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Working for Civil Liberties on the Internet

April 22, 2003

By U.S. Mail and Fax to (717) 705-4444

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L. Kinch Bowman
Director of Management Services
Office of Attorney General
14th Floor, Strawberry Square
Harrisburg, PA 17120

Dear Mr. Bowman:

On behalf of our client, XXXXXXXXXX, we are filing the following Exceptions to the partial denial of our client's Right to Know Law request submitted to the Office of the Attorney General on February 19, 2003 (the "Request"), and denied in part by letter of April 1, 2003 (the "Response"). The Response was supplemented on April 16, 2003. We appreciate the constructive discussions that we have been able to have with your office concerning the Right to Know Law request, and we are hopeful that after reviewing this appeal your office will decide to produce the remainder of the requested information.

In keeping with the requirements of the Pennsylvania Right to Know Law, 65 P.S. § 66.1 *et seq.*, this letter will cover the following points:

- I. Why the requested records qualify as "public records"
- II. Why we disagree with the grounds upon which the partial denial is based
- III. How we intended to use, and to safeguard, the requested records

As discussed in Part III below, we fully appreciate the potential sensitivity of the requested records, but nevertheless believe that Pennsylvania law gives its citizens the right to know about the specific actions of state officials. Under the relevant case law applicable to the Right to Know statute, the requested documents are public records that cannot be withheld based on any of the enumerated statutory exemptions.

As background – and to define certain terminology – the original Right to Know Law Request sought copies of "Informal Notice[s] of Child Pornography" sent by the Office of Attorney General to Internet Service Providers (ISPs) (the "Notices"), requesting that the ISPs block access to certain specified "uniform resource locators" (the "URLs") of content available over the Internet. In its Response (as supplemented), the Office of Attorney General produced the requested Notices, but with the URLs redacted. This appeal seeks reconsideration of the redaction of the URLs.

I. Why the requested records qualify as "public records"

There appears to be no dispute that, but for the statutory exemptions discussed below, the Notices (including the URLs) qualify as "public records" under the Pennsylvania Right to Know Law. Except for the assertion that certain specific exemptions support the withholding of the URLs, the Response does not dispute that the Notices are "public records." The production of the Notices (with the URLs redacted) is itself an acknowledgement that such Notices are public records.

Nor could there be any dispute that the Notices are public records. As the Supreme Court of Pennsylvania has stated:

in order to establish a right of access under the minutes/orders/decisions category of public records under the Act, a citizen must demonstrate a close relationship between the requested material and an actual agency minute, order, or decision fixing some right or duty.

North Hills News Record v. Town of McCandless, 555 Pa. 51, 58, 722 A.2d 1037, 1040 (Pa. 1999). Here, the requested documents have far more than a "close relationship" to actual agency minutes, orders, or decisions – the requested documents *are* the actual agency orders and decisions themselves. As such, they are certainly subject to production under the Pennsylvania Right to Know Law.

Moreover, the specific URLs represent the very core of the agency orders and decisions that are sought. Without the URLs, the Notices sent by the Attorney General would convey nothing at all to the ISP recipients. It is the specification of the URL in the requested documents that "fix[es] the ... duties or obligations" of the ISPs.

Thus the Notices (including the URLs) are properly considered "public records" under the Pennsylvania Right to Know Law. The only remaining question is which statutory exemptions, if any, appropriately apply to the URLs. Of the statutory exemptions, only three¹ are asserted to apply. Those assertions are discussed in the following section.

¹ The Right to Know Law contains four statutory exemptions, two of which have been invoked here. One the asserted exemptions, however, has two prongs (security and reputation), and case law suggests that these prongs should be considered separately.

II. Why we disagree with the grounds upon which the partial denial is based

The April 1 Response advanced three separate grounds to support the withholding of the URLs that are the subject of the Notices. Quoting the text of the Right to Know Law, the Response asserts that the disclosure of the URLs would:

- (a) be "prohibited, restricted or forbidden by statute,"
- (b) "operate to the prejudice or impairment of a person's ... personal security,"
- or
- (c) "operate to the prejudice or impairment of a person's reputation."

None of these three assertions are supported by the applicable case law from the Pennsylvania courts, as detailed below.

Before turning to the specific grounds asserted, however, a threshold matter must be addressed: *all* of the three of the grounds are based on the factually-inaccurate premise that the all of the redacted URLs are still valid, functioning Internet addresses that lead to alleged child pornography. In fact, a review of the URLs referenced in the one public proceeding under the relevant statute proves that some of the URLs targeted by the Notices no longer point to any functioning web site on the Internet. For such URLs, none of the three grounds advanced by the April 1 Response have any validity. Simply stated, for web sites that no longer exist, or that no longer contain alleged child pornography, there is no lawful basis whatsoever for the Office of the Attorney General to continue to withhold those URLs.

Thus, in addition to the specific arguments detailed below, this appeal specifically challenges the withholding of URLs for web sites that no longer exist today, or that no longer contain alleged child pornography. There is no proper basis to withhold these URLs. Beyond this threshold point, none of the three specific arguments advanced in the Response forms a valid basis to withhold the URLs:

- (a) be "prohibited, restricted or forbidden by statute"

In essence, the Response asserts that (i) Section 6312(c) of 18 Pennsylvania Statutes prohibits the distribution of child pornography, (ii) the requested URLs refer to web sites that are alleged to contain child pornography, and (iii) thus Section 6312(c) prohibits the disclosure of the URLs. This argument fails for a number of reasons.

First, Section 6312(c) prohibits only the distribution of "*depictions*" of minors engaged in a sexual act. The Request sought no "*depictions*" of any kind – instead, the Request sought only documents created by government officials. The Response fails to identify any statute that would prohibit the disclosure of government-created documents, or the disclosure of Internet addresses that may (or may not) contain child pornography. Simply

stated, the URLs are not illegal in their own right. As the Pennsylvania Commonwealth Court has held, the Right to Know Law exempts from disclosure only "information *specifically* protected from disclosure by statute," and the government bears the burden to "correlate the information sought with the statutory prohibition." *Anders v. Commonwealth*, 137 Pa. Commw. 111, 117-18, 585 A.2d 568, 571 (Pa. Commw. 1991) (emphasis added). The Response completely fails to correlate the specific documents and information requested with any relevant statutory provision.

Second, as you of course know, Section 6312(c) requires a judicial determination (usually following a trial) that certain content is illegal under the law. There have been no judicial proceedings whatsoever to determine whether any of the relevant content is in fact illegal under Section 6312(c).² The mere assertion by a governmental official that some content might be covered by Section 6312(c) does not make it so, and does not provide any basis to withhold the requested URLs.³ The Attorney General's office has intentionally chosen *not* to bring prosecutions under Section 6312(c) relating to the URLs at issue here, and cannot now turn around and seek to resist disclosure based on the mere assertion that the content does in fact violate Section 6312(c).

Third, even if Section 6312 were relevant here, that Section contains a specific exclusion that would permit the disclosure of the information sought here. Section 6312(f) makes clear that Section 6312(c) does not apply when there is a "bona fide educational, scientific, governmental or judicial purpose" for the disclosure. We believe that the statutory right of the citizens of Pennsylvania to know what Internet content the Attorney General is blocking certainly qualifies as a "bona fide" purpose under Section 6312(f).

Fourth, the very foundation of the Pennsylvania Right to Know Law would be wholly undermined if a state official could keep his or her actions secret based on an entirely unreviewed assertion that certain content might be illegal. The Pennsylvania Attorney General is blocking Internet content, with no judicial oversight whatsoever, and the citizens of Pennsylvania have the right to know what the Attorney General is doing in their name. As the Commonwealth Court has held in another context,

To determine otherwise would defeat the statutory right of a citizen to inspect and examine public records and erode the purpose of the

² The probable cause determination made by one court related to a proceeding under Section 7330 is not a final adjudication that any particular content is in fact illegal under Section 6312(c). In any event, this one proceeding is irrelevant to the vast majority of the documents sought by the Request.

³ To be clear, we take no position on whether the content in question in fact is illegal child pornography. But our position is just as irrelevant as the mere assertion of the Attorney General's office to the question of whether the content has been adjudicated in court to be illegal.

[Right to Know] Act to scrutinize the acts of public officials and make the officials accountable

Envirotest Partners v. Commonwealth, 664 A.2d 208, 215 (Pa. Commw. 1995).

Finally, the refusal to disclose the URLs is based on the assertion that the disclosure of a URL of a web site that contains child pornography is somehow itself a criminal act under the laws of the Commonwealth of Pennsylvania. If this analysis is correct (and we believe that it is not), the analysis would raise serious questions about the propriety of the Attorney General's own web site,⁴ which actively encourages citizens of Pennsylvania to disclose the URLs of possible child pornography sites. In light of this web site, it is plainly untenable to assert that any disclosure of a URL alleged to contain child pornography would itself be a criminal violation.

There is no support for the refusal to disclose the URLs based on an assertion that such disclosure would be contrary to statute.

(b) "operate to the prejudice or impairment of a person's ... personal security"

The second ground on which the Response withholds the URLs is the assertion that the disclosure of the URLs would impair the "personal security" of the children who are depicted in child pornography that is alleged to be found at the URLs. This argument fails for a number of reasons.

As discussed above, no visual images have been requested, and the URLs do not in themselves contain any information about any specific individuals.⁵ Simply put, none of the requested documents would disclose the identity of any individuals. The Commonwealth Court has held that

for records to fall within the personal security exception they must be intrinsically harmful and not merely capable of being used for harmful purposes.

Young v. Armstrong School Dist., 21 Pa. Commw. 203, 207, 344 A.2d 738, 740 (Pa. Commw. 1975). The URLs are not "intrinsically harmful."

⁴ See <http://www.attorneygeneral.gov/cld/cseuform.cfm>.

⁵ It is theoretically possible that a URL might be "www.picturesofjohnsmith.com" or something similar, and thus might arguably disclose the identity of a particular child victim. If this far fetched hypothetical were true, then the Response presumably would have made this clear.

More recently, the Commonwealth Court has advanced a balancing test to weigh the extent that a privacy interest might be implicated against the public benefit from the disclosure. *See Times Publishing Co. v. Michel*, 159 Pa. Commw. 398, 411, 633 A.2d 1233, 1239 (Pa. Commw. 1993). In this situation, the disclosure of the URLs presents only attenuated privacy and security concerns. On the other hand, without the URLs the public is wholly unable to know what actions state officials have taken. In no case under the Right to Know Law outside of the employment context have the actual decisions and orders of the government been withheld based on a privacy concern.

Finally, expressions of concern about the "personal security" and "reputation" of the child victims of the child pornography ring hollow when the Office of Attorney General has failed to take action to protect those children directly. As explained in our full report discussing the law at issue in this Right to Know request, *see* <http://www.cdt.org/speech/030200pennreport.pdf>, we believe that – rather than merely blocking viewers' access to child pornography (*and* lawful sites), which is what the Informal Notices do – a far better use of law enforcement resources would have been to take action against the underlying child pornography sites themselves, and thereby remove them entirely from the Internet (without interfering with lawful web sites). That certain of the URLs targeted in the Notices are still operating is proof that the Office of the Attorney General has done nothing to protect the "personal security" and "reputation" of the specific child victims depicted on those sites. The Office should not turn around and defend its Right to Know Law denial based on the "personal security" and "reputation" of those exact same children.

(c) "operate to the prejudice or impairment of a person's reputation"

As with the "personal security" exception discussed above, the Response asserts that the URLs should be withheld because they might damage the "reputation" of the children depicted in the alleged child pornography.

Again, the URLs will not reveal the identity of any child victims, and disclosure of the URLs will not damage the reputations of those children. As the Commonwealth Court has made clear

The exception for injury to reputation is not so broad as to justify nondisclosure of otherwise public records simply because an agency asserts that their release could, speculatively, impair the reputations of a particular class of individuals.

Travaglia v. Department of Corrections, 699 A.2d 1317, 1323 (Pa. Commw. 1997). Under *Travaglia* and other cases, the claimed threat to reputation is far too attenuated and speculative for the "reputation" exemption to apply.

And, as with the "personal security" exemption, the "reputations" of the victims of child pornography should not be used as an excuse to block disclosure when the Office of Attorney General has failed to take action to protect those same children directly.

III. How we intended to use, and to safeguard, the requested records

Under the Right to Know Law, no explanation of how requested records will be used is required. Nevertheless, we believe that our planned use of the requested documents is relevant.

We have no intention whatsoever of facilitating access to alleged child pornography. We will not post any still-active URLs from the Notices on our web site, nor will we visit those web sites. Our focus, instead, will be to determine what *other* web sites have been affected by the blocking orders. We will limit our disclosure of the still-active URLs to only those people who have a legitimate purpose to review them, including for example, technical and legal experts who are assisting in our investigation of the Attorney General's actions. To the extent that we submit any still-active URLs to a court in any legal proceeding, we will do so in a manner that will permit the Attorney General an opportunity to ask the court to keep the URLs confidential.

Once we have the URLs, we will determine what "Internet Protocol" ("IP") addresses have been blocked by the Attorney General. With those IP addresses, we will determine what innocent web sites have been blocked. Where innocent web sites have been blocked, we may publicly disclose the identity of those web sites, but this information cannot easily be used to determine the URLs that were originally listed in the Notices.

Thus, even if the "personal security" and "reputation" exemptions provide an arguable basis on which to withhold the URLs (and we do not believe that they do), the disclosure of the URLs in this case would not lead to dissemination of child pornography. In the face of this very attenuated risk, the citizens of Pennsylvania's right to know what their officials are doing fully justifies the disclosure of the URLs in this case.

We appreciate your consideration of the Exceptions raised in this letter, and we look forward to your response within thirty days. If your staff would be interested in continuing to discuss the issues raised in this letter, please do not hesitate to contact me. I can be reached at (202) 637-9800.

Sincerely,

{SIGNED}

John B. Morris, Jr.
Staff Counsel