390, *as amended*, 65 P.S. §§ 66.1 - 66.9. I am requesting on behalf of *Prison Legal News* 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.

I request that the documents responsive to my request be provided in electronic format. Each responsive document should be one PDF file, as opposed to each page of the document being a separate file. Each file should then be placed on a CD or DVD and mailed to me at the address above. For any documents you claim are exempt from disclosure, please provide a privilege log including the type/title of document withheld, the length of the document, its date, and the specific statutory exemption claimed as the basis for the non-disclosure. Please inform me of the administrative appeal options available in the event any part of this request is denied (i.e., to whom and where I should appeal.) I am requesting the disclosure of any non-exempt portions of the documents I am seeking.

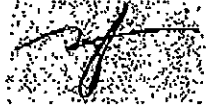
Finally, I am requesting a waiver of all fees associated with this request as the information being sought will further the advancement of public understanding of DOC operations. *Prison Legal News* is a non-profit media entity reporting on criminal justice news and issues. The information will not be used for commercial gain. A fee waiver is therefore appropriate



under 65 P.S. § 66.7(f)(2) (providing that agency may waive fees if "it is in the public interest to do so").

Thank you in advance for your attention to and cooperation in this matter. I look forward to your prompt response. If you have questions or require further information to process my request in a timely manner, please contact me by mail or e-mail. I prefer e-mail, as it is faster.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Wright", is written over a rectangular area of the document that has been heavily obscured by a dense pattern of small black dots, likely a scanning artifact or a redaction.

Paul Wright, Editor
Prison Legal News

**Pennsylvania Department of Corrections
Right-to-Know Office
55 Utley Drive
Camp Hill, PA 17011
(717) 731-0444**

February 17, 2009

Paul Wright
Prison Legal News
P.O. Box 2420
West Brattleboro, VT 05303

Re: RTKL #120-09
Department of Corrections Records Related to Claims, Settlements, and Verdicts

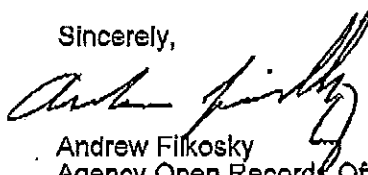
Dear Mr. Wright:

This letter acknowledges receipt by the Department of Corrections of your written request for records under the Pennsylvania Right-to-Know Law (RTKL). Your request was received by this office on February 9, 2009.

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); DC ADM-003, VI(E)(4)(d)(2). Your request implicates a rough estimate of at least 35,000 pages of material. The estimated cost of fulfilling your request is \$8,750.00 (\$.25 per page). Please remit this amount to the Department (DOC inmates may remit a cash slip to the business office with reference to the RTKL Request Number listed above. Others should remit a check to this office. Checks should be made out to the Commonwealth of Pennsylvania and also reference the RTKL Request Number listed above.) If the amount is not remitted within thirty days of the date that you received this letter, your request will be considered denied for failure to supply payment. Once payment is received the Department will process your request further. You will be reimbursed if the actual cost of production is less than the estimated cost. You will be required to pay the difference prior to accessing the request records if the actual cost exceeds the estimated cost.

Feel free to contact me with any questions.

Sincerely,


Andrew Filkosky
Agency Open Records Officer

Enclosure

cc: File



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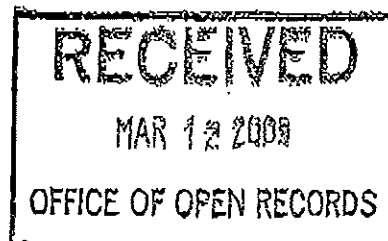
P.O. Box 2420, West Brattleboro, VT 05303—802-257-1342

www.prisonlegalnews.org

pwright@prisonlegalnews.org

March 7, 2008

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



Re: RTKL Request #120-09 and #155-09
Appeal of Denial by PDOC

Dear Mr. Mutchler:

This is an appeal of the denial of the above referenced Right to Know Law (RTKL) request for public records from the Pennsylvania Department of Corrections (PDOC). I will lay out the facts underlying my request and my grounds for appeal below.

FACTS

On February 6, 2009, I submitted a RTKL request in my capacity as editor of *Prison Legal News* (PLN) addressed to Mr. Andrew J. Filkosky, PDOC Open Records Officer, requesting the following documents:

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.

See Exhibit 1, Initial Request at 1 (2/6/09).



I also requested that the records be provided in electronic format, specifically as .pdf files on CD or DVD, and that PLN receive a fee waiver because the documents sought are in the public interest. *Ibid.* at 1-2. This request was received by the PDOC on February 9, 2009, and assigned tracking number 120-09 on February 17, *Ibid.* at 1.

On February 17, 2009, Mr. Filkosky responded to my request in writing. He estimated that my request "implicates a rough estimate of at least 35,000 pages of materials." *See Exhibit 2, Initial Response at 1 (2/17/09).* Mr. Filkosky requested that I remit a check in the amount of \$8,750.00 to process my request. *Ibid.*

I replied to Mr. Filkosky in a letter dated February 20, 2009, received by him on February 23 and assigned tracking number 155-09. *See Exhibit 3, Initial Reply at 1 (2/20/09).* In my reply, I pointed out that he had failed to address my request for a fee waiver or that the documents sought be disclosed in electronic format. *Ibid.* I provided ample legal grounds for both requests. *Ibid.* I also requested that the PDOC provide a spreadsheet "listing all of the claims and verdicts paid in the amount and during the time period as set out in my original request so that I may further narrow my request for documents." *Ibid.* at 1-2. My goal was to reduce the breadth of my request in an effort to minimize the expensive for the documents I seek.

On February 27, 2009, Mr. Filkosky mailed me a letter denying the above requests. *See Exhibit 4, Supplemental Response (2/27/09).* He summarily denied my request for a fee waiver without addressing any of the grounds set forth in my Initial Reply. *Ibid.* Similarly, he denied my request for records in electronic format by stating that the records sought do not exist in electronic format. *Ibid.* Mr. Filkosky also denied my request for the above-described spreadsheet by stating that such records do not currently exist. *Ibid.* Last, I was informed that I could appeal the decision to you within 15 business days. *Ibid.* This appeal letter timely follows.

GROUND FOR APPEAL

I note initially that the RTKL requires a requester to state in an appeal the reason he or she believes the records sought are public records in addition to addressing the reasons for denial of the records. *See 65 P.S. § 66.3-5(a).* Mr. Filkosky did not deny my request because the records sought are not "public records" within the meaning of the RTKL. *See 65 P.S. § 67.102* (defining public record as, among other things, any "financial record" of an agency); *Tribune-Review Pub. Co. v. Westmoreland County Housing Auth.*, 574 Pa. 661, 833 A.2d 112 (2003) (agreement settling litigation between an agency and a third party is a public financial record notwithstanding a confidentiality agreement contained therein). Thus, I can only assume that the PDOC has determined that I properly sought public records. I continue to believe so based on my reading of the RTKL. Therefore, I will address below the reasons why I believe Mr. Filkosky erred in his denial of my records request.

1. Overestimate of Records Sought

The RTKL provides in pertinent part that, “[u]pon receipt of a written request for access to a record, a Commonwealth agency shall make a **good faith effort** to determine if the record requested is a public record and to respond as promptly as possible under the circumstances existing at the time of the request” 65 P.S. § 66.3-3 (emphasis added). I simply do not believe that Mr. Filkosky’s estimate that my records request encompasses approximately 35,000 documents is reasonable under any definition of the word. Rather, I believe that Mr. Filkosky has overestimated the extent of documents responsive to my request in an effort to increase to cost of disclosure to a prohibitive level. Such conduct is inconsistent with both the spirit and letter of the RTKL.

I requested settlements and verdicts involving the PDOC, its facilities, employees or agents involving only \$1000 or more. I specially requested only those documents that disclose the facts underlying each such settlement or verdict (i.e., the tort claim or civil complaint), a copy of the document obligating the state to pay the complainant in each case (i.e., general release, settlement agreement, court order, etc.), and a copy of the check sent to each complainant. I have made identical requests to many other federal, state, and local correctional agencies in my capacity as PLN’s editor, and I have never received a disclosure estimate as burdensome as Mr. Filkosky’s. If he was somehow confused as to the records I actually sought, he should have contacted me for clarification rather than providing such a burdensome estimate. I offered as much in my initial request.

Based on the foregoing, I request that you reverse Mr. Filkosky’s estimate of the records responsive to my request and provide a new, reasonable estimate at your earliest convenience. If you have any question regarding the extent of documents sought, please do not hesitate to contact me at the email address above.

2. Cost Estimate

Mr. Filkosky estimated the cost of my initial request at \$8,750. The RTKL specifically provides that “[f]ees for duplication by photocopying, printing from electronic media or microfilm, copying onto electronic media, transmission by facsimile or other electronic means and other means of duplication **must be reasonable** and based on prevailing fees for comparable duplication services provided by local business entities.” 65 P.S. § 66.7(a) (emphasis added); *see also* 65 P.S. § 66.7(g). An estimate of nearly \$9,000 is not reasonable. Rather, the estimate seems to be a thinly veiled means of denial by making the cost of a records request prohibitively expensive. As explained in my Initial Request, PLN is a non-profit media organization and cannot afford the monetary output requested by Mr. Filkosky. Of course, had he made a more reasonable estimate of the documents requested and provided PLN with a fee waiver (addressed below), I would most likely not be in the position to challenge the current cost estimate. The fee is not broken down by cost. If this is solely for photocopying, we would ask that the records in question be scanned into electronic format. Agencies cannot charge for searches, only copying and duplication.

3. Denial of Fee Waiver

The RTKL specifically provides that “[a]n agency may waive the fees for duplication of a public record, including, but not limited to, when . . . the agency deems it is in the public interest to do so.” 66.7(f)(2). In both my Initial Request and Initial Reply (attached hereto as exhibits 1 and 3), I provided detailed reasons why the documents I have sought are in the public interest and should therefore be disclosed free of charge. No reason was given as to why the fee waiver would not be in the public interest in this case. In the interest of brevity, I will not repeat all the reasons discussed in my previous letters except to note that the United States District Court for the District of Columbia has found that documents identical to the ones sought in my Initial Request should have been provided free of charge under a fee waiver provision nearly identical to the RTKL provision. See *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17 (D.D.C. 2006). PLN should receive a fee waiver from the PDOC as well.

4. Denial of Records in Electronic Format

The RTKL specifically provides that “[a] public record shall be provided to a requester in the medium requested if the public record exists in that medium; otherwise, it shall be provided in the medium in which it exists.” 65 P.S. § 66.2(a). Mr. Filkosky denied my request for electronic records by stating that the records sought do not exist in electronic format. Pennsylvania law further provides that “[e]ach governmental agency in this Commonwealth shall determine whether and the extent to which it will create and retain electronic records and convert written records to electronic records. Executive agencies shall also comply with standards published by the Office of Administration.” 73 P.S. § 2260.501. In a state such as Pennsylvania that touts its efforts to streamline record keeping and interagency communication through the “Office of Enterprise Records Management”, I find it hard to believe that the PDOC does not keep at least some of the documents I sought in electronic format. In fact, federal courts have for a number of years required the electronic filing of court documents, I find it difficult to believe that not a single document I requested exists in electronic format. Moreover, PDOC’s failure to do so indicates an inability to conduct basic risk management if PDOC does not have any idea of where its liability actually lies with regard to the money it has paid out to settle litigation or been ordered to pay by the courts. I suspect that Mr. Filkosky’s response is just another means of denying my request for records. I request that you independently determine whether some or all of the records I requested exist in electronic format.

Moreover, Mr. Filkosky did not allow for an 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.

Thank you in advance for your attention to and cooperation in this important matter. I look forward to your prompt response. *See* 65 P.S. § 66.3-5(b). Please contact me via email if you have any questions or comments, as that is the most efficient means of communicating with me.

Sincerely,



Paul Wright, Editor
Prison Legal News