

STATE OF INDIANA )  
 ) ss:  
COUNTY OF MARION )

IN THE MARION CIRCUIT COURT  
CAUSE NO.: 49C01-1501-PL-003142

A. KATHERINE TOOMEY )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
INDIANA DEPARTMENT OF )  
CORRECTIONS, )  
 )  
Defendant. )

**FILED**  
223 JUN 12 2019  
*Myra C. Eldridge*  
CLERK OF THE MARION CIRCUIT COURT

**ORDER FOR PLAINTIFF'S FEE PETITION**

This matter is before the Court on Plaintiff (“Toomey”) Petitions for Fees. The Defendant is the Indiana Department of Correction (“The Department”). The Court held a hearing with witness testimony on February 21, 2019. Toomey without objection was granting until March 4, 2019 to submit their supplemental fee petition. The Court took the matter under advisement starting with March 4<sup>th</sup>. Both Toomey and the Department waived the 90 days to issue a ruling. The Court, having read the parties’ pleadings and having heard witness testimony now issues the following order:

**PROCEDURAL HISTORY**

1. On January 30, 2015, Toomey filed suit, generally alleging that the Department refused to provide her public records containing basic information regarding the drugs it maintains to carry out executions by lethal injection. A week later, she filed an amended complaint. The Department filed its answer on July 1, 2015. On April 18, 2016, Toomey sought summary judgment. On June 6, 2016, the Department filed its cross-motion for summary judgment. The Court held a hearing on August 4, 2016, and on October 24,

2016, it entered summary judgment for Toomey and against the Department, leaving only the question of Toomey's attorney fees as provided in the Access to Public Records Act (APRA), Ind. Code § 5-14-3-9(i).

2. The Order required the Department to "provide to the plaintiff all public records in its possession, including 'product packaging' that identify the manufacturers and vendors of pharmaceuticals used in the lethal injection process within 30 days of this order." The Court scheduled a hearing on fees for December 6, 2016.
3. On November 22, 2016, the Department filed a notice of appeal and asked the Court to stay execution of judgment without bond. It did not seek certification of the judgment as final under Ind. Trial Rule 54(B) or seek a discretionary interlocutory appeal under Appellate Rule 14(B).
4. On December 1, 2016, the Court granted the stay while the appeal was pending "or the Indiana Court of Appeals dismiss[es] the appeal for lack of a final judgment." On January 6, 2017, the Court of Appeals dismissed the appeal. On April 27, 2017, the Supreme Court denied the Department's petition seeking transfer of the dismissal.
5. On May 4, 2017, Toomey asked this Court to schedule the hearing on attorney fees as provided by APRA. The next day the Department objected, pointing to a newly enacted Statute at Ind. Code § 35-38-6-1(e)-(f) ("Statute").
6. On June 16, 2017, the Department filed a motion to modify the October 2016 judgment in light of the Statute's provisions. The parties thereafter engaged in discovery. On February 22, 2018, Toomey filed her response, accompanied by documents she had obtained during discovery under a confidentiality agreement.

7. On May 14, the Department filed its reply. The next day the Court held a hearing on whether the documents submitted with Toomey's response should be publicly accessible.
8. On July 12, 2018, the Court issued its ruling that the unredacted documents should remain under seal. On September 20, 2018, the parties appeared by counsel for a hearing on the Department's motion to modify the summary judgment Order.

### **FACTUAL BACKGROUND**

9. On May 29, 2014, Toomey requested under APRA that the Department provide public records in its possession concerning drugs that the Department had purchased, maintained, intended, or considered for use in carrying out executions. *See* Ind. Code §§ 5-14-3-1-1 to -10 (APRA).
10. The Department refused to produce any documents. As it later did in this Court, the Department first claimed that product packaging is not a public record under APRA. Second, it asserted that Ind. Code § 35-38-6-6 exempted documents that would identify persons who assisted in an execution. Third, it argued that 210 Ind. Admin. Code 1-6-2(3)(C) exempted documents because the information might result in physical harm to another person. Fourth, it contended that Ind. Code § 5-14-3-4(b)(8) exempted certain records because they would jeopardize a security system.
11. On July 18, 2014, Toomey filed a formal complaint with the Office of the Public Access Counselor challenging the Department's refusal to provide any documents. After receiving a copy of the complaint, the Department produced some responsive documents. The produced documents responded to Ms. Toomey's request 8 above.

12. On August 19, 2014, the Public Access Counselor rejected every one of the Department's grounds for withholding information, concluding the Department had violated APRA. On August 27, Toomey wrote the Department, asking the Department to produce the rest of the documents and pointing out that the produced correspondence was incomplete, including cut-off e-mails and missing attachments. The Department never responded.
13. In October 2015, the Department produced a second limited set of documents. This set included documents the Department characterized as "purchase orders" and invoices for execution drugs and a facility directive for the carrying out of death sentences.
14. After the 30(B)(6) deposition, the Department produced a fourth set of documents. This set included two logs, one for items held for executions and one for items held for training. Counsel's cover letter stated, "I believe the Department of Correction has produced all documents that are responsive to Ms. Toomey's request, either in redacted form or with the exception of the product packaging." The Department continues to withhold, at a minimum, records identifying the manufacturers and vendors of the drugs it uses in executions and the labels on the vials containing those drugs.
15. In April 2016 Ms. Toomey sought summary judgment. On June 23, 2016, the Department's Director of Legislative Services sent an e-mail to the Governor's Policy Director for Public Safety attaching a document titled "2017 Legislative Ideas." Among the ideas presented to the Governor was a proposed bill that would become the Statute.
16. On October 24, 2016, the Court issued an order granting Toomey's Motion for Summary Judgment and denying the Department's Cross-Motion for Summary Judgment. The Court concluded, among other things, that the Department was required to provide

Toomey with documents identifying the manufacturers and vendors of the drugs that the Department uses in executions.

17. On April 18, 2017, the Department's deputy commissioner e-mailed the Governor's legislative chief, saying, "[Name redacted] – I spoke with [name of Department's legislative services director redacted] about this. I believe these [sic] version is substantially similar to the earlier draft, and should be helpful in resolving the Toomey case, and serve the other purposes. I have no recommendations [sic] to make to it."
18. The language sent to the Governor's office found its way into a bill in the early hours of April 21, the last day of the 2017 session. The conference committee, without public hearing or notice, added the language in the final version of House Bill 1001, now Public Law 217-2017. That bill was the biennial budget. It was titled "An Act to amend the Indiana Code concerning state offices and administration and to make an appropriation."
19. On April 21, 2017, at approximately 2:00 a.m., an amendment was posted to House Bill 1001, which added Section 161 to the bill.
20. Section 158 of the Budget Bill added two subsections to the chapter on execution of death sentence in the Indiana Code:

(e) The department of correction may make and enter into a contract with an outsourcing facility, a wholesale drug distributor (as defined in IC 25-26-14-12), a pharmacy (as defined in IC 25-26-13-2), or a pharmacist (as defined in IC 25-26-13-2) for the issuance or compounding of a lethal substance necessary to carry out an execution by lethal injection. A lethal substance provided to the department of correction

under this subsection may be used only for the purpose of carrying out an execution by lethal injection ...

A pharmacist, a pharmacy, a wholesale drug distributor, or an outsourcing facility that provides a lethal substance to the department of correction under this subsection shall label the lethal substance with the name of the lethal substance, its dosage, a projected expiration date, and a statement that the lethal substance shall be used only by the department of correction for the purpose of carrying out an execution by lethal injection.

(f) The following are confidential, are not subject to discovery, and may not be introduced as evidence in any civil or criminal proceeding:

(1) The identity of a person described in subsection (e) that enters into a contract with the department of correction under subsection (e) for the issuance or compounding of lethal substances necessary to carry out an execution by lethal injection.

(2) The identity of an officer, an employee, or a contractor of a person described in subdivision (1).

(3) The identity of a person contracted by a person described in subdivision (1) to obtain equipment or a substance to

facilitate the compounding of a lethal substance described in subsection (e) ...

This subsection applies retroactively to any request for information, discovery request, or proceeding, no matter when made or initiated. Ind. Code § 35-38-6-1(e)-(f). These subsections constitute the Statute.

21. The Department filed its Motion to Modify the Summary Judgment Order on June 16, 2017, arguing that Indiana Code section 35-38-6-1, as amended and retroactively applied, designates as confidential the information sought by Toomey in the Complaint. The Department further argued that because the law had been changed since the Court issued its summary judgment in a manner that affects the substance of the order, that order should be modified to comply with the current law concerning the confidentiality of execution drug suppliers and manufacturers.
22. On February 22, 2018, Toomey filed her Response Opposing the Department's Motion to Modify the Judgment, in which she (1) raised four constitutional challenges to the Statute, (2) argued that the items sought in the Complaint were not covered by the Statute, and (3) argued that modification of the summary judgment order was not proper under the Indiana Trial Rules.
23. The Department filed a Reply Brief in support of its Motion to Modify on May 14, 2018, addressing each of the challenges raised in Toomey's

response. The Court heard oral argument from both parties on September 20, 2018.

24. On November 29, 2018, the Court denied the Department's Motion to Modify this Court's October 24, 2016 Summary Judgment Order.
25. After an agreed Continuance, the Court heard evidence and testimony on Toomey's Fee Petition Pursuant to I.C. 5-14-3-9 on February 21, 2019.

### **DISCUSSION**

26. The Court carefully examined Toomey's witnesses' testimony to judge their credibility and finds those witnesses testimony at the February 21, 2019 hearing credible. The Court notes the Department did not call any witnesses to testify at the February 21, 2019 hearing on Toomey's Fee Petition.
27. In addition, the Court has carefully reviewed all filings regarding Toomey's Fee Petition including the Department's Response as well as Toomey's Supplemental Fee Petition filed March 4, 2019 that was without objection.
28. Toomey submitted her initial fee petition on November 23, 2016, requesting an award of attorney fees incurred as of that date. The two subsequent fee petitions were following the Court's denial of the Department's Motion to Modify this Court's Summary Judgment Order dated November 29, 2018.
29. The Court has carefully considered I.C. 5-14-3-9(i), "in any action filed under this section, a court shall award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if:  
(1) the plaintiff substantially prevails; or (2) the defendant substantially

prevails and the court finds the action was frivolous or vexatious”. The Court has researched related Indiana Case Law.

30. In fact, I.C. 5-14-3-9(i), “[t]he APRA mandates an award of attorney fees to a plaintiff who ‘substantially prevails’ if that party has first sought an advisory opinion from the public access counselor.” *Shephard Props. Co. v. Int’l Union of Painters & Allied Trades*, 972 N.E. 2d 845, 852 (Ind. 2012) (emphasis added); *see also Indianapolis Newspapers v. Ind. State Lottery Commission*, 739 N.E.2d 144, 156 (Ind. Ct. App. 2000) (finding and award of attorney fees is mandatory when the requirements of the statute or met).
31. In this case Toomey did first seek an advisory opinion from the Indiana Public Access Counselor and prevailed. Toomey prevailed on the Court’s Summary Judgment Order dated October 24, 2016 as well as the Court’s Order Denying the Department’s Motion to Modify Summary Judgment dated November 29, 2018.
32. The Department argues that Toomey did not prevail and had an unsuccessful attempt in 2018 to force the public disclosure of e-mails and legislative materials.
33. If the Department had not gone to the General Assembly without knowledge to Toomey or the Court to get a retroactive statute to essentially vacate this Court’s Order for Summary Judgment dated October 24, 2016 in favor of Toomey and file an improper appeal to the Indiana Court of Appeals and the Indiana Supreme Court to prolong the Attorney Fee hearing, then Toomey

would not have needed to file its pleading to force the public disclosure of e-mails and legislative materials.

34. The Court finds the Department's argument fails. As such, the Court finds that Toomey substantially prevailed for the Court to award reasonable attorney fees, court costs, and other reasonable expenses of litigation.

35. The Court now moves to Rule 1.5(A) of the Indiana Rules of Professional Conduct and relevant Indiana Case Law. The Court has carefully reviewed all elements of this rule and the testimony of Toomey's witnesses as well as all of Toomey's exhibits. The Department failed to present any witness testimony or exhibits on their behalf at the evidentiary hearing. The Department only cross examined Toomey's witnesses and gave opening and closing arguments.

36. The Court notes at the evidentiary hearing that the Department stated it credits Toomey's attorneys on their billing statements, and the Court concurs. Furthermore, at the evidentiary hearing the Department did not state specific issues or objections to Toomey's billings accuracy.

37. The Department at the February 21, 2019 witness testimony hearing did object to the pre-judgment interest Toomey requested and the travel expenses, hourly rates of both firms representing Toomey.

38. The Department argued in closing a fair fee for Toomey was in the range of \$325,000 to \$375,000.

39. Toomey, the Plaintiff, is a partner at the Washington D.C. law firm Lewis Baach Kaufmann Middlemiss PLLC ("Lewis Baach"). Toomey was

represented by Lewis Baach and the Indianapolis law firm of Plews Shadley Racher & Braun LLP (“Plews Shadley”).

40. Toomey is an attorney and chose to use her law firm she is a partner at in Washington D.C. for the APRA request. This is different than a non-attorney choosing to retain expensive counsel outside of the state of Indiana. Not to mention a simple APRA request turned into major litigation given the Department’s handling of this case.
41. The Department’s argument regarding the Lewis Baach’s unnecessarily expensive rates fails.
42. Plews Shadley was hired in 2014 as local counsel and reviewed everything. Plews Shadley did not do the depositions or do oral argument for the initial Summary Judgment. After the Departments Motion to Modify the Summary Judgment Plews Shadley became the lead counsel.
43. Lewis Baach attorney Jeff Robinson assisted Toomey all of her APRA requests. He was experienced with lethal injections. It was not unreasonable for Toomey to retain him. He as was the attorney in Toomey’s firm that drafted the Complaint in the Marion Circuit Court and conducted the oral argument for the Department’s Motion for Summary Judgment which Toomey prevailed.
44. Attorney Robinson helped to prepare the initial fee request for Toomey’s request for attorney fees that the Court set for a hearing in the Order Denying the Department’s Motion for Summary Judgment.

45. Attorney Robinson took a back seat and was not active once the Department filed the appeal and matters thereafter. He was not experienced in appellate law or constitutional arguments.
46. The Court notes that it required Attorney Robinson to attend the evidentiary hearing on Toomey's Fee Petition in Indianapolis. The Court has broad discretion in awarding attorney fees. The Court wanted to make sure the Court could properly judge his credibility in person instead of a telephonic appearance given the amount of Attorney fees being requested along with his hourly rate as a Washington D.C. attorney on this case.
47. Toomey was an attorney and partner in Washington D.C. at the firm of Lewis Baach when she did the initial APRA request to the Department regarding the lethal injections in Indiana.
48. The Department argues that the hourly rates of the Lewis Baach firm are not at the local rate of Indianapolis and suggests their rates are inflated. The Department further argues this Court should follow the "Ken Faulk" of the ACLU rate of the Indiana Southern District, Federal Court.
49. Ken Faulk is an attorney for the ACLU a non-for-profit organization. Toomey is an attorney for a private law firm in Washington D.C. from the start of her initial APRA request. There is no "Ken Faulk" rule in the Indiana state case law.
50. The Department also argues that the travel expenses of Lewis Baach should not be granted by the Court.

51. The Department only gave oral argument and did not have any witnesses for testimony regarding its argument objecting to the hourly rates and travel expenses. Toomey on the other hand did present testimony for the hourly rates of both firms representing Toomey and the travel expenses.
52. Toomey retaining her firm with the Washington D.C. hourly rates and the travel expenses are reasonable given the history of this case and the relationship Toomey had with her firm at the start of this APRA request.
53. Toomey presented witness testimony of the reasonableness of Plews Shadley's hourly rates as reasonable, and the Court found the testimony credible.
54. The Department objects to Toomey's request of pre-judgment interest. The Court is not persuaded by the Department's sovereign immunity argument. The Court agrees with Toomey that sovereign immunity does not apply to an APRA request.
55. However, the Court has carefully considered Toomey's request for pre-judgment interest and the related case law Toomey presented.
56. This case is regarding an APRA case that went in a very complicated direction the Department created given the procedural history.
57. Toomey filed a Petition for Fees pursuant to I.C.5-14-3-9. Toomey argues that pre-judgment interest is a request for additional damages or expenses. The cases Toomey has cited to the Court are not applicable for an APRA request under I.C. 5-14-3-9.

58. The cases Toomey has presented to the Court are regarding damages and not attorney fees with a pre-judgment interest award on attorney fees. The APRA requests have a specific statute giving the Court how to handle attorney fees, court costs and other reasonable expenses of litigation.
59. I.C. 5-14-3-9 does specifically states an award of attorney fees, but it does not specifically state if attorney fees are awarded then pre-judgment interest can be awarded.
60. The Court does not find that pre-judgment interest under the APRA statute is an “other reasonable expenses of litigation to the prevailing party”. The Court considers other reasonable expenses of litigation like travel expenses.
61. Toomey’s argument for pre-judgment interest on their attorney fees fails.
62. The Court, after carefully considering the APRA request statute and the related case law, finds Toomey’s request for pre-judgment interest in this APRA request is not reasonable for additional damages or other reasonable expenses of litigation. Pre-Judgment interest is not reasonable for the Court to grant in this APRA case.

### **JUDGMENT**

63. Toomey has met the burden for an award of attorney fees. Toomey’s attorney fees and costs are reasonable given the procedural history of this APRA request for the lethal injection information.
64. The Department in its actions going to the General Assembly to successfully obtain a retroactive statute without advising the Court and Toomey after the Court issued its Summary Judgment Order October 24,

2016 in favor of Toomey, and filing an improper appeal to the Indiana Court of Appeals, Indiana Supreme Court which essentially vacated the October 24, 2016 Summary Judgment Order was egregious.

65. The Court has researched, reviewed all filings and spent much time deliberating the law and evidence presented in using its broad discretion in awarding attorney fees.

66. The Court orders the Department is ordered to pay Toomey's attorney fees and costs in the amount of \$538,343.72.

67. Toomey's request for pre-judgment interest on the attorney fees in the amount of \$56,617.32 is denied.

So Ordered on June 12, 2019.

A handwritten signature in black ink that reads "Sheryl Lynch". The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

Sheryl Lynch, Judge Marion Circuit Court