

IN THE FLORIDA SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

AMERICAN CIVIL LIBERTIES
UNION OF FLORIDA, INC.,

Petitioner,

Case No.: 37 2019 CA 2747

v.

FLORIDA DEPARTMENT OF
CORRECTIONS;

Respondent.

/

ACLU'S REPLY IN SUPPORT OF PETITION

Pursuant to the Court's Order to Show Cause (Dec. 13, 2019), at 2, Petitioner American Civil Liberties Union of Florida, Inc., ("ACLU" or "Petitioner") replies in support of its Petition for a Writ of Mandamus (Nov. 19, 2019), and to the response from the Respondent Florida Department of Corrections ("FDOC" or "Respondent") (Jan. 31, 2020) as follows:

Florida mandates public access to agency records. Art. I, § 24(a), Fla. Const.; § 119.01(1), Fla. Stat. An agency may offer assurances that it has provided the requested public access. However, when the public has valid reason to question the assurances, it may test them. Florida mandates the actual provision of the public access, not simply an agency's assurances of access. A court properly permits further inquiry into the agency's assurances to resolve the dispute.

The ACLU sought access to “[e]ach field or piece of information used to calculate the tentative release date,” held in FDOC’s database(s). Records Request (filed Nov. 19, 2019), at 2, ¶ 7. It paid FDOC \$1,380 for this access. On Jan. 14, 2020, FDOC provided the ACLU with 4 interrelated datasets along with supporting tables describing codes used in those datasets. FDOC assures everyone that these 4 datasets completely satisfy the ACLU’s request—it has no additional responsive records. FDOC’s Resp., ¶ 1. It explained why it does not have any information responsive to the ACLU’s request, ¶¶ 7(d) and 7(g). FDOC’s Resp., ¶¶ 2-4. Yet setting aside these specific subparagraphs, the 4 datasets FDOC provided raise numerous questions about their integrity, completeness, and descriptions.

On Jan. 27, 2020, the ACLU raised its concerns (repeated here with one addition) with FDOC. Yet, FDOC still assured everyone it has provided all the requested information it has—without addressing any of the ACLU’s concerns in its response. FDOC’s Resp., ¶ 1. It baldly says, “trust us.” The ACLU wants to trust, but verify. Accordingly, with questions abound, further inquiry is necessary.

FDOC DATASETS ARE INCOMPLETE

A. FDOC has, but did not provide, the Gain Time Ineligibility Period.

In most basic terms, a person's release date is determined from four pieces of information:

$$\text{Sentence Date} + \text{Sentence} - \text{Jail Credit} - \text{Gain Time} = \text{Release Date}$$

For example,

$$\text{Apr. 30, 2010} + \text{5 Years} - \text{60 Days} - \text{60 Days} = \text{Jan. 1, 2015}$$

However, a person is not always eligible to earn gain time—either for a portion of their sentence or its entirety. *See, e.g.,* § 784.07, Fla. Stat. (person ineligible for gain time while serving the minimum sentence for specified assault on LEO offenses); § 944.275(4)(e), Fla. Stat. (person ineligible for gain time while serving the entire portion of a sentence for kidnapping a young child). Thus, although FDOC may and often does record an award of gain time for the entire period of incarceration, FDOC excludes these awards during the period of ineligibility when calculating the person's release date. In short, that gain time, though awarded during a ineligibility period, does nothing to accelerate these persons' release.

The ACLU sought information about this ineligibility period. Records Request, at 2, ¶ 7(d). And more importantly, it sought each “piece of information

used to calculate the tentative release date.” *Id.*, at 2. FDOC claims it does not have any more information—it has provided all public information in its possession. FDOC Resp. It claims it did not provide the ineligibility-period information because it does not have such information. Yet, it is mistaken. Inasmuch as FDOC uses the ineligibility period to calculate a person’s release date, it must record that information.

An example illustrates this. The Gain Time dataset (“GNTMOUT.txt”) reflects that FDOC awarded 302 days of gain time to an inmate with FDOC No. 082137. The gain time was awarded starting in Jan. 2012, when the inmate first came to prison. However, FDOC only credited him with 64 days of gain time to accelerate his release date—his release date has only been reduced by 64 days of gain time. Without explaining why, the FDOC must have excluded (as the ACLU later deduced after running several scenarios) the first 5 years of awarded gain time—the 238 days awarded from Jan. 2012 through Dec. 2016. Based on this adjustment, the Root dataset reflects a Nov. 24, 2025, tentative release date:

$$\begin{array}{rcccccc} \underline{\text{Sentence Date}} & + & \underline{\text{Sentence}} & - & \underline{\text{Jail Credit}} & - & \underline{\text{Gain Time}} & = & \underline{\text{Release Date}} \\ \text{Aug. 24, 2011} & + & 15 \text{ Years} & - & 205 \text{ Days} & - & 64 \text{ Days} & = & \text{Nov. 24, 2025} \end{array}$$

Only by subtracting 64 days of gain time awarded after the 5-year ineligibility period (instead of his entire 302 *awarded* days of gain time) from the total sentence, can FDOC calculate the proper release date. FDOC relied on a 5-year

ineligibility period or an end date of ineligibility to make that calculation.

However, it did not provide the ineligibility period to the ACLU. It left the ACLU to try to guess each person's ineligibility period based on other information, when FDOC has the ineligibility period.

Other provided fields are inadequate to determine (without guesses) the ineligibility period. The "Adjudication Charge's Florida Statute Subsection" in the Offense dataset indicates each Florida Statutes subsection of each offense. But this information is insufficient to determine the ineligibility period. For example, the offense statutes for FDOC No. 082137 are § 843.01 and two § 784.07s. Offenses in violation of § 843.01 do not limit gain time eligibility. § 784.07 does limit eligibility during the "minimum sentence." But the statute specifies *two* minimum sentences. § 784.07(2)(c) specifies a 3-year minimum for aggravated assault; § 784.07(2)(d) specifies a 5-year minimum for aggravated battery. Thus, this field does not reveal whether the ineligibility period is 3 or 5 years. Yet, because FDOC, as explained above, must have calculated FDOC No. 082137's ineligibility period as 5 years, it clearly has recorded that information somewhere—but has not provided it.

FDOC did not provide this ineligibility-period information to the ACLU as requested. None of the 4 datasets provided to the ACLU contain this information.

B. FDOC listed release dates are inaccurate.

The ACLU sought access to the “information used to calculate the tentative release date,” held in FDOC’s database(s). Records Request (filed Nov. 19, 2019), at 2, ¶ 7. The ACLU presumed that FDOC’s calculations comport with Florida law. That is, it assumed the information and method the FDOC uses to calculate release dates is the same as dictated by Florida law. However, this does not always appear to be the case.¹

For example, the Root dataset shows FDOC No. I53158 with an overall sentence term of 4½ years in prison and FDOC received her on Mar. 20, 2017.² Adding the sentence term to the reception date, FDOC should not incarcerate after Sept. 17, 2021.³ Yet, the Root dataset shows a release date of Aug. 9, 2022. The Root dataset contains over 400 such examples of FDOC’s calculated release dates occurring *after* the sum of the listed overall sentence term plus the listed reception date.

¹ This is the sole issue that has not been previously raised with FDOC.

² The Offense dataset confirms a single 4½-year sentence, but also notes a July 25, 2018, sentence date with 13 days of jail credit. Using these figures, her release date should no later than Jan. 9, 2022.

³ FDOC’s real-time Corrections Offender Network similarly shows a Mar. 20, 2017, reception date and a single 4½-year sentence. It shows a July 30, 2022, release date presumably because she earned 10 days of gain time since FDOC’s extraction. *See* <http://www.dc.state.fl.us/offenderSearch/detail.aspx?Page=Detail&DCNumber=I53158&TypeSe arch=AI>

This raises serious questions about whether the FDOC has correctly calculated prisoners' legal release dates. Perhaps FDOC relies on additional or arbitrary information that was not provided to the ACLU. Perhaps FDOC's calculations do not comport with the law. In either case, the ACLU has no way of knowing whether FDOC has provided access to the requested "information used to calculate the tentative release date," Records Request, at 2, ¶ 7, unless FDOC explains what fields it relied on to calculate the release date. The ACLU cannot simply resort to Florida law to figure out what FDOC's calculation is. Its calculation does not comport with Florida law.

C. FDOC has, but did not provide, the field that properly identifies Consecutive sentences.

The Offenses dataset ("OFNSOUT.txt") contains details of each offense for which a person is serving a prison sentence. To calculate the total period of incarceration, the ACLU requested FDOC to identify whether offenses ran concurrent or consecutive. Records Request, ¶ 7(b). FDOC included in the Offenses dataset a field called, "concurrent or consecutive." However, this is not always dispositive. Sometimes, FDOC will treat an offense listed as "concurrent" as consecutive for purposes of calculating the overall sentence.

For example, the Offenses dataset shows FDOC No. 082137 with three 5-year *concurrent* sentences. Yet, the Root dataset reflects an overall sentence of

5,475 days or 15 years, which indicates FDOC calculated the overall sentence as if these offenses were *consecutive*. FDOC undoubtedly has, used, but did not provide, a field to calculate this 15-year prison term.

Clearly, to calculate the overall sentence, FDOC must know whether offenses run concurrent or consecutive. This must be recorded in its database. However, FDOC did not produce the field that it uses to calculate the total prison sentence.

D. FDOC Datasets include Non-Current inmates and exclude Current ones.

The ACLU sought information about persons in FDOC's *current* custody. Records Request (filed Nov. 19, 2019), at 1. On or about Dec. 19, 2019, FDOC extracted from its database(s) information purportedly about persons in its custody on that day. The Root dataset ("Rootout.txt") provides general information about each person in its custody and interrelates to the other 3 datasets, which include specific offense, gain time, and special provisions about these same persons. FDOC assures us that these datasets are completely responsive to the ACLU's request and reflects persons in its current custody. FDOC's Resp., ¶ 1. However, numerous reasons suggest this is inaccurate.

Phantom Persons with Non-standard FDOC Nos.

The Root dataset includes 40 persons with a non-standard FDOC No. Generally, FDOC Nos. are 6 characters long. Indeed, each person included in FDOC's Offender Based Information System (OBIS)⁴ has a 6-character FDOC No. Yet, the Root dataset (and consequently or incidentally the other datafiles) includes 40 persons with a 5-character FDOC No. Because of this feature, these 40 persons are excluded from and cannot be found in FDOC's other public databases. FDOC's monthly OBIS reports of the nearly 95,000 persons it detains identifies each inmate by a 6-character FDOC No. Its online Corrections Offender Network⁵ requires a 6-character FDOC No. to perform a search.

Thus, these 40 persons in the Root dataset appear to be phantoms that exist nowhere else.⁶ A 5-character FDOC No. exists only in its production to the ACLU. The ACLU identified for FDOC these 40 non-standard FDOC Nos.

⁴ FDOC publishes information about each person in its custody. It provides real-time access to inmates on its web page, <http://www.dc.state.fl.us/offendersearch/>. It publishes monthly a dataset of persons in its custody. http://www.dc.state.fl.us/pub/obis_request.html. Both the real-time web inquiries and the monthly OBIS reports all identify each person with a 6-character FDOC No. A 5-character FDOC No. exists only in its production to the ACLU.

⁵ Available at <http://www.dc.state.fl.us/OffenderSearch/Search.aspx>.

⁶ Perhaps some of the actual, 6-character FDOC Nos. can be fashioned from the 5-character FDOC No. simply by adding a lead "0." This works in 3-4 examples, e.g., "37493" may become "037493." However, it is far from certain that this accurately reflects the same person's FDOC No. in the OBIS database. This method does not appear to apply to the vast majority.

FDOC did not respond to this irregularity and the ACLU's concern for the integrity of the datasets. FDOC's Resp.

Current Persons with Prior Release Dates

The Root dataset, which was extracted on or about Dec. 19, 2019, includes 346 persons whose tentative release date was on or *before* Dec. 7, 2019. That is, the datasets include people who should have already been *released* before the information about "current" inmates was extracted. Possible reasons explain some. For people who have recently lost gain time for a prison rule violation or recently been convicted of a crime that would enlarge the period of custody, e.g., battery on a correctional officer, they would properly remain in FDOC custody pending a correction of their release date. Others may have had their release date adjusted to correct an initial input error. However, for hundreds of others the explanations are elusive at best.

For example, FDOC No. D29375, was sentenced in Aug. 2007 to 3 years of prison. FDOC included the inmate as a person in its *current* custody, although the Root dataset indicates an Apr. 11, 2010, release date. Furthermore, although the person is *included* in the datasets FDOC provided to the ACLU, FDOC excludes the person in its OBIS reports about current inmates. The person cannot be found in real-time web inquiry at <http://www.dc.state.fl.us/offendersearch/> nor in its OBIS monthly report of everyone in custody on or about Oct. 4, 2019. In all, a

total of 203 similar such persons⁷ (a) were identified by FDOC as in *current* custody and included in its Root dataset (extracted in mid-Dec. 2017), but (b) had a release date before Dec. 7, 2019, and (c) are excluded from FDOC’s public accounting of people in its custody in the OBIS databases. Many of the persons FDOC claims are in its custody had listed release dates in the 1960s and 1970s. Indeed, FDOC’s Root dataset shows it received one such person (FDOC No. 27028) in Jan. 1935, the person had a release date in May 1943, and yet FDOC included that person in the list of *current* inmates.

FDOC assures us that the persons in the provided datasets are current inmates, notwithstanding a prior release date and its failure to include them in other databases of current inmates. Its assurances stretch credulity beyond its breaking point.

Incomplete “Current” List

The Root dataset (and consequently or incidentally the other datasets) does not appear to include a complete set of *current* persons in prison—but a subset of people trimmed from two sides. The Dec. 19, 2019 data extraction excludes many persons released before Dec. 19, 2019. At the same time it excludes people who came to prison after Nov. 27, 2019. A time void exists between these two dates.

⁷ The 203 persons includes 32 with 5-character FDOC Nos.

Yet, this time void is not seen in FDOC’s monthly OBIS reports. Those reports show a sharp switch from intake to release at the time the report is generated. For example, the Oct. 2019 OBIS report shows a steady and consistent flow of people being admitted to prison from Sept. 9, 2019, through Oct. 3, 2019—an average of 90 persons/day. After Oct. 4, it reflects a sudden drop to zero as no one else arriving at prison. Conversely, starting Oct. 4, the Oct. 2019 OBIS report shows a sudden and consistent stream of people scheduled to leave prison—initially averaging about 70 person/day. And this too was a sudden change—the report reflects only a handful of people with a release date prior to Oct. 4.

Thus, FDOC has the capability to extract details of its *current* population—those recently received and those soon to depart. However, FDOC did not produce such a dataset to the ACLU. Instead, it excluded people in a 3-week time void—Nov. 27 to Dec. 19, 2019. Or alternatively, FDOC extracted the data on more than 1 day—thus creating two or more “current” dates for the datasets. Questions abound.

E. FDOC’s Code Descriptions are Themselves Codes

At times, FDOC used codes in the datasets and provided descriptions of the codes in supplemental tables. The ACLU takes no issue with this as a general practice. However, the code descriptions for the Gain Time Status (“GTSTOUT.txt”) and Gain Time Reason for Status (“GTRSOUT.txt”) are

themselves codes that reveal little. Public access is defeated when FDOC speaks in secret codes and refuses to provide a meaningful code sheet.

In the Gain Time dataset (“GNTMOUT.txt”), the status of each individually recorded gain time notation is marked with a code: 0-9, or A-D. FDOC then provided a “decoder” table that purportedly described the gain time status:

Gain Time Status

A	Applied%	3	Applied+
B	Cancelled	4	Applied-
C	Unrated	5	Applied*
D	Prohibit	6	Obsolete+
0	Spec Prov	7	On Hold
1	Pending	8	Forfeited
2	Applied	9	Void

However, the descriptions are themselves codes. We may know that a “3” means “Applied+,” and a “4” and “5” mean “Applied-” and “Applied*.” But these reveal little to nothing about what this information means or whether FDOC awarded the gain time and accordingly reduced the person’s prison sentence. The +, -, and * are themselves codes. The ACLU inquired about the meaning of these gain time status, as well as the gain time status reason. FDOC refused to provide any context or explanation. The ACLU reviewed FDOC’s response to its Oct. 23, 2019, records request for the policy and procedures FDOC has about how to calculate inmates’ Tentative Release Date. These too failed to shed light on the significance

of “Applied+,” “Applied-,” and “Applied*” or how gain time with these status codes affects release dates.

Clearly, FDOC has an explanation of what “Applied+” means, but refuses to provide it. It has thwarted public access.

AUTHORITY TO CONDUCT EVIDENTIARY HEARING AND ORDER DISCOVERY

The Court has clear authority and an obligation to conduct an evidentiary hearing on the disputed issue of whether FDOC has provided the requested access to public records. *Waters v. Inch*, 266 So. 3d 1216, 1218 (Fla. 1st DCA 2019) (ruling “if a mandamus petition and response raise disputed issues, the trial court must resolve those issues upon evidence submitted by the parties and the court errs in denying a petition unless there is sworn evidence refuting the petitioner’s allegations.”) (quotations omitted), *reh’g denied* (Mar. 29, 2019); *Ferrier v. Pub. Def.’s Office, Second Judicial Circuit of Florida*, 171 So. 3d 744 (Fla. 1st DCA 2015) (holding the trial court “erred in not conducting an evidentiary hearing on the contested issue of whether the [agency] had the requested materials in its possession.”); *Owens v. Crews*, 131 So. 3d 799, 799–800 (Fla. 1st DCA 2013) (“dismissal was erroneous because a disputed issue of fact exists”); *see also Lewis v. Office of the Pub. Def.*, 277 So. 3d 1146 (Fla. 1st DCA 2019) (remanding mandamus action for “evidentiary hearing on the contested issue of whether

[agency] had the requested public records in its possession.”) (citing *Ferrier*, 171 So. 3d 744).

Inasmuch as the Court has the obligation to resolve disputed facts, discovery (including a deposition) on disputed facts is authorized by Fla.R.Civ.P. 1.280. *See* Fla.R.Civ.P. 1.010 (civil rules generally “apply to all actions of a civil nature”). Ordering the FDOC to submit to a deposition would facilitate resolving any factual dispute and may alleviate a need for the Court to conduct an evidentiary hearing.

FDOC’S RESPONSE FAILS TO COMPORT WITH THE COURT’S ORDERS

The Court’s Order to Show Cause (Dec. 13, 2019) directed FDOC to “address the allegations made in the petition.” *Id.*, at 1. The Order Following Case Management Conference (Jan. 8, 2020) directed FDOC to address whether the Court may “order an evidentiary hearing.” *Id.*, at 1.

FDOC did not address the Petition’s allegations. FDOC did not address the Court’s authority to conduct an evidentiary hearing.

The Court should deem admitted the allegations in the Petition left undisputed by FDOC. The Court should not give FDOC a second opportunity to address the Court’s authority to conduct an evidentiary hearing.

ATTORNEY'S FEES & COSTS

As ordered by the Court, the entitlement and amount of any attorney's fees and costs will be decided after resolution of the underlying mandamus relief. Order Following Case Management Conference (Jan. 8, 2020), at 2. This comports with Fla.R.Civ.P. 1.525.

Notwithstanding the Court's Order, FDOC argued that it provided timely access to public records and should not be taxed attorney's fees. The ACLU disputes this. FDOC did not provide timely access to public records; the ACLU is entitled to attorney's fees.

The ACLU wishes an opportunity to properly assert its claim in a proper motion at the proper time.

CONCLUSION

The ACLU does not expect FDOC's datasets to be flawless. However, the information requested from the FDOC carry significant consequences. It accounts for whom FDOC detains. FDOC uses it to calculate when to release a person from prison. Given the significant liberty issues at stake, FDOC should be expected to take care to keep mistakes to a minimum. So, when the public raises valid questions about the integrity and completeness of FDOC's records, this cannot be ignored. Certainly, databases are only as good as the inputted information.

However, equally true, extracts of that database are only as good as the designed reports. An inquiry into the FDOC's provision of public records is warranted.

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the following persons on the E-filed date of this document by filing the document with service through the e-Service system (Fla.R.Jud.Admin. 2.516(b)(1)):

William D. Hall (whall@deanmead.com, bgsanders@deanmead.com) –
Respondent Florida Department of Corrections

Kenneth Steely (Kenneth.Steely@fdc.myflorida.com,
courtfilings@fdc.myflorida.com) – General Counsel for Respondent
Florida Department of Corrections

Respectfully Submitted,

s/Benjamin James Stevenson
Benjamin James Stevenson
Fla. Bar. No. 598909
ACLU Found. of Fla.
3 W. Garden St., Suite 712
Pensacola, FL 32502-5636
T. 786.363.2738
bstevenson@aclufl.org

Daniel Tilley
Florida Bar No. 102882
ACLU Found. of Fla.
4343 W. Flagler St., Suite 400
Miami, FL 33134
T. 786.363.2714
dtilley@aclufl.org

Counsel for the Petitioner