

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

PRISON LEGAL NEWS
2400 NW 80th Street
#148
Seattle, WA 98117

Plaintiff,

v.

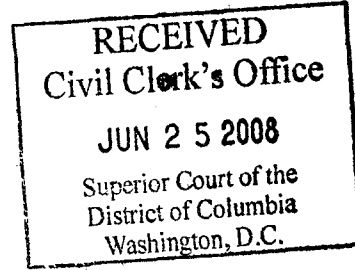
THE DISTRICT OF COLUMBIA

Serve: Adrian M. Fenty
Mayor of the District of Columbia
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Serve: Peter Nickles
Interim Attorney General
441 4th Street, NW
Washington, DC 20001

Defendant.

Civil Action No. 0004588 - 08



COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

[Freedom of Information Act, D.C. Code § 2-531, *et seq.*]

Introduction

Prison Legal News (PLN), a non-profit monthly publication, seeks an injunction to be issued compelling the District of Columbia Office of Attorney General (OAG) agency to provide full and complete responses to a January 7, 2008 request under the District of Columbia Freedom of Information Act (D.C. FOIA) without the charging of fees.

The request seeks disclosure of the initial claim or complaint and the verdict sheet, settlement and/or general release filed in each case where the District of Columbia Department

of Corrections paid more than \$1,000.00 in damages, attorney fees or sanctions from January 1, 2000 to December 31, 2007, excluding claims of lost or damaged inmate property and excluding car or vehicle accident-related claims under \$5,000. PLN also seeks a waiver of any fees associated with the request.

The request seeks production of the information in electronic format where available, as required to be maintained under D.C. Code §2-536(b).

The information is sought as a matter of public interest in the operations of the District of Columbia Department of Corrections.

Prison Legal News, as a representative of the news media, will disseminate the information received publicly and use the information to provide the public with a better understanding of how the District of Columbia's prison system is run and managed.

The Office of Attorney General has denied Prison Legal News's request for a waiver of duplication fees on the basis that it is not in the interest of the agency to waive copying costs. In its decision, OAG did not consider the public interest in granting Prison Legal News a waiver of fees. Under applicable law, Prison Legal News is eligible for a complete waiver of fees related to its request.

The Office of Attorney General has denied the request for information to be produced in electronic format despite the obligations under the District of Columbia Freedom of Information Act that certain enumerated records be maintained in such format. Production of the information in electronic format would eliminate copying expenses.

Prison Legal News has filed the instant complaint seeking an injunction to cause the disclosure of the requested information without the charging of fees.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to D.C. Code §2-537(a)(1) (D.C. FOIA) and §11-921 (civil jurisdiction).
2. Venue properly lies with this Court as the defendants are the District of Columbia Government and the actions forming the basis of the claim occurred principally within the District of Columbia and the agency records at issue are located in the District of Columbia.

PARTIES

3. PRISON LEGAL NEWS (PLN) is a § 501(c)(3) non-profit organization organized under the laws of Washington State, with its headquarters in the State of Washington.
4. The DISTRICT OF COLUMBIA is a municipal corporation, subject to suit, that runs and constitutes the local government of the District of Columbia.
5. The OFFICE OF ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA (OAG) is an agency within the executive branch of the District of Columbia government.

FACTUAL BACKGROUND

6. Plaintiff, Prison Legal News is a legal and political journal that reports on news and litigation involving detention facilities.
7. PLN has been publishing monthly since 1990 and has about 6,800 subscribers in all 50 states. PLN's subscribers include lawyers, journalists, judges, courts, public libraries and universities. The estimated actual readership is in the range of 58,000. PLN also maintains a website that receives around 85,000 visitors per month.
8. PLN, a § 501(c)(3) non-profit organization, is small and underfunded.

9. By letter dated January 7, 2008, PLN requested documents from the OAG pursuant to the D.C. FOIA for disclosure of “all claims, settlements, verdicts, judgments and jury awards paid out by the District of Columbia Dept. of Corrections from Jan. 1, 2000 to December 31, 2007, excluding claims of lost or damaged inmate property and excluding car or vehicle accident-related claims under \$5,000. This request encompasses claims and litigation filed by inmates, DC DOC contractor, visitors, DC DOC employees and any other persons or entities. We are also requesting records pertaining to the payment of attorney fee awards, sanctions and special master fees by the DC DOC.”
10. The PLN advised in its January 7, 2008 FOIA request that the OAG “Please note that we are not simply seeking a spreadsheet listing the amounts of such verdicts and settlements, although that would be helpful. Rather, we are requesting the claim, complaint or last amended complaint filed in each such case or claim, as well as the settlement, release, judgment order and/or jury verdict form in each such case or claim, as applicable, that states the payout amount, case number and caption, parties, etc.”
11. The PLN further specified in its January 7, 2008 FOIA request “that all of the requested documents be provided in electronic format if they are available electronically.”
12. Pursuant to the January 7, 2008 FLOA submission, the PLN also requested “a waiver of any fees associated with this request pursuant to § 2-532(b), as we are a media publication and the requested records will be used to disseminate information for the benefit of the public as a matter of public interest. The federal district court for the District of Columbia has previously found that PLN was entitled to a waiver of all fees in connection with searching and producing documents that we requested from the Bureau

of Prisons under the federal FOIA. See: *Prison Legal News v. Lappin*, 436 F.Supp.2d 17 (D DC 2006).”

13. PLN is “a representative of the news media,” as that term is used in D.C. Code § 2-532(b-1)(2).
14. PLN will disseminate the information received for the benefit of the public as a matter of public interest through its print journal and on its website. Specifically, PLN will analyze how the D.C. Department of Corrections (D.C. DOC) spends public tax dollars and manages its prisons on behalf of the taxpayers, will publicize how the D.C. DOC is run and managed and how it handles its liability in lawsuits and claims, and will test how well D.C. DOC programs address inmate concerns.
15. Pursuant to the District of Columbia Freedom of Information Act, enumerated categories of documents and information “are specifically made public information,” including “[i]nformation in or taken from any account, voucher or contract dealing with the receipt or expenditure of public or other funds by public bodies.” D.C. Code §2-536(a)(6).
16. For documents created after November 1, 2001 within any category enumerated as “public information,” a public body or agency is required to make such information available by “electronic means” if it is not made available by the public body on the Internet. D.C. Code §2-536(b).
17. As above, the PLN FOIA request was specifically for the production of specified documents related to and underlying public expenditures. On February 13, 2008, instead of providing those documents, the OAG provided a spreadsheet print out listing certain partial data. The spreadsheet print out was entitled “CLD Prolaw DOC Settled Cases (1.1.2000 to 1/25/2008).”

18. The OAG indicated that “[d]ue to the overwhelming volume of documents on which the attached report is based ... we are not in a position to provide you with copies of all the underlying documents you have requested.” See February 13, 2008 letter from Thorn Pozen to Alex Friedmann.
19. The OAG did not represent or suggest that the underlying documents were unavailable. To the contrary, the OAG represented that “we are prepared to make the underlying documents responsive to your request. . . available to you for your inspection at our office.” Id.
20. The OAG informed PLN that they would be charged duplication fees of “25 cents per page for each page of a document you wish to take with you.” Id.
21. By statute, where a fee waiver is not issued, public bodies are expressly prohibited from charging any amount above the actual and direct costs for duplication. D.C. Code § 2-532(b-1)(4). The FOIA statute mandates that any fee schedule promulgated by regulation or otherwise “shall provide that . . . [o]nly the direct costs of . . . duplication . . . may be recovered.” Id.
22. The cost of twenty-five cents per page does not constitute the direct costs of duplication.
23. Twenty five cents per page exceeds the direct costs of duplication.
24. Twenty five cents per page exceeds the standard per page duplication costs at commercial copy service providers, such as Kinkos, whose ten cents per page charge even includes a fee component for profit.
25. On March 3, 2008, PLN responded to the OAG, informing the OAG FOIA Officer that PLN did want copies of the underlying documents. The PLN decreased any burden on the OAG by significantly narrowing its original request to just production of “the initial

claim or complaint and the verdict sheet, settlement and/or general release filed in each case where the District of Columbia paid more than 1,000.00 in damages, attorney fees or sanctions from January 1, 2000 to December 31, 2007.”

26. In its March 3, 2008 letter, PLN reiterated its request that documents be provided in electronic format where available. PLN informed the OAG that production of the documents in electronic format would reduce the burden on the OAG of responding to PLN’s request and would eliminate or minimize any duplication costs. The PLN reiterated its request that the OAG identify what portion of records requested was available in electronic format.
27. In its March 3, 2008 letter, PLN renewed its request for a fee waiver, explaining in detail its status as a § 501(c)(3) non-profit organization, its status as a representative of the news media, its ability to disseminate information to approximately 80,000 people per month, and its lack of commercial interest in the request. PLN explained, in detail, that the requested information was in the public interest, would shed light on the operations of the D.C. DOC and that dissemination of the information would provide the public with a better understanding of how the District of Columbia’s prison system is run and managed. PLN reiterated to the OAG that all information obtained through this request will be disseminated to the public as a matter of public interest. PLN also informed the OAG that the United States District Court for the District of Columbia previously found that PLN was entitled to a waiver of all fees under the Federal Freedom of Information Act in connection with searching and producing documents from the Bureau of Prisons similar to the documents requested from the OAG.

28. The OAG responded to PLN's March 3, 2008 letter in an E-mail dated March 4, 2008.

The OAG informed PLN that it does not maintain the underlying documents requested in electronic format and was therefore not in a position to provide the documents to PLN electronically.

29. In its March 4, 2008 E-mail, the OAG informed PLN that it considered PLN a member of the media and so could not charge for searching, reviewing and preparing the responsive documents.

30. However, the OAG's representative denied PLN's request for a waiver of duplication fees, stating, "I do not find it to be in the interest of the agency to waive copying costs here."

31. On March 25, 2008, by certified mail, PLN appealed the OAG's denial of fee waiver and refusal to provide documents in electronic format to the Mayor's Correspondence Unit, pursuant to the D.C. FOIA. Pursuant to the D.C. FOIA, PLN sent a copy of its appeal and supporting documents to Thorn Pozen, FOIA Officer for the OAG.

32. The D.C. FOIA requires the Mayor to communicate the determination of an appeal and the reasons therefore in writing within 10 days of the submission of such appeal. D.C. Official Code § 2-537(a).

33. PLN has not received any response to its FOIA appeal.

34. On May 1, 2008, by facsimile and certified mail, PLN sent follow up correspondence to the Mayor's Correspondence Unit, observing that the deadline for response was April 10, 2008 and had passed. PLN informed the Mayor's Correspondence Unit that if no response was received by May 7, 2008, it would exercise its right to judicial review thereafter pursuant to 1 DCMR § 412.10.

35. The Mayor's Correspondence Unit has to date not responded to PLN's March 25, 2008 appeal, nor has it responded to PLN's May 1, 2008 letter.
36. The D.C. FOIA requires its provisions to "be construed with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information." D.C. Official Code § 2-531.
37. The D.C. FOIA requires, *inter alia*, that records of information in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by public bodies, created on or after November 1, 2001, must be made available on the Internet or by other electronic means. D.C. Official Code § 2-536(b).
38. The OAG has stated that it does not maintain any of the underlying records requested by PLN in electronic format.
39. District of Columbia agencies, including the OAG, routinely fail to maintain as required by statute public information required to be published on the Internet or made available in electronic format.
40. The D.C. FOIA imposes a limitation of fees on requests made by a representative of the news media for records that are not sought for commercial use. D.C. Code § 2-532(b-1)(2).
41. The only fees that the agency may impose upon a representative of the news media are strictly limited to the actual and "direct" costs of duplication. D.C. Code § 2-532(b-1)(4).
42. The D.C. FOIA grants the right to a fee waiver, and provides that documents requested under the D.C. FOIA may be furnished without charge "where a public body determines that waiver or reduction of the fee is in the public interest because furnishing the

information can be considered as primarily benefiting the general public.” D.C. Code § 2-532(b).

43. The implementing regulations for the D.C. FOIA grant the right to a fee waiver, and provide that an agency may waive all or part of any fee when it is deemed to be either in the agency’s interest *or in the interest of the public*. 1 DCMR § 408.9 (emphasis added).
44. PLN satisfies this requirement as it will benefit the general public and contribute to the public’s understanding of the D.C. Department of Corrections operations and activities by analyzing and publishing the information obtained through this FOIA request in its print journal and on its website. The documents requested are sought for noncommercial purposes and this request is not primarily in the commercial interest of PLN.
45. In violation of its obligations under the D.C. FOIA, the OAG refused to consider the public interest in its decision to deny PLN’s request for a fee waiver.
46. By refusing to grant PLN’s request for a fee waiver and by refusing to provide the requested documents in electronic format the OAG has substantially denied PLN access to the documents.
47. By and through its failure to respond to PLN’s March 25, 2008 appeal, the Mayor’s Correspondence Unit has denied PLN’s appeal. 1 DCMR § 412.10.
48. The sole reason provided by both the OAG and the Mayor’s Office, which has opted to neither review nor respond to plaintiff’s appeal, for the denial of the fee waiver request is that the OAG does not think it is in the OAG’s interest to facilitate publication of information that is relevant to the operations of the Department of Corrections, including specifically the history of the DOC’s payments of taxpayer funds for misconduct.

49. Neither the OAG nor the Mayor's Office has represented, or denied the fee waiver request on the basis, that such waiver is not in the public interest. See D.C. Code §2-532(b).
50. PLN is adversely affected and injured by the OAG's improper refusal to grant a fee waiver to which PLN is entitled and, independently but as a related matter, by the refusal to provide documents in electronic format. The OAG's actions discourage and restrict PLN and other members of the public from obtaining public records from the District of Columbia government. Without the FOIA information PLN requested, PLN and the members of the public to which PLN disseminates information will not be able to effectively evaluate and understand how the D.C. DOC spends public tax dollars and manages its prisons on behalf of the taxpayers, and the operations and activities of the D.C. DOC. Further, without the requested information, PLN is unable to inform, educate and counsel the public regarding the same. Unless the Court grants the requested relief, PLN will continue to be adversely affected and injured by the OAG's failure to comply with D.C. FOIA as alleged herein.

RIGHT TO JUDICIAL REVIEW

51. The District of Columbia and OAG has failed to comply with plaintiff's request under the D.C. FOIA. The plaintiff's appeal is deemed to have been denied and plaintiff has the right to judicial review of this denial. D.C. Official Code § 2-537(a)(1).

COUNT ONE

(Failure to waive fees relating to plaintiff's request under the D.C. FOIA)

52. The preceding paragraphs numbered 1 through 50 are incorporated by reference as if set forth herein.

53. Plaintiff has properly filed a request to the District of Columbia Office of the Attorney General pursuant to the D.C. FOIA.
54. Plaintiff has properly requested a waiver of fees relating to its D.C. FOIA request.
55. Plaintiff satisfies the statutory and regulatory requirement for a waiver of fees under the D.C. FOIA.
56. In violation of the D.C. FOIA, the OAG and the Mayor's Office did not consider the public interest in its decision to deny plaintiff's request for a fee waiver.
57. At no time has either the OAG or the Mayor's Office denied the fee waiver on the purported basis that the plaintiff's request for a fee waiver was not in the public interest.
58. The District of Columbia and the OAG have improperly denied plaintiff's request for a fee waiver pursuant to the D.C. FOIA.

COUNT TWO

(Failure to maintain documents in electronic format pursuant to the D.C. FOIA)

59. The preceding paragraphs numbered 1 through 50 are incorporated by reference as if set forth herein.
60. Plaintiff has requested underlying documents regarding the payment of damages, attorney fees or sanctions, which are documents dealing with the expenditure of public or other funds by public bodies and also include final opinions and orders made in the adjudication of cases.
61. Pursuant to the D.C. FOIA, the District is required to make such records created on or after November 1, 2001 available on the Internet or by other electronic means. D.C. Code §2-536.

62. The District of Columbia, including the Office of the Attorney General, routinely fail to make available on the Internet or by electronic means the specific categories of public information enumerated in D.C. Code §2-536.
63. The purpose and effect of such requirement imposed upon public bodies and executive agencies is to eliminate or minimize the costs of production of requested information and to facilitate the dissemination of such public information to the public, including to plaintiff.
64. The OAG has failed to maintain these records in electronic format.
65. The OAG harms and continues to harm the interests of the public and of the plaintiff by this refusal or failure, by creating difficulties and obstacles upon, and imposing costs effectively eradicated under the statute, relating to the production of public information.

COUNT THREE
(Charges in Excess of Actual and *Direct* Costs of Duplication)

66. The preceding paragraphs numbered 1 through 50 are incorporated by reference as if set forth herein.
67. The District of Columbia and its OAG are strictly restricted in their ability to impose duplication fees, and such fees may only be imposed - - when no waiver is justified - - to the extent of actual and “**direct**” costs with duplication.
68. The D.C. FOIA statute expressly requires that “Any fee schedules adopted by the Mayor, an agency or a public body shall provide that . . . [o]nly the direct costs of . . . duplication . . . may be recovered.” D.C. Code §2-532 (b-1)(4).

69. The Office of the Mayor has promulgated regulations constituting a fee schedule for FOIA requests. Those regulations do not state, as required, that “only the direct costs of duplication may be recovered.” See 1 DCMR §408.1.
70. For charges not specifically itemized on the fee schedule, the Mayor’s regulations limit charges only to “the direct cost of the services or materials.” 1 DCMR §408.2.
71. However, the Mayor’s regulatory fee schedule provides that “copies by photocopy machines” shall be charged at “\$.25 per page” and does not provide, as required by statute, that only direct duplication costs should be charged. See 1 DCMR §408.1(c).
72. The charge of \$.25 per page is in excess of actual and direct costs for duplication.
73. The standard market rate for duplication, were one to resort to a commercial service is approximately \$.07 per page, and that is a charge which encompasses some significant percentage for profit.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff requests that this Honorable Court:

- A. Issue a declaratory judgment that the defendant is in violation of the D.C. FOIA;
- B. Issue a declaratory judgment that defendant’s denial of the fee waiver request is unlawful;
- C. Order the defendant to grant the requested fee waiver;
- D. Order the defendant to comply with the D.C. FOIA and make all records within categories enumerated in D.C. Code §2-536 available on the Internet or by electronic means, as required by statute;
- E. Enter a prohibitory injunction enjoining the District of Columbia from arbitrarily charging twenty-five cents per page for duplication and mandating that the

District of Columbia charge only the actual and direct costs of duplication,
specifically the cost of paper and toner, for each page printed;

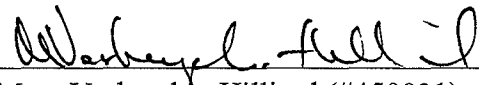
F. Order the defendant to produce the requested records, without the charging of
fees;

G. Award reasonable attorneys fees and costs pursuant to D.C. Code §2-537(c); and

H. Grant such further relief as the Court may deem just and proper.

June 25, 2008

Respectfully submitted,



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