

JANET T. MILLS  
ATTORNEY GENERAL



STATE OF MAINE  
OFFICE OF THE ATTORNEY GENERAL  
6 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES  
84 HARLOW ST. 2ND FLOOR  
BANGOR, MAINE 04401  
TEL: (207) 941-3070  
FAX: (207) 941-3075  
  
415 CONGRESS ST., STE. 301  
PORTLAND, MAINE 04101  
TEL: (207) 822-0260  
FAX: (207) 822-0259  
  
14 ACCESS HIGHWAY, STE. 1  
CARIBOU, MAINE 04736  
TEL: (207) 496-3792  
FAX: (207) 496-3291

TEL: (207) 626-8800  
TTY USERS CALL MAINE RELAY 711

November 16, 2015

Thomas C. Sturtevant  
Assistant Attorney General  
Office of the Attorney General  
6 State House Station  
Augusta, Maine 04333-006

Re: Progressive Companies' Objections to the  
Advocacy Panel's Alleged Failure to Respond  
to Information Requests  
Dkt. No. INS-15-1001

Dear Tom:

On November 3, 2015, Appellants submitted a letter alleging deficiencies in the Advocacy Panel's responses to informational requests. Appellants make four specific complaints. They allege that the Advocacy Panel is guilty of:

1. Improperly relying on the "Mental Process Rule";
2. Erroneously failing to concede the relevance of other rate filings;
3. Improperly withholding certain categories of documents; and
4. Failing to provide a sufficient listing of withheld documents.

All four complaints are baseless.

A. Reliance on the "Mental Process Rule"

Appellants take aim at four specific Advocacy Panel responses for which they erroneously believe they should have additional document production: 4, 6, 8, and 9. In each, the Advocacy Panel objected on the ground that

Letter to Thomas C. Sturtevant, Esq.  
Re: Progressive Companies  
Dkt. No. INS-15-1001  
November 16, 2015

Applicants were attempting to inquire about the mental processes of decision makers. In none, was that ground the exclusive reason for objection.

- With respect to Request No. 4, the Panel referred Appellants to three preceding responses discussing documents to which Appellants have access, eliminating the need for production by the Panel.
- With respect to Request No. 6, Appellants ask for “all communication” to which their filing is “related,” whatever that means. Any documents memorializing the thought processes of decision makers are justifiably protected from disclosure.
- With respect to Request No. 8, the Advocacy Panel noted that it was unaware of any unprivileged documents covered by that request, which specifically sought “analysis” by decision makers.
- With respect to Request No. 9, the Panel did not provide documents but cited documents to which Appellants have easy access, eliminating the need for production by the Panel.

Appellants attempt to justify discovery of the decision maker’s mental processes on the ground that disapproval of their filing did not involve “the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings,” *quoting Morgan v. United States*, 298 U.S. 468, 480 (1936). Actually, consideration of Applicants’ filing did involve:

1. A taking of evidence, *viz.*, the acceptance of Appellants’ filing for review;
2. A weighing of evidence, *viz.*, the review of Appellants’ filing;
3. A determination of fact, *viz.*, that Appellants’ filing was inconsistent with the provisions of 24-A M.R.S. § 2916; and
4. An order supported by the determination of fact, *viz.*, the disapproval of Appellants’ filing.

In short, by Appellants’ standard, everything necessary to justify prohibition of inquiry into decision makers’ mental processes is present here.

Letter to Thomas C. Sturtevant, Esq.  
Re: Progressive Companies  
Dkt. No. INS-15-1001  
November 16, 2015

Appellants completely ignore the requirement that, before allowing inquiry into an administrative decision maker's mental processes, there must be a *prima facie* showing of (1) bad faith or abuse of power strong enough to justify such intrusion and (2) evidence that such inquiry will yield relevant evidence not otherwise in the record. Maine cases illustrate the difficulty of meeting this requirement. See, e.g., *Dyer v. Department of Transportation*, 2008 ME 106, ¶¶ 1 n. 1 & 17, 951 A.2d 821 (attempt to discover mental processes of DOT employees blocked after agency took property by eminent domain; property owners alleged the taking was excessive and therefore an abuse of power); *Carl L. Cutler Co., Inc. v. State Purchasing Agent*, 472 A.2d 913, 917-919 (1984) (attempt to discover mental processes of Purchasing Agent accused of favoritism in awarding contract blocked; losing bidder alleged Agent and winning bidder were social friends); *Frye v. Inhabitants of the Town of Cumberland*, 464 A.2d 195, 199-200 (1983) (attempt to discover mental processes of town manager who dismissed a police officer blocked; officer alleged prehearing contact with the chief of police was prejudicial). Evaluating Appellants' requests in light of this case law, it is clear that Appellants have not met the prerequisite requirement for requesting information about the mental processes of decision makers.

Appellants' contention that the record does not explain why their filing was disapproved is incorrect. The explanation is appropriately brief and fully adequate for the narrow question presented: whether the terms of 24-A M.R.S. § 2916 constitute grounds for denial of the filing.

#### B. The Relevance of Other Filings

The principal effect of Appellants' unjustified requests for information about irrelevant past filings is to deflect attention from the relevant inquiry for the Superintendent: the meaning of 24-A M.R.S. § 2916 *vis-à-vis* Appellants' present filing. To bolster their claim to historical information, Appellants refer to the Bureau's allegedly inconsistent handling of two prior cases, one of which involved a filing by a Progressive company. Appellants' state that they "understand" that after disapproving a Progressive filing the Bureau withdrew its approval or pending approval of a different carrier's "substantially similar" filing. What Appellants actually describe is the ultimately *consistent* treatment of "substantially similar" filings.

Appellants' offer to narrow their Informational Requests 11, 13-16, 19, and 21 is a specious attempt to justify unduly burdensome requests, which remain unduly burdensome even as modified. It does not eliminate the irrelevance of those requests.

Letter to Thomas C. Sturtevant, Esq.  
Re: Progressive Companies  
Dkt. No. INS-15-1001  
November 16, 2015

### C. Documents Allegedly Withheld Improperly

Appellants complain about the Advocacy Panel's response to their Informational Request 27. That request's design makes a comprehensive response unduly burdensome, if not impossible. Appellant's Request 27 provides:

Please provide a list of privileged documents otherwise responsive to these Informational Requests in accordance with paragraph 4 of the Instructions, *supra*.

Paragraph 4 of Appellants' Instructions provides:

In response to any request that the Bureau identify particular filings or Bureau rulings, please provide the appropriate product name and product number, responsible company, and SERFF number.

The Advocacy Panel did not adopt Appellants' Instructions. See the Panel's General Objection 3. Instruction 4 is simply an attempt to increase the objectionable burdensomeness of already unduly burdensome production. Read literally and in light of other requests, Request 27 is duplicative

### D. Alleged Need for a More Detailed Accounting of Withheld Materials

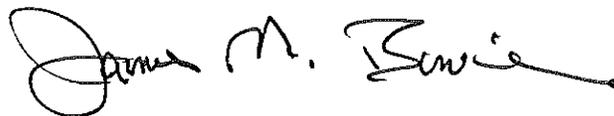
This complaint suffers from the same shortcomings as that discussed in Point C above.

\*\*\*

Letter to Thomas C. Sturtevant, Esq.  
Re: Progressive Companies  
Dkt. No. INS-15-1001  
November 16, 2015

The Advocacy Panel appreciates the Superintendent's recent informational requests to Appellants and the Panel. The Panel believes that the Superintendent's requests may assist Appellants in focusing on the narrow issue presented by their appeal.

Very truly yours,

A handwritten signature in black ink that reads "James M. Bowie". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

JAMES M. BOWIE  
Assistant Attorney General

cc: Bruce C. Gerrity, Esq.  
Matthew S. Warner, Esq.  
Members, Staff Advocacy Panel