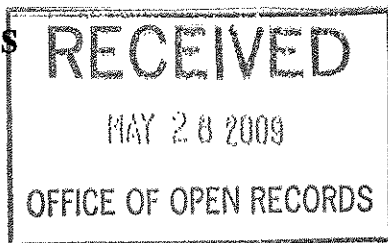


PENNSYLVANIA OFFICE OF OPEN RECORDS



IN THE MATTER OF:

JAMES SCHNELLER,
Complainant

v.

PENNSYLVANIA GAMING
CONTROL BOARD,
Respondent

Docket No. AP 2009-0281

PETITION FOR RECONSIDERATION

Respondent, the Pennsylvania Gaming Control Board (PGCB) files this Petition for Reconsideration of the Final Determination of the Office of Open Records issued in the above-captioned case on May 11, 2009, pursuant to 1 Pa. Code § 35.241.

The PGCB submits that the Final Determination of the Office of Open Records, directing the PGCB provides James Schneller with access to requested documents within 30 days, is contrary to law, procedure, and public policy, and the Office of Open Records did not have jurisdiction to consider the merits of Mr. Schneller’s filing because no Right to Know Law request was made to the PGCB. Specifically, the Appeals Officer’s legal analysis finding that Mr. Schneller’s March 20, 2009 correspondence to the PGCB was a Right to Know Law request is flawed. Further, the Appeals Officer has failed to follow Office of Open Records procedure as set forth in its “Interim Guidelines” (Regulations); ordered the PGCB to provide documents that are protected by its enabling statute; and, by issuing this Order, has begun to set the brakes on government agencies being able to perform the tasks for which they were created.

1. The Appeals Officer incorrectly deemed Mr. Schneller’s letter, dated March 20, 2009, a

Right to Know Law request. The Appeals Officer states that the Right to Know Law “does not require requests to cite the Right to Know Law, nor to state that the request is being made pursuant to the Right to Know Law,” (F.D. Pg. 3). The Appeals Officer reasons that because Mr. Schneller made a request for records *in writing* that his letter is a Right to Know Law request. This conclusion is contrary to the plain language of the Right to Know Law, which under 65 P.S. §67.702 requires that a Right to Know Law request be made in writing in order for a requester to pursue relief (appeals). It does not require, nor was the Right to Know Law intended to make every written request to a government agency into a Right to Know Law request. Rather, the Right to Know Law requires that a request invoke the Right to Know Law by addressing it to the Open Records Officer and indicating that the request is being made pursuant to the Act, 65 P.S. §67.703.

Despite the PGCB’s continued argument that the Office of Open Records does not have jurisdiction over Mr. Schneller’s March 20, 2009 letter, the Appeals Officer failed to address the issue of jurisdiction before proceeding to the underlying merits. Subject matter jurisdiction must be established, before a tribunal can review or make determinations of law or fact. The Office of Open Records only has jurisdiction over appeals from denials of Right to Know Law requests,¹ and cannot assert its authority over general requests. In this case, the PGCB argued, from the initial date of “appeal,” April 7, 2009, that Office of Open Records had no jurisdiction over the matter.

Additionally, the Right to Know Law does not require, as the Appeals Officer suggests, that the PGCB must specify a person’s name on its website who has been designated as the Open Records Officer. The Right to Know Law requires that an Open Records Officer be designated and that contact information, namely the Office name, address, telephone number, and a designated e-mail address, for the Open Records Officer be placed upon the agency website, 65 P.S. §504(b).

¹ 65 P.S. §503, §1101, and §1310 (requiring the Office of Open Records to review only those requests made under the Right to Know Law)

The PGCB has complied with this requirement. Unless a requester either addresses his/her correspondence to the "Open Records Officer" or invokes the Right to Know Law by mentioning it, general requests for documents cannot and should not be identified as a Right to Know Law request.

2. The Office of Open Records has failed to follow its own procedures as set forth in its "Interim Guidelines" (Regulations), which are spelled out on its website. If the Appeals Officer had followed Office of Open Records' regulation to "review all Advisory Opinions and Final Determinations previously issued by the Office," IV(C)(4)(Office of Open Records Appeals Process-Interim Guidelines), this matter would have quickly been dismissed because this same issue, "what is a Right to Know Law request under the Right to Know Law," was decided and final determination issued by the Office of Open Records on April 29, 2009, in Hocker v. East Stroudsburg Area School District, AP-2009-0193. This determination was made eight (8) days prior to the PGCB's last argument that the Office of Open Records did not have jurisdiction and twelve (12) days prior to the Appeals Officer in this matter issuing her Final Determination. A Right to Know Law request, as set forth in the law and as analyzed in Hocker, requires that a request be addressed to the open records officer and/or at least reference the Right to Know Law. Despite the determination in Hocker, the Appeals Officer failed to review Office of Open Records' own prior rulings; and, if she did, she failed to differentiate this matter from others with the same issue. See Pennsylvania Trout v. Dept. of Environmental Protection, 863 A.2d 93(Pa. Cmwlth. 2004)(citing Bell At. v. Pub. Util. Comm'n, 672 A.2d 352 (Pa.Cmwlth.1995).

3. The Office of Open Records has issued an Order requiring the PGCB to release the requested records to Mr. Schneller within thirty (30) days. The PGCB is not able to release the requested records because to do so would violate its own enabling Act, the Pennsylvania Race

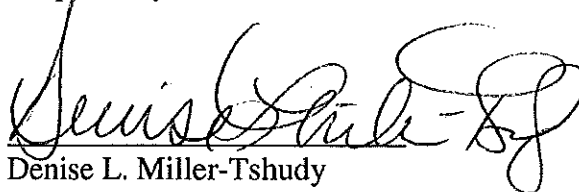
Horse Development and Gaming Act. All records that are submitted by an applicant or obtained by the Board as part of a background investigation are confidential and may not be disclosed to the public, 4 Pa.C.S. §1206(f). The Office of Open Records cannot order an agency to provide records that are prohibited from release by statute; it lacks the jurisdiction to issue such an order. The PGCB did not have the opportunity to address the violations that may occur should the Office of Open Records determine that Mr. Schneller's request was a Right to Know Law request because the Office of Open Records did not rule upon the jurisdiction issue prior to addressing the underlying issue.

4. The Office of Open Records' Order in this matter is contrary to public policy. The citizens of the Commonwealth, whom government agencies serve and are required to protect, will suffer because government agencies across the Commonwealth will become unable to perform their functions as proscribed by law. The Appeals Officer has determined that any written request for records triggers the Right to Know Law and all of the Right to Know Law's protections under the law ensues. Government agencies receive a countless number requests for documents on a daily basis that are not made under the Right to Know Law. If every request for documents that comes into a government agency is to be treated as a Right to Know Law request, each letter, fax, or e-mail will need to be responded to within five (5) days; documents will need to be found, redacted, and copied; appeals to the Office of Open Records will be triggered; and finally, appeals to the Commonwealth Court will follow. In order to handle Right to Know Law requests as defined by the Appeals Officers, government agencies will be required to hire more employees; taxes will have to be raised to support government functions; and more appeals will be taken to the Office of Open Records and the Commonwealth Court bogging down the legal system.

Accordingly, the PGCB respectfully requests that the Office of Open Records reconsider its

Final Determination; find that the legal reasoning in Hocker is correct; and dismiss Mr. Schneller's appeal because the Office of Open Records lacks jurisdiction over requests that are not made and appealed under the Right to Know Law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Denise L. Miller-Tshudy". The signature is written in a cursive style with a large, looping initial "D".

Denise L. Miller-Tshudy
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PENNSYLVANIA OFFICE OF OPEN RECORDS

IN THE MATTER OF:

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Docket No. AP 2009-0281

I, Denise L. Miller-Tshudy, hereby certify that I have this 26th day of June, 2009 served a true and correct copy of the foregoing Petition for Reconsideration upon all parties of record in this proceeding in accordance with the requirements of §33.31 of the General Rules of Administrative Practice and Procedure, 1 Pa. Code §33.31 (relating to service by the agency).

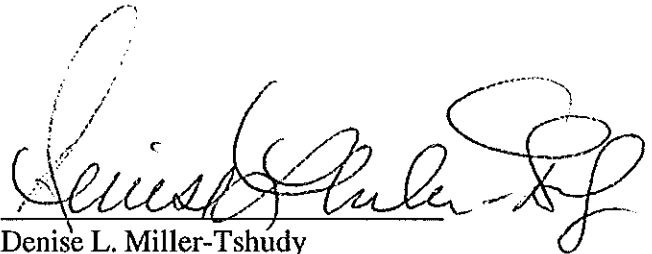
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