07-401-CD
M. Nernberg vs City of DuBois

Maurice Nernberg vs City of Dubois

Supreme Court of Pennsylvania

Western District

April 20, 2009

John A. Vaskov, Esq.
Deputy Prothonotary
Patricia A. Nicola
Chief Clerk

801 City-County Building
Pittsburgh, PA 15219
412-565-2816
www.aopc.org

Michael Krimmel, Esq.
Chief Clerk of Commonwealth Court
Irvis Office Building, Room 624
Sixth Floor
Harrisburg, PA 17120

RE: Maurice A. Nernberg, Petitioner
v.
City of Dubois, Respondent
Commonwealth Docket Number - 2064 CD 2007

Trial Court/Agency Dkt. Number: 07-401-CD

No. 395 WAL 2008

Appeal Docket No.:

Date Petition for Allowance of Appeal Filed: August 14, 2008

Disposition: Order Denying Petition for Allowance of Appeal
Date: April 1, 2009

Reargument/Reconsideration Disposition:

Reargument/Reconsideration
Disposition Date:

/kao

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MAURICE A. NERNBERG,	:	No. 395 WAL 2008
	:	
Petitioner	:	
	:	Petition for Allowance of Appeal from the
	:	Order of the Commonwealth Court
v.	:	
	:	
	:	
CITY OF DUBOIS,	:	
	:	
Respondent		

ORDER

PER CURIAM

AND NOW, this 1st day of April, 2009, the Petition for Allowance of Appeal is hereby **DENIED**.

Madame Justice Todd did not participate in the consideration or decision of this case.

A True Copy Patricia Nicola
As of: April 1, 2009
Attest: Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

In the Commonwealth Court of Pennsylvania

Maurice A. Nernberg, Appellant v. City of Dubois	No.: 2064 CD 2007

ORDER

NOW, July 18, 2008, having considered appellant's application for reargument, the application is denied.

BY THE COURT:

Bonnie B. Leadbetter

Bonnie Brigance Leadbetter,
President Judge

Certified from the Record

JUL 18 2008

and Order Exit

CR

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,

Plaintiff,

vs.

CITY OF DUBOIS,

Defendant.

CIVIL DIVISION

No. 07-401 C.D.

MOTION TO ENFORCE COURT ORDER AND FOR SANCTIONS

Filed on Behalf of: Kukurin Contracting, Inc., Plaintiff

Counsel of Record for this Party:

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

Joshua A. Lyons
Pa. I.D. No. 94301

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

Firm No. 331

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,	)	CIVIL DIVISION
	)	
Plaintiff,	)	No. 07-401 C.D.
	)	
vs.	)	
	)	
CITY OF DUBOIS,	)	
	)	
Defendant.	)	

MOTION TO ENFORCE COURT ORDER AND FOR SANCTIONS

1. Plaintiff, Maurice A. Nernberg ("Nernberg"), filed an appeal to the Clearfield County Court of Common Pleas seeking the production of records pursuant to the Pennsylvania Right to Know Act.

2. On September 20, 2007, the Honorable Judge Frederic J. Ammerman entered an order granting in part and denying in part that request. (See Opinion and Order, attached hereto as Exhibit "A")

3. Specifically, the Court noted that Nernberg requested 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.

4. The Court then held "the City of DuBois must produce the documents in Item five if it has not already done so."

5. On February 5, 2008, a letter was sent to Toni Cherry, the solicitor for the City of DuBois, informing her that Nernberg

checked his files and only had meeting minutes from two dates, June 21, 2006 and August 24, 2006. It was requested that if there were others, they be provided. (Attached hereto as Exhibit "B")

6. Nernberg neither received a response from Ms. Cherry nor received any of the court-ordered meeting minutes.

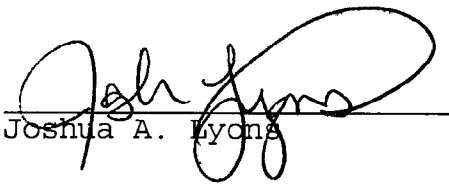
7. As a result of the City's willful noncompliance with this Court's Order, Nernberg is entitled to a reasonable attorney fee as a sanction for the City's conduct.

8. Furthermore, in light of the hearing already held in this matter and this Court's Order requiring the production of meeting minutes, the City's conduct is dilatory, obdurate, and vexatious, entitling Nernberg to a reasonable attorney fee as a sanction for the City's Conduct. 42 Pa.C.S. § 2503(7).

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant its Motion to Enforce Court Order and For Sanctions and Order the Defendant to produce the court-ordered documents within ten (10) days and award the Plaintiff a reasonable attorney fee as an appropriate sanction.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

By: 
Joshua A. Lyons

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

MAURICE A. NERNBERG,
Plaintiff

v.

CITY OF DUBOIS,
Defendant

No. 07-401-CD

I hereby certify this to be a true and attested copy of the original statement filed in this case.

OCT 05 2007

Attest.

William L. Shaw
Prothonotary/
Clerk of Courts

OPINION

The Pennsylvania "Right to Know" Act (hereafter Act) requires that "[u]nless otherwise prohibited by law, a public record shall be accessible for inspection and duplication by a requester in accordance with this act." 65 P.S. §66.2. Also, "[n]othing in this act shall provide for access to a record which is not a public record." *Id.* A public record is defined by the Act as:

> Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons.
> 65 P.S. §66.1.

With regard to the first category, accounts, vouchers, or contracts, the Court has said those "should be broadly construed and need only constitute records evidencing disbursement of government money." *Associated Builders & Contractors, Inc. v. Pennsylvania Dept. of General Services,* 747 A.2d 962, 965 (Pa.Cmwlth. 2000) citations omitted. However, the "second category of documents under the Act is construed more narrowly." *Id.* Specifically, the party requesting this information under the Act must establish that the material:

> 1. was generated by an agency covered by the Act;
> 2. constitutes a minute, order or decision of an agency or an essential component of the agency's decision;
> 3. fixes the personal or property rights or duties of any person or group of persons; and
> 4. is not protected by statute, order or decree of court;

Blumberg No. 5208 EXHIBIT A

Id. citations omitted.

The Court has also interpreted the definition to include "documents that are considered essential to the agency's decision. To be considered as embodying an essential component of an agency decision, the decision must have been contingent on the information contained in the document and could not have been made without it." *Id.* However, "[j]ust because a document may have an effect on or influence an agency decision, it does not make it an 'essential component' of that decision." *Id.* citations omitted.

With these criteria in mind the Court now turns to the requests made by the Plaintiff in the February 12, 2007 letter to Mr. Suplizio (hereafter letter). Items one and two of the letter ask for "all correspondence and communication" between Dubois and Nussbaumer & Clarke, Inc. and Dubois and Pennsylvania Department of Transportation regarding the contract with Kukurin for the North and South Main Street Sewer Replacement Project. Correspondence is neither an "account, voucher or contract" nor is it a "minute, order or decision." Again, the first category is to be broadly construed to include anything that evidences a disbursement of government money. However, even with such a broad construction the connection between correspondence and communications and accounts, vouchers, or contracts is nebulous at best. The Plaintiff did not include any support for a construction of correspondence that would fall into the definition of public records in his brief nor did he attend the scheduled argument to argue that construction to the Court. Therefore, items one and two do not need to be provided under the Act because they are not public records as defined by the Act.

The next item in the letter requests "all documents or reports regarding the project which the City of Dubois's (sic) relied upon in making the decision to issue a stop work order and/or terminate the contract with Kukurin." Preliminarily, the Commonwealth Court has stated "[f]or the agency to be required to give access, a person who makes a public records request has an obligation to identify with some specificity the type of information being sought." *Nanayakkara v. Casella*, 681 A.2d 857, 859-60 (Pa.Cmwlth. 1996). Where the request is not sufficiently specific, the agency has no obligation to comply with the request because the lack of specificity prevents the agency from determining whether to grant or deny the request. *Id.* at 860. Finally, a "lack of specificity in the request makes it difficult, if not impossible, for this court to conduct meaningful review of the agency's decision." *Id.* The Court in *Associated Builders & Contractors, Inc.* determined that several of the requests were phrased in a similar manner to requests for document production and that "[s]uch requests fail to provide sufficient facts to determine what type of record is being requested and whether, on review, any part of the request constitutes a public record requiring disclosure." *Associated Builders & Contractors, Inc. v. Pennsylvania Dept. of General Services,* 747 A.2d 962, 965 (Pa.Cmwlth. 2000). The phraseology used in item three is essentially the same phraseology one would expect to see in a request for discovery. As phrased, this item does not provide enough information to show that it fits into either definition of public record as discussed above. Again, the definition, as it has been interpreted by Courts, includes only those documents that are "considered essential to the agency's decision." *Associated Builders & Contractors, Inc. v. Pennsylvania Dept. of General Services,* 747 A.2d 962, 965 (Pa.Cmwlth. 2000). The broad phrasing of item three makes

it impossible to determine what if any of the documents in that category constitute documents that were essential to the agency's decision. Again, the Plaintiff's brief does not make this request more specific nor did the Plaintiff himself appear at argument to inform the Court which specific documents he was requesting. Therefore, the City of Dubois does not have to provide the documents requested in item three.

Item four requests "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." Here again the phrasing is more akin to phrasing in a request for discovery – it is too broadly phrased and this Court cannot conduct any meaningful review of Dubois' decision to not provide the requested material. The request, as stated, would include documents not covered by the Act. In determining if a document is a public record under the second category covered in the Act it is necessary to show that the document "was generated by an agency covered by the Act." *Associated Builders & Contractors, Inc. v. Pennsylvania Dept. of General Services,* 747 A.2d 962, 965 (Pa.Cmwlth. 2000) citations omitted. As phrased, Item four would include "all documents submitted by *any* party." However, the Act only covers documents generated by the agency. Therefore, because Item four is phrased too broadly and would cover documents that are not public records, the decision to deny it must be affirmed.

Item five requests "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." This request is covered by the Act, specifically "any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any

person or group of persons." 65 P.S. §66.1. Therefore, the City of Dubois must produce the documents requested in Item five if it has not already done so.

Item six requests "all documents and correspondence sent to solicit another contractor to complete the Project." This request, similar to Items one and two, does not fall into either of the category of public records. Additionally, even if item six did fall into one of definitions of public records, the documents requested here would be excluded because these documents do not fix "the personal or property rights or duties of any person or group of persons" as required. *Associated Builders & Contractors, Inc. v. Pennsylvania Dept. of General Services,* 747 A.2d 962, 965 (Pa.Cmwlth. 2000) citations omitted. As stated, this item six requests all documents and correspondence sent to *solicit* another contractor. At the stage where the City of Dubois would be soliciting another contractor no rights or duties would be fixed. Therefore, the City of Dubois properly denied item six.

Item seven requests "the contract to complete the Project with HRI, Inc." This would be a public record under the Act. As such, the City of Dubois must provide it to the Plaintiff if it has not already done so.

Finally, Item eight requests "all documents and correspondence related to the awarding of the contract to HRI, Inc." This request as it pertains to correspondence, like Items one and two, does not fall into either definition of public records. Additionally, here again the phraseology is more akin to a request for discovery. The broad phrasing of Item eight makes it impossible for this Court to determine what, if any, part of this request would constitute public records. Again, the Plaintiff did not appear in Court for the scheduled argument in this matter, nor did he specify exactly which documents he was requesting in his brief, thereby making it impossible for this

Court to review this request and determine if any portion of it would need to be provided. Therefore, the City of Dubois properly denied this request.

In regards to the Plaintiff's request for Attorney's Fees and Costs, the Act provides that "if a court reverses an agency's final determination the court may award reasonable attorney's fees and costs or a portion thereof if it finds that (1) the agency acted willfully or with wanton disregard in depriving the requester of access or (2) the exemptions, exclusions or defenses asserted by the agency are not based on a reasonable interpretation of law." 65 P.S. §66.4-1. This Court only reversed the agency's final determination with regard to Items five and seven. However, no testimony was submitted by the Plaintiff at the time of argument that those documents had not been provided. The City of Dubois maintains that they did provide the contract and the minutes as requested. As the Plaintiff did not establish that the City of Dubois had, in fact, deprived him of access to those documents this Court will not award attorney's fees and costs to the Plaintiff.

The Act also provides for sanctions for "frivolous requests or appeals. If a court affirms an agency's final determination, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to the agency if the court finds that the legal challenge to the agency's final determination was frivolous." 65 P.S. 66.4-1(b). This Court considered imposing sanctions on the Plaintiff. The Plaintiff is acting as Kukurin's Attorney for the case filed in Clearfield County at number 06-0501-CD. That case involves a substantial contract dispute between Kukurin and the City of Dubois. Under that action, the Plaintiff made requests for discovery of many of the same materials he now requests under the Act. This Court has heard numerous motions relating to discovery in that case and has issued several orders concerning the same. Essentially, the Plaintiff asked this Court to duplicate the work already

done on number 06-0501-CD and the request for discovery made in that case. The Court also has little doubt that the Plaintiff in the case at bar is acting on behalf of his client, Kukurin, and will bill Kukurin for his services.

ORDER

NOW, this 20th day of September, 2007, following argument and review of the briefs, the Plaintiff's appeal is HEREBY GRANTED in part and DENIED in part. Specifically, it is granted as to Items five and seven of the request for public records and denied as to the remaining Items. The Plaintiff's Request for Attorney's Fee's and Costs to the Defendant is HEREBY DENIED.

BY THE COURT:

FREDRIC J. AMMERMAN
President Judge

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

February 5, 2008

Toni M. Cherry, Esquire
GLEASON, CHERRY AND CHERRY, LLP
P.O. Box 505
One North Franklin Street
Dubois, PA 15801-0505

Re: Maurice A. Nernberg v. City of Dubois
No. 07-401-CD
Our Ref. No. 15495L42

Dear Ms. Cherry:

On September 20, 2007, the Honorable Judge Frederic J. Ammerman granted Maurice Nernberg's request under the Right To Know Act as it pertained to Nernberg's request No. 5. That request was for "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."

To date, no documents have been provided in response to that Order. I reviewed our files and the only meeting minutes in our possession are from June 21, 2006 and August 24, 2006. Can you confirm that these are the only two meeting minutes in the City's possession? If there are other meeting minutes aside from the ones listed above, please provide the same pursuant to Judge Ammerman's Order.

If you have any questions, please feel free to contact me.

Very truly yours,

MAURICE A. NERNBERG & ASSOCIATES

By: _____
Joshua A. Lyons

/klk

CERTIFICATE OF SERVICE

I, Joshua A. Lyons, hereby certify that a true and correct copy of the within **Motion to Enforce Court Order and for Sanctions** was served upon all parties to the within matter, this date, by first class mail, addressed as follows:

Toni M. Cherry, Esquire
GLEASON, CHERRY & CHERRY, LLP
Atty. for the City of DuBois
P.O. Box 505
One North Franklin Street
DuBois, PA 15801

Date: February 26, 2008

By: _____
Joshua A. Lyons

CommonwealthDocketSheet **CommonwealthCourtofPennsylvania**

DocketNumber: 2064CD2007
Page1of4
December10,2007

MauriceA.Nernberg,
Appellant
v.
CityofDubois

InitiatingDocument: NoticeofAppeal
CaseStatus: Active
CaseProcessingStatus: November5,2007 AwaitingOriginalRecord
JournalNumber:
CaseCategory: Civil CaseType: CivilActionLaw

ConsolidatedDocketNos.: **RelatedDocketNos.:**

COUNSELINFORMATION

Appellant Nernberg,MauriceA.
ProSe: AppointCounselStatus:
IFPStatus:
Attorney: Nernberg,MauriceA.
LawFirm:
Address: MauriceA.Nernberg&Assoc.
301SmithfieldStreet
Pittsburgh,PA15222-2277
PhoneNo.:(412)232-0334

Appellant Nernberg,MauriceA.
ProSe: AppointCounselStatus:
IFPStatus:
Attorney: Lyons,JoshuaAlan
LawFirm:Nernberg&Associates
Address: 301SmithfieldStreet
Pittsburgh,PA15222
PhoneNo.:(412)232-0334

Appellee CityofDubois

RECEIVED & FILED
COMMONWEALTH COURT
OF PENNSYLVANIA
12 DEC 2007 09 22

FILED
DEC 10 2007
William A. Shaw
Prothonotary/Clerk of Courts

#11

CommonwealthDocketSheet **CommonwealthCourtofPennsylvania**

DocketNumber: 2064CD2007
Page2of4
December10,2007

ProSe: AppointCounselStatus:

IFPStatus:

Attorney: Cherry,ToniM.

LawFirm:Gleason,CherryandCherry,L.L.P.

Address: 1NFranklinSt
POBox505
DuBois,PA15801
PhoneNo.:(814)371-5800

TRIALCOURT/AGENCYINFORMATION

CourtBelow: ClearfieldCountyCourtofCommonPleas

County: Clearfield Division:

DateofOrderAppealedFrom: October5,2007 JudicialDistrict: 46

DateDocumentsReceived: November7,2007 DateNoticeofAppealFiled:November5,2007

OrderType: OrderEntered

Judge: Ammerman,FredricJ. LowerCourtDocketNo.: 07-401C.D.
PresidentJudge

ORIGINALRECORDCONTENTS

BRIEFINGSCHEDULE

CommonwealthDocketSheet **CommonwealthCourtofPennsylvania**

DocketNumber: 2064CD2007
Page3of4
December10,2007

DOCKETENTRIES

Filed Date	DocketEntry/DocumentName	PartyType	FiledBy
November5,2007	NoticeofAppealFiled	Appellant	Nernberg,MauriceA.
November8,2007	SendBackforCorrection LacksserviceofNOAonlowercourtjudge(nameandaddress)		CommonwealthCourtFilingOffice
November15,2007	AmendedCertificateofService	Appellant	Nernberg,MauriceA.
November15,2007	CompliedwithSendback	Appellant	Nernberg,MauriceA.
November15,2007	NoticeofDocketingAppealExited		CommonwealthCourtFilingOffice
December3,2007	DocketingStatementFiled JoshuaA.Lyons	Appellant	Nernberg,MauriceA.

REARGUMENT/RECONSIDERATION/REMITTAL

Reargument/ReconsiderationFiledDate:

ReargumentDisposition: Date:

RecordRemitted:

CERTIFICATE AND TRANSMITTAL OF RECORD UNDER PENNSYLVANIA RULE OF APPELLATE PROCEDURE 1931(C)

To the Prothonotary of the Appellate Court to which the within matter has been appealed:

THE UNDERSIGNED, Clerk (or Prothonotary) of the court of Common Pleas of Clearfield County, the said Court being a court of record, does hereby certify that annexed hereto is a true and correct copy of the whole and entire record, including an opinion of the Court as required by Pa. R.A.P. 1925, the original papers and exhibits, if any, on file, the transcript of the proceeding, if any, and the docket entries in the following matter:

07-401-CD

Maurice A. Nernberg
VS.
City of DuBois

In compliance with Pa. R.A.P. 1931 (c).

The documents compromising the record have been numbered from **No. 1 to No.** 12, and attached hereto as Exhibit A is a list of the documents correspondingly numbered and identified with reasonable definiteness, including with respect to each document, the number of pages compromising the document.

The date on which the record had been transmitted to the Appellate Court is December 10, 2007.

Prothonotary/Clerk of Courts

(seal)

Date: 12/10/2007
Time: 09:01 AM
Page 1 of 1

Clearfield County Court of Common Pleas
ROA Report
Case: 2007-00401-CD
Current Judge: Fredric Joseph Ammerman

User: BHUDSON

I hereby certify this to be a true and attested copy of the original statement filed in this case.

DEC 10 2007

William A. Shaw
Prothonotary/
Clerk of Courts

Maurice A. Nernberg vs. City of Dubois

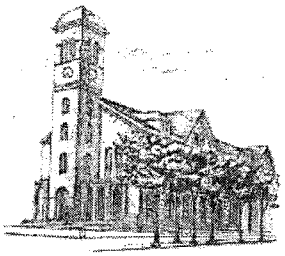
Civil Other

Date		Judge
03/15/2007	New Case Filed.	No Judge
	Filing: Appeal Pursuant to 65 P.S. sections 66.1 et. seq. from the Denial of Access to Records. Paid by: Nernberg, Maurice A. (attorney for Nernberg, Maurice A.) Receipt number: 1918067 Dated: 03/15/2007 Amount: $85.00 (Check) NO CC.	No Judge
06/11/2007	Praecipe For Briefing Schedule And Argument Date For Right to Know Act Appeal, filed by s/ Matthew W. Dewey, Esquire. No CC	No Judge
06/15/2007	Rule Returnable, this 14th day of June, 2007, upon consideration of the Appeal filed by Plaintiff Maurice A. Nernberg, a Rule is issued upon the City of DuBois. Evidentiary hearing will be held on the 26th day of July, 2007 at 9:00 a.m. in Courtroom 1. 30 minutes has been reserved for this hearing. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: Nernberg, Dewey; 1CC Def. - PO Box 408, DuBois, PA 15801; Courtesy CC to Atty. T. Cherry	Fredric Joseph Ammerman
07/27/2007	Order, this 26th day of July 2007, following evidentiary hearing it is Ordered that both parties supply the Court with appropriate brief on the issues within no more than 30 days from this date. By The Court, /s/ Fredrric J. Ammerman, Pres. Judge. 2CC M. Nernberg and M. Dewey; 2CC City of DuBois, 16 W. Scribner Ave., DuBois, PA 15801	Fredric Joseph Ammerman
08/02/2007	Praecipe For Entry of Appearance, filed on behalf of City of DuBois, enter appearance of Toni M. Cherry, Esquire. Filed by Atty. Cherry. 2CC Atty. Cherry	Fredric Joseph Ammerman
08/22/2007	Transcript of Proceedings, filed. Evidentiary Hearing on Plaintiff's Appeal, held before Fredric J. Ammerman, Pres. Judge, on July 26, 2007.	Fredric Joseph Ammerman
10/05/2007	Opinion and Order, this 20th day of Sept., 2007, Plaintiff's appeal is Granted in part and Denied in part. It is granted as to Items five and seven of the request for public records and denied as to the remaining items. The Plaintiff's Request for Attorney's Fees and Costs to the Defendant is Denied. by The Court, /s/ Fredric J. Ammerman, pres. Judge. 1CC Attys: Neinberg, Dewey, T. Cherry; 1CC D. Mikesel, Law Library	Fredric Joseph Ammerman
11/05/2007	Filing: Appeal to Commonwealth Court Paid by: Noble, Theron Receipt number: 1921334 Dated: 11/05/2007 Amount: $45.00 (Cash) 1 Cert. to Commonwealth Court with check in the amount of $60.00	Fredric Joseph Ammerman
11/19/2007	Order, this 19th day of Nov., 2007, this Court having been notified of Appeal to the Commonwealth Court of Pennsylvania, it is Ordered that Maurice Nernberg file a concise statement of the matters complained of on said Appeal no later than 21 days herefrom. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: Nernberg/Dewey, T. Cherry	Fredric Joseph Ammerman
12/07/2007	Concise Statement of Matters Complained of on Appeal, filed by Atty.	Fredric Joseph Ammerman
12/10/2007	Commonwealth Docket Sheet, Commonwealth Court Number 2064 CD 2007.	Fredric Joseph Ammerman
	December 10, 2007, Mailed Appeal to Commonwealth Court. December 10, 2007, Letters, Re: Notification of mailing appeal mailed to Maurice A. Nernberg, Esq.; Matthew W. Dewey, Esq.; Toni M. Cherry, Esq.; with certified copies of docket sheet and Document listing required by Pa.R.A.P. 1931 (c).	Fredric Joseph Ammerman

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 07-401-CD
Maurice A. Nernberg
VS.
City of DuBois

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
01	03/15/07	Appeal Pursuant to 65 P.S. Sections 66.1 et. seq from the Denial of Access to Records	09
02	06/11/07	Praecipe for Briefing Schedule and Argument Date for Right to Know Act Appeal	04
03	06/15/07	Rule Returnable, Evidentiary hearing scheduled	01
04	07/27/07	Order, Re: briefs to be supplied to Court	01
05	08/02/07	Praecipe for Entry of Appearance	02
06	08/22/07	Transcript of Proceedings, Evidentiary Hearing on Plaintiff's Appeal, held July 26, 2007, before Honorable Fredric J. Ammerman, P.J.	Separate Cover
07	10/05/07	Opinion and Order	07
08	11/05/07	Appeal to Commonwealth Court	04
09	11/19/07	Order, Re: Concise statement to be filed	01
10	12/07/07	Concise Statement of Matters Complained of on Appeal	05
11	12/10/07	Commonwealth Docket Sheet, Commonwealth Court Number 2064 CD 2007	04
12	12/10/07	Letters, Re: Notification of mailing appeal mailed to Maurice A. Nernberg, Esq.; Matthew W. Dewey, Esq.; Toni M. Cherry, Esq.; with certified copies of docket sheet and Document listing required by Pa.R.A.P. 1931 (c).	03



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts | **Jacki Kendrick** Deputy Prothonotary/Clerk of Courts | **Bonnie Hudson** Administrative Assistant | **David S. Ammerman** Solicitor

PO Box 549, Clearfield, PA 16830 ▪ Phone: (814) 765-2641 Ext. 1330 ▪ Fax: (814) 765-7659 ▪ www.clearfieldco.org

COPY

Fredric J. Ammerman, P.J.
Court of Common Pleas
230 E. Market Street
Clearfield, PA 16830

Maurice A. Nernberg, Esq.
301 Smithfield Street
Pittsburgh, PA 15222

Matthew W. Dewey, Esq.
301 Smithfield Street
Pittsburgh, PA 15222

Toni M. Cherry, Esq.
PO Box 505
DuBois, PA 15801

Maurice A. Nernberg
Vs.
City of DuBois

Court No. 07-401-CD; Commonwealth Court No. 2064 CD 2007

Dear Counsel:

Please be advised that the above referenced record was forwarded to the Commonwealth Court of Pennsylvania on December 10, 2007.

Sincerely,

William A. Shaw
Prothonotary/Clerk of Courts

FILED
08:32 PM
DEC 10 2007

William A. Shaw
Prothonotary/Clerk of Courts

#12

Clearfield County Court of Common Pleas
ROA Report
Case: 2007-00401-CD
Current Judge: Fredric Joseph Ammerman

Maurice A. Nernberg vs. City of Dubois

Civil Other

Date		Judge
03/15/2007	New Case Filed.	No Judge
	Filing: Appeal Pursuant to 65 P.S. sections 66.1 et. seq. from the Denial of Access to Records. Paid by: Nernberg, Maurice A. (attorney for Nernberg, Maurice A.) Receipt number: 1918067 Dated: 03/15/2007 Amount: $85.00 (Check) NO CC.	No Judge
06/11/2007	Praecipe For Briefing Schedule And Argument Date For Right to Know Act Appeal, filed by s/ Matthew W. Dewey, Esquire. No CC	No Judge
06/15/2007	Rule Returnable, this 14th day of June, 2007, upon consideration of the Appeal filed by Plaintiff Maurice A. Nernberg, a Rule is issued upon the City of DuBois. Evidentiary hearing will be held on the 26th day of July, 2007 at 9:00 a.m. in Courtroom 1. 30 minutes has been reserved for this hearing. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: Nernberg, Dewey; 1CC Def. - PO Box 408, DuBois, PA 15801; Courtesy CC to Atty. T. Cherry	Fredric Joseph Ammerman
07/27/2007	Order, this 26th day of July 2007, following evidentiary hearing it is Ordered that both parties supply the Court with appropriate brief on the issues within no more than 30 days from this date. By The Court, /s/ Fredrric J. Ammerman, Pres. Judge. 2CC M. Nernberg and M. Dewey; 2CC City of DuBois, 16 W. Scribner Ave., DuBois, PA 15801	Fredric Joseph Ammerman
08/02/2007	Praecipe For Entry of Appearance, filed on behalf of City of DuBois, enter appearance of Toni M. Cherry, Esquire. Filed by Atty. Cherry. 2CC Atty. Cherry	Fredric Joseph Ammerman
08/22/2007	Transcript of Proceedings, filed. Evidentiary Hearing on Plaintiff's Appeal, held before Fredric J. Ammerman, Pres. Judge, on July 26, 2007.	Fredric Joseph Ammerman
10/05/2007	Opinion and Order, this 20th day of Sept., 2007, Plaintiff's appeal is Granted in part and Denied in part. It is granted as to Items five and seven of the request for public records and denied as to the remaining items. The Plaintiff's Request for Attorney's Fees and Costs to the Defendant is Denied. by The Court, /s/ Fredric J. Ammerman, pres. Judge. 1CC Attys: Neinberg, Dewey, T. Cherry; 1CC D. Mikesel, Law Library	Fredric Joseph Ammerman
11/05/2007	Filing: Appeal to Commonwealth Court Paid by: Noble, Theron Receipt number: 1921334 Dated: 11/05/2007 Amount: $45.00 (Cash) 1 Cert. to Commonwealth Court with check in the amount of $60.00	Fredric Joseph Ammerman
11/19/2007	Order, this 19th day of Nov., 2007, this Court having been notified of Appeal to the Commonwealth Court of Pennsylvania, it is Ordered that Maurice Nernberg file a concise statement of the matters complained of on said Appeal no later than 21 days herefrom. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: Nernberg/Dewey, T. Cherry	Fredric Joseph Ammerman
12/07/2007	Concise Statement of Matters Complained of on Appeal, filed by Atty.	Fredric Joseph Ammerman
12/10/2007	Commonwealth Docket Sheet, Commonwealth Court Number 2064 CD 2007.	Fredric Joseph Ammerman

I hereby certify this to be a true and attested copy of the original statement filed in this case.

DEC 10 2007

Attest.

William L. Shaw
Prothonotary/
Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 07-401-CD
Maurice A. Nernberg
VS.
City of DuBois

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
01	03/15/07	Appeal Pursuant to 65 P.S. Sections 66.1 et. seq from the Denial of Access to Records	09
02	06/11/07	Praecipe for Briefing Schedule and Argument Date for Right to Know Act Appeal	04
03	06/15/07	Rule Returnable, Evidentiary hearing scheduled	01
04	07/27/07	Order, Re: briefs to be supplied to Court	01
05	08/02/07	Praecipe for Entry of Appearance	02
06	08/22/07	Transcript of Proceedings, Evidentiary Hearing on Plaintiff's Appeal, held July 26, 2007, before Honorable Fredric J. Ammerman, P.J.	Separate Cover
07	10/05/07	Opinion and Order	07
08	11/05/07	Appeal to Commonwealth Court	04
09	11/19/07	Order, Re: Concise statement to be filed	01
10	12/07/07	Concise Statement of Matters Complained of on Appeal	05
11	12/10/07	Commonwealth Docket Sheet, Commonwealth Court Number 2064 CD 2007	04

COPY

CommonwealthDocketSheet **CommonwealthCourtofPennsylvania**

DocketNumber: 2064CD2007
Page1of4
December10,2007

MauriceA.Nernberg,
Appellant
v.
CityofDubois

InitiatingDocument: NoticeofAppeal
CaseStatus: Active
CaseProcessingStatus: November5,2007 AwaitingOriginalRecord
JournalNumber:
CaseCategory: Civil CaseType: CivilActionLaw

ConsolidatedDocketNos.: **RelatedDocketNos.:**

COUNSELINFORMATION

Appellant Nernberg,MauriceA.
ProSe: AppointCounselStatus:
IFPStatus:
Attorney: Nernberg,MauriceA.
LawFirm:
Address: MauriceA.Nernberg&Assoc.
301SmithfieldStreet
Pittsburgh,PA15222-2277
PhoneNo.:(412)232-0334

Appellant Nernberg,MauriceA.
ProSe: AppointCounselStatus:
IFPStatus:
Attorney: Lyons,JoshuaAlan
LawFirm:Nernberg&Associates
Address: 301SmithfieldStreet
Pittsburgh,PA15222
PhoneNo.:(412)232-0334

FILED
DEC 10 2007
William A. Shaw
Prothonotary/Clerk of Courts

Appellee CityofDubois

#11

CommonwealthDocketSheet **CommonwealthCourtofPennsylvania**

DocketNumber: 2064CD2007
Page2of4
December10,2007

ProSe: AppointCounselStatus:

IFPStatus:

Attorney: Cherry,ToniM.

LawFirm:Gleason,CherryandCherry,L.L.P.

Address: 1NFranklinSt
POBox505
DuBois,PA15801
PhoneNo.:(814)371-5800

TRIALCOURT/AGENCYINFORMATION

CourtBelow: ClearfieldCountyCourtofCommonPleas

County: Clearfield Division:

DateofOrderAppealedFrom: October5,2007 JudicialDistrict: 46

DateDocumentsReceived: November7,2007 DateNoticeofAppealFiled:November5,2007

OrderType: OrderEntered

Judge: Ammerman,FredricJ. LowerCourtDocketNo.: 07-401C.D.
PresidentJudge

ORIGINALRECORDCONTENTS

BRIEFINGSCHEDULE

CommonwealthDocketSheet **CommonwealthCourtofPennsylvania**

DocketNumber: 2064CD2007
Page3of4
December10,2007

DOCKETENTRIES

Filed Date	DocketEntry/DocumentName	PartyType	FiledBy
November5,2007	NoticeofAppealFiled	Appellant	Nernberg,MauriceA.
November8,2007	SendBackforCorrection LacksserviceofNOAonlowercourtjudge(nameandaddress)		CommonwealthCourtFilingOffice
November15,2007	AmendedCertificateofService	Appellant	Nernberg,MauriceA.
November15,2007	CompliedwithSendback	Appellant	Nernberg,MauriceA.
November15,2007	NoticeofDocketingAppealExited		CommonwealthCourtFilingOffice
December3,2007	DocketingStatementFiled JoshuaA.Lyons	Appellant	Nernberg,MauriceA.

REARGUMENT/RECONSIDERATION/REMITTAL

Reargument/ReconsiderationFiledDate:

ReargumentDisposition: Date:

RecordRemitted:

CommonwealthDocketSheet **CommonwealthCourtofPennsylvania**

DocketNumber: 2064CD2007
Page4of4
December10,2007

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,

Plaintiff,

vs.

CITY OF DUBOIS,

Defendant.

CIVIL DIVISION

No. 07-401 C.D.

CONCISE STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

Filed on Behalf of:
Maurice A. Nernberg,
Plaintiff

Counsel of Record for this Party:

Joshua A. Lyons
Pa. I.D. No. 94301

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

Firm No. 331

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IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,	)	CIVIL DIVISION
	)	
Plaintiff,	)	No. 07-401 C.D.
	)	
vs.	)	
	)	
CITY OF DUBOIS,	)	
	)	
Defendant.	)	

CONCISE STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

This appeal concerns the Honorable Frederic J. Ammerman's order granting in part and denying in part the Appellant's Appeal of Denial of Records under the Right to Know Act ("RTKA").

Appellant requested eight types of documents from the Appellee concerning a sewer project conducted in the City of DuBois and related to the termination of Kukurin Contracting, Inc., the general contractor. Appellee admitted it never answered the request or produced any documents pursuant to the request.

At the hearing, the Court erred by considering facts outside the record on appeal and by permitting Appellee's attorney to testify. The Court further erred by allowing testimony relative to discovery in an action between Kukurin and DuBois and by considering that Appellant, an attorney, represented Kukurin. The Court previously precluded Kukurin from obtaining documents in discovery in another matter; thus, the Court admonished Appellant for trying to circumvent discovery rules with its RTKA appeal. However, both discovery rulings in another matter and Appellant's

interest in obtaining public records are irrelevant under the RTKA.

In its opinion, the Court committed an error of law when it held the Appellee is only required to produce documents generated by it, as the Appellee was also required to provide any documents kept or maintained by it. The Court also incorrectly held that no evidence was submitted that the City did not provide documents to the Appellant as the Appellee admitted it did not respond and did not provide any documents pursuant to the request. Instead, the Court, in error, equated the Appellee's production of documents through discovery to another party in another matter, to the production of public records to the Appellant pursuant to the RTKA.

The Court erred when it declined to order the Appellee to comply with the Appellant's requests 1, 2, 3, 4, 6, and 8, as those requests were not excessively broad. Moreover, in Appellant's briefs, he noted that he wanted documents related to the firing of Kukurin and the hiring of a replacement contractor, properly characterized as both decisional records and records related to a contract. The Appellee admitted it withheld records which clarified the type of material to be used on the project, thus becoming an essential component of the contract; yet, the Court, in error, did not require their production. The Court also incorrectly held that requests 3 and 4 did not qualify as decisional records.

As Appellee admitted it did not give Appellant documents, removed documents from its file, and claimed to have given Appellant other documents, the Court erred by not requesting a detailed list of the Appellee's files for an in camera review to

determine what documents were 1) requested, 2) public records, and 3) produced.

The Court committed an error of law and abuse of discretion when it did not grant attorney fees despite the fact that Appellee admitted that it did not provide per se public records, i.e., contracts and meeting minutes. Also, Appellee's admitted complete failure to respond to the Appellant's request under the RTKA, done willfully and wantonly, wholly prevented the parties from resolving any issues prior to any appeal. Also, Appellee's reasons for withholding documents were not based on a reasonable interpretation of the law.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

By: _____
Joshua A. Lyons

CERTIFICATE OF SERVICE

I, Joshua A. Lyons, hereby certify that a true and correct copy of the within **Concise Statement of Matters Complained of on Appeal** was served upon all parties to the within matter, this date, by first class mail, addressed as fcllows:

Toni M. Cherry, Esquire
GLEASON, CHERRY AND CHERRY, LLP
P.O. Box 505
One North Franklin Street
DuBois, PA 15801

The Honorable Fredric J. Ammerman, P.J.
COURT OF COMMON PLEAS OF CLEARFIELD COUNTY
230 E. Market Street
Clearfield, PA 16830

Date: 12/5/07

Joshua A. Lyons

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

MAURICE A. NERNBERG,	*	
Planintiff	*	
vs.	*	NO. 07-401-CD
CITY OF DUBOIS,	*	
Defendant	*	

ORDER

NOW, this 19th day of November, 2007, this Court having been notified of Appeal to the Commonwealth Court of Pennsylvania in the above-captioned matter; it is the ORDER of this Court that MAURICE NERNBERG, Appellant, file a concise statement of the matters complained of on said Appeal no later than twenty-one (21) days herefrom, as set forth in Rule 1925(b) of the Rules of Appellate Procedure.

BY THE COURT,

FREDRIC J. AMMERMAN
President Judge

FILED
NOV 19 2007
William A. Shaw
Prothonotary/Clerk of Courts

cc Attys:
12:08 BY
Nernberg/Dewey
T-Cherry
GK

#9

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,

Plaintiff,

vs.

CITY OF DUBOIS,

Defendant.

CIVIL DIVISION

No. 07-401 C.D.

FILED
NOV 05 2007
01:10 | cc
William A. Shaw
Prothonotary/Clerk of Courts

NOTICE OF APPEAL

2 cert to Att'y
no bvc $60.-
1 cert w/ check
to Comm Court

Filed on Behalf of:
Kukurin Contracting, Inc., Plaintiff

Counsel of Record for this Party:

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

Joshua A. Lyons
Pa. I.D. No. 94301

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

Firm No. 331

#8

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,	)	CIVIL DIVISION
Plaintiff,	)	No. 07-401 C.D.
vs.	)	
CITY OF DUBOIS,	)	
Defendant.	)	

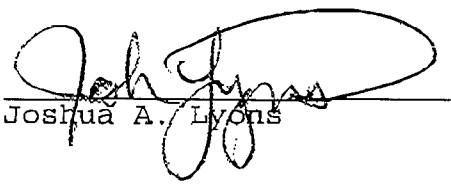
NOTICE OF APPEAL

Notice is hereby given that Maurice A. Nernberg, plaintiff above named, hereby appeals to the Commonwealth Court of Pennsylvania from the Order entered in this matter on the 5th day of October, 2007. This order has been entered in the docket as evidenced by the attached copy of the docket entries.

The transcript of the Evidentiary Hearing held in this matter on July 26, 2007, has been lodged of record as evidenced by the attached copy of the docket entries.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

By: 
Joshua A. Lyons

Date: 11/05/2007 **Clearfield County Court of Common Pleas** User: BHUDSON
Time: 09:24 AM ROA Report
Page 1 of 1 Case: 2007-00401-CD
Current Judge: Fredric Joseph Ammerman

Maurice A. Nernberg vs. City of Dubois

Civil Other

Date		Judge
03/15/2007	New Case Filed.	No Judge
	Filing: Appeal Pursuant to 65 P.S. sections 66.1 et. seq. from the Denial of Access to Records. Paid by: Nernberg, Maurice A. (attorney for Nernberg, Maurice A.) Receipt number: 1918067 Dated: 03/15/2007 Amount: $85.00 (Check) NO CC.	No Judge
06/11/2007	Praecipe For Briefing Schedule And Argument Date For Right to Know Act Appeal, filed by s/ Matthew W. Dewey, Esquire. No CC	No Judge
06/15/2007	Rule Returnable, this 14th day of June, 2007, upon consideration of the Appeal filed by Plaintiff Maurice A. Nernberg, a Rule is issued upon the City of DuBois. Evidentiary hearing will be held on the 26th day of July, 2007 at 9:00 a.m. in Courtroom 1. 30 minutes has been reserved for this hearing. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: Nernberg, Dewey; 1CC Def. - PO Box 408, DuBois, PA 15801; Courtesy CC to Atty. T. Cherry	Fredric Joseph Ammerman
07/27/2007	Order, this 26th day of July 2007, following evidentiary hearing it is Ordered that both parties supply the Court with appropriate brief on the issues within no more than 30 days from this date. By The Court, /s/ Fredrric J. Ammerman, Pres. Judge. 2CC M. Nernberg and M. Dewey; 2CC City of DuBois, 16 W. Scribner Ave., DuBois, PA 15801	Fredric Joseph Ammerman
08/02/2007	Praecipe For Entry of Appearance, filed on behalf of City of DuBois, enter appearance of Toni M. Cherry, Esquire. Filed by Atty. Cherry. 2CC Atty. Cherry	Fredric Joseph Ammerman
08/22/2007	Transcript of Proceedings, filed. Evidentiary Hearing on Plaintiff's Appeal, held before Fredric J. Ammerman, Pres. Judge, on July 26, 2007.	Fredric Joseph Ammerman
10/05/2007	Opinion and Order, this 20th day of Sept., 2007, Plaintiff's appeal is Granted in part and Denied in part. It is granted as to Items five and seven of the request for public records and denied as to the remaining items. The Plaintiff's Request for Attorney's Fees and Costs to the Defendant is Denied. by The Court, /s/ Fredric J. Ammerman, pres. Judge. 1CC Attys: Neinberg, Dewey, T. Cherry; 1CC D. Mikesel, Law Library	Fredric Joseph Ammerman

CERTIFICATE OF SERVICE

I, Joshua A. Lyons, hereby certify that a true and correct copy of the within Notice of Appeal was served upon all parties to the within matter, this date, by first class mail, addressed as follows:

Toni M. Cherry, Esquire
GLEASON, CHERRY AND CHERRY, LLP
P.O. Box 505
One North Franklin Street
DuBois, PA 15801

Date: 11/5/07

Joshua A. Lyons

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

MAURICE A. NERNBERG, Plaintiff	:	No. 07-401-CD
v.	:	
CITY OF DUBOIS, Defendant	:	

OPINION

The Pennsylvania "Right to Know" Act (hereafter Act) requires that "[u]nless otherwise prohibited by law, a public record shall be accessible for inspection and duplication by a requester in accordance with this act." 65 P.S. §66.2. Also, "[n]othing in this act shall provide for access to a record which is not a public record." *Id.* A public record is defined by the Act as:

> Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons.
> 65 P.S. §66.1.

With regard to the first category, accounts, vouchers, or contracts, the Court has said those "should be broadly construed and need only constitute records evidencing disbursement of government money." *Associated Builders & Contractors, Inc. v. Pennsylvania Dept. of General Services,* 747 A.2d 962, 965 (Pa.Cmwlth. 2000) citations omitted. However, the "second category of documents under the Act is construed more narrowly." *Id.* Specifically, the party requesting this information under the Act must establish that the material:

1. was generated by an agency covered by the Act;
2. constitutes a minute, order or decision of an agency or an essential component of the agency's decision;
3. fixes the personal or property rights or duties of any person or group of persons; and
4. is not protected by statute, order or decree of court;

(#7)

Id. citations omitted.

The Court has also interpreted the definition to include "documents that are considered essential to the agency's decision. To be considered as embodying an essential component of an agency decision, the decision must have been contingent on the information contained in the document and could not have been made without it." *Id.* However, "[j]ust because a document may have an effect on or influence an agency decision, it does not make it an 'essential component' of that decision." *Id.* citations omitted.

With these criteria in mind the Court now turns to the requests made by the Plaintiff in the February 12, 2007 letter to Mr. Suplizio (hereafter letter). Items one and two of the letter ask for "all correspondence and communication" between Dubois and Nussbaumer & Clarke, Inc. and Dubois and Pennsylvania Department of Transportation regarding the contract with Kukurin for the North and South Main Street Sewer Replacement Project. Correspondence is neither an "account, voucher or contract" nor is it a "minute, order or decision." Again, the first category is to be broadly construed to include anything that evidences a disbursement of government money. However, even with such a broad construction the connection between correspondence and communications and accounts, vouchers, or contracts is nebulous at best. The Plaintiff did not include any support for a construction of correspondence that would fall into the definition of public records in his brief nor did he attend the scheduled argument to argue that construction to the Court. Therefore, items one and two do not need to be provided under the Act because they are not public records as defined by the Act.

The next item in the letter requests "all documents or reports regarding the project which the City of Dubois's (sic) relied upon in making the decision to issue a stop work order and/or terminate the contract with Kukurin." Preliminarily, the Commonwealth Court has stated "[f]or the agency to be required to give access, a person who makes a public records request has an obligation to identify with some specificity the type of information being sought." *Nanayakkara v. Casella*, 681 A.2d 857, 859-60 (Pa.Cmwlth. 1996). Where the request is not sufficiently specific, the agency has no obligation to comply with the request because the lack of specificity prevents the agency from determining whether to grant or deny the request. *Id.* at 860. Finally, a "lack of specificity in the request makes it difficult, if not impossible, for this court to conduct meaningful review of the agency's decision." *Id.* The Court in *Associated Builders & Contractors, Inc.* determined that several of the requests were phrased in a similar manner to requests for document production and that "[s]uch requests fail to provide sufficient facts to determine what type of record is being requested and whether, on review, any part of the request constitutes a public record requiring disclosure." *Associated Builders & Contractors, Inc. v. Pennsylvania Dept. of General Services,* 747 A.2d 962, 965 (Pa.Cmwlth. 2000). The phraseology used in item three is essentially the same phraseology one would expect to see in a request for discovery. As phrased, this item does not provide enough information to show that it fits into either definition of public record as discussed above. Again, the definition, as it has been interpreted by Courts, includes only those documents that are "considered essential to the agency's decision." *Associated Builders & Contractors, Inc. v. Pennsylvania Dept. of General Services,* 747 A.2d 962, 965 (Pa.Cmwlth. 2000). The broad phrasing of item three makes

it impossible to determine what if any of the documents in that category constitute documents that were essential to the agency's decision. Again, the Plaintiff's brief does not make this request more specific nor did the Plaintiff himself appear at argument to inform the Court which specific documents he was requesting. Therefore, the City of Dubois does not have to provide the documents requested in item three.

Item four requests "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." Here again the phrasing is more akin to phrasing in a request for discovery – it is too broadly phrased and this Court cannot conduct any meaningful review of Dubois' decision to not provide the requested material. The request, as stated, would include documents not covered by the Act. In determining if a document is a public record under the second category covered in the Act it is necessary to show that the document "was generated by an agency covered by the Act." *Associated Builders & Contractors, Inc. v. Pennsylvania Dept. of General Services,* 747 A.2d 962, 965 (Pa.Cmwlth. 2000) citations omitted. As phrased, Item four would include "all documents submitted by *any* party." However, the Act only covers documents generated by the agency. Therefore, because Item four is phrased too broadly and would cover documents that are not public records, the decision to deny it must be affirmed.

Item five requests "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." This request is covered by the Act, specifically "any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any

person or group of persons." 65 P.S. §66.1. Therefore, the City of Dubois must produce the documents requested in Item five if it has not already done so.

Item six requests "all documents and correspondence sent to solicit another contractor to complete the Project." This request, similar to Items one and two, does not fall into either of the category of public records. Additionally, even if item six did fall into one of definitions of public records, the documents requested here would be excluded because these documents do not fix "the personal or property rights or duties of any person or group of persons" as required. *Associated Builders & Contractors, Inc. v. Pennsylvania Dept. of General Services,* 747 A.2d 962, 965 (Pa.Cmwlth. 2000) citations omitted. As stated, this item six requests all documents and correspondence sent to *solicit* another contractor. At the stage where the City of Dubois would be soliciting another contractor no rights or duties would be fixed. Therefore, the City of Dubois properly denied item six.

Item seven requests "the contract to complete the Project with HRI, Inc." This would be a public record under the Act. As such, the City of Dubois must provide it to the Plaintiff if it has not already done so.

Finally, Item eight requests "all documents and correspondence related to the awarding of the contract to HRI, Inc." This request as it pertains to correspondence, like Items one and two, does not fall into either definition of public records. Additionally, here again the phraseology is more akin to a request for discovery. The broad phrasing of Item eight makes it impossible for this Court to determine what, if any, part of this request would constitute public records. Again, the Plaintiff did not appear in Court for the scheduled argument in this matter, nor did he specify exactly which documents he was requesting in his brief, thereby making it impossible for this

Court to review this request and determine if any portion of it would need to be provided. Therefore, the City of Dubois properly denied this request.

In regards to the Plaintiff's request for Attorney's Fees and Costs, the Act provides that "if a court reverses an agency's final determination the court may award reasonable attorney's fees and costs or a portion thereof if it finds that (1) the agency acted willfully or with wanton disregard in depriving the requester of access or (2) the exemptions, exclusions or defenses asserted by the agency are not based on a reasonable interpretation of law." 65 P.S. §66.4-1. This Court only reversed the agency's final determination with regard to Items five and seven. However, no testimony was submitted by the Plaintiff at the time of argument that those documents had not been provided. The City of Dubois maintains that they did provide the contract and the minutes as requested. As the Plaintiff did not establish that the City of Dubois had, in fact, deprived him of access to those documents this Court will not award attorney's fees and costs to the Plaintiff.

The Act also provides for sanctions for "frivolous requests or appeals. If a court affirms an agency's final determination, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to the agency if the court finds that the legal challenge to the agency's final determination was frivolous." 65 P.S. 66.4-1(b). This Court considered imposing sanctions on the Plaintiff. The Plaintiff is acting as Kukurin's Attorney for the case filed in Clearfield County at number 06-0501-CD. That case involves a substantial contract dispute between Kukurin and the City of Dubois. Under that action, the Plaintiff made requests for discovery of many of the same materials he now requests under the Act. This Court has heard numerous motions relating to discovery in that case and has issued several orders concerning the same. Essentially, the Plaintiff asked this Court to duplicate the work already

done on number 06-0501-CD and the request for discovery made in that case. The Court also has little doubt that the Plaintiff in the case at bar is acting on behalf of his client, Kukurin, and will bill Kukurin for his services.

ORDER

NOW, this 20th day of September, 2007, following argument and review of the briefs, the Plaintiff's appeal is HEREBY GRANTED in part and DENIED in part. Specifically, it is granted as to Items five and seven of the request for public records and denied as to the remaining Items. The Plaintiff's Request for Attorney's Fee's and Costs to the Defendant is HEREBY DENIED.

BY THE COURT:

FREDRIC J. AMMERMAN
President Judge

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

MAURICE A. NERNBERG,
Plaintiff

vs.

CITY OF DUBOIS,
Defendant

: No. 07 - 401 C.D.
:
: Type of Case: CIVIL
:
: Type of Pleading: PRAECIPE FOR ENTRY OF APPEARANCE
:
: Filed on Behalf of: CITY OF DUBOIS, Defendant
:
: 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 2cc
AUG 02 2007 @10:22/01 Atty Cherry
William A. Shaw Copy to CIA
Prothonotary/Clerk of Courts
GK
#5

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

MAURICE A. NERNBERG, Plaintiff	:	
vs.	:	No. 07 - 401 C.D.
CITY OF DUBOIS, Defendant	:	

PRAECIPE FOR ENTRY OF APPEARANCE

TO WILLIAM A. SHAW, PROTHONOTARY

SIR:

Kindly enter our appearance on behalf of the Defendant in the above-captioned case.

Respectfully submitted,

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

By _____
Attorneys for Defendant

Dated: August 2, 2007

CA

IN THE COURT OF COMMON PLEAS

OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

MAURICE A. NERNBERG :

-vs- : No. 07-401-CD

CITY OF DUBOIS :

O R D E R

AND NOW, this 26th day of July, 2007, following evidentiary hearing, it is the ORDER of this Court that both parties supply the Court with appropriate brief on the issues within no more than thirty (30) days from this date.

BY THE COURT,

President Judge

FILED 2cc
01/4:00 BK M. Nernberg and
JUL 27 2007 M. Dewey
William A. Shaw
Prothonotary/Clerk of Courts

2cc City of DuBois
16 W Scribner Ave
DuBois, PA 15801

GK

#4

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

MAURICE A. NERNBERG,	*	
	*	NO. 07-401-CD
vs.	*	
	*	
CITY OF DUBOIS,	*	

RULE RETURNABLE

NOW, this 14th day of June, 2007, upon consideration of the Appeal filed by Plaintiff Maurice A. Nernberg, a Rule is hereby issued upon the City of DuBois to show cause why said Appeal should not be granted. Evidentiary hearing will be held on the 26th day of July, 2007 at 9:00 A.m. in Courtroom No. 1 of the Clearfield County Courthouse, Clearfield, Pennsylvania. Thirty minutes has been reserved for this hearing.

BY THE COURT,

Fredric J. Ammerman

FREDRIC J. AMMERMAN
President Judge

FILED
01 10:54 BH
JUN 15 2007
William A. Shaw
Prothonotary/Clerk of Courts

1 cc Attys Nernberg & Dewey
cc Def - PO Box 408 DuBois, PA 15801
Courtesy CC to Atty T. Cheezy
GK
#3

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,

Appellant,

vs.

CITY OF DUBOIS,

Appellee.

CIVIL DIVISION

No. 07-401 C.D.

PRAECIPE FOR BRIEFING SCHEDULE AND ARGUMENT DATE FOR RIGHT TO KNOW ACT APPEAL

Filed on Behalf of:
Maurice A. Nernberg,
Appellant
Counsel of Record for
this Party:

Matthew W. Dewey
Pa. I.D. No.200781

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

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

Firm No. 331

#2

15495PR2\mwd\040307\rmk\060707

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,

Appellant,

vs.

CITY OF DUBOIS,

Appellee.

CIVIL DIVISION

No. 07-401 C.D.

PRAECIPE FOR BRIEFING SCHEDULE AND ARGUMENT DATE FOR RIGHT TO KNOW ACT APPEAL

To the Prothonotary of Said Court:

Please direct the Court Administrator to establish a briefing schedule and set an argument date, for the APPEAL PURSUANT TO 65 P.S. §66.1 ET SEQ., FROM THE DENIAL OF ACCESS TO RECORDS filed on behalf of Maurice A. Nernberg.

Respectfully submitted,

MAURICE A. NERNBERG & ASSOCIATES

By: _____
Matthew W. Dewey

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,	)	CIVIL DIVISION
	)	
Plaintiff,	)	No. 07-401 C.D.
	)	
vs.	)	
	)	
CITY OF DUBOIS,	)	
	)	
Defendant.	)	

ORDER OF COURT

AND NOW, this _____ day of _____, 2007, it is hereby ORDERED, ADJUDGED and DECREED that the briefing schedule is set as follows:

Appellant's Brief to be served 10 days after the date of this order, by: _____

Appellee's Brief due 30 days after service of Appellant's Brief.

Appellant's reply brief due 14 days after service of Appellee's Brief.

Argument on the APPEAL PURSUANT TO 65 P.S. §66.1 ET SEQ., FROM THE DENIAL OF ACCESS TO RECORDS will then be scheduled for: _____

BY THE COURT:

_____J.

CERTIFICATE OF SERVICE

I, MATTHEW W. DEWEY, hereby certify that a true and correct copy of the within **PRAECIPE FOR BRIEFING SCHEDULE AND ARGUMENT DATE FOR RIGHT TO KNOW ACT APPEAL** was served upon all parties to the within matter, this date, by first class mail, addressed as follows:

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

Date: June 8, 2007

Matthew W. Dewey

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,

Appellant,

vs.

CITY OF DUBOIS,

Appellee.

CIVIL DIVISION

No. 07-401-CD

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

#1

15495A2\mnwch020607\pleq\03120

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

MAURICE A. NERNBERG,	)	CIVIL DIVISION
	)	
Plaintiff,	)	No. _____
	)	
vs.	)	
	)	
CITY OF DUBOIS,	)	
	)	
Defendant.	)	

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 February 12, 2007, Appellant made a written request ("the Request") upon DuBois (see the Request attached hereto as Exhibit No. 1).

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

5. The Request sought access to public records of accounts regarding contracts which disbursed public funds.

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

7. 65 P.S. §66.3-4(b) provides for an exception, but requires that an agency send written notice to the requester within five business days of receipt of the request if it is being reviewed. The agency is to state the reason for the review and a reasonable date that a response is expected to be provided.

8. To date, the only response received from Dubois was a letter dated, February 16, 2007 from John Suplizio stating that the request is being turned over to the City Solicitor (see Suplizio letter attached hereto as Exhibit 2).

9. The Suplizio letter did not state the Request was being reviewed, any reason for a review or when a response dated may be expected. As such, it is an inadequate response to fall within the exception of 65 P.S. §66.3-4(b).

10. Dubois did not provide an appropriate response as required by the Right-To-Know-Act.

11. 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).

12. 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

February 12, 2007

John F. Suplizio
City Manager/Mayor of the City of Dubois
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. 15495L17

Dear Mr. Suplizio:

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 ("the 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.

7. The contract to complete the Project with HRI Inc.

8. All documents and correspondence related to the awarding of the contract to HRI Inc.

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

Very truly yours,

MAURICE A. NERNBERG & ASSOCIATES

By: _____
Maurice A. Nernberg

CITY OF DUBOIS, PENNSYLVANIA

16 W. SCRIBNER AVE. P.O. BOX 408 DUBOIS, PENNSYLVANIA 15801

TELEPHONE: (814) 371-2002, Ext. 136
FAX: (814) 371-1290

Office of the Mayor

February 16, 2007

Mr. Maurice A. Nernberg
Attorney at Law
Maurice A. Nernberg & Associates
301 Smithfield Street
Pittsburgh, PA 15222-2277

Re: KuKurin Contracting, Inc./City of DuBois
Right to Know Act Request
Ref. No. 15495L17

Dear Attorney Nernberg:

Please be advised that I am in receipt of your letter dated February 12, 2007 regarding the referenced "Right to Know Act Request".

This request has been turned over to the City's Solicitor, Toni M. Cherry, who can be reached at (814) 371-5800.

Sincerely,

John "Herm" Suplizio
Mayor/Acting City Manager

JHS:fl

cc: Toni M. Cherry – City Solicitor
File

Blumberg No. 5137
EXHIBIT
2

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: 3-13-07

Maurice A. Nernberg

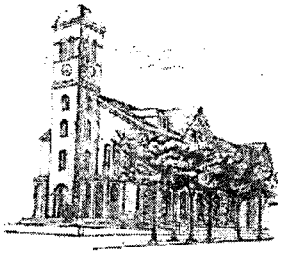
CERTIFICATE OF SERVICE

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:

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

Date: 3-13-07

Maurice A. Nernberg



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts | **Jacki Kendrick** Deputy Prothonotary/Clerk of Courts | **Bonnie Hudson** Administrative Assistant | **David S. Ammerman** Solicitor

PO Box 549, Clearfield, PA 16830 ▪ Phone: (814) 765-2641 Ext. 1330 ▪ Fax: (814) 765-7659 ▪ www.clearfieldco.org

December 10, 2007

Commonwealth Court of Pennsylvania
Irvis Office Building
6th Floor, Room 624
Commonwealth Ave. & Walnut St.
Harrisburg, PA 17120

COPY

Re: Maurice A. Nernberg
Vs.
City of DuBois
No. 07-401-CD
Commonwealth Court No. 2064 CD 2007

Dear Prothonotary:

Enclosed you will find the above referenced complete record appealed to your office. Please also find enclosed one transcript under separate cover.

Sincerely,

William A. Shaw
Prothonotary/Clerk of Courts

FILED

DEC 10 2007

William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS
CLEARFIELD COUNTY, PENNSYLVANIA

COPY

Maurice A. Nernberg

Vs. Case No. 2007-00401-CD

City of Dubois

CERTIFICATE OF CONTENTS

NOW, this 10th day of December, 2007, the undersigned, Prothonotary or Deputy Prothonotary of the Court of Common Pleas of Clearfield County, Pennsylvania, the said Court of record, does hereby certify that attached is the original record of the case currently on Appeal.

An additional copy of this Certificate is enclosed with the original hereof and the Clerk or Prothonotary of the Commonwealth Court is hereby directed to acknowledge receipt of the Appeal Record by executing such copy at the place indicated by forthwith returning the same to this Court.

By: _____
William A. Shaw, Prothonotary

Record, Etc. Received: Date: _____

_____
(Signature & Title)

RECEIVED & FILED
COMMONWEALTH COURT
OF PENNSYLVANIA
11 DEC 2007 08 12

FILED NO CC
m/10:37BH
DEC 13 2007
William A. Shaw
Prothonotary/Clerk of Courts

CR

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

MAURICE A. NERNBERG,
Plaintiff

vs. NO. 07-401-CD

CITY OF DUBOIS,
Defendant

ORDER

NOW, this 28th day of February, 2008, this Court is in receipt of the Motion to Enforce Court Order and for Sanctions filed by Maurice A. Nernberg; this Court notes that the said Plaintiff had previously filed an appeal to the Commonwealth Court from this Court's Opinion and Order of September 20, 2007. The record is currently before the Commonwealth Court pursuant to the appeal. As such, this Court no longer has jurisdiction to proceed and in consideration of the same the Motion to Enforce Court Order and for Sanctions is hereby DISMISSED.

BY THE COURT,

FREDRIC J. AMMERMAN
President Judge

FILED
01:57 BH 3cc
FEB 29 2008 Atty Lyons

William A. Shaw
Prothonotary/Clerk of Courts

6K

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

MAURICE A. NERNBERG,
Plaintiff

vs.

CITY OF DUBOIS,
Defendant

: No. 07 - 401 C.D.
:
: Type of Case: APPEAL PURSUANT TO
: 65 P.S. §66.1, *ET SEQ.* FROM THE DENIAL
: OF ACCESS TO RECORDS
:
: Type of Pleading: ANSWER TO MOTION TO
: ENFORCE COURT ORDER AND FOR
: SANCTIONS
:
: Filed on Behalf of: CITY OF DUBOIS,
: Defendant
:
: 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

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

MAURICE A. NERNBERG, Plaintiff	:	
vs.	:	No. 07 - 401 C.D.
CITY OF DUBOIS, Defendant	:	

ANSWER TO MOTION TO ENFORCE COURT ORDER AND FOR SANCTIONS

AND NOW, comes the CITY OF DUBOIS, by and through its attorneys, GLEASON, CHERRY AND CHERRY, L.L.P., and answers the Motion to Enforce Court Order and for Sanctions as follows:

1. ADMITTED.

2. DENIED as stated. On October 5, 2007, the Honorable Fredric J. Ammerman, President Judge of Clearfield County, did enter an Opinion and Order dated September 20, 2007, granting that portion of Plaintiff's requests under the Right to Know Act (65 P.S. §66.1, *et seq.*) asking for minutes of the City's meetings wherein the decision to issue a stop work order and/or terminate Kukurin Contracting, Inc., were discussed and directing the City of DuBois to deliver the foregoing if those minutes had not already been delivered to Nernberg and denying all other aspects of the requests other than the delivery of the contract with HRI, Inc., which is obviously not a subject of this Motion.

3. ADMITTED.

4. ADMITTED. However, by way of further answer, it is averred that at trial, the Secretary for the City of DuBois testified without contradiction that all minutes of all meetings in which the City of DuBois participated concerning or related to the decision to issue a stop work order and/or to terminate the contract with Kukurin had previously been delivered to either Kukurin Contracting, Inc., directly, the entity for which the request was made by Nernberg (see In re of requesting letter of February 12, 2007) or directly to Nernberg. (R. 30a ; pp. 21 through 24 of Transcript of hearing held July 26, 2007, before the Honorable Fredric J. Ammerman).

In addition, the City Solicitor for the City of DuBois testified without contradiction that 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 had already been supplied. (R. 36a; p. 47 of Transcript of hearing before the Honorable Fredric J. Ammerman held July 26, 2007).

By way of further answer, it is averred that counsel for Nernberg admitted having this information at said hearing. (R. 29a; pp. 18 and 19 of the Transcript of the hearing of July 26, 2007).

5. ADMITTED in part and DENIED in part. While it is ADMITTED that yet another letter was sent by Plaintiff and/or his legal representative on February 5, 2008, it is DENIED that Nernberg would only have the minutes from June 21, 2006, and August 24, 2006.

On the contrary, Nernberg, as counsel of record for Kukurin Contracting, Inc., was in trial through other counsel in his firm, Joshua A. Lyons, Esq., on July 26, 2007, and

heard the unequivocal and uncontradicted testimony of Frances Lias, Secretary of the City of DuBois, who testified that she responded to numerous Right to Know requests from Kukurin and directly sent to them all of the minutes that that were requested. In addition, Frances Lias testified that she sent to Nernberg all of the minutes requested by him through the Right to Know Act (65 P.S. §66.1, *et. seq.*).

Moreover, by way of further answer, the averments contained in Paragraph 4 are incorporated herein by reference. Finally, enclosed herewith as Defendant's Exhibit "1" are copies of all of the request forms for minutes acted upon by the City of DuBois wherein the minutes requested were directly sent to Mr. Nernberg's client's, Kukurin, Inc. Defendant notes that such requests span a period of time from September 22, 2006, through February 1, 2007, long after the decision to terminate the contract was made and well after the City of DuBois had awarded the contract to complete the project to HRI, Inc. Consequently, Defendant believes and therefore avers that all minutes were supplied to Nernberg either through direct Right to Know responses to Nernberg's requests; Right to Know responses to Nernberg's client's requests or through discovery proceedings detailed at length in the testimony given by the Solicitor of the City of DuBois at the hearing of July 26, 2007, on pages 43 through 49 being R. 36a-37a of the Reproduced Record filed in the appeal of this case in Commonwealth Court at No. 2064 C.D. 2007.

6. DENIED. By way of further answer, Defendant incorporates herein the averments contained in Paragraphs 4 and 5 hereof as if the same were set forth at length herein, together with copies of all exhibits attached hereto. Nernberg has received repeated responses not only from Ms. Cherry but from the City of DuBois and any and all minutes of meetings where the

stop work order or termination of Kukurin Contracting, Inc., ordered by Your Honorable Court to be delivered were already supplied to Nernberg either directly or by way of his client, Kukurin Contracting, Inc., for use by Nernberg since Nernberg was making the request on behalf of his client, well before Your Honorable Court issued the Order entered October 5, 2007.

7. DENIED. At no point has the City of DuBois evidenced willful noncompliance with Your Honorable Court's Order. On the contrary, the City of DuBois testified without contradiction at the hearing held on July 26, 2007, that the City of DuBois had previously supplied all minutes wherein the stop work order and/or termination of Kukurin Contracting, Inc., was discussed. In fact, the City has supplied numerous other minutes from subsequent meetings wherein Kukurin was not discussed just to satisfy Kukurin's' demand for minutes under the Right to Know Act (65 P.S. §66.1, *et seq.*) (See exhibits attached hereto).

It is further DENIED that Nernberg is entitled to attorney's fees as a sanction for the City's conduct. On the contrary, it is the City of DuBois who is entitled now to attorney's fees as a result of the harassing conduct of Nernberg by repeatedly making requests for information that he knows is in his possession or should be in his possession as a result of requests made for such information and the delivery thereof by the City of DuBois.

Moreover, both this case and the Kukurin Contracting, Inc. v. City of DuBois case filed to No. 06 - 1501 C.D. are on appeal and the entire certified record for both cases has been sent to the respective appellate courts handling both appeals. Nernberg's continued attempt to litigate matters currently on appeal is further evidence of the obdurate and vexatious conduct exhibited by Nernberg.

8. DENIED as a conclusion of law to which no response is required. Insofar as a response is required, it is DENIED that the City of DuBois has exhibited dilatory, obdurate or vexatious conduct entitling Plaintiff to counsel fees. By way of further answer, Defendant, City of DuBois, incorporates the averments contained in Paragraphs 4, 5, 6 and 7 of this Answer as if the same were set forth at length herein.

Moreover, it is averred that all matters arising out of the Right to Know Act (65 P.S. §66.1, *et seq.*) are governed by the Right to Know statute found at 65 P.S. §66.1, *et seq.* In particular, the matter of Court costs and attorney fees is specifically found at 65 P.S. §66.4-1 which provides that Your Honorable Court may award attorney's fees only if It finds that the City of DuBois willfully or with wanton disregard deprived Nernberg of access to a public record subject to access under the provisions of this Act or if Your Honorable Court found that the City's defenses to not supplying the information that was required was not based on a reasonable interpretation of the law.

Your Honorable Court has already found that no attorney's fees were warranted by the conduct of the City of DuBois. In fact, the City testified unequivocally that the minutes that the City was required to produce had already been delivered to Nernberg. The City cannot deliver minutes concerning discussions of the stop work order and/or termination decision concerning Kukurin Contracting, Inc., when it has no more of such minutes.

The sewer replacement project that was the subject of the terminated contract with Kukurin Contracting, Inc., has already been completed by another contractor and the City of DuBois has no reason to discuss either its stop work order or its termination of Kukurin Contracting, Inc., at public meetings and Kukurin's continued demand for information it has

been told does not exist constitutes conduct that is certainly obdurate and vexatious entitling the City of DuBois to attorney's fees in this case which the City of DuBois has incurred in the amount of $1,000.00.

WHEREFORE, Defendant, CITY OF DUBOIS, respectfully requests Your Honorable Court to dismiss Plaintiff's Motion to Enforce Court Order and for Sanctions and to award the CITY OF DUBOIS counsel fees incurred as a result of the City having to respond to Plaintiff's frivolous Motion in the amount of ONE THOUSAND DOLLARS ($1,000.00).

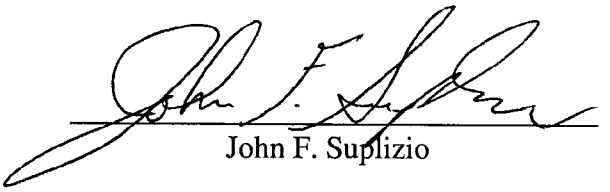
Respectfully submitted,

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 am authorized to make this Verification on behalf of Defendant, 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: March 10, 2008

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly. Date of Request: SEPTEMBER 22, 2006

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 203

Requester's FAX Number: 724-733-2303

I request [X] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE FORWARD ME THE MEETING MINUTES FROM THE SEPTEMBER 21, 2006 CITY OF DUBOIS COUNCIL MEETING AS SOON AS POSSIBLE AFTER THEY ARE APPROVED.

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J Kravetz 9/22/06
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

FAX: 814-375-2307

REVISED: JANUARY 22, 2004

SENT VIA FAX & U.S. MAIL

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

To be completed by City Manager or Designee.

Request No.: 131

Date Received: 9/22/06

Action Taken:

Approved: John Snyder Date of Approval: 9/25/06

Denied: Date Notice Mailed: _____

Additional Review: Date Notice Mailed: _____

9/26/06 - Mailed copies of 9/21/06 minutes to Kravetz.

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly. Date of Request: SEPTEMBER 26, 2006

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 203

Requester's FAX Number: 724-733-2303

I request [X] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE SEND ME A COPY OF MEETING MINUTES AND A COPY OF THE TAPE RECORDING OF THE SEPTEMBER 25, 2006 COUNCIL MEETING.

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J Kravetz 9/26/06
Signature of Requester

This request may be submitted in person or by mail to:

FAX: 814-375-2307

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

REVISED: JANUARY 22, 2004

SENT VIA FAX AND CERTIFIED MAIL

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

To be completed by City Manager or Designee.

Request No.: 133

Date Received: 9/26/06

Action Taken:

Approved: Date of Approval: John Sunderland

Denied: Date Notice Mailed: _____

Additional Review: Date Notice Mailed: _____

10/10/06 - Sent Minutes, but not tape. JL

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly. Date of Request: SEPTEMBER 26, 2006

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 203

Requester's FAX Number: 724-733-2303

I request [X] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE SEND ME A COPY OF MEETING MINUTES AND A COPY OF THE TAPE RECORDING OF THE SEPTEMBER 25, 2006 COUNCIL MEETING.

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J Kravetz 9/26/06
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

FAX: 814-375-2307

REVISED: JANUARY 22, 2004

SENT VIA FAX AND CERTIFIED MAIL

Rec'd minutes 10/10/06

Exhibit "1" REC'D OCT - 3 2006

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly. Date of Request: OCTOBER 5, 2006

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 203

Requester's FAX Number: 724-733-2303

I request [X] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE FORWARD ME A COPY OF THE MEETING MINUTES FROM THE OCTOBER 5, 2006 CITY OF DUBOIS COUNCIL MEETING AS SOON AS THEY ARE APPROVED.

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J. Kravetz 10/5/06
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

FAX: 814-371-1290

REVISED: JANUARY 22, 2004

SENT VIA FAX AND CERTIFIED MAIL

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly. Date of Request: OCTOBER 5, 2006

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 203

Requester's FAX Number: 724-733-2303

I request [X] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE FORWARD ME A COPY OF THE MEETING MINUTES FROM THE OCTOBER 5, 2006 CITY OF DUBOIS COUNCIL MEETING AS SOON AS THEY ARE APPROVED.

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J Kravetz 10/5/06
Signature of Requester

This request may be submitted in person or by mail to:

FAX: 814-371-1290

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

REVISED: JANUARY 22, 2004

SENT VIA FAX AND CERTIFIED MAIL

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

To be completed by City Manager or Designee.

Request No.: ~~13~~ # 135

Date Received: 10/5/06

Action Taken:

Approved: Date of Approval: Fran Lois - 10/5/06

Denied: Date Notice Mailed: _____

Additional Review: Date Notice Mailed: _____

10/10/06 - Send minutes. (JS)

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly. Date of Request: OCTOBER 19, 2006

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 203

Requester's FAX Number: 724-733-2303

I request [ ] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE FORWARD ME A COPY OF THE MEETING MINUTES FROM THE OCTOBER 19, 2006 CITY OF DUBOIS COUNCIL MEETING AS SOON AS THEY ARE APPROVED.

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J Kravetz 10/19/06
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

FAX: 814-371-1290

REVISED: JANUARY 22, 2004

SENT VIA FAX AND CERTIFIED MAIL

Exhibit "1" REC'D [illegible] 2006

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

To be completed by City Manager or Designee.

Request No.: 139

Date Received: 10/19/06

Action Taken:

Approved: Date of Approval: 10/19/06 (JK)

Denied: Date Notice Mailed: _____

Additional Review: Date Notice Mailed: _____

10/24/06 - Sent minutes. (JK)

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly. Date of Request: OCTOBER 9, 2006

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 203

Requester's FAX Number: 724-733-2303

I request [N] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE FORWARD ME A COPY OF THE MEETING MINUTES FROM THE OCTOBER 9, 2006 CITY OF DUBOIS COUNCIL MEETING AS SOON AS THEY ARE APPROVED

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J Kravetz 10/9/06
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

FAX: 814-371-1290

REVISED: JANUARY 22, 2004

SENT VIA FAX AND CERTIFIED MAIL

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly. Date of Request: OCTOBER 9, 2006

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 203

Requester's FAX Number: 724-733-2303

I request [X] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE FORWARD ME A COPY OF THE MEETING MINUTES FROM THE OCTOBER 9, 2006 CITY OF DUBOIS COUNCIL MEETING AS SOON AS THEY ARE APPROVED

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J Kravetz 10/9/06
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

FAX: 814-371-1290

REVISED: JANUARY 22, 2004

SENT VIA FAX AND CERTIFIED MAIL

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly. Date of Request: OCTOBER 9, 2006

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 203

Requester's FAX Number: 724-733-2303

I request [ ] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE FORWARD ME A COPY OF THE MEETING MINUTES FROM THE OCTOBER 9, 2006 CITY OF DUBOIS COUNCIL MEETING AS SOON AS THEY ARE APPROVED

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J Kravetz 10/9/06
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

FAX: 814-371-1290

REVISED: JANUARY 22, 2004

SENT VIA FAX AND CERTIFIED MAIL

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

To be completed by City Manager or Designee.

Request No.: 136

Date Received: 10/10/06

Action Taken:

Approved: Date of Approval: 10/10/06 TL

Denied: Date Notice Mailed: _____

Additional Review: Date Notice Mailed: _____

10/24/06 - Sent minutes. TL

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly. Date of Request: OCTOBER 25, 2006

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXT. 203

Requester's FAX Number: 724-733-2303

I request [ ] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE FORWARD ME A COPY OF THE MEETING MINUTES FROM THE OCTOBER 23, 2006 CITY OF DUBOIS COUNCIL MEETING AS SOON AS THEY ARE APPROVED.

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J Kravetz 10/25/06
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

FAX: 814-371-1290

REVISED: JANUARY 22, 2004

11/17/06 — sent minutes of 10/23/06, 11/2/06 and 11/9/06 SENT VIA FAX + US MAIL

Exhibit "1"

RECD OCT 30 2006

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly.

Date of Request: OCTOBER 25, 2006

Requester's Name: NANCY KRAVETZ
KUKURIN CONTRACTING, INC.

Requester's Address: 1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXT. 203

Requester's FAX Number: 724-733-2303

I request [ ] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE FORWARD ME A COPY OF THE MEETING MINUTES FROM THE OCTOBER 23, 2006 CITY OF DUBOIS COUNCIL MEETING AS SOON AS THEY ARE APPROVED.

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy Kravetz 10/25/06
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

FAX: 814-371-1290

REVISED: JANUARY 22, 2004

SENT VIA FAX + US MAIL

Exhibit "1"

MEMO

TO: NANCY KRAVETZ
KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

FROM: FRAN LIAS – CITY OF DUBOIS

DATE: OCTOBER 24, 2006

SUBJECT: RIGHT-TO-KNOW REQUESTS

Enclosed please find the approved minutes of the DuBois Council Meeting held October 9, 2006 and the Council Work Session held October 19, 2006, as you requested.

/fl

Enclosures

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly. Date of Request: NOVEMBER 22, 2006

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 203

Requester's FAX Number: 724-733-2303

I request [X] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE FORWARD ME A COPY OF THE MEETING MINUTES FROM CITY OF DUBOIS COUNCIL MEETINGS FOR THE FOLLOWING DATES AS SOON AS THEY ARE APPROVED: NOVEMBER 13, 2006 ; NOVEMBER 22, 2006 ; NOVEMBER 28, 2006 - sent 12/12/06 (none) - sent 11/29/06 JK

Also - minutes of Co. Work Session of 12/7/06. OK

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy Kravetz 11/22/06
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

VIA FAX - 814-371-1290
& MAIL
ATTN: FRAN LIAS, SECRETARY

REVISED: JANUARY 22, 2004

Nancy
There were no minutes from 11/22/06.

from Exhibit "1"

NOV 28 2006

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly. Date of Request: NOVEMBER 22, 2006

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 203

Requester's FAX Number: 724-733-2303

I request [ ] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.
PLEASE FORWARD ME A COPY OF THE MEETING MINUTES FROM CITY OF DUBOIS COUNCIL MEETINGS FOR THE FOLLOWING DATES AS SOON AS THEY ARE APPROVED: NOVEMBER 13, 2006; NOVEMBER 22, 2006; NOVEMBER 28, 2006

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J Kravetz 11/22/06
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

VIA FAX - 814-371-1290
& MAIL
ATTN: FRAN LIAS, SECRETARY

REVISED: JANUARY 22, 2004

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

To be completed by City Manager or Designee.

Request No.: 143

Date Received: 11/22/06

Action Taken:

Approved: Date of Approval: 11/22/06 (K)

Denied: Date Notice Mailed: _____

Additional Review: Date Notice Mailed: _____

Exhibit "1"

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly.

Date of Request: FEBRUARY 1, 2007

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 203

Requester's FAX Number: 724-733-2303

I request [X] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE FORWARD ME A COPY OF THE MEETING MINUTES FROM CITY OF DUBOIS COUNCIL MEETINGS FOR THE FOLLOWING DATES AS SOON AS THEY ARE APPROVED: JANUARY 8, 2007; JANUARY 18, 2007; JANUARY 22, 2007; FEBRUARY 1, 2007

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J. Kravetz 2/1/2007
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

VIA FAX AND U.S. MAIL
FAX: 814/371-1290
ATTN: FRAN LIAS, SECRETARY

REVISED: JANUARY 22, 2004

January 18, 2007 – No Minutes
February 1, 2007 – No Minutes

sent 2/15/07 (JK)
Exhibit "1"

RECD FEB - 5 2007

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

Please print legibly.

Date of Request: FEBRUARY 1, 2007

Requester's Name: NANCY KRAVETZ

Requester's Address: KUKURIN CONTRACTING, INC.
1169 ROUTE 286
EXPORT, PA 15632

Requester's Telephone: 724-325-2136 EXTENSION 303

Requester's FAX Number: 724-733-2303

I request [X] review [X] duplication (check applicable boxes) of the following records.
Important: You must identify or describe the records with sufficient specificity to enable City to determine which records are being requested. Use additional sheets, if necessary.

PLEASE FORWARD ME A COPY OF THE MEETING MINUTES FROM CITY OF DUBOIS COUNCIL MEETINGS FOR THE FOLLOWING DATES AS SOON AS THEY ARE APPROVED: JANUARY 8, 2007; JANUARY 18, 2007; JANUARY 22, 2007; FEBRUARY 1, 2007

I certify that I am a resident of the Commonwealth of Pennsylvania.

Nancy J Kravetz 2/1/2007
Signature of Requester

This request may be submitted in person or by mail to:

City Manager
City of DuBois
16 West Scribner Avenue
P. O. Box 408
DuBois, PA 15801

VIA FAX AND U.S. MAIL
FAX: 814/371-1290
ATTN: FRAN LIAS, SECRETARY

REVISED: JANUARY 22, 2004

Exhibit "1".

CITY OF DUBOIS

PUBLIC RECORD REVIEW/DUPLICATION REQUEST

To be completed by City Manager or Designee.

Request No.: 148

Date Received: 2/1/07

Action Taken:

Approved: Date of Approval: 2/2/07 JH

Denied: Date Notice Mailed: _____

Additional Review: Date Notice Mailed: _____

Exhibit "1"

No Minutes

(JK)

COUNCIL WORK SESSION AGENDA
January 18, 2007

1. Request for Hearing for Certificate of Use from RHJ Medical Center.

2. Authorization to advertise for chemicals for Water Treatment Plant, Sewage Treatment Plant and Swimming Pool.

3. Renewal of Salt Contract Participation Agreement.

4. Accounts Payable – Voucher Register.

February 1, 2007 - No actual meeting.
Just discussed new phone system to be put in with office staff.

(JK)

Exhibit "1"

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

MAURICE A. NERNBERG, Plaintiff	:	
vs.	:	No. 07 - 401 C.D.
CITY OF DUBOIS, Defendant	:	

CERTIFICATE OF SERVICE

I hereby certify that on this 10TH day of March, 2008, a true and correct copy of Defendant's Answer to Motion to Enforce Court Order and for Sanctions was sent to the following persons by mailing the same to them 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.
JOSHUA A. LYONS, 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: March 10, 2008

07-401-CD

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Maurice A. Nernberg, Appellant	:	
v.	:	No. 2064 C.D. 2007
	:	Argued: May 6, 2008
City of Dubois	:	

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION BY JUDGE FRIEDMAN FILED: May 23, 2008

Maurice A. Nernberg (Nernberg) appeals from the September 20, 2007, order of the Court of Common Pleas of Clearfield County (trial court), which: (1) granted in part and denied in part Nernberg's challenge to the City of Dubois' (City) deemed denial of his request for public records under the act known as the Right to Know Law (Law);[1] and (2) denied Nernberg's request for attorney fees and costs. We *sua sponte* dismiss Nernberg's appeal because the trial court lacked jurisdiction to render a decision.

By letter dated February 12, 2007, Nernberg requested that the City provide an opportunity for him to review and copy various materials regarding a City contract for the North and South Main Street (SR4019) Sewer Replacement Project. By letter dated February 16, 2007, the City advised Nernberg that his request had

[1] Act of June 21, 1957, P.L. 390, *as amended*, 65 P.S. §§66.1-66.9.

been turned over to the City's solicitor, Toni M. Cherry. No further details were provided. (R.R. at 9a.)

On March 15, 2007, Nernberg filed an appeal with the trial court, asserting that the City's February 16, 2007, letter did not constitute a proper response to his request under section 3.4(b) of the Law[2] because the letter did not specifically state that the solicitor is conducting a legal review of the request, did not provide the reason for the review, and did not give the date that a response is expected to be provided. Nernberg argued that the City's failure to provide a proper response results in a deemed denial of the request under section 3.4(a) of the Law,[3] and Nernberg requested that the trial court order the City to produce the documents and award him attorney fees and costs. (R.R. at 5a.)

On July 26, 2007, the trial court held a hearing on the matter. After allowing the City to present evidence over objections from Nernberg's counsel,[4] the

---

[2] Added by section 4 of the Act of June 29, 2002, P.L. 663, 65 P.S. §66.3-4(b).

[3] Section 3.4(a) of the Law provides, in pertinent part, "If the non-Commonwealth agency fails to send the response within five business days of receipt of the written request for access, the written request shall be deemed denied." 65 P.S. §66.3-4(a).

[4] Nernberg did not appear at the hearing. Counsel for Nernberg argued that the trial court was not permitted to take evidence because, under section 4(d) of the Law, the record on appeal to the trial court was "the request, the agency's response, the requester's exceptions, if applicable, the hearing transcript, if any, and the agency's final determination, if applicable." 65 P.S. §66.4(d). Counsel objected to the presentation of evidence by the City, stating that "The record is what it is." (R.R. at 29a.) In effect, Nernberg contended that, because the City's response gave no reason for denying Nernberg's request for documents, the trial court was required to sustain Nernberg's appeal.

trial court granted Nernberg's appeal with respect to certain requested items but denied Nernberg's appeal with respect to all other items. The trial court also denied Nernberg's request for attorney fees and costs. Nernberg now appeals to this court.[5]

Nernberg maintains that the trial court erred in several respects; however, we do not address the merits of Nernberg's arguments because we must dismiss his appeal.

Section 3.4 of the Law provides, in pertinent part, as follows:

> (a) General rule. Upon receipt of a written request for access to a record, a non-Commonwealth agency shall make a good faith effort to determine if the record requested is a public record and to respond as promptly as possible under the circumstances existing at the time of the request but shall not exceed five business days from the date the written request is received by the non-Commonwealth agency.... *If the non-Commonwealth agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied.*
>
> (b) Exception. Upon receipt of a written request for access, if a non-Commonwealth agency determines that one of the following applies:
>
> ...

[5] Our scope of review is limited to determining whether an error of law was committed, whether constitutional rights were violated or whether necessary findings of fact are supported by substantial evidence. *Goppelt v. City of Philadelphia Revenue Department*, 841 A.2d 599 (Pa. Cmwlth. 2004).

(4) a legal review is necessary to determine whether the record is a public record subject to access under this act ..., the non-Commonwealth agency shall send written notice to the requester within five business days of the non-Commonwealth agency's receipt of the request *notifying the requester that the request for access is being reviewed, the reason for the review and a reasonable date that a response is expected to be provided.* If the date that a response is expected to be provided is in excess of 30 days, following the five business days allowed in subsection (a), the request for access shall be deemed denied.

(c) Denial. If a non-Commonwealth agency's response is a denial of a written request for access, whether in whole or in part, a written response shall be issued and include:

(1) A description of the record requested.

(2) The specific reasons for the denial, including a citation of supporting legal authority. If the denial is the result of a determination that the record requested is not a public record, the specific reasons for the agency's determination that the record is not a public record shall be included.

(3) The typed or printed name ... of the public official or public employee on whose authority the denial is issued.

(4) Date of the response.

(5) The procedure to appeal the denial of access under this act.

65 P.S. §66.3-4 (emphasis added).

Here, the non-Commonwealth agency was the City. It is clear that the City's February 16, 2007, letter, which indicated only that Nernberg's request had been turned over to the solicitor, does not constitute a denial under section 3.4(c) of the Law. The City's letter could be construed as an attempt to comply with

section 3.4(b)(4) of the Law, but, because the City failed to fully comply with that section, Nernberg's request was deemed denied under section 3.4(a) of the Law.[6]

Following the deemed denial, Nernberg filed an appeal with the trial court pursuant to section 4(b) of the Law. However, while section 4(b) of the Law allows for a judicial appeal following a *denial* of a request under the Law,[7] this is not the proper statutory procedure following a *deemed denial.* In such a case, the requester must file exceptions pursuant to section 3.5 of the Law. That section provides:

> (a) Filing of exceptions. If a written request for access is denied or *deemed denied,* the requester may file *exceptions* with the head of the agency ... within 15 business days of the mailing date of the agency's response or *within 15 days of a deemed denial.* The exceptions shall state grounds upon which the requester asserts that the record is a public record and shall address any grounds stated by the agency for delaying or denying the request.

---

[6] Even if we were to treat the City's response as sufficient enough to avoid a deemed denial under section 3.4(a) of the Law, because an additional thirty days passed without further response by the City, Nernberg's request would be deemed denied under section 3.4(b) of the Law.

[7] Section 4(b) of the Law provides, in relevant part, that:

> Within 30 days [1] of a *denial* by a non-Commonwealth agency *under section 3.4(c)* [i.e., a written denial] or [2] of the mailing date of a *final determination* of a non-Commonwealth agency *affirming the denial* of access, a requester may file a petition for review ... with the court of common pleas....

65 P.S. §66.4(b) (emphasis added).

> (b) Determination. Unless the requester agrees otherwise, the agency head or his designee shall make a *final determination* regarding the exceptions within 30 days of the mailing date of the exceptions. Prior to issuing the final determination ... the agency head or his designee may conduct a hearing. The determination shall be the final order of the agency. If the agency head or his designee determines that the agency correctly denied the request for access, the agency head or his designee shall provide a written explanation to the requester of the reason for the denial.

65 P.S. §66.3-5 (emphasis added). The adjudication of the exceptions leads to a final determination, which then may lead to a judicial appeal.

This interpretation of the statute is supported by our holding in *Muir v. Alexander*, 858 A.2d 653 (Pa. Cmwlth. 2004). In that case, this court held that the trial court lacked jurisdiction over an appeal taken under section 4(b) of the Law because the agency never responded to, or held a hearing on, the exceptions filed by the requester, i.e., there was no final determination.

As a jurisdictional defect, the failure to pursue a statutory remedy may be raised at any point in a proceeding, even by the court *sua sponte*. *Id.* Here, because Nernberg did not first obtain a final determination by the City through the filing of exceptions, the trial court lacked jurisdiction over Nernberg's appeal. *Id.*

Accordingly, we dismiss Nernberg's appeal from the trial court's order.

ROCHELLE S. FRIEDMAN, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Maurice A. Nernberg, Appellant	:	
v.	:	No. 2064 C.D. 2007
City of Dubois	:	

ORDER

AND NOW, this 23rd day of May, 2008, the appeal of Maurice A. Nernberg from the September 20, 2007, order of the Court of Common Pleas of Clearfield County is hereby dismissed in accordance with the foregoing opinion.

Rochelle S. Friedman

ROCHELLE S. FRIEDMAN, Judge

07-401-CD

In the Commonwealth Court of Pennsylvania

Maurice A. Nernberg, Appellant v. City of Dubois	No.: 2064 CD 2007

ORDER

NOW, July 18, 2008, having considered appellant's application for reargument, the application is denied.

BY THE COURT:

Bonnie B. Leadbetter

Bonnie Brigance Leadbetter,
President Judge

FILED NO CC
m/10:55/BOL
JUL 21 2008
GW

William A. Shaw
Prothonotary/Clerk of Courts

Certified from the Record
JUL 18 2008
and Order Exit

Supreme Court of Pennsylvania
Western District

John A. Vaskov, Esq.
Deputy Prothonotary
Patricia A. Nicola
Chief Clerk

801 City-County Building
Pittsburgh, PA 15219
412-565-2816
www.aopc.org

August 14, 2008

07-401-CD

Mr. William A. Shaw
Prothonotary
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830

RE: Maurice A. Nernberg, Petitioner
v.
City of Dubois, Respondent
Commonwealth Docket Number - 2064 CD 2007

Trial Court/Agency Dkt. Number: 07-401-CD

No. 395 WAL 2008

Appeal Docket No.:

Date Petition for Allowance of Appeal Filed: August 14, 2008

Disposition:
Date:

Reargument/Reconsideration Disposition:
Reargument/Reconsideration
Disposition Date:

/kao

FILED
m/8:55BN
AUG 14 2008 CW

William A. Shaw
Prothonotary/Clerk of Courts

File Copy

Commonwealth Court of Pennsylvania

Kristen W. Brown
Prothonotary
Michael Krimmel, Esq.
Chief Clerk of Commonwealth Court

April 23, 2009

Irvis Office Building, Room 624
Harrisburg, PA 17120
717-255-1650

Certificate of Remittal/Remand of Record

TO:

RE: Nernberg v. City of Dubois
No.2064 CD 2007
Trial Court/Agency Dkt. Number: 07-401 C.D.
Trial Court/Agency Name: Clearfield County Court of Common Pleas
Intermediate Appellate Court Number:

APR 24 2009
William A. Shaw
Prothonotary/Clerk of Courts
copy to Comm Court

Annexed hereto pursuant to Pennsylvania Rules of Appellate Procedure 2571 and 2572 is the entire record for the above matter.

Contents of Original Record:

Original Record Item	Filed Date	Description
trial court record	December 12, 2007	1
Date of Remand of Record:	w/TRANSCRIPT	1

ORIGINAL RECIPIENT ONLY - Please acknowledge receipt by signing, dating, and returning the enclosed copy of this certificate to our office. Copy recipients (noted below) need not acknowledge receipt.

Signature

4-24-09
Date

Printed Name

WILLIAM A. SHAW
Prothonotary
My Commission Expires
1st Monday in Jan. 2010
Clearfield Co., Clearfield, PA

07-401-CD

Supreme Court of Pennsylvania

John A. Vaskov, Esq.
Deputy Prothonotary
Patricia A. Nicola
Chief Clerk

Western District
April 20, 2009

801 City-County Building
Pittsburgh, PA 15219
412-565-2816
www.aopc.org

Mr. William A. Shaw
Prothonotary
Clearfield County Courthouse
230 East Market Street
Clearfield, PA 16830

FILED
APR 22 2009
M/12:20/cm
William A. Shaw
Prothonotary/Clerk of Courts

RE: Maurice A. Nernberg, Petitioner
v.
City of Dubois, Respondent
Commonwealth Docket Number - 2064 CD 2007

Trial Court/Agency Dkt. Number: 07-401-CD

No. 395 WAL 2008

Appeal Docket No.:

Date Petition for Allowance of Appeal Filed: August 14, 2008

Disposition: Order Denying Petition for Allowance of Appeal
Date: April 1, 2009

Reargument/Reconsideration Disposition:

Reargument/Reconsideration
Disposition Date:

/kao

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MAURICE A. NERNBERG,	:	No. 395 WAL 2008
	:	
Petitioner	:	
	:	Petition for Allowance of Appeal from the
	:	Order of the Commonwealth Court
v.	:	
	:	
	:	
CITY OF DUBOIS,	:	
	:	
Respondent		

ORDER

PER CURIAM

AND NOW, this 1st day of April, 2009, the Petition for Allowance of Appeal is hereby **DENIED**.

Madame Justice Todd did not participate in the consideration or decision of this case.

A True Copy Patricia Nicola
As of: April 1, 2009
Attest: Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

07-401-CD

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Maurice A. Nernberg, Appellant	:		
v.	:	No. 2064 C.D. 2007	
	:	Argued: May 6, 2008	
City of Dubois	:		

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION BY JUDGE FRIEDMAN FILED: May 23, 2008

Maurice A. Nernberg (Nernberg) appeals from the September 20, 2007, order of the Court of Common Pleas of Clearfield County (trial court), which: (1) granted in part and denied in part Nernberg's challenge to the City of Dubois' (City) deemed denial of his request for public records under the act known as the Right to Know Law (Law);[1] and (2) denied Nernberg's request for attorney fees and costs. We *sua sponte* dismiss Nernberg's appeal because the trial court lacked jurisdiction to render a decision.

By letter dated February 12, 2007, Nernberg requested that the City provide an opportunity for him to review and copy various materials regarding a City contract for the North and South Main Street (SR4019) Sewer Replacement Project. By letter dated February 16, 2007, the City advised Nernberg that his request had

[1] Act of June 21, 1957, P.L. 390, *as amended*, 65 P.S. §§66.1-66.9.

been turned over to the City's solicitor, Toni M. Cherry. No further details were provided. (R.R. at 9a.)

On March 15, 2007, Nernberg filed an appeal with the trial court, asserting that the City's February 16, 2007, letter did not constitute a proper response to his request under section 3.4(b) of the Law[2] because the letter did not specifically state that the solicitor is conducting a legal review of the request, did not provide the reason for the review, and did not give the date that a response is expected to be provided. Nernberg argued that the City's failure to provide a proper response results in a deemed denial of the request under section 3.4(a) of the Law,[3] and Nernberg requested that the trial court order the City to produce the documents and award him attorney fees and costs. (R.R. at 5a.)

On July 26, 2007, the trial court held a hearing on the matter. After allowing the City to present evidence over objections from Nernberg's counsel,[4] the

---

[2] Added by section 4 of the Act of June 29, 2002, P.L. 663, 65 P.S. §66.3-4(b).

[3] Section 3.4(a) of the Law provides, in pertinent part, "If the non-Commonwealth agency fails to send the response within five business days of receipt of the written request for access, the written request shall be deemed denied." 65 P.S. §66.3-4(a).

[4] Nernberg did not appear at the hearing. Counsel for Nernberg argued that the trial court was not permitted to take evidence because, under section 4(d) of the Law, the record on appeal to the trial court was "the request, the agency's response, the requester's exceptions, if applicable, the hearing transcript, if any, and the agency's final determination, if applicable." 65 P.S. §66.4(d). Counsel objected to the presentation of evidence by the City, stating that "The record is what it is." (R.R. at 29a.) In effect, Nernberg contended that, because the City's response gave no reason for denying Nernberg's request for documents, the trial court was required to sustain Nernberg's appeal.

trial court granted Nernberg's appeal with respect to certain requested items but denied Nernberg's appeal with respect to all other items. The trial court also denied Nernberg's request for attorney fees and costs. Nernberg now appeals to this court.[5]

Nernberg maintains that the trial court erred in several respects; however, we do not address the merits of Nernberg's arguments because we must dismiss his appeal.

Section 3.4 of the Law provides, in pertinent part, as follows:

> (a) General rule. Upon receipt of a written request for access to a record, a non-Commonwealth agency shall make a good faith effort to determine if the record requested is a public record and to respond as promptly as possible under the circumstances existing at the time of the request but shall not exceed five business days from the date the written request is received by the non-Commonwealth agency.... *If the non-Commonwealth agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied.*
>
> (b) Exception. Upon receipt of a written request for access, if a non-Commonwealth agency determines that one of the following applies:
>
> ...

[5] Our scope of review is limited to determining whether an error of law was committed, whether constitutional rights were violated or whether necessary findings of fact are supported by substantial evidence. *Goppelt v. City of Philadelphia Revenue Department*, 841 A.2d 599 (Pa. Cmwlth. 2004).

(4) a legal review is necessary to determine whether the record is a public record subject to access under this act ..., the non-Commonwealth agency shall send written notice to the requester within five business days of the non-Commonwealth agency's receipt of the request *notifying the requester that the request for access is being reviewed, the reason for the review and a reasonable date that a response is expected to be provided.* If the date that a response is expected to be provided is in excess of 30 days, following the five business days allowed in subsection (a), the request for access shall be deemed denied.

(c) Denial. If a non-Commonwealth agency's response is a denial of a written request for access, whether in whole or in part, a written response shall be issued and include:

(1) A description of the record requested.

(2) The specific reasons for the denial, including a citation of supporting legal authority. If the denial is the result of a determination that the record requested is not a public record, the specific reasons for the agency's determination that the record is not a public record shall be included.

(3) The typed or printed name ... of the public official or public employee on whose authority the denial is issued.

(4) Date of the response.

(5) The procedure to appeal the denial of access under this act.

65 P.S. §66.3-4 (emphasis added).

Here, the non-Commonwealth agency was the City. It is clear that the City's February 16, 2007, letter, which indicated only that Nernberg's request had been turned over to the solicitor, does not constitute a denial under section 3.4(c) of the Law. The City's letter could be construed as an attempt to comply with

section 3.4(b)(4) of the Law, but, because the City failed to fully comply with that section, Nernberg's request was deemed denied under section 3.4(a) of the Law.[6]

Following the deemed denial, Nernberg filed an appeal with the trial court pursuant to section 4(b) of the Law. However, while section 4(b) of the Law allows for a judicial appeal following a *denial* of a request under the Law,[7] this is not the proper statutory procedure following a *deemed denial.* In such a case, the requester must file exceptions pursuant to section 3.5 of the Law. That section provides:

> (a) Filing of exceptions. If a written request for access is denied or *deemed denied,* the requester may file *exceptions* with the head of the agency ... within 15 business days of the mailing date of the agency's response or *within 15 days of a deemed denial.* The exceptions shall state grounds upon which the requester asserts that the record is a public record and shall address any grounds stated by the agency for delaying or denying the request.

---

[6] Even if we were to treat the City's response as sufficient enough to avoid a deemed denial under section 3.4(a) of the Law, because an additional thirty days passed without further response by the City, Nernberg's request would be deemed denied under section 3.4(b) of the Law.

[7] Section 4(b) of the Law provides, in relevant part, that:

> Within 30 days [1] of a *denial* by a non-Commonwealth agency *under section 3.4(c)* [i.e., a written denial] or [2] of the mailing date of a *final determination* of a non-Commonwealth agency *affirming the denial* of access, a requester may file a petition for review ... with the court of common pleas....

65 P.S. §66.4(b) (emphasis added).

> (b) Determination. Unless the requester agrees otherwise, the agency head or his designee shall make a *final determination* regarding the exceptions within 30 days of the mailing date of the exceptions. Prior to issuing the final determination ... the agency head or his designee may conduct a hearing. The determination shall be the final order of the agency. If the agency head or his designee determines that the agency correctly denied the request for access, the agency head or his designee shall provide a written explanation to the requester of the reason for the denial.

65 P.S. §66.3-5 (emphasis added). The adjudication of the exceptions leads to a final determination, which then may lead to a judicial appeal.

This interpretation of the statute is supported by our holding in *Muir v. Alexander*, 858 A.2d 653 (Pa. Cmwlth. 2004). In that case, this court held that the trial court lacked jurisdiction over an appeal taken under section 4(b) of the Law because the agency never responded to, or held a hearing on, the exceptions filed by the requester, i.e., there was no final determination.

As a jurisdictional defect, the failure to pursue a statutory remedy may be raised at any point in a proceeding, even by the court *sua sponte*. *Id.* Here, because Nernberg did not first obtain a final determination by the City through the filing of exceptions, the trial court lacked jurisdiction over Nernberg's appeal. *Id.*

Accordingly, we dismiss Nernberg's appeal from the trial court's order.

ROCHELLE S. FRIEDMAN, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

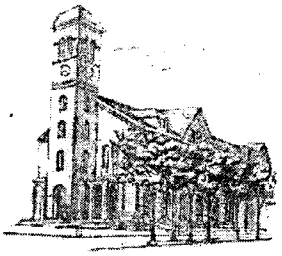
Maurice A. Nernberg, Appellant	:	
v.	:	No. 2064 C.D. 2007
City of Dubois	:	

ORDER

AND NOW, this 23rd day of May, 2008, the appeal of Maurice A. Nernberg from the September 20, 2007, order of the Court of Common Pleas of Clearfield County is hereby dismissed in accordance with the foregoing opinion.

Rochelle S. Friedman

ROCHELLE S. FRIEDMAN, Judge



Clearfield County Office of the Prothonotary and Clerk of Courts

William A. Shaw Prothonotary/Clerk of Courts | **Jacki Kendrick** Deputy Prothonotary/Clerk of Courts | **Bonnie Hudson** Administrative Assistant | **David S. Ammerman** Solicitor

PO Box 549, Clearfield, PA 16830 ▪ Phone: (814) 765-2641 Ext. 1330 ▪ Fax: (814) 765-7659 ▪ www.clearfieldco.org

Fredric J. Ammerman, P.J.
Court of Common Pleas
230 E. Market Street
Clearfield, PA 16830

Maurice A. Nernberg, Esq.
301 Smithfield Street
Pittsburgh, PA 15222

Matthew W. Dewey, Esq.
301 Smithfield Street
Pittsburgh, PA 15222

Toni M. Cherry, Esq.
PO Box 505
DuBois, PA 15801

Maurice A. Nernberg
Vs.
City of DuBois

Court No. 07-401-CD; Commonwealth Court No. 2064 CD 2007

Dear Counsel:

Please be advised that the above referenced record was forwarded to the Commonwealth Court of Pennsylvania on December 10, 2007.

Sincerely,

William A. Shaw
Prothonotary/Clerk of Courts

Clearfield County Court of Common Pleas

ROA Report

Case: 2007-00401-CD

Current Judge: Fredric Joseph Ammerman

Maurice A. Nernberg vs. City of Dubois

Civil Other

Date		Judge
03/15/2007	New Case Filed.	No Judge
	Filing: Appeal Pursuant to 65 P.S. sections 66.1 et. seq. from the Denial of Access to Records. Paid by: Nernberg, Maurice A. (attorney for Nernberg, Maurice A.) Receipt number: 1918067 Dated: 03/15/2007 Amount: $85.00 (Check) NO CC.	No Judge
06/11/2007	Praecipe For Briefing Schedule And Argument Date For Right to Know Act Appeal, filed by s/ Matthew W. Dewey, Esquire. No CC	No Judge
06/15/2007	Rule Returnable, this 14th day of June, 2007, upon consideration of the Appeal filed by Plaintiff Maurice A. Nernberg, a Rule is issued upon the City of DuBois. Evidentiary hearing will be held on the 26th day of July, 2007 at 9:00 a.m. in Courtroom 1. 30 minutes has been reserved for this hearing. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: Nernberg, Dewey; 1CC Def. - PO Box 408, DuBois, PA 15801; Courtesy CC to Atty. T. Cherry	Fredric Joseph Ammerman
07/27/2007	Order, this 26th day of July 2007, following evidentiary hearing it is Ordered that both parties supply the Court with appropriate brief on the issues within no more than 30 days from this date. By The Court, /s/ Fredrric J. Ammerman, Pres. Judge. 2CC M. Nernberg and M. Dewey; 2CC City of DuBois, 16 W. Scribner Ave., DuBois, PA 15801	Fredric Joseph Ammerman
08/02/2007	Praecipe For Entry of Appearance, filed on behalf of City of DuBois, enter appearance of Toni M. Cherry, Esquire. Filed by Atty. Cherry. 2CC Atty. Cherry	Fredric Joseph Ammerman
08/22/2007	Transcript of Proceedings, filed. Evidentiary Hearing on Plaintiff's Appeal, held before Fredric J. Ammerman, Pres. Judge, on July 26, 2007.	Fredric Joseph Ammerman
10/05/2007	Opinion and Order, this 20th day of Sept., 2007, Plaintiff's appeal is Granted in part and Denied in part. It is granted as to Items five and seven of the request for public records and denied as to the remaining items. The Plaintiff's Request for Attorney's Fees and Costs to the Defendant is Denied. by The Court, /s/ Fredric J. Ammerman, pres. Judge. 1CC Attys: Neinberg, Dewey, T. Cherry; 1CC D. Mikesel, Law Library	Fredric Joseph Ammerman
11/05/2007	Filing: Appeal to Commonwealth Court Paid by: Noble, Theron Receipt number: 1921334 Dated: 11/05/2007 Amount: $45.00 (Cash) 1 Cert. to Commonwealth Court with check in the amount of $60.00	Fredric Joseph Ammerman
11/19/2007	Order, this 19th day of Nov., 2007, this Court having been notified of Appeal to the Commonwealth Court of Pennsylvania, it is Ordered that Maurice Nernberg file a concise statement of the matters complained of on said Appeal no later than 21 days herefrom. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: Nernberg/Dewey, T. Cherry	Fredric Joseph Ammerman
12/07/2007	Concise Statement of Matters Complained of on Appeal, filed by Atty.	Fredric Joseph Ammerman
12/10/2007	Commonwealth Docket Sheet, Commonwealth Court Number 2064 CD 2007.	Fredric Joseph Ammerman

I hereby certify this to be a true and attested copy of the original statement filed in this case.

DEC 10 2007

Attest.

William L. Shaw
Prothonotary/
Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

No. 07-401-CD
Maurice A. Nernberg
VS.
City of DuBois

ITEM NO.	*DATE OF FILING*	*NAME OF DOCUMENT*	*NO. OF PAGES*
01	03/15/07	Appeal Pursuant to 65 P.S. Sections 66.1 et. seq from the Denial of Access to Records	09
02	06/11/07	Praecipe for Briefing Schedule and Argument Date for Right to Know Act Appeal	04
03	06/15/07	Rule Returnable, Evidentiary hearing scheduled	01
04	07/27/07	Order, Re: briefs to be supplied to Court	01
05	08/02/07	Praecipe for Entry of Appearance	02
06	08/22/07	Transcript of Proceedings, Evidentiary Hearing on Plaintiff's Appeal, held July 26, 2007, before Honorable Fredric J. Ammerman, P.J.	Separate Cover
07	10/05/07	Opinion and Order	07
08	11/05/07	Appeal to Commonwealth Court	04
09	11/19/07	Order, Re: Concise statement to be filed	01
10	12/07/07	Concise Statement of Matters Complained of on Appeal	05
11	12/10/07	Commonwealth Docket Sheet, Commonwealth Court Number 2064 CD 2007	04

Maurice A. Nernberg vs. City of Dubois

Civil Other

Date		Judge
03/15/2007	New Case Filed.	No Judge
(1)	Filing: Appeal Pursuant to 65 P.S. sections 66.1 et. seq. from the Deniel of Access to Records. Paid by: Nernberg, Maurice A. (attorney for Nernberg, Maurice A.) Receipt number: 1918067 Dated: 03/15/2007 Amount: $85.00 (Check) NO CC.	No Judge
06/11/2007 (2)	Praecipe For Briefing Schedule And Argument Date For Right to Know Act Appeal, filed by s/ Matthew W. Dewey, Esquire. No CC	No Judge
06/15/2007 (3)	Rule Returnable, this 14th day of June, 2007, upon consideration of the Appeal filed by Plaintiff Maurice A. Nernberg, a Rule is issued upon the City of DuBois. Evidentiary hearing will be held on the 26th day of July, 2007 at 9:00 a.m. in Courtroom 1. 30 minutes has been reserved for this hearing. By The Court, /s/ Fredric J. Ammerman, Pres. Judge. 1CC Attys: Nernberg, Dewey; 1CC Def. - PO Box 408, DuBois, PA 15801; Courtesy CC to Atty. T. Cherry	Fredric Joseph Ammerman
07/27/2007 (4)	Order, this 26th day of July 2007, following evidentiary hearing it is Ordered that both parties supply the Court with appropriate brief on the issues within no more than 30 days from this date. By The Court, /s/ Fredrric J. Ammerman, Pres. Judge. 2CC M. Nernberg and M. Dewey; 2CC City of DuBois, 16 W. Scribner Ave., DuBois, PA 15801	Fredric Joseph Ammerman
08/02/2007 (5)	Praecipe For Entry of Appearance, filed on behalf of City of DuBois, enter appearance of Toni M. Cherry, Esquire. Filed by Atty. Cherry. 2CC Atty. Cherry	Fredric Joseph Ammerman
08/22/2007 (6)	Transcript of Proceedings, filed. Evidentiary Hearing on Plaintiff's Appeal, held before Fredric J. Ammerman, Pres. Judge, on July 26, 2007.	Fredric Joseph Ammerman
10/05/2007 (7)	Opinion and Order, this 20th day of Sept., 2007, Plaintiff's appeal is Granted in part and Denied in part. It is granted as to Items five and seven of the request for public records and denied as to the remaining items. The Plaintiff's Request for Attorney's Fees and Costs to the Defendant is Denied. by The Court, /s/ Fredric J. Ammerman, pres. Judge. 1CC Attys: Neinberg, Dewey, T. Cherry; 1CC D. Mikesel, Law Library	Fredric Joseph Ammerman
11/05/2007 (8)	Filing: Appeal to Commonwealth Court Paid by: Noble, Theron Receipt number: 1921334 Dated: 11/05/2007 Amount: $45.00 (Cash) 1 Cert. to Commonwealth Court with check in the amount of $60.00	Fredric Joseph Ammerman
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