



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**JAMES BEST,
Requester**

v.

**PENNSYLVANIA DEPARTMENT OF
INSURANCE,
Respondent**

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Docket No: AP 2022-0547

INTRODUCTION

James Best, Esq. (“Requester”) submitted a request (“Request”) to the Pennsylvania Department of Insurance (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking documents pertaining to a specified complaint. The Department denied the Request, arguing that responsive records are related to a noncriminal investigation and are also protected from disclosure by the Insurance Department Act. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **denied**, and the Department is not required to take any further action.

FACTUAL BACKGROUND

On February 16, 2022, the Request was filed, seeking:

Any and all documents pertaining to a complaint made about Laura R. Shrawder-Miles t/d/b/a Riverfront Financial Services, 205 North Front Street, Sunbury, PA 17801. The complaint was numbered 2021-0126-02.

On February 22, 2022, the Department denied the Request, arguing that the responsive records are related to noncriminal investigations, 65 P.S. § 67.708(b)(17), and are also protected from disclosure by the Insurance Department Act, 40 P.S. §§ 1 *et seq.*

On March 1, 2022, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.¹ The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On March 22, 2022, the Department submitted a position statement reiterating its grounds for denial. In support of its position, the Department submitted the attestation, made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, of its Deputy Insurance Commissioner for the Office of Market Regulation, Dave Buono.

LEGAL ANALYSIS

“The objective of the Right to Know Law...is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law 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 v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and

¹ In the appeal, the Requester granted the OOR an additional thirty days to issue this Final Determination. *See* 65 P.S. § 67.1101(b)(1).

relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing is discretionary and non-appealable. *Id.* Here, neither party requested a hearing.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

In this instance, the Department argues that the responsive records are confidential under the Insurance Department Act, 40 P.S. §§ 1 *et seq.* The Department has the power and authority to execute the laws of the Commonwealth of Pennsylvania in relation to insurance. *See* 40 P.S. § 41. Additionally, the Department is statutorily authorized to respond to complaints of suspected

insurance fraud and unfair trade practices, investigate claims, and report findings to the appropriate law enforcement agency. 40 P.S. §§ 325.42(3), (4) & (7); 40 P.S. § 1171.7. Information obtained and produced in the course of such investigations is subject to broad confidentiality provisions:

GENERAL RULE.-- Any documents, materials or other information in the control or possession of the [D]epartment which is furnished by an insurer or licensee under section 671.1-A or which is obtained by the [D]epartment in an investigation pursuant to this act shall be confidential by law and privileged, shall not be subject to the [RTKL], shall not be subject to subpoena and shall not be subject to discovery or admissible in evidence in any private civil action.

40 P.S. § 310.79. Furthermore, Section 325.5(f) provides:

All working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the [D]epartment or any other person in the course of an examination made under this article shall be given confidential treatment and are not subject to subpoena and may not be made public by the [D]epartment or any other person except to the extent provided in subsection (e).² ... Such parties must agree in writing prior to receiving the information to provide to it the same confidential treatment as required by the [RTKL], unless the prior written consent of the company to which it pertains has been obtained.

40 P.S. § 325(f). Section 3101.1 of the RTKL provides that “[i]f the provisions of this act regarding access to records conflict with any other Federal or State law, the provisions of this act shall not apply.” 65 P.S. § 67.3101.1.

Here, Mr. Buono attests:

The Department conducts an investigation into each and every complaint received by the Department. Part of the standard investigative inquiry into the complaint involves a determination of whether the Department has jurisdiction over the matter alleged. Any time that the Department investigates a complaint, the assigned investigator conducts a systematic and searching inquiry into the allegations of the complainant and the activities of the involved insurance licensee, and a determination of whether the Department has jurisdiction over the matters and allegations involved. [] ... [I]f jurisdiction is determined to lie outside of the Department, whenever possible, a referral is made to another agency that might have jurisdiction to handle the complaint. If jurisdiction is found to be within the purview of the Department, the Bureau makes inquires of insurance companies and

² Subsection (e)(1) provides that, after thirty days, the Department “may open the [final inspection] report for public inspection....” 40 P.S. § 325(e)(1). However, the OOR cannot compel the Department to exercise its discretion in publicizing such reports.

other licensees or individuals involved in the claims being investigated. The Department collects all relevant information to determine whether Pennsylvania insurance laws and/or standard insurance practices have been violated.

If a violation is found, the investigation file may be referred to other divisions within my office, including the Bureau of Enforcement for further investigation or enforcement action.

[]

In this case, the complaint at issue was forwarded to the Department's Bureau of Enforcement for further investigation because the complaint was not filed by an insurance consumer, but a licensee of the Department alleging violations of law by another licensee. All documents and investigative materials, records of telephone calls, notes, exhibits, records, correspondence and reports created, developed and/or received in the process of the Department's investigation of complaints are maintained in the investigative file.

All complaints received by the Insurance Department are logged and tracked primarily by the name of the complainant (i.e., the insured) and the insurance entity or licensee against whom the complaint is filed (i.e., the insurer, insurance producer, or other licensee within the jurisdiction of the Department). Additional information can be tracked as well, such as the type of insurance involved, the disposition of the complaint and involved third parties.

The Bureau of Enforcement is responsible for investigating potential violations of the Commonwealth's insurance laws and regulations, and those investigations are noncriminal in nature.... Investigations within this Bureau are targeted against specific licensees and they can arise from consumer complaints, specific information discovered by the Department, referrals from other areas within our agency and other state and federal agencies, legislative inquiries, and numerous other sources. These investigations involve collection and review of voluminous amounts of information and records from multiple sources, interviewing witnesses and informants, consulting with state and federal criminal and administrative records, collaborating with other regulators and agencies, and assessing whether the actions being investigated amount to a violation of the Commonwealth's laws and regulations.

[]

If violations of law are found, these investigations can be concluded through a Consent Order with the person or entity being investigated or civilly prosecuted through the filing of an administrative action within the Department's Administrative Hearings Office. Referrals to other state and federal agencies can be made if it is determined that the Department does not have appropriate jurisdiction over a matter, or if concurrent jurisdiction lies with a fellow regulatory

agency. The investigations within this unit can result in the imposition of fines, penalties, restitution, licensure action and other remedies allowable under the Commonwealth's insurance laws and regulations. If no violations are found, investigations can be closed with no action.

...[A]ll records relating to these investigations are subject to the confidentiality afforded by 40 P.S. 310.79, which states that any "documents, materials or other information in the control or possession of the [D]epartment which is furnished by an insurer or licensee [...] or which is obtained by the [D]epartment in an investigation [...] shall be confidential by law and privileged" and "shall not be subject to the Right-to-Know Law." All the materials collected during these investigations are retained in an investigative file, and the records within this file are utilized internally by the Department's staff and leadership in rendering a determination as to whether or the person or entity being examined has violated the law and what course of action should be taken with regard to any such violations.

Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department acted in bad faith, "the averments in [the statement] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

In this instance, the Requester does not challenge the attestation provided by the Department, which shows that the Department conducts authorized investigations into every complaint it receives. Because all records obtained or produced by the Department in an investigation are confidential pursuant to the Insurance Department Act, the Department has met its burden of proving that records responsive to the Request are not subject to disclosure under the RTKL.³ *See* 65 P.S. § 67.3101.1; *see also In re: Neil Anand and Institute of Advance Medicine and Surgery*, OOR Dkt. AP 2022-0319; 2022 PA O.O.R.D. LEXIS 82.

³ Because the Department proved that the responsive records are not subject to disclosure under the RTKL pursuant to 65 P.S. § 67.3101.1, the OOR need not reach the Department's alternative grounds for denying access. *See Jamison*

CONCLUSION

For the foregoing reasons, the appeal is **denied**, and the Department is not required to take any further action. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁴ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: May 4, 2022

/s/ Erika Similo

APPEALS OFFICER
ERIKA SIMILO, ESQ.

Sent to: James Best, Esq. (via email only);
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v. Norristown Bor. Police Dept., OOR Dkt. AP 2011-1233, 2011 PA O.O.R.D. LEXIS 927. Moreover, the OOR recently determined that records related to complaints made to the Department are related to noncriminal investigations. *See In re: Neil Anand and Institute of Advance Medicine and Surgery*, OOR Dkt. AP 2021-2402, 2022 PA O.O.R.D. LEXIS 371.

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).