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IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,

Appellant,

vs.

CITY OF DUBOIS,

Appellee.

CIVIL DIVISION

No. 06-2026-CD

JURY TRIAL DEMANDED

APPEAL PURSUANT TO 65
P.S. §66.1 ET SEQ.,
FROM THE DENIAL OF
ACCESS TO RECORDS

Filed on Behalf of:
Maurice A. Nernberg,
Appellant.

Counsel of Record for
this Party:

Maurice A. Nernberg
Pa. I.D. No. 00127

MAURICE A. NERNBERG &
ASSOCIATES
301 Smithfield Street
Pittsburgh, PA 15222
(412) 232-0334

Firm No. 331

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DEC 04 2006 Att'y pd. 85.00
(57)

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,

Plaintiff,

vs.

CITY OF DUBOIS,

Defendant .

CIVIL DIVISION

No.

JURY TRIAL DEMANDED

APPEAL PURSUANT TO 65 P.S. §66.1 ET SEQ., FROM THE DENIAL OF
ACCESS TO RECORDS

AND NOW, Appellant Maurice A. Nernberg, by and through his attorneys Maurice A. Nernberg & Associates, hereby appeals the City of Dubois' deemed denial of access to certain public documents pursuant to 65 P.S. §66.1, et seq. In support of this appeal, Appellant avers the following:

1. Appellant, Maurice A. Nernberg, is a citizen and a resident of the Commonwealth of Pennsylvania.
2. Appellee, City of Dubois ("Dubois"), is an agency within the meaning of the Right-To-Know-Act.
3. On October 31, 2006, Appellant made a written request ("the Request") upon DuBois, through its City Manager, Lance Marshall, for certain public records (see the Request attached hereto as Exhibit No. 1).
4. The Request sought public records of accounts regarding a contract which disbursed public funds.

5. To date, no response has been received.

6. Under 65 P.S. § 66.3-4, the failure to respond to the Request results in a deemed denial.

7. The Request was for public records as defined by 65 P.S. §66.1.

8. The Court may award attorneys' fees and costs for an agency's willful disregard of the public's requested access to a public record. 65 P.S. § 66.4-1(a).

9. Because of Dubois' deemed denial and its refusal to produce the requested documents, Appellant asks this Court to order Dubois to produce the records requested by Appellant.

WHEREFORE, Appellant Maurice A. Nernberg respectfully requests that this Honorable Court reverse Dubois' denial of access to public records and order the Appellee, City of Dubois, to produce the documents as requested in the Request and award attorneys' fees and costs to the Appellant.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

By: 

Maurice A. Nernberg

MAURICE A. NERNBERG & ASSOCIATES
ATTORNEYS AT LAW

301 SMITHFIELD STREET
PITTSBURGH, PA 15222-2277
Telephone (412) 232-0334
Facsimile No. (412) 232-0710
e-mail: naoffice@nernberg.com

October 31, 2006

Lance Marshall
City Manager
16 W. Scribner Ave.
P.O. Box 408
Dubois, PA 15801

Re: Kukurin Contracting Inc./City of Dubois
Right to Know Act Request
Our Ref. No. 15495L10

Dear Mr. Marshall:

This is a request to review records and obtain copies under the Act of June 21, 1957, P.L. 390, as amended, 65 P.S. §§ 66.1 et seq. ("Right to Know Act").

We request the opportunity to review and copy any and all written, printed, typed, recorded or electronically created or stored material including audit papers which the Department has in its possession or control which discuss or relate to:

1. All correspondence and communications with Nussbaumer & Clarke, Inc. regarding the contract with Kukurin for the North and South Main Street (SR4019) Sewer Replacement Project.
2. All correspondence and communications with Pennsylvania Department of Transportation regarding the contract with Kukurin for the North and South Main Street (SR4019) Sewer Replacement Project.
3. All documents or reports regarding the project which the City of Dubois's relied upon in making the decision to issue a stop work order and/or terminate the contract with Kukurin.
4. All documents submitted by any party to a board, bonding company, financing source such as a bank or PennVest relating to or explaining the decision to issue a stop work order, and/or terminate the contract with Kukurin.
5. All minutes of any meetings in which the City of Dubois participated, concerning or related to the decision to issue a stop work order and/ or terminate the contract with Kukurin.
6. All documents and correspondence sent to solicit another contractor to complete the project.

If you have any questions concerning this request, please call the undersigned.

Very truly yours,

MAURICE A. NERNBERG & ASSOCIATES

By: 

Maurice A. Nernberg

MWD/ptq

Blumberg No. 5119

EXHIBIT

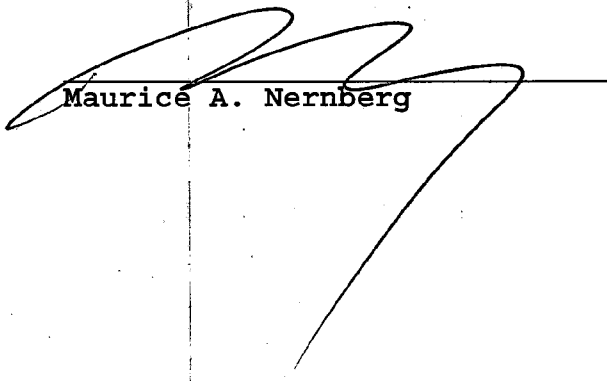
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VERIFICATION

I, Maurice A. Nernberg, verify that the statements made in this Appeal Pursuant to 65 P.S. §66.1 et seq., from the Denial of Access to Records are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

DATE: _____

12/1/06



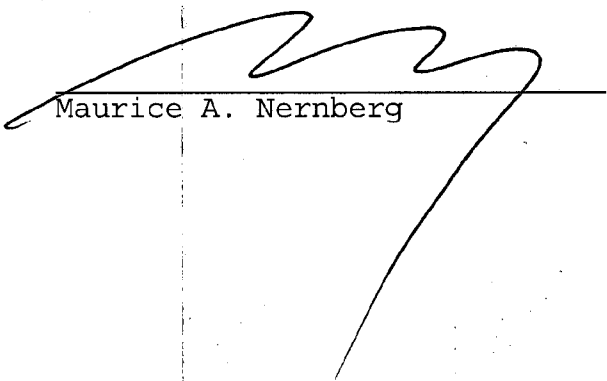
Maurice A. Nernberg

CERTIFICATE OF SERVICE

I, MAURICE A. NERNBERG, hereby certify that a true and correct copy of the within **Appeal Pursuant to 65 P.S. §66.1 Et. Seq., From the Denial of Access to Public Records** was served upon all parties to the within matter, this date, by first class mail, addressed as follows:

Lance Marshall, City Manager
CITY OF DUBOIS
16 West Scribner Avenue
P.O. Box 408
DuBois, PA 15801

Date: 12/11/06


Maurice A. Nernberg

MAURICE A. NERNBERG & ASSOCIATES

ATTORNEYS AT LAW

301 SMITHFIELD STREET
PITTSBURGH, PA 15222-2277
Telephone (412) 232-0334
Facsimile No. (412) 232-0710
e-mail: naoffice@nernberg.com

December 1, 2006

Office of the Prothonotary
COURT OF COMMON PLEAS OF CLEARFIELD COUNTY
230 East Market Street
Clearfield, PA 16830

Re: KUKURIN/DuBois
Statutory Appeal re: Access to Records
Ref. No. 15495L14

Dear Sir/Madam:

Enclosed please find the original **Appeal Pursuant to 65 P.S. §66.1 Et Seq., From the Denial of Access to Records** along with a check for the requisite \$85.00 filing fee for filing in the above matter. Per a teleconference with Bonnie of the Prothonotary's office of this date, this appeal, which stems from the Kukurin Contracting v. City of Dubois matter docketed at No. 06-1501-CV, should be filed as a separate action.

Very truly yours,

MAURICE A. NERNBERG & ASSOCIATES

By: 

Maurice A. Nernberg

/mes

Enclosures:
Appeal Pursuant to 65 P.S. §66.1
N&A Check No. 10972

cc: Lance Marshall, DuBois City Manager (w/enclosure)

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

MAURICE A. NERNBERG,
Appellant

vs.

CITY OF DUBOIS,
Appellee

: No. 2006- 2026 C.D.

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: Type of Pleading: ANSWER TO
: APPEAL PURSUANT TO 65 P.S.
: §66.1, *ET SEQ.*, FROM THE DENIAL OF
: ACCESS TO RECORDS

:

: Filed on Behalf of: CITY OF DUBOIS,
: Appellee

:

: Counsel of Record for this Party:

:

: TONI M. CHERRY, ESQ.
: Supreme Court No.: 30205

:

: GLEASON, CHERRY AND CHERRY, L.L.P.
: Attorneys at Law
: P. O. Box 505
: One North Franklin Street
: DuBois, PA 15801

:

: (814) 371-5800

FILED

DEC 22 2006

William A. Shaw
Prothonotary/Clerk of Courts

CP

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

MAURICE A. NERNBERG,
Appellant

vs.

CITY OF DUBOIS,
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No. 2006 - 2026 C.D.

ANSWER TO APPEAL PURSUANT TO
65 P.S. §66.1, ET SEQ., FROM THE DENIAL OF
ACCESS TO RECORDS

AND NOW, comes the above-named Appellee, CITY OF DUBOIS, by and through its attorneys, GLEASON, CHERRY AND CHERRY, L.L.P., and answers the Appeal filed by Appellant pursuant to 65 P.S. §66.1, *et seq.*, as follows:

1. ADMITTED.

2. ADMITTED.

3. DENIED. Appellant did not make a written request on October 31, 2006, upon the City of DuBois through its City Manager, Lance Marshall, for certain public records. Appellant could never have made a written request upon the City of DuBois for any public records by making the same to Lance Marshall as City Manager. On the contrary, Lance Marshall is not, nor has he ever been, the City Manager of the City of DuBois. Lance Marshall is not even an employee of the City of DuBois and thus cannot qualify as the "agency head or other person designated in the rules" established by the City of DuBois as required by

65 P.S. §66.2(c) for such written request to be valid. Lance Marshall is the Director of the Redevelopment Authority, a separate entity from the City of DuBois. The only individual designated to receive written requests for public records of the City of DuBois is its City Manager. Under the rules of the City of DuBois, the City Manager may designate the administrative secretary to handle the request. However, the request in this instance was directed neither to the City Manager nor to the administrative secretary.

The individual currently designated as the acting City Manager is the Mayor of the City of DuBois, John F. Suplizio. No written request was ever made by Appellant to John F. Suplizio as evidenced by the document attached to Appellant's own Appeal as Exhibit No. 1.

4. DENIED. The request did not seek documents that are public records of accounts regarding a contract which disbursed public funds. On the contrary, the request, among other things, sought attorney work product and other documents that would be privileged when the Right-To-Know Act is read in *pari materia* with the Sunshine Act found at 65 Pa. C.S.A. §701, *et seq.*

By way of further answer, it is averred that Appellant is the attorney for Kukurin Contracting, Inc., a company that previously had a contract with the City of DuBois but that contract has now been terminated and Kukurin contracting, Inc., has filed suit against the City of DuBois. The documents set forth in Appellant's Exhibit 1, other than the minutes, are not public records but are documents and correspondence generated in the conduct of the lawsuit and would not be subject to review under the Right-To-Know Act because of the operation of the Sunshine Act. The minutes requested by Appellant are regularly and repeatedly supplied to

Kukurin Contracting, Inc., as a result of its continued and repeated requests filed under the Right-To-Know Act.

5. ADMITTED in part and DENIED in part. While it is ADMITTED that no response was made to Appellant, it is DENIED that any response was required to be made to Appellant because Appellant did not present a written request "to the agency head or other person designated in the rules established by the agency.", as required by the Right-to-Know Act at 65 P.S. §66.2(c).

It is further DENIED that the documents that are considered public documents have not been supplied to Appellant. On the contrary, Appellant's client, Kukurin Contracting, Inc., has repeatedly and regularly made requests under the Right-To-Know Act for minutes of public meetings of the City of DuBois and those minutes were promptly supplied. It is DENIED that any of the other documents set forth on Appellant's Exhibit 1 constitute "public records" under the provisions of 65 P.S. §66.1. On the contrary, such information constitutes matters that are part and parcel of ongoing litigation and, as such, are not subject to review under the Right-To-Know Act because they are protected by the Sunshine Act. Had Appellant properly delivered a written request to the City Manager or his designate in accordance with the rules established by the City of DuBois, the City would have responded to each and every written request. However, because Appellant failed to abide by the rules of the Right-to-Know Act and never addressed a written request to the City, no response was required.

6. DENIED as stated. The failure to respond to the request of Appellant in this case is not a deemed denial because the Appellant never properly made a written request to the individual charged with maintaining the public records of the City of DuBois. On the contrary,

the individual to whom the written request was addressed is not even an employee of the City of DuBois. Consequently, the City of DuBois had no obligation to respond to a request not made to its agent in writing.

7. DENIED. Appellant's request was not primarily for public records as defined by 65 P.S. §66.1. On the contrary, Appellant's request was for documents directly involved in litigation that would not be the subject of a Right-To-Know request.

8. ADMITTED in part and DENIED in part. While it is true that the Court may award attorney's fees and costs for an agency's willful disregard of the public's requested access to a public record, it is DENIED that the Court may award attorneys' fees and costs in the instant case. On the contrary, Appellant's written request was never directed to the proper agent of the City of DuBois as Lance Marshall is neither the City Manager nor is he even an employee of the City of DuBois. Until such time as the City of DuBois receives a written request directed to the individual designated in its rules as the person who is to receive a written request for public records under the Right-To-Know Act, the City of DuBois has no duty to respond as no request has been received.

9. DENIED. §66.2(c) requires that: "A written request **shall** be addressed to the agency head or other person designated in the rules established by the agency." The City of DuBois is a Third Class City operating under the optional manager-council form of government. The rules of the City of DuBois require that all requests be addressed to the City Manager or to the City Manager's designate. Appellant addressed a written request to one Lance Marshall as the City Manager of the City of DuBois. Lance Marshall has never been nor

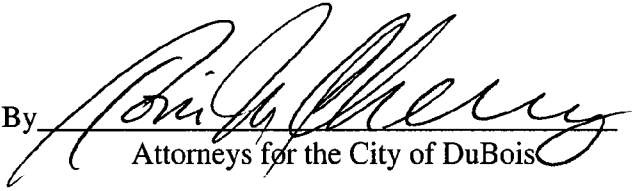
is he now the City Manager of the City of DuBois. Moreover, Lance Marshall is not even an employee of the City of DuBois.

The City of DuBois cannot be deemed to have denied any written request by Appellant because Appellant made no written request to the individual designated by the City of DuBois to receive requests under the Right-To-Know Act. Consequently, until and unless Appellant properly addresses a written request for public records to the City Manager of the City of DuBois, which person is currently the Mayor, John F. Suplizio, no proper request for public records in accordance with the requirements of the Right-To-Know Act has been addressed to the City of DuBois by the Appellant and; therefore, the City of DuBois has no obligation to respond.

WHEREFORE, the City of DuBois respectfully requests Your Honorable Court to dismiss the appeal filed by Maurice A. Nernberg for the reasons set forth herein.

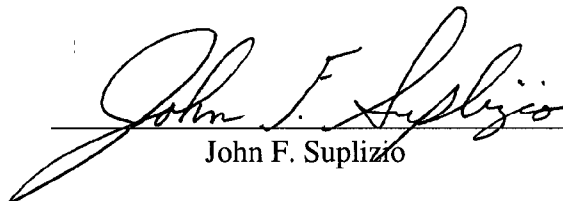
Respectfully submitted,

GLEASON, CHERRY AND CHERRY, L.L.P.

By 
Attorneys for the City of DuBois

VERIFICATION

I, JOHN F. SUPLIZIO, Mayor and President of City Council of the City of DuBois, verify that I have been designated as the acting City Manager and that I am authorized to make this Verification on behalf of Appellee, CITY OF DUBOIS, and I verify that the information provided in the foregoing Answer is true and correct to the best of my knowledge, information and belief. I understand that false statements therein are made subject to the penalties of 18 Pa. C.S.A. §4904, relating to unsworn falsification to authorities.



John F. Suplizio

DATED: December 21, 2006

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CIVIL DIVISION

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Appellant

vs.

CITY OF DUBOIS,
Appellee

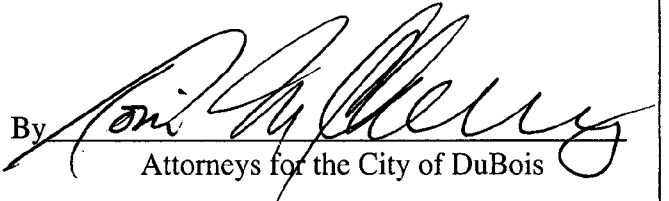
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: No. 2006 - 2026 C.D.
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2006, a certified copy of the Answer to Appeal Pursuant to 65 P.S. §66.1, Et Seq., From the Denial of Access to Records filed on behalf of Defendant, CITY OF DUBOIS, was served upon MAURICE A. NERNBERG, Appellant above-named, by mailing the same to him by United States First Class Mail, Postage Prepaid, by depositing the same in the United States Post Office at DuBois, Pennsylvania, addressed as follows:

MAURICE A. NERNBERG, ESQ.
Maurice A. Nernberg & Associates
Attorneys at Law
301 Smithfield Street
Pittsburgh, PA 15222

GLEASON, CHERRY AND CHERRY, L.L.P.

By 
Attorneys for the City of DuBois

Dated: December 22, 2006