

ORR Holds that the Investigative File of a Municipality's Insurance Company is Not a Public Record

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Under the RTKL, two groups of records are accessible—those records in an agency's actual or constructive possession reached directly under Section 901 of the RTKL and records that are only in the possession of third parties that are indirectly accessible through Section 506(d) of the RTKL. *See Pa. Dep't of Public Welfare v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. 2014), *aff'd* 124 A.3d 1214 (Pa. 2015).

In *Bell v. Collier Township*, AP 2019-0466 (May 28, 2019), the Requester sought the investigative file of the Township's insurance company relating to the Requester's property. The insurance company's adjuster inspected the Requester's property and stated that the inspection findings would become a part of the insurance company's investigative file.

The Township established by affidavit that it did not actually possess a copy of the investigative file, so the issue was whether the file must be provided pursuant to Section 506(d)(1) of the RTKL, which provides:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency....

65 P.S. § 67.506(d)(1). In other words, to reach records outside an agency's actual possession the following two elements must be met: (1) the third party must perform a governmental function on behalf of the agency; and (2) the information sought must directly relate to the performance of that function. In addition, there must be an actual contract with the third party in possession of the records.

With respect to the first element, a third party performs a governmental function on behalf of an agency where it performs a function generally performed by that agency and is not ancillary to the agency's functions. This must include the delegation of some substantial facet of the agency's role and responsibilities, as opposed to entry into routine service agreements with independent contractors.

To satisfy the "directly relates" prong, the records must relate to the performance of the governmental function. In determining whether records directly relate to a third party's governmental function, the Commonwealth Court has consistently looked to whether the records are relevant to the third party's performance of its governmental function. *See Allegheny County Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 345 (Pa. Commw. 2013) (finding that "[t]he 'directly relates' test ... focuses on what services are performed and how they are performed, not who performs them").

In making its determination in *Bell*, the OOR analyzed two Commonwealth Court cases. In *Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. 2010), a requester sought records evidencing the wholesale price paid by a third-party contractor that provided commissary services to the Pennsylvania Township of Corrections ("DOC"). The OOR and the Commonwealth Court denied the request because the price paid for goods to be sold under the commissary contract was beyond the parameters of its contract and does not directly relate to performing or carrying the governmental function of providing commissary services. From this case, the OOR concluded that a vendor's costs to perform its contractual obligations, if not shared with the agency, are not directly related to the underlying contract.

In *Allegheny County Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 344 (Pa. Commw. 2013), the Commonwealth Court analyzed whether employee names of a third-party contractor were directly related to the government contract and concluded that because the employee names were not provided to the government and performance under the contract was not contingent upon this information, the information was not directly related to the contract. Thus, the OOR concluded that unless contractor information is required to be provided to the government, and performance is contingent on the requested information, such contractor information is not "directly related" to the contract's governmental function, and, therefore, not accessible under Section 506(d)(1).

With this background, the OOR concluded in *Bel* that the insurance company's investigative file was not a public record because, while the Township contracted with the insurance company to provide insurance coverage to the Township, the investigation conducted by the Insurance Company's adjuster relative to the Requester's property was separate and distinct from the governmental functions that the Township performs, the investigative files held by the Insurance Company were not provided to the Township, and the Township did not review the investigative files. Therefore, the OOR held that the records requested did not meet either element of Section 506(d)(1) and were not accessible under the RTKL.

While the OOR specifically stated that some records in the possession of an insurance company may be public records under the RTKL, Open Records Officers should consult with their solicitors before demanding or requesting documents from their insurance carrier, because, unless the insurance company is required to provide this information, it is probably not public. See also *Berney v. Colonial Sch. Dist.*, AP 2017-2426 (finding that the legal invoices paid by the school district's insurance carrier are not accessible under Section 506(d)(1)).

Next week's post will provide an example of when an agency is required to get records from a third party contractor under Section 506(d)(1).

If you have any questions or comments, please do not hesitate to contact Chris Voltz or any of the other Municipal and School Attorneys at Tucker Arensberg, P.C.