

BEFORE THE STATE CLAIMS COMMISSION
Of the State of Arkansas

Mr.
 Ms.
 Mx.
 Miss

Steven Shults

Arkansas
State Claims Commission

August 20 2018

Do Not Write in These Spaces		
Claim No.		
Date Filed	(Month)	(Day) (Year)
Amount of Claim \$		
Fund		

State of Arkansas, Respondent

RECEIVED

COMPLAINT

Steven Shults

200 W. Capitol, Ste 1100 Little Rock

AR 72201 501 375-2301 Pulaski

Alec Gaines

111 Center Street, Ste 2200 Little Rock AR 72201 501 372-0800 372-1453

State agency involved: AR Department of Corrections Amount sought: \$33,578.00

Month, day, year and place of incident or service

Explanation:

Claimant seeks attorneys fees and costs pursuant to Ark Code Ann § 25-19-107, as the prevailing party in an FOIA claim against the Arkansas Department of Corrections. There are six exhibits to this Complaint.

Aspects of this complaint, the claimant makes the following statement, and agrees to the following questions as indicated: (1) Has claimant provided to my state department in official form? NO

and that \$ was paid because (2) Has my state patron or corporation an interest in this claim? NO

THE UNDERSIGNED states on oath that he or she is familiar with the matters and things set forth in the above complaint, and that he or she verily believes that they are true.

Alec Gaines (Print Claimant Representative Name)

Alec Gaines (Signature of Claimant Representative)

SWORN TO and subscribed before me at Little Rock, AR

on this 20th day of August 2018

Jennifer R Armour (Signature of Notary Public)

My Commission Expires March 9 2021



AUG 20 2018

BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS

STEVEN SHULTS

RECEIVED
CLAIMANT

v.

STATE OF ARKANSAS

RESPONDENT

STATEMENT OF CLAIM

Claimant, Steven Shults, for his Statement of Claim, states:

1. Claimant substantially prevailed in a Freedom of Information Act appeal against the Arkansas Department of Correction ("ADC") in Case No. 60CV-17-1419 in the Circuit Court of Pulaski County, Arkansas, Seventeenth Division.

2. The lower court found that Claimant had prevailed on his FOIA claim and that the State was not substantially justified, stating, "The ADC violated the AFOIA by its refusal to produce those documents. That refusal was not justified by the language of the MEA in any respect." See Exhibit 3.

3. ADC appealed the court's ruling to the Arkansas Supreme Court, which affirmed the lower court's principal ruling, and reversed/remanded on an ancillary issue. See Exhibit 4.

4. ADC did not appeal the lower court's ruling on "substantial justification" and the Arkansas Supreme Court affirmed that portion of the Court's ruling *sub silentio*.

5. On remand, the Circuit Court ordered limited redaction by agreement of the Parties and reaffirmed its determination that "Plaintiff has substantially prevailed in this matter." See Exhibit 5.

6. Claimant attaches the following Exhibits to the Complaint.

Exhibit 1: Statement of Claim

Exhibit 2: Complaint in Case No. 60CV-17-1419



Exhibit 3: March 31, 2017, Order in Case No. 60CV-17-1419

Exhibit 4: March 29, 2018, Opinion in Case No. CV-17-544

Exhibit 5: July 24, 2018, Order in Case No. 60CV-17-1419

Exhibit 6: Statement of Fees and Expenses Rendered by Williams & Anderson PLC

WHEREFORE, Claimant Steven Shults is entitled to attorneys' fees and expenses in the amount of \$33,578.00 pursuant to the Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-107.

Respectfully Submitted,

WILLIAMS & ANDERSON PLC
111 Center Street, Suite 2200
Little Rock, Arkansas 72201
Telephone: 501-372-0800
Facsimile: 501-372-6453

/s/ Alec Gaines

Philip E. Kaplan (AR68026)
pkaplan@williamsanderson.com
Heather G. Zachary (AR2004216)
hzachary@williamsanderson.com
Alec Gaines (AR2012277)
againes@williamsanderson.com

Attorneys for Steven Shults

JAN 05 2018

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Please Read Instructions on Reverse Side of Yellow copy

Please print in ink or type

BEFORE THE STATE CLAIMS COMMISSION
Of the State of Arkansas

Mr.
 Mrs.
 Ms.
 Miss
Steven Shults Claimant

vs.

State of Arkansas, Respondent

Do Not Write in These Spaces	
Claim No.	180567
Date Filed	January 5, 2018 (Month) (Day) (Year)
Amount of Claim	\$15,000.00
Fund	ADC Other

Dept of Corrections

COMPLAINT

Steven Shults the above named Claimant, of 200 W Capitol, Ste 1600 Little Rock
(Name) (Street or R.F.D. & No.) (City)

AR 72201 501375 2301 County of Pulaski represented by Alex Gaines
(State) (Zip Code) (Daytime Phone No.) (Legal Counsel, if any, for Claim)

of 111 Carter St., Ste 2200 Little Rock AR 72201 501372 0800 501372 6453 says:
(Street and No.) (City) (State) (Zip Code) (Phone No.) (Fax No.)

State agency involved: AR Dept. of Corrections Amount sought: \$15,000.00

Month, day, year and place of incident or service: August 21, 2017

Explanation: Claimant seeks attorneys' fees and costs pursuant to Ark. Code Ann. § 25-19-107. There are six (6) exhibits to this Complaint.

As parts of this complaint, the claimant makes the statements, and answers the following questions, as indicated: (1) Has claim been presented to any state department or officer thereof?
No when? _____ to whom? _____ (Department)
(Yes or No) (Month) (Day) (Year)

and that \$ _____ was paid thereon: (2) Has any third person or corporation an interest in this claim? No; if so, state name and address
(Name) (Street or R.F.D. & No.) (City) (State) (Zip Code)

and that the nature thereof is as follows: _____ and was acquired on _____ in the following manner: _____

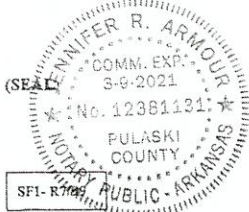
THE UNDERSIGNED states on oath that he or she is familiar with the matters and things set forth in the above complaint, and that he or she verily believes that they are true.
Alex Gaines Esq (Print Claimant/Representative Name) Alex Gaines (Signature of Claimant/Representative)

SWORN TO and subscribed before me at Little Rock, AR
(City) (State)

on this 5th day of January, 2018
(Date) (Month) (Year)

Jennifer R. Armour
(Notary Public)

My Commission Expires: March 9 2021
(Month) (Day) (Year)



JAN 05 2018

RECEIVED
CLAIMANT

BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS

STEVEN SHULTS

v.

STATE OF ARKANSAS

RESPONDENT

STATEMENT OF CLAIM

Claimant, Steven Shults, for his Statement of Claim, states:

1. Claimant substantially prevailed in a Freedom of Information Act appeal against the Arkansas Department of Correction ("ADC") in Case No. 60CV-17-4931 in the Circuit Court of Pulaski County, Arkansas, Seventeenth Division.

2. The court held ADC's position was not substantially justified.

3. ADC appealed the court's ruling to the Arkansas Supreme Court, which affirmed the lower court's principal ruling, and reversed/remanded on an ancillary issue.

4. ADC did not appeal the lower court's ruling on "substantial justification" and the Arkansas Supreme Court affirmed that portion of the Court's ruling *sub silentio*.

5. Claimant does not seek attorneys' fees and costs related to the remand proceedings, as reflected on Exhibit 6.

6. Claimant attaches the following Exhibits to the Complaint.

Exhibit 1: Statement of Claim

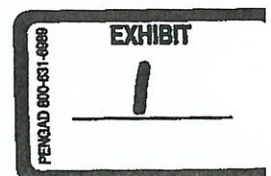
Exhibit 2: Complaint in Case No. 60CV-17-4931

Exhibit 3: September 22, 2017, Order in Case No. 60CV-17-4931

Exhibit 4: November 2, 2017, Order in Case No. CV-17-788

Exhibit 5: November 13, 2017, Order in Case No. 60CV-17-4931

Exhibit 6: Statement of Fees and Expenses Rendered by Williams & Anderson PLC



WHEREFORE, Claimant Steven Shults is entitled to attorneys' fees and expenses in the amount of \$15,000.00 pursuant to the Arkansas Freedom of Information Act, Ark. Code Ann. § 25-19-107.

Respectfully Submitted,

WILLIAMS & ANDERSON PLC
111 Center Street, Suite 2200
Little Rock, Arkansas 72201
Telephone: 501-372-0800
Facsimile: 501-372-6453

/s/ Alec Gaines
Philip E. Kaplan (AR68026)
pkaplan@williamsanderson.com
Heather G. Zachary (AR2004216)
hzachary@williamsanderson.com
Alec Gaines (AR2012277)
againes@williamsanderson.com

Attorneys for Steven Shults

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

STEVEN SHULTS

CLAIMANT

V.

CLAIM NO. 180567

CLAIM NO. 190250

ARKANSAS DEPARTMENT OF
CORRECTION

RESPONDENT

ORDER

Now before the Arkansas State Claims Commission (the “Claims Commission”) are the claims of Steven Shults (the “Claimant”) against the Arkansas Department of Correction (the “Respondent”). At the hearing held September 13, 2018, Claimant was represented by Alec Gaines and Heather Zachary. Thomas Burns appeared on behalf of Respondent.

Background of Claim No. 180567

1. Claimant submitted a request pursuant to the Arkansas Freedom of Information Act (“FOIA”) to Respondent in August 2017 asking for information relating to Respondent’s supply of drugs intended for use in executions. Respondent revealed that it had acquired 40 vials of midazolam but refused to disclose the package inserts or labels (the “Requested Documents”) because they could be used to identify the supplier.

2. Claimant filed suit against Respondent on September 7, 2017, in Pulaski County Circuit Court. This lawsuit was styled as *Steven Shults v. Arkansas Department of Correction; et al.*, Pulaski County Circuit Court Case No. 60CV-17-4931 (the “Midazolam Case”).

3. Respondent moved to dismiss the Midazolam Case, arguing that the Method of Execution Act (“MEA”) prohibits disclosure of the Requested Documents.

4. On September 22, 2017, the Pulaski County Circuit Court denied Respondent’s motion to dismiss and ordered Respondent to produce unredacted versions of the Requested

Documents. As part of that order, the Pulaski County Circuit Court found that Respondent's "position [in refusing disclosure] was not substantially justified." The Pulaski County Circuit Court also found that Claimant "substantially prevailed" in the Midazolam Case.

5. Respondent appealed the Pulaski County Circuit Court's ruling that the confidentiality provisions of the MEA are not intended to protect the identity of the drug manufacturers. Alternatively, Respondent argued that the lot, batch, and control numbers could lead to the identification of the suppliers or sellers should be redacted. Respondent did not appeal the Pulaski County Circuit Court's explicit finding that its nondisclosure was "not substantially justified."

6. The Arkansas Supreme Court affirmed the circuit court's ruling that the drug manufacturers are not protected under the confidentiality provisions of the MEA. However, the Arkansas Supreme Court remanded the case back to the circuit court for a determination of exactly what information should be redacted on the Requested Documents.

7. On remand, the Pulaski County Circuit Court issued an order finding that Claimant is entitled to an unredacted copy of the package insert and a redacted copy of the label.

8. On January 5, 2018, the Claimant filed his claim for \$15,000.00 in attorney's fees and costs with the Claims Commission.

Background of Claim No. 190250

9. Claimant submitted FOIA requests to Respondent in February 2017 and March 2017 asking for information relating to Respondent's supply of drugs intended for use in executions. Respondent revealed that it had acquired 100 vials of potassium chloride but refused to disclose the package inserts or labels (again referred to as the "Requested Documents") because they could be used to identify the supplier.

10. Claimant filed suit against Respondent on March 23, 2017, in Pulaski County Circuit Court. This lawsuit was styled as *Steven Shults v. Arkansas Department of Correction; et al.*, Pulaski County Circuit Court Case No. 60CV-17-1419 (the “Potassium Chloride Case”).

11. Respondent moved to dismiss the Potassium Chloride Case, arguing that the MEA prohibits disclosure of the Requested Documents.

12. On March 31, 2017, the Pulaski County Circuit Court ordered Respondent to produce unredacted versions of the Requested Documents. As part of that order, the Pulaski County Circuit Court found that Respondent’s “refusal [to disclose the Requested Documents] was not justified by the language of the MEA in any respect.” The Pulaski County Circuit Court also found that Claimant “substantially prevailed” in the Potassium Chloride Case.

13. Respondent appealed the Pulaski County Circuit Court’s ruling that the confidentiality provisions of the MEA are not intended to protect the identity of the drug manufacturers. Alternatively, Respondent argued that the lot, batch, and control numbers could lead to the identification of the suppliers or sellers should be redacted. Respondent did not appeal the Pulaski County Circuit Court’s explicit finding that its nondisclosure was “not justified . . . in any respect.”

14. The Arkansas Supreme Court affirmed the circuit court’s ruling that the drug manufacturers are not protected under the confidentiality provisions of the MEA. However, the Arkansas Supreme Court agreed with Respondent that redaction of lot, batch and control numbers was proper and remanded the case back to the circuit court for a determination of exactly what information must be redacted on the package inserts and labels.

15. On remand, the Pulaski County Circuit Court issued an order finding that Claimant is entitled to an unredacted copy of the package insert and a redacted copy of the label. The circuit court also found that Claimant “has substantially prevailed in this matter.”

16. On August 20, 2018, the Claimant filed his claim for \$33,578.00 in attorney’s fees and costs with the Claims Commission.

Findings of Fact

17. The Claims Commission finds that Claimant filed the Midazolam Case and the Potassium Chloride Case in Pulaski County Circuit Court against Respondent regarding Respondent’s refusal to disclose the Requested Documents.

18. The Claims Commission finds that in both the Midazolam Case and the Potassium Chloride Case, the Pulaski County Circuit Court ordered Respondent to disclose the Requested Documents.

19. The Claims Commission finds that in both the Midazolam Case and the Potassium Chloride Case, the Pulaski County Circuit Court held that Claimant was the substantially prevailing party.

20. The Claims Commission finds that in both the Midazolam Case and the Potassium Chloride Case, the Pulaski County Circuit Court held that Respondent’s refusal to disclose the Requested Documents was not justified.

21. The Claims Commission finds that in both the Midazolam Case and the Potassium Chloride Case, Respondent appealed the circuit court’s rulings to the Arkansas Supreme Court. Specifically, in both cases, Respondent appealed the rulings that the Requested Documents were subject to disclosure under the MEA.

22. The Claims Commission finds that in both the Midazolam Case and the Potassium Chloride Case, Respondent did not appeal the rulings of the Pulaski County Circuit Court that Claimant was the substantially prevailing party.

23. The Claims Commission finds that in both the Midazolam Case and the Potassium Chloride Case, Respondent did not appeal the rulings of the Pulaski County Circuit Court that its position in refusing disclosure was not justified.

24. The Claims Commission finds that in both the Midazolam Case and the Potassium Chloride Case, Respondent offered redaction as an alternative argument in the event that the circuit court's rulings as to disclosure were affirmed.

25. The Claims Commission finds that in both the Midazolam Case and the Potassium Chloride Case, the Arkansas Supreme Court disagreed with Respondent that the confidentiality provisions of the MEA prohibit disclosure of the Requested Documents.

26. The Claims Commission finds that in both the Midazolam Case and the Potassium Chloride Case, the Arkansas Supreme Court remanded the cases back to the circuit court to determine whether redactions of lot, batch, and control numbers were necessary.

27. The Claims Commission finds that in both the Midazolam Case and the Potassium Chloride Case, the circuit court, on remand, ordered the redaction of lot, batch, and control numbers.

28. The Claims Commission finds that in the Potassium Chloride Case, on remand, the circuit court made another specific ruling in its order that the Claimant substantially prevailed.

29. The Claims Commission finds that the Midazolam Case and Potassium Chloride Case are essentially identical except as to the specific type of drug.

30. The Claims Commission finds that in both the Midazolam Case and the Potassium Chloride Case, the circuit court did not make specific rulings in any order that Respondent was substantially justified in failing to disclose the Requested Documents.

31. The Claims Commission finds that Claimant filed a claim related to its attorney's fees and costs incurred in the Midazolam Case on January 5, 2018.

32. The Claims Commission finds that Claimant filed a claim related to its attorney's fees and costs incurred in the Potassium Chloride Case on August 20, 2018.

33. The Claims Commission finds that, at hearing, Respondent did not object to the reasonableness of Claimants' attorney's fees and costs in either the Midazolam Case or the Potassium Chloride Case. Respondent did, however, argue that Claimant has not been damaged by the prosecution of the Midazolam Case or the Potassium Chloride Case because Claimant had a contingent fee agreement with his attorneys.

Conclusions of Law

34. Ark. Code Ann. § 19-10-204(d) gives the Claims Commission jurisdiction to consider claims for reasonable attorney's fees and litigation expenses pursuant to Ark. Code Ann. § 25-19-107.

35. Pursuant to Ark. Code Ann. § 25-19-107(d)(1), a defendant may be liable for "reasonable attorney's fees and other litigation expenses reasonably incurred by a plaintiff who has substantially prevailed unless the court finds that the position of the defendant was substantially justified."

36. The Claims Commission finds that Ark. Code Ann. § 25-19-107(d)(1) must be read in conjunction with Ark. Code Ann. § 25-19-107(e)(2), which clarifies that where a plaintiff substantially prevails in a FOIA action against "the State of Arkansas or a department, agency, or

institution of the state,” the claim for attorney’s fees and other litigation expenses must be filed with the Claims Commission.

37. The Claims Commission finds that, where “the State of Arkansas or a department, agency, or institution of the state” (collectively referred to herein as the “State”) is ordered to disclose documents or information by the courts, it is incumbent upon the State to seek a ruling from the court as to whether the State was “substantially justified” in refusing disclosure pursuant to Ark. Code Ann. § 25-19-107(d)(1).

38. Likewise, where a plaintiff prevails in a FOIA lawsuit against the State, unless the court rules that the State must disclose all documents or information sought by the plaintiff (thereby eliminating the question of whether the plaintiff “substantially prevailed”), the plaintiff should obtain a ruling by the court that it “substantially prevailed” pursuant to Ark. Code Ann. § 25-19-107(d)(1) in order to preserve its claim for attorney’s fees.

39. To hold otherwise would require the Claims Commission to engage in the ultimate exercise in inefficiency, which would be to essentially re-hear the FOIA lawsuit.

40. The Claims Commission is unpersuaded by Respondent’s argument that it was substantially justified in failing to disclose the Requested Documents because certain information was eventually redacted from the labels. The Claims Commission will not infer this language from the rulings of the Arkansas Supreme Court or the remand orders of the Pulaski County Circuit Court, especially where Respondent failed to appeal the findings of the Pulaski County Circuit Court in both cases that its refusal to disclose the Requested Documents was not justified and that Claimant was found to be the substantially prevailing party. Given that Respondent did not appeal these rulings, it would be improper—and inconsistent with the unappealed findings in the

Midazolam Case and Potassium Chloride Case—for the Claims Commission to now hold that Respondent was substantially justified in refusing disclosure.


41. As such, pursuant to Ark. Code Ann. §§ 19-10-204(d) and 25-19-107, the Claims Commission finds that Claimant is entitled to reasonable attorney’s fees and costs related to the Midazolam Case and Potassium Chloride Case.

42. Given that Respondent did not object to the reasonableness of attorney’s fees and costs incurred by Claimant in either case, the only remaining question is whether the contingent fee agreement that Claimant had with his attorneys is relevant. The Claims Commission finds that there is nothing in Ark. Code Ann. §§ 19-10-204(d) or 25-19-107 to suggest that attorney’s fees and costs incurred by virtue of a contingent fee agreement are not recoverable.

43. The Claims Commission finds that Claimant is entitled to an AWARD of \$15,000.00 in attorney’s fees and costs in the Midazolam Case and \$33,578.00 in attorney’s fees and costs in the Potassium Chloride Case.

44. Pursuant to Ark. Code Ann. § 19-10-215(b), the Potassium Chloride Case will be referred to the General Assembly for review, approval, and placement on an appropriations bill.

IT IS SO ORDERED.



ARKANSAS STATE CLAIMS COMMISSION
Dexter Booth



ARKANSAS STATE CLAIMS COMMISSION
Henry Kinslow, Co-Chair



ARKANSAS STATE CLAIMS COMMISSION
Bill Lancaster

DATE: October 18, 2018

Notice(s) which may apply to your claim

- (1) A party has forty (40) days from the date of this Order to file a Motion for Reconsideration or a Notice of Appeal with the Claims Commission. Ark. Code Ann. § 19-10-211(b). If a Motion for Reconsideration is denied, that party then has twenty (20) days from the date of the denial of the Motion for Reconsideration to file a Notice of Appeal with the Claims Commission. Ark. Code Ann. § 19-10-211(b)(3). A decision of the Claims Commission may only be appealed to the General Assembly. Ark. Code Ann. § 19-10-211(a).
- (2) If a Claimant is awarded less than \$15,000.00 by the Claims Commission at hearing, that claim is held forty (40) days from the date of disposition before payment will be processed. *See* Ark. Code Ann. § 19-10-211(b). Note: This does not apply to agency admissions of liability and negotiated settlement agreements.
- (3) Awards or negotiated settlement agreements of \$15,000.00 or more are referred to the General Assembly for approval and authorization to pay. Ark. Code Ann. § 19-10-215(b).

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

STEVEN SHULTS

CLAIMANT

v

CLAIM NO. 180567

CLAIM NO. 190250

ARKANSAS DEPARTMENT OF CORRECTION

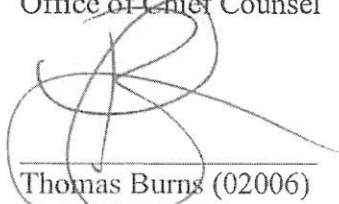
RESPONDENT

NOTICE OF APPEAL AND DESIGNATION OF THE RECORD

Comes now Respondent, Arkansas Department of Correction (ADC), and hereby gives notice of appeal from all orders, judgments, and findings of the Commission in the above-referenced case. Specifically, ADC appeals the October 18, 2018, Order granting the award of attorney's fees, and all other decisions of the Claims Commission adverse to the ADC in the above-styled cause.

The ADC designates the entire record and all proceedings: including, but not limited to, any pretrial proceedings, exhibits, evidence and documents introduced into evidence or offered into evidence at all hearings to be contained in the record on appeal. The transcript shall be forwarded by the Commission to the Joint Budget Committee.

Respectfully submitted,
Department of Correction
Office of Chief Counsel

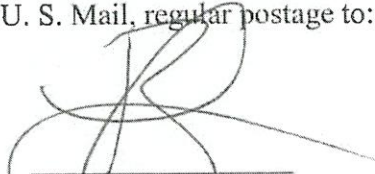


Thomas Burns (02006)
General Counsel
Post Office Box 8707
Pine Bluff, AR 71611
(870) 267-6845 Office
(870) 267-6373 Facsimile
thomas.burns@arkansas.gov

CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been served this 24th day of October, 2018, on the Claimant by placing a copy of the same in the U. S. Mail, regular postage to:

Alec Gaines
againes@williamsanderson.com



Thomas Burns