

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

JOSHUA D. WOLSON
TEL 202.662.5263
FAX 202.778.5263
JWOLSON@COV.COM

January 26, 2006

BY ELECTRONIC AND FIRST CLASS MAIL

Ethan Eddy, Esq.
Meyer Glitzenstein & Crystal
1601 Connecticut Ave. NW, Suite 700
Washington, DC 20009

Re: ASPCA et al. v. Ringling Bros. and Barnum & Bailey Circus,
No. 03-2006 (EGS/JMF)

Dear Ethan:

I write in response to your letter of January 12 concerning defendant's production of x-rays in this case.

It is not correct that defendant has "hundreds and perhaps more than a thousand" x-rays that have not yet been produced to plaintiffs. The premise on which you base your assumption -- that the x-rays that you reviewed on January 6, 2006, included "no films dated later than 2002, and very few prior to 2000" -- is not correct. Included among the x-rays that defendant produced in September 2005, and which plaintiffs reviewed on January 6, are approximately 40 x-rays from 2003 and more than 20 x-rays from 1998. Nonetheless, after receiving your letter, we spoke with personnel at Feld, including employees at the CEC and Williston facilities, veterinarians, and other animal care staff, in an effort to determine (a) whether Feld maintained additional stores of x-rays and (b) the reason that the majority of x-rays are dated between 2000 and 2002. We have learned that, from 2000 to 2002, Feld attempted to x-ray every elephant's feet at least once per year. Some time in 2002, however, Feld ceased that practice. Except for that foot x-ray program, Feld has x-rayed elephants only if they have a clinical issue for which an x-ray might be a helpful diagnostic tool. Thus, there are not hundreds more x-rays of Feld elephants, as your letter assumes. However, in the course of our discussions, we located 11 additional x-rays that were not included in the x-rays you inspected. Those x-rays have been shipped to our offices, and you are free to review them within a reasonable time period that is convenient for you. I have attached a list of the elephants whose x-rays are included in this pile. Other than these 11 x-rays, we are told that the more than 700 x-rays that you reviewed on January constitute a complete set of the x-rays in defendant's custody.

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There is accordingly no basis for the position that your designation of the x-rays that plaintiffs want copied must await production of other x-rays. Defendant, as you know, made the x-rays available to plaintiffs for inspection or copying on September 28, 2005. (See Letter from Joshua Wolson to Kimberly Ockene dated Sept. 28, 2005.) Under Federal Rule of Civil Procedure 34(b), the x-rays (and all materials included with them, including diagnostic reports in the envelopes) were produced on that date. The fact that plaintiffs waited until January 6 to review the x-rays does not mean that they were produced in January. Since September 28, defendant has, out of courtesy, maintained the x-rays at our offices in Washington, awaiting plaintiffs' decision to review them. Notably, even after three months, plaintiffs did not decide to make arrangements to review the x-rays until defendant explained that the x-rays needed to be returned to the CEC for use in providing care to the elephants at the CEC. (See Letter from Joshua Wolson to Kimberly Ockene dated December 16, 2005.)

According to your letter, plaintiffs decided to review other medical records before reviewing the x-rays that defendant produced in order to prioritize which x-rays plaintiffs seek to copy and to minimize plaintiffs' litigation costs.¹ Plaintiffs' decision to prioritize their review of some records over others, including x-rays, is, of course, their own to make. However, it is not reasonable to require defendant to facilitate that process by holding the x-rays at our offices indefinitely while plaintiffs prepare their case. Defendant is also not required to accommodate plaintiffs' cost concerns by waiting for plaintiffs to decide, at some indeterminate point in the future, which x-rays it wants to copy.² If plaintiffs wanted to prioritize their review of other materials before reviewing the x-rays so that they have appropriate "context" when they review the x-rays, they should have made arrangements to have the x-rays copied shortly after they were produced. After that, plaintiffs could have reviewed the x-rays on their own schedule, without interfering with defendant's care for its elephants. Because plaintiffs' actions are interfering with defendant's care for its elephants, we need to return the x-rays to the CEC by the end of January. If plaintiffs want copies of some or all x-rays before that, please contact me so that we may make arrangements to have the x-rays copied, and please confirm in writing that plaintiffs will pay for such copies. If plaintiffs decide at some later point in time that they want copies of x-rays that have been produced to them, please contact me, and we will make arrangements with

¹ Your claim of poverty on behalf of plaintiffs is belied by plaintiffs' annual reports. For example, in their 2003 annual reports, the ASPCA reported having net assets of nearly \$65 million and the Fund for Animals reported nearly \$20 million in assets. In addition, the Humane Society of the United States, with which the Fund for Animals combined its operations in 2005, reported having nearly \$100 million in assets in its 2003 IRS Form 990.

² Your suggestion that defendant make copies of all x-rays while awaiting plaintiffs' decision about which x-rays to copy is an inappropriate attempt to shift the costs of plaintiffs' discovery and trial preparation to defendant.

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the CEC to have copies made. Again, we will insist that plaintiffs pay for these copies, as well as any shipment costs for transporting the x-rays from Florida.

You are correct that on January 6 you and I discussed x-rays that had recently been located at the University of Florida. There are two groups of x-rays at the University. First, there are films of elephants that are taken for diagnostic purposes when an elephant is brought to the University with a clinical problem. It is defendant's understanding that the only elephant that fell into this category was Riccardo. Plaintiffs have already received copies of these x-rays through a request to the University of Florida, made in connection with this case, under the Florida Sunshine Act in January 2005. (*See* Tab A.) As plaintiffs' request to the University of Florida acknowledged, the University is the custodian of those x-rays – not Feld. Second, Dr. Ramiro Isaza of the University of Florida, as well as others working with him, have x-rays of Feld's elephants which were taken solely for research purposes. That is, these x-rays were not taken for and are not used for any clinical or diagnostic purpose. We have also learned that these research x-rays are not in Feld's possession, custody, or control. Instead, they are in the possession of the individuals at the University of Florida who are doing the research and to whom Feld, as a courtesy and out of scientific interest, grants access to its elephants. Feld has no legal right to these x-rays, and the custodians have resisted providing copies of them. The fact that the films are of Feld's elephants does not change this analysis. Even if Feld did have a right to obtain the x-rays, they would not be responsive to plaintiffs' document requests. Because the x-rays were taken solely for research purposes, as opposed to any clinical or diagnostic purpose, they are not medical records. Accordingly, defendant is under no obligation to produce these x-rays.

We will provide you with copies of the transcription reports that accompanied the x-rays that you reviewed, as I told you. Given plaintiffs' decision not to request copies of any x-rays, your letter's discussion of a procedure to be used in copying the x-rays is premature. That procedure will depend on the circumstances at the time that plaintiffs decide to request copies of the x-rays, including without limitation the location of the x-rays and the volume that plaintiffs request. When plaintiffs decide to make such a request, please contact me so that we can work out an appropriate procedure.

Your discussion of x-rays that are subject to the protective order is similarly premature. If plaintiffs request copies of x-rays that form the basis for any research papers, we will inform you of that fact when we provide plaintiffs with copies of the x-rays. Until plaintiffs receive copies of any of defendant's x-rays, however, the protective order is not implicated because plaintiffs are not in a position to disclose the basis of the research.

Finally, I must respond to your suggestion that defendant has "belatedly" produced medical records to plaintiffs in this case – an issue that has nothing to do with defendant's production of x-rays. As I have explained to Ms. Ockene in prior correspondence (*see* Letter from Joshua Wolson to Kimberly Ockene dated December 16, 2005), defendant produced to plaintiffs all medical records relating to its elephants in September 2005, including x-rays,

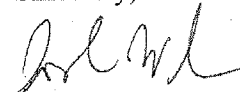
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ultrasounds, and sonograms. Since that time, defendant has produced additional medical records which have consisted almost entirely of a) medical records that have been generated since September 2005 and b) duplicate copies of medical records that have been previously produced to plaintiffs. As to this latter category of documents, defendant produced additional copies of previously-produced documents in an abundance of caution because the documents were included in files related to various USDA inspections and investigations – files that defendant agreed to search in September during meet and confer discussions with plaintiffs – and defendant has produced documents from those files as kept in the ordinary course of business.

Please contact me if you would like to discuss any of this further.

Sincerely,



Joshua Wolson

Attachment

Feld Elephants For Which X-Rays Recently Arrived

Prince
Sabu
India
Calcutta
Putzi
Cora

Meyer & Glitzenstein
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009-1056

Telephone (202) 588-5206
Fax (202) 588-5049
meyerglitz@meyerglitz.com

Katherine A. Meyer
Eric R. Glitzenstein
Howard M. Crystal
Kimberly D. Ockene
Tanya M. Sanerib

January 10, 2005

By Certified Mail

Eleanor M. Green, Chief of Staff,
VC-3A, Box 100136
Veterinary Medical Teaching Hospital
College of Veterinary Medicine
University of Florida, Gainesville
2015 SW 16th Avenue
Gainesville, Florida 32610

Re: Request for Public Records Related to Ringling Brothers, Barnum and Bailey
Circus, and Feld Entertainment

Dear Ms. Green:

I am writing on behalf of the American Society for the Prevention of Cruelty to Animals, the Fund for Animals, and the Animal Welfare Institute, to request public records pursuant to Fl. Stat. ch. 119.07(1)(A) (custodian of public records "shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions") & 119.07(4) (a "custodian" of public records "shall furnish a copy or a certified copy of the record upon payment of the fee prescribed by law").

This request is for copies of: (a) any and all records that the University of Florida at Gainesville has received, created, or otherwise obtained within the past 10 years concerning or related to Ringling Brothers, Barnum and Bailey Circus, and Feld Entertainment's ("Ringling Brothers") Asian elephants; (b) any records concerning Riccardo, an Asian elephant that was formerly in the care and custody of Ringling Brothers, including, but not limited to, records concerning the testing, treatment, study, or necropsy of Riccardo.

"Public records" in this request include the complete range of records as that term is defined in Fl. Stat. Ch. 119.011(11), *i.e.*, "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission." *Id.* 119.011(11).




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Thank you for your prompt response to this request. Although the Florida Public Records Act does not set a deadline for agencies to respond to public record requests, the Act only permits delays that are "necessary to retrieve a record and review and excise exempt material." Tribune Co. v. Cannella, 458 So. 2d. 1075, 1078 (Fla. 1984).

Please do not hesitate to contact me should you have any questions (202.588.5206).

Sincerely,



Erin Tobin