

FINAL REPORT OF INQUIRY

Office of Consumer Protection

July 9, 2013



**Montgomery County, Maryland
Office of the Inspector General**



OFFICE OF THE INSPECTOR GENERAL

MEMORANDUM

July 9, 2013

TO: Hon. Nancy Navarro, President, County Council
Hon. Isiah Leggett, County Executive

FROM: Edward Blansitt 
Inspector General

SUBJECT: Final Report of Inquiry, *Montgomery County Office of Consumer Protection* – OIG Report Number: 14-001

The Office of the Inspector General conducted an inquiry into a complaint filed by two Montgomery County residents (Complainants) with the OCP. Specifically, this inquiry concentrated on the complaint that an OCP Program Administrator inappropriately signed an affidavit supportive of a home builder during an adjudicative process. It was reported that OCP did not disclose the existence of the affidavit to the Complainants. The Complainants learned of the existence of the affidavit as the result of an MPIA request the Complainants made in September 2010 and their inspection of OCP's case file.

Although we substantiated the allegations made in this complaint against the OCP and the Program Administrator, these actions did not clearly violate any County administrative policy, procedure, or law. The Program Administrator inappropriately disregarded the chain of command by signing what appears to have been an important document without the prior knowledge and consent of a supervisor. The failure to obtain an appropriate supervisory review may have been due, in part, to the fact that the supervisor had been serving temporarily in an "Acting" capacity at the time. The current Director of OCP stated that this was a single occasion that occurred several years ago, and he has taken appropriate steps to prevent recurrence at OCP.

The Chief Administrative Officer's response to our draft report is summarized in this final report.

We appreciate the cooperation and assistance provided by the staff of OCP during our inquiry. If you have any questions, please contact me at 240-777-8241.

Attachment

cc: County Council Members
Timothy Firestine, Chief Administrative Officer
Eric Friedman, Director, Office of Consumer Protection

Office of the Inspector General
Report of Inquiry
Office of Consumer Protection

Report Number: 14-001

Introduction

The Office of the Inspector General conducted an inquiry into a complaint filed by two Montgomery County residents (Complainants) with the Montgomery County Office of Consumer Protection (OCP). Specifically, this investigation concentrated on the handling of a complaint by OCP staff.

On July 11, 2012, the Complainants (a married couple) contacted the Office of the Inspector General (OIG) and filed a complaint against the OCP. The Complainants stated that they believed the Program Administrator for OCP inappropriately signed an affidavit supportive of a home builder during an adjudicative process. The OCP did not disclose the existence of the affidavit to the Complainants. The Complainants learned of the existence of the affidavit as the result of an MPIA request the Complainants made in September 2010 and their inspection of OCP's case file.

Objectives, Scope, and Methodology

Our objectives in conducting this inquiry were limited to addressing those specific issues raised by the Complainants that were interpreted as allegations appropriate for investigation by the OIG. Specifically, the objectives of our investigation were to determine:

- The validity of the Complainants' allegations of actions taken by OCP staff;
- If any County policies, procedures, or laws may have been violated by a public employee¹.

We interviewed OCP management and staff. We requested and analyzed evidence relevant to the issues raised and reviewed relevant laws and regulations. Our finding is detailed in the body of this report.

Our inquiry was conducted in January and February 2013 in accordance with the standards contained in *Quality Standard for Inspection and Evaluations* issued by the Council of the Inspectors General on Integrity and Efficiency (January 2012).

¹ A public employee means any person employed by a County agency, including the director of the agency.

Background

The Montgomery County Office of Consumer Protection (OCP) is the County agency responsible for enforcing consumer protection laws that prohibit unfair and deceptive business acts to ensure a fair marketplace for consumers and businesses. Their “Mission Statement” reads as follows:

“The Mission of the Office of Consumer Protection is to enforce consumer protection laws prohibiting unfair and deceptive business acts or practices in order to ensure a fair marketplace for consumers and businesses. Activities include complaint resolution, law enforcement, education, legislation, advocacy, licensing, and outreach.”

OCP enforces the County's laws against unfair and deceptive trade practices. OCP is empowered to investigate such practices, and may issue subpoenas and hold investigative conferences if necessary. If appropriate, OCP may transmit cases to the County Attorney for legal action.

OCP also investigates and conciliates individual consumer complaints. The function of OCP in this area is to uncover all facts relevant to the complaint, review the facts to determine if the law has been violated, and attempt to work out a voluntary settlement between the merchant and consumer. If a voluntary conciliation cannot be reached, OCP can advise the consumer as to what other remedies may be available. OCP has jurisdiction to investigate complaints arising out of consumer transactions that take place in Montgomery County.

On February 1, 2006, the Complainants signed a “Regional Sales Contract” (contract) for the purchase of a new custom residence (residence), which was under construction, located in Montgomery County. The sellers (Sellers) of the residence obtained a “Use and Occupancy Permit” (U and O) on May 1, 2006. The Sellers demanded that the Complainants settle on the residence within 10 business days of the U and O or the Sellers would find the Complainants in default of the contract and the Complainants would forfeit their deposit.

On May 10, 2006, the Complainants settled on this residence although they claim construction of the residence was approximately 80-85 percent complete. The contract stated that the Sellers’ home builder (Builder) would provide the Complainants with a new home warranty in accordance with Montgomery County Law².

² In 1986 Montgomery County established a New Home Warranty and Builders Licensing Law under Chapter 31C of the County's Code. This law governs all new home construction. Chapter 31C requires: Builders first submit an application showing competency and experience in the construction field; Pay a \$700 non-refundable fee; Be approved by the Board of Registration; and, if approved, the builder must provide a limited new home warranty which gives protection to the buyer; for 1 year the warranty must provide protection against defects in materials and workmanship, the warranty must cover for 2 years all mechanical, HVAC, electrical, and plumbing systems, and the warranty must give a 5 year protection against major structural defects. In addition, the terms of the limited new home warranty are covered under the Executive Regulations.

According to the Complainants, from May 2006 through March 2007 they continued to provide the Builder with lists of uncompleted work and nonperformance related to construction and warranty issues. On March 31, 2007, the Complainants provided a nine page document, complete with photographs, identified as a “Master Defect List (for residence) Current Outstanding Problems – 3/31/2007” (defect list) to the Builder. The defect list identified 209 issues that either were in need of repair or were items not completed on the residence according to the contract.

The Complainants continued discussions with the Builder to cure the issues identified in the defect list. However, the Builder, according to the Complainants, failed to cure all the deficiencies in the defect list.

On April 6, 2007, the Complainants filed a complaint with OCP. The complaint alleged misrepresentation by the Builder, realtors, and owners of the residence. The case was assigned to OCP’s Program Administrator.

The Complainants and Builder retained legal counsel to assist each with the issues arising out of the defect list and determine how those issues would be resolved. The Complainants and the Builder agreed to arbitrate their issues.

Finding: We substantiated the allegation that the Program Administrator signed a notarized affidavit prepared for his signature by an attorney for the builder that characterized the attorney’s client as “stellar”, an action that compromised the perception of OCP’s independence and impartiality in the execution of the mission of the office.

Montgomery County’s Public Ethics Law, Section 19A-2 states:

- (a) Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees who are impartial and use independent judgment.
- (b) The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.

In preparation for the arbitration hearing, the Builder’s attorney contacted the OCP Program Administrator on July 16, 2007. On July 18, 2007, the Builder’s attorney sent the Program Administrator an email stating:

“Thank you for speaking with me on Monday regarding the home repairs dispute between the [Complainants] and the [Builder] Case No. 32354RLV. We believe that you could make a valuable contribution toward resolving this dispute by participating in [the Builder’s] written submission to Judge Platt. If you are so inclined, we would particularly appreciate an affidavit setting forth your views of the issues raised by this dispute.

“We understand, however, that you may have several other commitments that prevent you from drafting such an affidavit on short notice. For your

convenience, I would be happy to give you a call to discuss this dispute in greater detail. I would take precise, detailed notes regarding your views and could then convert those notes into a draft affidavit for your review. You could of course make any changes to ensure that the affidavit is an accurate and complete summary of your own views.”

On July 19, 2007, the Program Administrator responded to the Builder’s attorney by stating:

“...Yes, I accept your offer to submit my affidavit via phone, my office number is [phone number] and I can also be reached at [number] (my cell number).”

On August 2, 2007, the Program Administrator received the aforementioned affidavit. Paragraph 25 of the affidavit entitled “Affidavit of [Program Administrator]”, states:

“I cannot stress enough that [Builder’s] response to the Office of Consumer Protection regarding the Complainants’ complaint has been just stellar. Builder has demonstrated the characteristics of a good builder, and it is my sincere hope that the parties will be able to reach an amicable resolution to their dispute”.

On August 2, 2007, the Program Administrator signed the seven page affidavit before a Notary Public, who was also an OCP employee.

We found no independently developed evidence in the OCP case file, or otherwise, that would support the conclusions contained in the affidavit signed by the Program Administrator.

In a February 13, 2013 interview with the OIG, the Program Administrator confirmed that he was the lead investigator on this specific complaint. He stated that he had conversations with the Complainants and the Builder. He stated that he conducted some field work and prepared necessary correspondence related to this complaint.

The Program Administrator stated that he believed that the OCP was an independent County agency. He also stated that employees of OCP should be able to offer opinions as to the elements involved in any complaint.

The Program Administrator stated that he recalled the affidavit that was prepared by the Builder’s attorney and that he signed before a Notary Public. He was also aware, at the time he signed the affidavit, that the complaint was being litigated and assigned to be heard by a Mediator. At the time, the Program Administrator stated he felt he was compelled to sign the affidavit. However, he stated that he believed his affidavit was independent and did not show any favoritism toward the Builder.

He also stated that, other than this affidavit, he has not signed any other affidavit prepared by a third party.

We found no evidence that the Program Administrator was improperly influenced by the Builder.

In a February 1, 2013 interview with the OIG, the Director advised that he was familiar with this case and was involved in its adjudication as he was one of three “Acting Directors” during the time this complaint was filed. He stated that he was not aware of any affidavit signed by any OCP employee related to this case until an MPIA request was made by the Complainants in January 2011. Once he became aware of the affidavit signed by the Program Administrator, the Director had a conversation with the Program Administrator and discussed how to properly respond to signing any affidavit or other documents prepared by third parties in support of or to the detriment of a complainant or a respondent on any case involving the OCP.

The Director stated that he was disturbed by the affidavit and saw it as a potential problem. He stated that he was not as much concerned about an affidavit but that the language in this affidavit was inappropriate for an attorney to include for signature by an OCP employee. The Director stated that the affidavit showed favoritism toward the Builder and that using the word “stellar” in describing the Builder showed favoritism and, if he had had the opportunity to review the affidavit prior to it being signed and released, he would have not allowed it to leave his office.

The Director stated that OCP does not have any written policies or procedures governing the technical work of OCP personnel, which would include signing affidavits prepared by interested third parties. Upon consulting with the County Attorney, we were advised that the County has no policies or procedures regarding the signing of affidavits by County personnel.

Conclusion

It is not surprising that no specific policies or procedures are in place to govern actions that a County employee would reasonably be expected to avoid. County employees should not permit an agent or attorney representing a private party to prepare a document for them to sign in their official capacity. Further, the County Attorney or other authorized individual should be consulted before a County employee signs any document that may have legal consequences for the County.

Although we substantiated the allegations made in this complaint against the OCP and the Program Administrator, these actions did not clearly violate of any County administrative policy, procedure, or law. The Program Administrator inappropriately disregarded his chain of command by signing what appears to have been an important document without the prior knowledge and consent of his supervisor. The failure to obtain an appropriate supervisory review may have been due, in part, to the fact that the supervisor had been serving temporarily in an “Acting” capacity at the time.

The Director of OCP stated that this was a single occasion that occurred several years ago, and he has taken appropriate steps to prohibit recurrence at OCP.

County management should be aware of this matter, but because the event occurred several years ago and we have no indication that this was anything other than an isolated instance, we make no recommendation for corrective action at this time.

Chief Administrative Officer's Response

The Chief Administrative Officer's May 15, 2013 response stated that: "The inquiry received by OIG from the owners of a home concerned the manner in which their complaint alleging warranty defects in the purchase of a \$3.6 million residential home was handled by OCP 6 years ago. OCP staff has been counseled regarding the best practices for documenting the action taken by OCP when disputes are partially resolved by OCP and are subsequently submitted to an arbitration process."