

IN THE CIRCUIT COURT OF CRITTENDON COUNTY, ARKANSAS

DIVISION

PATRICK J. BENCA

PLAINTIFF

v.

No.

18CV-21-547

WEST MEMPHIS POLICE DEPARTMENT

DEFENDANT

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Arkansas has enacted a Freedom Of Information statute designed to afford its citizens access to public records held by government agencies and public meetings. 2010 Arkansas Code Section 25-19-105. According to the Arkansas Attorney General: "The Arkansas Freedom of Information Act (FOIA) is one of the most comprehensive and strongest open-records and open-meetings laws in the country." www.arkansasag.com. The statute requires, among other things, that government agencies respond to FOIA requests within three days of receipt. Id. Here, the relevant agency has wholly failed to do so.

PARTIES

2. Patrick J. Benca ("Benca") is an individual citizen of the State of Arkansas. As such, Benca is permitted to seek access to government agency records under the Arkansas FOIA.

FILED
2021 SEP 10 PM 3:34
JERRY HAWKINS
CLERK
CRITTENDON COUNTY, AR

3. The City of West Memphis Police Department (“WMPD”) is a government agency as defined by the Arkansas FOIA. As such, the WMPD is subject to receiving and responding to FOIA requests from state citizens.

FACTS

4. On July 6, 2021, Benca sent the FOIA request attached hereto as Exhibit A to the WMPD by certified mail.

5. On July 8, 2021, the WMPD received Benca’s FOIA request as evidenced by the certified mail receipt attached hereto as Exhibit B.

6. To date, sixty-two (62) days since his FOIA request was submitted, Benca has received no response whatsoever from the WMPD to that FOIA request.

CAUSE OF ACTION

7. The Arkansas FOIA provides jurisdiction for citizen suits to enforce its terms. See 2010 Arkansas Code Section 25-19-107(a).

8. Here, as discussed above, the WMPD has completely failed to fulfill its statutory obligations to respond to Benca’s pending FOIA request within three days.

9. As a result, this Court should order the WMPD to respond to Benca’s pending FOIA request.

PRAYER FOR RELIEF

On the basis of the foregoing, this Court should:

(A) declare that the WMPD has violated its statutory obligations to respond to Benca's pending FOIA request;

(B) direct the WMPD to respond to Benca's FOIA request within three days;
and

(C) award such further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Stephen Braga
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s/ Patrick Benca
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Jon Shirron
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July 6, 2021

Custodian of Records
West Memphis Police Department
626 E. Broadway Blvd.
West Memphis, Arkansas 72301

RE: Freedom of Information Act Request

Dear Sir or Madam:

As a citizen of Arkansas, and as counsel for Damien Echols, I write to request prompt access to the public records described below under the Arkansas Freedom of Information Act (Ark. Code Ann. Sections 25-19-101, et seq.).

Background Of The Request

As you are aware, Echols was one of three teenagers tried and convicted of killing three young boys in the infamous West Memphis Three case. Echols was sentenced to death as a result of his murder convictions. Throughout the proceedings, Echols and his co-defendants Jason Baldwin and Jessie Misskelley, Jr. (collectively "the WM3") maintained their innocence of the crimes.

Over the course of the eighteen years following the murders, and consistent with their claims of innocence, the WM3 pursued numerous factual and legal challenges to the convictions. In connection with one of those challenges, in November 2010, the Arkansas Supreme Court ordered the trial court to hold a hearing to consider whether newly analyzed DNA evidence might exonerate the WM3. Ultimately, the development of further evidence in anticipation of that hearing - including the results of additional new DNA testing of certain evidence - led the parties to negotiate an Alford plea resolution of the cases, enabling the WM3 to maintain their innocence while being immediately released from prison.

their counsel made it abundantly clear to the State that they intended to continue with all available means of further investigating the case to prove their actual innocence of the crimes charged. Prosecutor Scott Ellington, in turn, committed that “the Arkansas state crime laboratory would help seek other suspects by running searches on any DNA evidence produced in private laboratory tests during the defense team's investigation. This would include running the results through the FBI's Combined DNA Index System database.”

In early 2020, investigative journalist Bob Ruff was producing a new “documentary” show re-examining the WM3 case. Ruff thought it would be a productive idea in that regard to use new DNA testing technology called MVac to search for and test DNA that might remain on certain items of the State’s evidence in the case. [Accordingly, Ruff asked the WM3 if they would agree to such testing, and they all did. When he asked Ellington however, the prosecutor balked. As a result, Ruff’s show ultimately aired in late March 2020 without the new DNA testing but with plenty of questions being asked by viewers about why Ellington would not return Ruff’s calls asking about the testing.

After his show aired, and with many viewers still furious at the State over the testing issue, Ruff asked Echols’ counsel Stephen L. Braga if he would endeavor to intervene with Ellington to secure his consent to MVac testing of certain evidence in the case. Braga agreed to do so. Braga subsequently reached out to Ellington, who said he had no problem with having the evidence tested.

Over the course of the next eight months, Braga and Ellington engaged in a series of communications designed to facilitate the transmission of specified items of evidence from the West Memphis Police Department (“WMPD”) to the laboratory chosen to do the MVac DNA testing. The specified items of evidence were the victims’ shoes, socks, Boy Scout cap, shirts, pants and underwear, as well as the sticks used to hold the clothing underwater and the shoelaces used as ligatures to bind the victims. The chosen laboratory was “Pure Gold Forensics, Inc.,” a California-accredited private forensic DNA laboratory specializing in the new MVac technology.

Unfortunately, despite these many communications, which also involved at certain points - at the express direction of Ellington - Assistant Chief Langston and Major Stacey Allen of the WMPD, none of the evidence was ever transferred by

the WMPD to the MVac laboratory. No explanation was ever given for this failure. It just never occurred. At no point during any of these communications did Ellington or either of the WMPD personnel ever indicate that anything had happened to the evidence in the WM3 case.

In March of 2020, Ellington was elected to a position as Circuit Judge for the Second Judicial Circuit in Jonesboro. On October 22, 2020, Governor Asa Hutchinson appointed Keith Chrestman to serve as Ellington's replacement as the Prosecuting Attorney for the Second Judicial District. Chrestman's term was set to run from January 1, 2021 through December 31, 2022.

In light of the then still-uncompleted effort to have certain WM3 evidence tested with the new Mac DNA technology, despite Ellington's repeated consent to that testing, Echols' undersigned counsel reached out to Chrestman to try to complete that task. In mid-March, undersigned counsel and Chrestman spoke by phone. In an unexpected development, however, Chrestman informed undersigned counsel that after the 2011 Alford plea, some of the evidence ended up "lost," some of the evidence was "misplaced" and some of the evidence was "destroyed by fire" in a building that burned down.

On April 1, 2021, Chrestman wrote to undersigned counsel as follows:

I confirmed with my predecessor your discussion. Based on his description, it sounds like your client wants to use the M-Vac® Wet-Vacuum-Based Collection Method analysis. Regardless of whether this will yield valuable evidence, releasing the material isn't my decision. The property is seized; it doesn't belong to my office. So you'll need to petition the court, asking for permission and giving the State an opportunity to be heard. But in anticipation of your client's motion, I've asked the West Memphis Police Department to catalogue what remaining evidence there is. (Emphasis added).

In response to Chrestman's email, on April 5, 2021, undersigned counsel sent a letter to Chrestman seeking the details of what Chrestman had described in their phone conversation as some of the WM3 evidence being "lost," some of the evidence being "misplaced" and some of the evidence being "destroyed by fire."

The letter also requested indications of “when” these things had happened to the evidence in the case.

Receiving no response from Chrestman to his letter, on April 13, 2021, undersigned counsel emailed Chrestman:

Just wanted to follow up with you regarding the cataloguing of evidence in this matter post-discovery of its current condition. I have attached a letter that I sent out a week or so ago. I really want to make sure we get ahead of this. Thanks again for your assistance.

Once again, Echols’ counsel received no response to this email.

On April 28, 2021, however, Chrestman gave a media interview concerning his “first 100 days in office.”¹ In that interview, Chrestman volunteered that:

Echols . . . ha[d] asked Chrestman’s office to test items of evidence in the case, but much of it is gone, the prosecutor said. In capital murder cases, evidence is kept and securely stored, but in cases like this the evidence is often destroyed or lost.

Id. at 2. The WM3 case was a capital murder case with regard to Echols of course, and it was hardly a run of the mill “case[] like this” under anyone’s definition. There has never been, and hopefully will never be, another case like this.

As of mid-May 2021, Chrestman had still not responded to undersigned counsel’s April 5 letter requesting to be informed of the details concerning Chrestman’s representation that some of the WM3 case evidence was “lost,” some was “misplaced” and some was “destroyed by fire,” and “when” those things had occurred. Nor had Chrestman provided any information as a result of his April 1 tasking of “the West Memphis Police Department to catalogue what remaining evidence there is.”

¹ See <https://talkbusiness.net/2021/04/prosecutor-keith-chrestman-talks-first-100-days-in-office>.

In light of Echols' defense team's inability to secure the information it seeks from the WMPD informally, I now submit this formal request under the Arkansas FOIA to "inspect, copy or receive" records containing the following information.

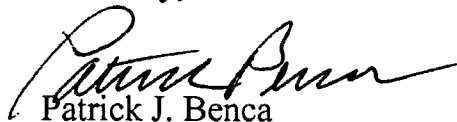
Records Requested

1. All records cataloging the evidence in the WM3 case before August 19, 2011, and identifying the location(s) of the evidence at the time of such cataloging.
2. All records cataloging the evidence in the WM3 case after August 19, 2011, and identifying the location(s) of the evidence at the time of such cataloging.
3. All records referencing the "loss" of any of the evidence in the WM3 case after August 19, 2011.
4. All records referencing the "misplacement" of any of the evidence in the WM3 case after August 19, 2011.
5. All records referencing the "destruction by fire" of any of the evidence in the WM3 case after August 19, 2011, and identifying the location of that fire.
6. All records referencing the "destruction" of any of the evidence in the WM3 case for any other reason after August 19, 2011, and identifying the participants in the ordering and implementing of that destruction.
7. All records identifying any policies or procedures to be followed by the WMPD in preserving evidence seized in criminal cases.
8. All records identifying any policies or procedures to be followed by the WMPD in preserving sources of potential DNA evidence in criminal cases.
9. All records evidencing any communications between one or more of Ellington, Chrestman, Langston, Allen, other members of the WMPD or any personnel associated with the Arkansas State Crime Laboratory concerning the evidence in the WM3 case from August 19, 2011 to date.

10. All records evidencing any communications by one or more of Ellington, Chrestman, Langston, Allen or any other members of the WMPD and any third-parties concerning the evidence in the WM3 case from August 19, 2011 to date.

Pursuant to the Arkansas FOIA, I commit to pay any of the costs required by statute that might be associated with the fulfillment of this request. I look forward to hearing from you within the time period provided by the statute.

Sincerely,



Patrick J. Benca

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Custodian of Records
West Memphis Police Department
626 E. Broadway Blvd.
West Memphis, AR 72301



9590 9402 5823 0034 3813 62

2. Article Identification Number: 7019 2970 0001 0619 7988

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X *[Signature]*

☒ Agent
☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

7-8-21

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☐ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery

- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

Restricted Delivery

(over \$500)