



On March 11, 2011, Requester requested the following:

1. Copy of Cornerstone Appraisal Service, Inc. Report that was stated in Mr. Justin Hays, Underwriting Manager Nationwide Insurance letter dated January 28, 2011.
2. Copy of report that was prepared by Ms. Tina Stanton, Independent Inspection Consultant for Cornerstone Appraisal Services, Inc. . . . .
3. Copy of contract between Cornerstone Appraisal Services, Inc. and Tina Stanton.
4. Copy of Professional Membership Organization for Home Inspections that list Tina Stanton as a current member in good standing and date Tina Stanton was issued an Appraisal License in the State of Pennsylvania.
5. Copy of contract between Nationwide Property & Casualty Insurance Co. and Cornerstone Appraisal Services, Inc.
6. Official date Nationwide Representative Adnan Ilyas Agent Number 0435121 was removed as my agent.

Requester's First Request, March 11, 2011, Paragraphs 1-6 at 1-2; C.R. at No. 1.

The Department denied the request:

The Department does not have records that you requested in its control. The Department does not maintain contractual documents that might exist between an insurance company and the appraisers used. Nor does the Department license appraisers; therefore, Ms. Stanton's status in a "Professional Membership Organization" is unknown to us. In addition, you asked for an official date that Adnan Ilyas was removed as your agent. The Pennsylvania Open Records Law is designed

to allow requestors copies of documents filed with the Department, therefore the question cannot be answered as it is not a document.

If the Department had the documents, the request would have been denied because investigative records including complaints submitted to the Department are not considered public records and therefore exempt from disclosure. . . 65 P.S. § 67.708(17) . . . . (emphasis added).

The Department's Denial to the Requester's First RTKL Request, March 16, 2011, at 1; C.R. at No. 2.

#### Second Request.

On March 22, 2011, Requester submitted his Second Request and sought the following:

1. Requesting copies of all documents from Nationwide Property and Casualty Insurance Company and any other company that have [sic] provided Mr. Gregory Long, Insurance Investigator and Mr. James E. John, Insurance Investigator Supervisor with any type of documents.
2. Complete copy of the Act of July 22, 1974, P.L. 589, No. 205, as amended 40 P.S. Sections 1171.1-1171.11 (Act 205), which governs the termination of policies covering owner-occupied residences or personal property of individuals as stated in the first paragraph of Mr. Gregory Long's letter dated February 10, 2011.
3. Copy of a document(s) that state "The insurance company can cancel a policy for any underwriting related reason".
4. Did Nationwide Property And Casualty Insurance Company list a specific reason for canceling the homeowner's policy? Submit written proof.

5. Provide proof (documents) in regards to the 4<sup>th</sup> paragraph where Mr. Gregory Long states “Our investigation has determined the company met the requirements of Act 205 and the Insurance Department therefore finds that your policy may be cancelled”.

6. If insurance underwriters are required to be licensed by the State of Pennsylvania Insurance Department, provide me with the date Mr. Justin Hays and Ms. Amy Daniels of Nationwide Property and Casualty Insurance Company were licensed or not. If complaints that were filed against him, How many? Provide me with copies.

7. If insurance underwriters are not required to be licensed, how are they trained in underwriting insurance contracts? Please explain.

8. Attached to Mr. Gregory Long’s, February 10, 2011 letter that was address [sic] to me was a letter from Justin Hays. The second paragraph is unclear to me therefore, I need the question answered clearly upon stating parts of the second paragraph . . . . Therefore, the question I am asking did Cornerstone Appraisal Services, Inc. conducted [sic] the inspection or did someone else conduct the inspection for Cornerstone Appraisal Services, Inc. where Cornerstone Appraisal Services, Inc. reviewed the inspection report. If someone else conducted the inspection for Cornerstone Appraisal Services Inc., what is the name of the person?

Requester’s Second Request, March 22, 2011, Paragraphs 1-8 at 1-2; C.R. at No. 3.

On March 31, 2011, the Department denied Requester’s Second Request:

The Department has denied your request to the items in paragraph one (1), four (4) and five (5) because these documents are considered investigatory in nature and

excluded under the RTKL. Please see 65 P.S. §67.708(17) . . . .

In addition, paragraph one (1) is overly broad. The RTKL at 65 P.S. § 67.703 requires that a written request identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested. Mr. Long and Mr. John are representatives of our Bureau of Consumer Services and as such, may receive hundreds, if not thousands of documents each month, from various insurance entities pertaining to complaints and questions.

. . . .

With regards to paragraph three (3), your request is overly broad . . . .

Paragraphs six (6) and seven (7) concerning the licensing of underwriters and the training they receive. Please be advised that the Insurance Department does not license underwriters. In addition, the Department does not have records that you request in its possession, under its custody or its control . . . .

Paragraph eight (8) asks several questions . . . . The RTKL does not provide for answering questions, therefore, the Department is unable to interpret the request as stated . . . . (emphasis added).

Insurance Department's Response to Requester's Second Request, April 29, 2011, at 2-3; C.R. at No. 5.

### Third Request.

On May 4, 2011, Requester submitted a Third Request and sought the following:

1. Name the person(s) from your Insurance Department or from Nationwide Insurance that you received the

Cornerstone Appraisal copy from and the date you received the Appraisal.

2. When you received the Cornerstone Appraisal did you personally read the entire Appraisal? Answer yes or no.

3. Upon receiving the Cornerstone Appraisal did you inform Mr. Gregory Long and Mr. James John that you received a copy of the Cornerstone Appraisal and did you give Mr. Long and Mr. John an individual copy of the Cornerstone Appraisal? Answer yes or no.

Requestor's Third Request, May 4, 2011, Paragraphs 1-3 at 1; C.R. at No. 6.

On May 12, 2011, the Department denied Requester's Third Request because the items sought were exempt from public disclosure pursuant to Section 708(b) (exceptions) of the RTKL, 65 P.S. § 67.708(b), that the request did not seek specific documents, and that the purpose of the RTKL was not to secure answers to interrogatories. Insurance Department's Denial to Requester's Third Request at 2; C.R. at No. 7.

#### Appeal To The OOR.

On May 16, 2011, Requester appealed the Department's March 16, 2011, denial, the April 29, 2011, denial, and the May 12, 2011, denial of his requests under the RTKL to the OOR. Both parties supplemented the record before the OOR with additional relevant information and argued their respective positions.

#### OOR's Decision.

The OOR determined:

On March 16, 2011, the Department denied the First Request . . . . [A] requester may only appeal within fifteen business days of the date a request is denied or deemed denied. As the appeal was filed beyond this period, the appeal is dismissed as untimely as to the First Request.

. . . .  
Item 8 of the Second Request and Items 2 and 3 of the Third Request asked the Department to answer various questions. The OOR has previously held that a request must seek records, rather than answers to questions . . . . Consequently, the OOR finds that Item 8 of the Second Request and Items 2 and 3 of the Third Request did not properly seek records and instead asked questions.

. . . Based on a review of the Request and the argument presented by the Department, the OOR holds that Items 1 and 3 of the Second Request did not sufficiently identify what records were sought and, accordingly, did not comply with 65 P.S. § 67.703. Because the OOR finds that Item 1 of the Second Request failed to identify what records were sought, the OOR need not address whether such records are exempt under 65 P.S. § 67.708(b)(17).

. . . .  
The OOR finds that this affidavit [Regional Manager for the Department's Bureau of Consumer Services], along with the position statement submitted by the Department, provides factual support that the requested records relate to a noncriminal investigation pursuant to 65 P.S. § 67.708(b)(17)(ii). Accordingly, the OOR holds that the Department established that Items 4 and 5 of the Second Request and Item 1 of the Third Request are not subject to public access . . . .

. . . .  
. . . Based on the evidence provided, the Department demonstrated that no records exist in response to Items 6 and 7 of the Second Request. (emphasis added).

OOR's Final Determination, June 15, 2011, at 6-9; C.R. at No. 13. The OOR denied Requester's appeal of the Department's April 26, 2011, denial of his Second Request and the Department's May 12, 2011, denial of his Third Request. The OOR dismissed as untimely Requester's appeal of the Department's March 16, 2011, denial of his First. Request.

## **I. Requester's Statement Of Issues.**

### **A. Was Requester's Appeal Of The Department's March 16, 2011, Denial Untimely?**

Initially, Requester, appearing *pro se*, contends<sup>3</sup> that his appeal was not untimely because the OOR issued its final determination beyond the statutory time period provided in RTKL.<sup>4</sup>

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<sup>3</sup> This Court's review in appeals from the OOR is *de novo*. Bowling v. Office of Open Records, 990 A.2d 813 (Pa. Cmwlth. 2010), petition for allowance of appeal granted, 609 Pa. 265, 15 A.3 427 (2011); Section 1301(a) of the RTKL, 65 P.S. § 67.1301(a) ("The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole. The decision shall clearly and concisely explain the rationale for the decision"). Additionally, this Court may substitute its own findings of fact for that of the agency. Bowling, 990 A.2d at 818.

<sup>4</sup> This Court notes that Requester's brief consisted of nineteen pages alleging: 1) that there was a conspiracy entered into between the OOR and the Department's attorneys to deprive Requester of his requested documents; 2) that the "Appeals Officer" made false statements "in his Final Determination"; 3) that the OOR Executive Director's letter dated May 16, 2011, and sent "to Ben Walker . . . was nothing more than a cover-up"; and 4) that "the five (5) attorneys that included the Appeals Officer named in the Petition for Review violated their oath of office as licensed Attorneys . . . [and that] [b]ased on what those attorneys have done none of them should be allowed to practice law because four of the five attorneys tried to protect all of the Appeals Officer statements." See Requester's Brief at 9-14. In an attempt to render meaningful appellate review, this Court will address Requester's issues first and then proceed to address the Department's counter-statement of the issues.



Initially, Section 1101 (filing of appeal) of the RTKL, 65 P.S. § 67.1101, provides:

**(a) Authorization.-**

(1) If a written request for access to a record is denied or deemed denied, the requester may file an appeal with the Office of Open Records or judicial, legislative or other appeals officer designated under Section 503(d) within 15 business days of the mailing date of the agency's response or within 15 business days of a deemed denial. The appeal shall state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record and shall address any grounds stated by the agency for delaying or denying the request. (emphasis added).

In the present controversy, Requester's First Request was received by the Department on March 14, 2011, and denied on March 16, 2011. C.R. at No. 2. Requester filed an appeal from the Department's March 16, 2011, denial on May 16, 2011. C.R. at No. 8. Pursuant to Section 1101(a) of the RTKL, 65 P.S. §67.1101(a) Requester had fifteen days to appeal that decision or no later than April 6, 2011. Requester's appeal of the Department's denial was filed more than five weeks beyond that date. "It is well established that failure to timely appeal an administrative agency's action is a jurisdictional defect; consequently, the time for taking an appeal cannot be extended as a matter of grace or mere indulgence." H.D. v. Department of Public Welfare, 751 A.2d 1216, 1219 (Pa. Cmwlth. 2000).

Second, there is no merit to Requester's argument that the OOR issued an untimely final determination.

Section 1101**(b) (Determination).**- of the RTKL, 65 P.S. § 67.1101(b) provides:

(1) Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a). (emphasis added).

(2) If the appeals officer fails to issue a final determination within 30 days, the appeal is deemed denied. (appeal denied).

Here, Requester's appeal was received by the OOR on May 16, 2011, and the OOR rendered its decision on June 15, 2011, exactly thirty calendar days from the date Requester filed his appeal and within the thirty day requirement. The OOR timely dismissed Requester's appeal of the denial of his First Request as untimely. In any event, *assuming arguendo* that a final determination was not made "within 30 days, the appeal is deemed denied."

**B. Did The OOR Preclude The Department's Agency Open Records Officer From Submitting Documents And Information?**

Requester next contends that the OOR precluded the Department from submitting documents and information in support of its denial of Requester's requests. Apparently, Requester believes the OOR did follow the RTKL when it did not order the Department to produce "documents and information."

The certified record indicates that Requester is factually incorrect. The OOR did allow the Agency Open Record Officer to submit information by way of counsel. First, OOR directed the Department that "[a]ll facts and statement of facts, including those made in letters, submissions, and/or written argument must be supported by an affidavit made under penalty of perjury by a person with actual knowledge." (emphasis in original). Letter from the OOR to Requester and

Peter Salvatore (Mr. Salvatore), Agency Open Records Officer, May 16, 2011, at 1; C.R. at No. 9.<sup>5</sup>

C. Was The OOR's Use Of Quoted Material From The Department's Submission In Support Of Its Decision Tantamount To A Conspiracy?

Requester contends that the OOR's use of portions of the Department's submission of evidence in its final determination indicated a conspiracy between the Department and the OOR.

The OOR's final determination referenced a quoted statement from the Department's submission that Item 1 and Item 3 of Requester's Second Request were overly broad. See OOR's Final Determination, June 15, 2011, at 7; C.R. at No. 13. However, Requester does not direct this Court to any part of the record which evidences a conspiracy between the Department and the OOR. The mere fact that the OOR quoted a well-reasoned portion of the Department's submission on page seven of its final determination is not sufficient evidence to warrant a reversal of the OOR's decision.<sup>6</sup>

**II. The Department's Counter-Statement Of Issues.**

A. Was The OOR Required Under The RTKL To Respond To Requester's Questions?

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<sup>5</sup> Contrary to Requester's allegations, the Department's counsel did not usurp the authority of the Agency Open Records Officer but merely represented Mr. Salvatore before the OOR. See Department's Brief at 19.

<sup>6</sup> Last, Requester seeks damages in the amount of \$500,000 as a result of the time he spent in preparing his appeal and the alleged conspiracy between the Department and the OOR which deprived him of sufficient time to prepare for the patent bar examination. This claim is baseless.

Requester sought answers from the Department to questions he raised in Item 8 of his Second Request and Item 2 and Item 3 in his Third Request. These requests were concisely recounted by the Department: “[s]pecifically requested item 8 in Request #2 makes several extensive statements concerning a letter Petitioner [Requester] had received regarding his homeowners insurance carrier’s appraisal of his property, and then asks the name of the entity that conducted the appraisal. See CR 3, p.3. Items number 2 and 3 in Request #3 specifically sought a „yes“ or „no“ answer to several questions concerning this appraisal. See CR 6, p.2.” Department’s Brief at 12 n.5.

Section 102 of the RTKL, 65 P.S. § 67.102, defines the term “public record” as “[a] record, including a financial record, of a Commonwealth or local agency . . . not exempt under section 708 . . . not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree [and] not protected by a privilege.” Section 102 of the RTKL also defines the term “record” as “[i]nformation . . . that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency . . . .”

Here, Requester did not seek “records” but rather requested answers to certain questions. The RTKL is designed to “promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions.” Bowling, 990 A.2d at 284. The RTKL is not a forum for the public to demand answers to specifically posed questions to either a Commonwealth or local agency. In fact, there is no provision in the RTKL that requires an agency to respond to questions

posed in a request. Therefore, the OOR properly dismissed the requested items in Requester's Second and Third Requests.

#### B. Did Portions Of Requester's Request Lack Sufficient Specificity?

Specifically, Requester sought, in Item 1 of his Second Request, copies of "all documents" that were received from "Nationwide Property And Casualty Company and any other company" to two named staff members of the Department's Consumer Service Bureau. (emphasis added). Second Request, Item 1; C.R. at No. 5. Also, as to Item 3 of the Second Request, Requester sought copies of "all documents" possessed by the Department that contain the phrase, „the insurance company can cancel a policy for any underwriting related reason.“ (emphasis added). Second Request, Item 3; C.R. at No.5.

The Department denied Requester's Item 1 and Item 3 in his Second Request and Third Request because they lacked sufficient specificity insofar as the Department could not determine precisely what documents were being sought.

Section 703 of the RTKL, 65 P.S. § 67.703, relevantly provides that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested . . . ." (emphasis added).

Here, Requester failed to limit the time period involved, failed to adequately describe the records sought, and failed to list any specifics that could possibly assist the Department in its search. See Mollick v. Township of Worchester, 32 A.3 859, 870-71 (Pa. Cmwlth. 2011) (a request seeking all e-mails

regarding any township business over a five year period was not sufficiently specific to ascertain which records were requested and as a result would place an unreasonable burden on an agency). The OOR committed no error when it determined that Requester's requests were not sufficiently specific.

C. Was The Department Required Under The RTKL To Disclose Certain Investigative Material Sought By Requester?

At Item 4 and Item 5 of the Second Request, Requester wanted the Department to provide a "specific reason", "submit written proof", and "provide . . . documents" to explain why his homeowner's policy was canceled, and why the Department agreed with the insurance carrier that his policy could be terminated pursuant to the "Unfair Insurance Practices Act."<sup>7</sup> Second Request, Item 4 and Item 5; C.R. at No. 3.

The General Assembly established a rebuttable presumption that documents in the possession of a Commonwealth agency are public records.<sup>8</sup> The burden of proving that a record is exempt from public access is on the Commonwealth agency.<sup>9</sup>

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<sup>7</sup> Act of July 22, 1974, P.L. 589, as amended, 40 P.S. §§ 1171.1-1171.15.

<sup>8</sup> Section 305(a) of the RTKL, 65 P.S. § 67.305(a), provides:

A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record. The presumption shall not apply if:

- (1) the record is exempt under Section 708;
- (2) the record is protected by a privilege;
- (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree.

<sup>9</sup> Section 708(a)(1) of the RTKL, 65 P.S. § 67.708(a)(1), provides that "[t]he burden of proving that a record of a Commonwealth agency or local agency is exempt from public access **(Footnote continued on next page...)**

Section 708 of the RTKL, 65 P.S. § 67.708, provides:

**(b) Exceptions.**-Except as provided in subsection (c) and (d), the following are exempt from access by a requester under this act:

(17) A record of an agency relating to a noncriminal investigation, including:

(i) Complaints submitted to an agency.

(ii) Investigative materials, notes, correspondence and reports.

(iii) A record that includes the identity of a confidential source, including individuals subject to . . . the Whistleblower Law.

(iv) Work papers underlying an audit.

.....

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

(B) Deprive a person of the right to an impartial adjudication.

(C) Constitute an unwarranted invasion of privacy.

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**(continued...)**

shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.”

(D) Hinder an agency's ability to secure an administrative or civil sanction.

(E) Endanger the life or physical safety of an individual.

This Court reviewed the term "investigation" and "conclude[d] that, as used in Section 708(b)(17), the term „investigation“ means a systematic or searching inquiry, a detailed examination, or an official probe.” Department of Health v. Office of Open Records, 4 A.3d 803, 810-11 (Pa. Cmwlth. 2010). However, this Court cautioned that “the exemptions from disclosure must be narrowly construed.” Bowling, 990 A.2d at 824.

Here, the Department denied the information sought based upon the noncriminal investigation exception under Section 708(b)(17) of the RTKL. In support of its position, the Department submitted a sworn and notarized affidavit of William J. Rohaly (Rohaly), the Regional Manager for the Department's Consumer Service Bureau. Rohaly stated:

On or about January 20, 2011, the Bureau of Consumer Services received a complaint from Ben Walker [Requester]. In response to Mr. Walker's [Requester's] complaint, Department's File No. 11-119-98623 was created. All documents and notations in the Department's File No. 11-119-98623 are investigative materials, notes, correspondence and reports created, developed and/or received in the process of the Department's investigation of Mr. Walker's [Requester's] complaint. (emphasis added).

No financial or aggregate data is contained in Department's File No. 11-119-98623. This file consists only of investigative material relating to and/or collected in the process of investigating Mr. Walker's [Requester's] complaint. (emphasis added).



In addition, any documents provided to Mr. Gregory Long, Insurance Investigator, and/or Mr. Gregory Long, Insurance Investigator, and/or Mr. James John, Insurance Investigator Supervisor, from Nationwide or any other company would have been provided pursuant to a complaint or investigation, as a result of a complaint or in the process of investigating a complaint.

Affidavit of William J. Rohaly, May 25, 2011, at 1-2; C.R. at No. 10.

Here, the record supports the Department's position that it conducted a "systematic or searching inquiry, a detailed examination, or an official probe" into Requester's complaint and that the documents sought by Requester fell within the noncriminal investigative material exception under Section 708(b) . . . (17) of the RTKL, 65 P.S. § 67.708(b)(17).

D. Did The Department Provide Sufficient Evidence In Support Of Its Position That No Responsive Documents Existed?

Last, Requester sought information at Item 6 and Item 7 of his Second Request that related to the purported licensure and training of insurance underwriters by the Department and specific information that related to Mr. Justin Hays, underwriter for Nationwide Property and Casualty Company, as to all complaints filed against him.

The Department denied Requester's request because the Department lacked the regulatory authority to license or train insurance underwriters and there were no documents in existence that satisfied Requester's request. Specifically, the Department introduced the following notarized affidavit that explained the Department's reason for denial:

As the Agency Open Records Officer:

1) I am to make a good faith effort to determine whether the agency has possession, custody, or control of the record requested, pursuant to 65 P.S. § 67.901<sup>[10]</sup>;

2) I have made a thorough inquiry of any designated and/or reasonably likely records custodians for the records requested, above; and

3) Based on the information provided to me, I do hereby affirm that, to the best of my knowledge, information and belief, such records do not exist within our agency. (emphasis added).

Affidavit of Mr. Salvatore, Agency Open Records Office, May 25, 2011, at 1; C.R. No. 11.

The OOR accepted the Department's un rebutted affidavit as sufficient evidence that there were no documents in its possession to match Requester's requests in Item 6 and Item 7 of his Second Request. "Furthermore, this Court has tacitly approved OOR's requests for, and use of, testimonial affidavits in rendering decisions." Sherry v. Radnor Township School District, 20 A.3d 515, 520 (Pa. Cmwlth. 2011). "The use of such affidavits is especially significant given the strict time limitations imposed on agencies and [the] OOR to make a determination."

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<sup>10</sup> Section 901 of the RTKL, 65 P.S. § 67.901 provides:

Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody, or control of the identified record and to respond as promptly as possible under the circumstances existing at the time of the request . . . .

(footnote omitted). Id. at 520. The OOR properly determined that the Department adequately demonstrated that no records existed that matched Requester's request.

According, this Court affirms.

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ben Walker,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Insurance Department,	:	No. 1485 C.D. 2011
Respondent	:	

**ORDER**

AND NOW, this 15th day of June, 2012, the order of the Office of Open Records in the above-captioned matter is affirmed.

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BERNARD L. MCGINLEY, Judge