

BEFORE THE PENNSYLVANIA OFFICE OF OPEN RECORDS

IN THE MATTER OF

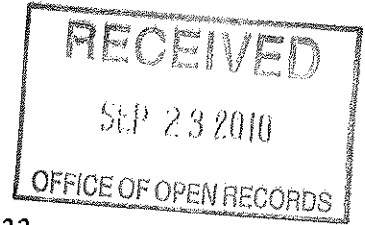
JONATHAN BARI,
Complainant

v.

OFFICE OF THE GOVERNOR,
Respondent

INDEPENDENCE VISITOR
CENTER CORPORATION,
Intervenor

Docket No. AP 2010-0733



PETITION FOR RECONSIDERATION OF THE OFFICE OF THE GOVERNOR

The Office of Open Records (OOR) filed a Final Determination in the above-captioned matter on September 13, 2010, granting the appeal and directing the Office of the Governor (Office) to produce all the records requested. The Independence Visitor Center Corporation (IVCC), whose records are sought, also intervened in the appeal.

There are three sets of records at issue: 1) the Minutes of IVCC, from March 18, 2003 to August 2, 2010; 2) a 2003 Memorandum from William Moore, the former President and CEO of IVCC to Governor Rendell; and 3) an attachment to a letter dated July 9, 2004 from Mr. Moore to the Governor.

The Office of the Governor (Office) asserted that it properly denied the request as disruptive. It further asserted to both the requester and the Office of Open Records (OOR) that it does not have any Minutes of meetings. In addition, the two other records have been withheld as confidential proprietary information. Nonetheless, the Final Determination of the OOR Appeals Officer (Appeals Officer), without making any factual determination that the Office has possession, custody or control over the Minutes, concluded that the Office is to produce all the records requested.

The Office hereby petitions for reconsideration due to:

- 1) the failure of the Appeals Officer to address the factual bases asserted by the Office as to the unreasonable burden involved and his curious conclusion that the response by the Office "within five business days rather than invoking a thirty-day extension [citation omitted] strongly suggest[ed] that the Office did not encounter an unreasonable burden when forming its rapid response;"

- 2) the implication by the Appeals Officer that a request has to be made “and *granted*” (emphasis in the Final Determination, quoting a previous OOR case) in order for it to be denied as unreasonably burdensome, which is an impermissible engrafting of language to the Right-to-Know Law (RTKL), because there is no requirement that the request has to have been *granted* in order to be disruptive under section 506(a);
- 3) the failure of the Appeals Officer to deny the request as unreasonably burdensome when granting the request enables the requester to circumvent the appeals period set forth in RTKL section 1101(a) and allows the requester to effectively appeal a denial that the agency issued five months earlier, in response to an earlier request from the requester for the same records;
- 4) the failure of the Appeals Officer to determine that the records in question are not agency records and to distinguish between when records of a Board that is not an agency are records of an agency because the head of the agency (such as Mayor Nutter) actively sits on a Board and this situation, where the Governor merely nominated a private individual to a Board, who is not an employee of the Office nor a public official, and then had no further input, interaction, reporting, documentation or other activity from that individual as part of his Board position;
- 5) the Office being required to produce records that it has stated that it does not have in its possession, custody or under its control, when the truth of this statement by the Office is un rebutted, rather than having the option to provide an additional affidavit if the Appeals Officer found the facts averred by Cathleen McCormack, Esq., the attorney representing the Office, under 18 Pa. C.S. § 4904, to be insufficient;
- 6) the failure of the Appeals Officer to consider in evidence statements made by Office counsel and by the Agency Open Records Officer, which statements were made in response to a RTKL request and were therefore subject to the penalties provided under 18 Pa. C.S. § 4904, whether specifically averred or not (see OOR’s Determination Upon Petition for Reconsideration, *Baxter and the Morning Call v. Department of Environmental Protection*, OOR Dkt. AP 2010-0139 “the OOR will accept affidavits/attestations ... made subject to the penalties of 18 Pa. C.S. § 4904.”); and
- 7) the failure of the Appeals Officer to find that the evidence supported non-disclosure of the records as confidential proprietary information.

The Office has 30 days to appeal the September 13, 2010 Final Determination to Commonwealth Court of Pennsylvania, with the final date for filing being October 13, 2010. Therefore, if this Motion for Reconsideration is not timely granted by the OOR, the Office will be compelled to file an appeal with Commonwealth Court by that date. Under Pa. R.A.P 1701(b)(3), a government unit such as OOR may grant reconsideration within the applicable appeal period. However, a motion for reconsideration does not act as a stay of the appeal period. *Moore v. Moore*, 535 Pa. 18, 634 A.2d 163 (1993).

I. As Properly Acknowledged and Factually Substantiated by the Office, the RTKL Permits Agencies to Deny Disruptive Requests, Which the Office Properly Did

The Office averred that it has been unreasonably burdened and attested to the facts that it has been unreasonably burdened by being compelled: 1) to expend duplicative staff and attorney time for responding at length to a request that the OOR Appeals Officer conceded was duplicative and 2) in a time of significant budgetary and staffing constraints, to devote attorney and staff time to again responding to a request that has been asked and answered. The accuracy of this is even further underscored by the fact of an appeal for a request that was already responded to and denied and that now has been made again, again responded to and, based on the decision by the OOR, has generated the need for this Petition for Reconsideration and any further appeal procedures. Moreover, in allowing the repetition of this request, the OOR allows the requester to circumvent the limitation on the time for taking an appeal, as set forth in section 1101(a) of the RTKL and, rather than the fifteen business days set forth in the RTKL, effectively permits the requester to wait five months before repeating the request and being allowed an appeal of the exact same response that he chose not to appeal earlier.

To have the Appeals Officer dismiss this burden on the Office as not unreasonable, in large part because the Office was able to prepare and file a response to the request within five days, rather than taking a 30-day extension, shows a lack of understanding both of the respect that this Office has for its responsibilities under the RTKL and of the nature of the unreasonable burden that is generated by having to address, repeatedly, requests for the same records when granting such a request allows the requester to completely bypass the clear constraints of the RTKL for the timing of appeals.

Further, Appeals Officer Schnee cited an OOR Final Determination and emphasized that an unreasonable burden applies under section 506(a) when the request has been *granted*. As he stated in the Final Determination in this case, when “ ‘(a request has been made under the ... RTKL and *granted*, the OOR finds that a repeat request for the same record is repetitive and places an unreasonable burden on the agency’)(emphasis added).”

However, there is no requirement in the RTKL that an agency must have *granted* the request in order to find an unreasonable burden. As noted by Commonwealth Court in *Department of Health v. Office of Open Records*, ___ A.2d ___ (Pa. Cmwlth. 2010), 2010 Pa. Commw. LEXIS 506—September 9, 2010, it is impermissible for to insert language into a statute when such language was not provided for by the General Assembly and inappropriate for the OOR to do so.

The Office adequately demonstrated that the request was disruptive under section 506(a) and its denial was proper on that basis.

II. The Attestation of the Office of the Governor as to Not Having Records Was Sufficient, Uncontested and Demonstrates that the Records are Not Agency Records

The Final Determination concludes that the records requested are records of the Office because:

- 1) the records reflect a "transaction or activity of an agency" -- despite the fact that uncontroverted evidence was submitted to show that a private individual was nominated by the Governor to the IVCC ("Governor's Representative"), pursuant to the IVCC by-laws, and the Governor's office averred the Governor received no reports or documents as to his activity on the Board and the Governor had no involvement in the Board; and
- 2) the "records sought are "created, received or retained' in connection with the Office's activity" -- despite the fact that no evidence was submitted to rebut the repeated averments by the Office in its response letter to the requester of August 10, 2010 and its letter of August 20, 2010 to Appeal Officer Schnee, wherein Attorney McCormack averred, expressly pursuant to 18 Pa. C.S. § 4904, that no documents or reports of IVCC have been submitted to the Office nor does it have any minutes or other additional records regarding Mr. Graham, the Governor's Representative, in its possession, custody or control.

First, the only "transaction or activity of an agency" that was involved was the "appointment" by the Governor of William Graham to the Board of IVCC, which is actually, as noted in the by-laws, only a "nomination." The Governor termed this an "appointment" and, in the one-sentence letter previously produced by the Office to the requester in response to his overlapping original request, the Governor said that he was "appointing you as my representative to serve on the Independence Visitor's Corporation." That was the full extent of the transaction or activity of the Office. As was stated by the Office in this case, the Office was not involved in any further transaction or activity regarding Mr. Graham's tenure on that Board. There was no reporting, no involvement by the Governor with the activities of the Board, no documents or reports or Minutes filed with the Governor. (See Affidavit of William Graham, appended to the IVCC Information Memorandum and the above-referenced letters from the Agency Open Records Officer of the Office, Mily Maiden, and its Records Legal Liaison, Attorney McCormack) Therefore, any meeting minutes are totally unrelated to any transaction or activity of the Office and the first part of the test for an agency record is not fulfilled.

The second part of the RTKL definitional test of an agency record is that it is "created, received or retained" by the agency. It is only by rejecting the unrebuted evidence that was presented to the contrary that the Appeals Officer is able to conclude that the records requested are ones "created, received or retained" by the Office. This was based on his ignoring the explicit written statement from the Agency Open Records Officer, Mily Maiden, that the Office has no Minutes in its possession, custody or control. Instead, he simply stated that "the Office's statement from its Records Legal Liaison [Cathleen McCormack] offers no information as to whether a search for responsive records was conducted or whether the attachment, memorandum or any of the Minutes exist within the Office's possession custody or control. As a result, the Office's statement that the records do not exist is an insufficient legal basis for denying the request." However, as Appeals Officer Schnee should be aware, while the burden of proof is on the agency to establish that a public record is exempt *when* the materials requested are indeed "records in the possession of a...local agency," 65 P.S. 607.305(a), in cases that raise the threshold issue of whether the requested materials are in the possession of the agency, the burden shifts to the requestor. *In the matter of the Pet'n of Kenneth Silberstein*, No. 2009-SU-004714-

08 (April 5, 2010).¹ No evidence was presented to rebut Ms. Maiden's explicit statement that the Office does not have the records and Attorney McCormack's statement that no additional records exist in the possession of the Office. Therefore, the level of confusion evidenced by the "legal" conclusion of the Appeals Officer and his rejection of the uncontroverted facts is difficult to comprehend.

The Office specifically stated in its response that it has only two records that are responsive but that it is not producing based on the confidential proprietary information exclusion (See Section headed "Responsive Records were Exempt under the RTKL" in the August 20, 2010 letter from Attorney McCormack and "[t]he Records Requested Are Exempt from Disclosure under the RTKL" section in the August 10 final response letter). It had previously produced a one sentence letter from the Governor stating that Mr. Graham was to serve on the IVCC Board. This is the same response that it had previously given to the earlier request for these records, among others.

The Office further states in both letters that it has no other responsive records, and specifically states in the August 10, 2010 letter by Agency Open Records Officer Mily Maiden that, "the Office of the Governor does not have copies of IVCC Board minutes within its possession, custody or control." The statement from Attorney McCormack, expressly made pursuant to 18 Pa. C.S. § 4904, reiterates that Mr. Graham "does not report to or submit documents to the Office of the Governor" and "nor are any reports or documents submitted" to the Office from this Board. There was no discussion or finding that there was any contractual relationship that would make the records agency records under 65 P.S. § 67.506(d). The Office clearly stated that it only has the two records that were not being produced pursuant to the confidential proprietary exemption and it has no minutes, reports or other documents from IVCC. None of these factual allegations by the Office were contested and no factual finding was made that the Minutes are in the possession, custody or control of the Office.

In similar circumstances, other Final Determinations of the OOR have allowed an agency to either provide the records or an affidavit that the agency does not have the records in its possession, custody or under its control (as had been stated by the Office in its final response letter) and that standard OOR procedure, of directing an agency either to produce the requested records or an affidavit of nonexistence, should have been followed here. See, *Cap v. Lehigh County*, OOR Dkt. AP 2010-0561, (there was no response from the agency and the OOR directed that the records should be produced or "[i]f the records do not exist, the City is required to provide the Requester with an affidavit of non-existence signed under penalty of perjury by a person with actual knowledge."). As was recently stated by the OOR in *Leone v. Eric County Controller*, OOR Dkt. AP 2010-0554, "[n]otwithstanding the principle espoused in *Signature Information Solutions v. Aston Twp.*, ___ A.2d ___ (Pa. Commw. No.1311 CD 2009, May 26, 2010) that no other bases for denial will be considered other than those raised in the agency's original response, *it would create a absurd result for the OOR to order disclosure of nonexistent records.*" (Emphasis added).

¹ Appeals Officer Schnee recently represented the OOR when the OOR submitted a brief to the Commonwealth Court of Pennsylvania in the appeal of a York County Common Pleas Court finding that the RTKL has a shifting burden of proof. *In the matter of the Pet'n of Kenneth Silberstein*, No. 2009-SU-004714-08 (April 5, 2010).

Accordingly, if the Appeals Officer felt that a more specific Affidavit or attestation was needed, provision should have been made for this, rather than directing the agency to produce records that it does not have and that are not agency records.

III. Averments Made by Agency Counsel or an Agency Open Records Officer in a RTKL Proceeding are Implicitly Subject to 18 Pa. C.S. § 4904, Are Reasonably Probative and Relevant and Should Have Been Admitted into Evidence

The decision by the Appeals Officer to reject as competent evidence the written statements made as part of this RTKL proceeding by the Agency Open Records Officer and counsel for IVCC, Michael Fabius, Esq., is untenable and without justification under the RTKL. As was noted by Commonwealth Court in *Moore v. OOR*, 992 A.2d 907, 909 (Pa. Commw. 2010):

Under Section 1102 of the RTKL, the requester and the assigned open records officer are permitted 'to submit documents in support of their positions' and '[t]he appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute.' [Citation omitted] The [unsworn] attestation and affidavit of non-existence were certainly probative and relevant to the issue of the existence of [the record sought]. [Emphasis added]

Similarly, in the OOR's Determination Upon Petition for Reconsideration, *Baxter and the Morning Call v. Department of Environmental Protection*, OOR Dkt. AP 2010-0139, the OOR reversed its previous rejection of statements presented by the Department of Environmental Protection that did not say they were made under penalty of perjury and instead concluded that "the OOR will accept affidavits/attestations ... made subject to the penalties of 18 Pa. C.S. § 4904."

The statements made by Mily Maiden and by Attorney Fabius were inherently, although not explicitly, made subject to the penalties of 18 Pa. C.S. § 4904, as set forth below, which penalties apply *regardless* of whether any special language being contained in the written statement:

§ 4904. Unsworn falsification to authorities

(a) IN GENERAL. --A person commits a misdemeanor of the second degree if, with intent to mislead a public servant in performing his official function, he:

(1) makes any written false statement which he does not believe to be true;

(2) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(3) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

(b) STATEMENTS "UNDER PENALTY," --A person commits a misdemeanor

of the third degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

The written statements made by Mily Maiden and by Attorney Fabius that were presented to the OOR were statements for which, if they did not believe them to be true, they would be culpable under the above section. There is no allegation by the requester that the statements were false and no reason to think that they would be.

Further, the statement of Attorney Fabius should have been accepted as competent evidence in light of Pa. RCP No. 1023.1, which provides that:

The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, motion, or other paper. By signing, filing, submitting, or later advocating such a document, the attorney or pro se party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law,

(3) the factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual allegations are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The refusal of the Appeals Officer to consider the statements of the Open Records Officer of the Office of the Governor or of Attorney Fabius in his signed filing of his "Information Memorandum in Support of the Office of the Governor's Denial" is not justified under the RTKL and has impeded arriving at a reasonable or just result in this case.

IV. The Appeals Officer Erroneously Ignored Facts Justifying the Confidential Proprietary Exemption

Despite the abundance of facts presented by IVCC as to the bases for application of the exemption for confidential proprietary information, by rejecting as evidence the statements made by Attorney Fabius and narrowly reading the Affidavits provided, the Appeals Officer erroneously concluded that the facts needed to demonstrate the applicability of the exemption for confidential proprietary information were not in evidence. They were in evidence and should have been accepted as such.

Specifically, with regard to the Minutes, the Appeals Officer stated that: 1) "the Office and IVCC *failed to provide any factual detail*" as to the confidentiality of the Minutes sought and how disclosure would cause substantial harm to the competitive position of IVCC. (Emphasis

added) Such a finding demonstrates a failure to consider the competent evidence presented. Attorney Fabius stated that the information sought in the Minutes "is not available to the public." See IVCC's Information Memorandum, pg. 10. Extensive detail as to the nature of the information and the potential harm to IVCC as to its disclosure was provided by Attorney Fabius and in the Affidavits.

With regard to the Attachment to the letter of July 9, the Appeals Officer stated that as a consequence of the fact that "legal counsel only stated, without affirming under penalty of perjury, that the attachment is non-public, and failed to provide any evidence supporting an allegation that the attachment was kept secret in any way." Again, the Appeals Officer has unreasonably chosen to ignore competent evidence presented by Attorney Fabius that "[t]his information is not available to the public." See IVCC's Information Memorandum, pg. 11.

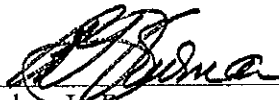
With regard to the Memorandum, the Appeals Officer stated that "similarly, [IVCC's CEO's] affidavit provides no factual detail with which the OOR may evaluate whether the responsive record was properly withheld as confidential proprietary information." However, the competent statements by Attorney Fabius on page 11 on the Information Memorandum provide additional factual detail and those statements should have been admitted as evidence.

V. The OOR Should Grant the Petition for Reconsideration

The Office of the Governor respectfully requests that the OOR grant this Petition for Reconsideration and that the Final Determination be vacated. A new Final Determination should be based on: 1) a test for "disruptive request" that respects the RTKL restrictions on the time frame for appeals, does not imply that the previous request must have been granted and that addresses the unreasonable burden that has been factually substantiated by the Office; 2) a determination as to whether the Minutes are agency records that appropriately applies the definitional criteria for "record" from the RTKL; 3) admission into evidence the written statements made in this RTKL proceeding by the Agency Open Records Officer of the Office, Mily Maiden, and the Attorney Fabius, in IVCC's Information Memorandum; and 4) if a determination is made that the Minutes should be provided by the Office, the Office should alternatively be provided with the opportunity to provide an Affidavit attesting that the records are not in its possession, custody or under its control.

Respectfully submitted,

FOR THE OFFICE OF THE GOVERNOR OF PENNSYLVANIA



Andrea L. Bowman,
Deputy General Counsel
Attorney I.D. No. 30188

Governor's Office of General Counsel
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Harrisburg, PA 17102
Phone: 717-787-9354

Dated: September 22, 2010

Brawley, Maryanne

From: Byerly, Nathanael
Sent: Thursday, September 23, 2010 5:41 PM
To: Brawley, Maryanne
Subject: FW: In the Matter of Jonathan Bari v. Office of the Governor, OOR Dkt. AP 2010-0139

Another PFR

From: Maiden, Yamileth
Sent: Thursday, September 23, 2010 2:00 PM
To: Mutchler, Terry; Byerly, Nathanael
Cc: 'Jonathan Bari'; 'Fabius, Michael D. (Phila)'
Subject: In the Matter of Jonathan Bari v. Office of the Governor, OOR Dkt. AP 2010-0139

Attached, please find a Petition For Reconsideration regarding, *In the Matter of Jonathan Bari v. Office of the Governor*, OOR Dkt. AP 2010-0139. A hard-copy of this document will be sent via U.S. Postal.

Thank you.



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on for Recons...

Mily Maiden
Office of Governor Edward G. Rendell
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Phone:
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pennsylvania
OFFICE OF OPEN RECORDS

October 5, 2010

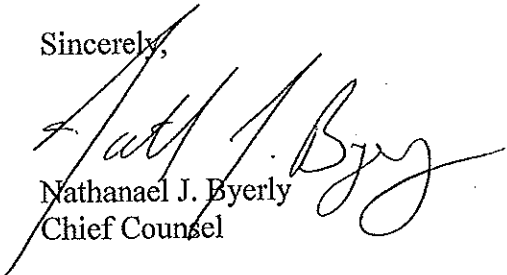
Andrea L. Bowman
Deputy General Counsel
Governor's Office of General Counsel
17th Floor, 333 Market Street
Harrisburg, PA 17102

RE: Petition for Reconsideration OOR Dkt. AP 2010-0733

Dear Ms. Bowman:

We are in receipt of your Petition for Reconsideration dated September 22, 2010, that was received by this office on September 23, 2010, in connection with the Office of Open Records Final Determination in *Bari v. Office of the Governor*, OOR Dkt. AP 2010-0733. We hereby deny your Petition.

Sincerely,



Nathanael J. Byerly
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records
Jonathan Bari
Michael Fabius, Esquire