



U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

JUL 28 2008

E.J. Hurst, Esq.  
PMB No. 124  
Severna Park, MD 21146

Re: Appeal No. 05-2411  
Request No. 2005-03244  
JGM:SRO

Dear Mr. Hurst:

You appealed from the fee waiver and fee status determinations made by the Western Regional Office of the Federal Bureau of Prisons (BOP) on your request for access to fourteen enumerated items pertaining to the Federal Correctional Complex in Victorville, California. I regret the substantial delay in responding to your appeal.

The statutory standard for evaluating fee waiver requests provides that fees shall be waived or reduced "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 U.S.C. § 552(a)(4)(A)(iii). In determining whether you have satisfied this statutory standard, I considered the six factors set out in the Department of Justice regulation that puts this statutory standard into effect. See 28 C.F.R. § 16.11(k) (2007). The first four of these factors concern the "public interest" requirement; the fifth and six factors concern whether your interest in the records is primarily commercial.

On the basis of all of the information available to me, I have concluded that your request for a waiver of fees was properly denied. Although it is not evident that you have an overriding commercial interest in the records, and the records pertain at least in part to the operations or activities of the government, you have failed to satisfy other relevant factors.

To qualify for a fee waiver, you must make an adequate showing that release of the information to you is in the public interest -- fee waiver factors one through four. See Oglesby v. Dep't of the Army, 920 F.2d 57, 66 n.11 (D.C. Cir. 1990). You have not done so. Your stated purpose for seeking these records is to shed light on alleged improper uses of force by BOP personnel and on alleged deficient medical, psychological and other care given to the inmates. You cite frequent leadership changes at Victorville and the unsuitability of the FCI Medium II facility for the housing of high security inmates as possible aggravating factors in such alleged mistreatment of the inmates. Please be advised that the releasable portions of the requested records would do very little to significantly -- as required by factor four -- enlighten the public on the improprieties alleged in your request. I note that out of the fourteen categories of records you requested, it appears that only items eight through ten are likely to be releasable to you. These records pertain to the names, ranks, duty stations, qualifications, and monthly reports of

Victorville's medical staff. Such records would shed little light on the misconduct suggested by you in your request.

Additionally, I note that the improprieties alleged in your request are entirely speculative. You have provided no evidence of actual misconduct by BOP personnel. For instance, you state that it is "unknown" whether certain cell extractions were justified. You also mentioned well known instances of misconduct by military personnel at the Abu Ghraib prison in Iraq, and you stated that the public is entitled to know whether similar conduct is occurring in BOP facilities, but you failed to provide any evidence that events at Abu Ghraib lend support to your supposition that similar misconduct has occurred at Victorville. You also stated that "direct evidence" supports your claims of BOP abuses, but you failed to include any such evidence in your request. Speculative or conclusory allegations of agency wrongdoing are not sufficient to demonstrate that records sought under the Freedom of Information Act are of sufficient public interest to qualify for a fee waiver. See AFGE v. U.S. Dep't of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986) (finding allegations of malfeasance to be too ephemeral to warrant waiver of fees without further evidence that informative material will be found), aff'd on other grounds, 907 F.2d 203 (D.C. Cir. 1990); cf. NARA v. Favish, 541 U.S. 157, 174 (holding, in the context of Exemption 7(C)'s closely related public interest balancing test, that where the "public interest" asserted is to show negligence or improper performance of the agency officials' duties, "the requester must establish more than a bare suspicion in order to obtain disclosure"), reh'g denied, 541 U.S. 1057 (2004).

Furthermore, the fee waiver regulations require that you have both the intent and ability to disseminate the requested information to the public. While you may have the intent to disseminate the requested information, you have failed to demonstrate the ability to do so. Your assertions that you regularly contribute to certain internet listserves and blogs such as FedCURE and BOP Watch, and your statement that you make regular filings in federal court are not sufficient for this purpose. This alone is a sufficient basis for denying a fee waiver request. See Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988). Accordingly, I am denying the fee waiver portion of your appeal.

You also appealed from BOP's determination that you do not qualify as a "representative of the news media" for fee purposes. On the basis of a review of all of the information available to me, I have concluded that BOP properly determined that you do not qualify to be categorized as a "representative of the news media" for fee purposes.


By definition, a "representative of the news media" is one who gathers "news for an entity that is organized and operated to publish or broadcast news." 28 C.F.R. § 16.11(b)(6) (Department of Justice FOIA regulation encompassing definitions). You have stated your general intent is to "disseminate" the requested information through your "pending" Maryland law office website and through another website that you created, and you also assert that you have a pattern of past publication on electronic news outlets, including FedCURE and BOP Watch. Yet, you have not provided any information to support the proposition that either of these entities are "organized and operated to publish or broadcast news." See id. Nor have you

provided any evidence of journalistic credentials or that you have used or will use your editorial skills "to turn the raw materials [received] into a distinct work" to be distributed to an audience. See Nat'l Sec. Archive v. DOD, 880 F.2d 1381, 1387 (D.C. Cir. 1989). You appear to be an information middleman or vendor, which is insufficient for you to be classified as a "representative of the news media." See Judicial Watch, Inc. v. U.S. Dep't of Justice, 185 F. Supp. 2d 54, 59 (concluding that information vendors and middlemen not organized to publish or broadcast news do not qualify for media fee status). Accordingly, I am denying the fee status portion of your appeal.

Please be advised that BOP has agreed to conduct two hours of search and to release to you the 100 pages to which you are entitled without charge. Because you have requested a fee waiver, you are not presumed to be willing to pay any fees. Accordingly, you should inform BOP of your willingness to pay all or a portion of the estimated fees associated with your request (see BOP's letter to you dated May 28, 2005) if you wish to pursue the remainder of this request. If you do not contact BOP about this matter, its processing of your request will be limited to the first two hours of search and the first 100 releasable pages of records.

If you are dissatisfied with my action on your appeal, you may file a lawsuit in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in black ink, appearing to read "Janice Galli McLeod". The signature is written in a cursive, flowing style.

Janice Galli McLeod  
Associate Director