

June 7, 2016

Attorney General Kathleen Kane
Pennsylvania Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Ms. Marsha A. Sajer, Chief Counsel
Department of Labor & Industry, Uniform Construction Codes
651 Boas Street, Room 1613
Harrisburg, PA 17121

Mr. Juan Ruiz, Esquire
Board Counsel
Ms. Robin R. Shearer
Board Administrator
Board for Professional Engineers, Land Surveyors and Geologists
One Penn Center, 2601 N. 3rd Street
Harrisburg, PA 17110

Mr. Ian J. Harlow, Commissioner
Bureau of Professional and Occupational Affairs
2601 N 3rd St,
Harrisburg, PA 17110

Dear Attorney General Kane, Chief Counsel Sajer, Board Counsel Ruiz, and Commissioner Harlow:

Our goal with this letter is to address a request to divulge intellectual property (IP)/proprietary test data and analysis of Pennsylvania Building Officials, in the context of Pennsylvania law.

Pennsylvania Building Official/Building Official “Contractor Staff”¹ (PABO) Requests of Companies to Provide Proprietary Intellectual Property/Test Data to PABO Staff

Our membership has been asked to provide IP and proprietary test data and analysis on a frequent enough basis that it is cause for concern. Generally, all testing, analysis and design work performed by professional engineers or others on the staffs of SBCA members often use proprietary IP. Hence:

1. By divulging any test reports or any IP, SBCA members would violate;
 - a. Responsibilities under our contracts with customers.
 - b. Non-disclosure agreements.
 - c. [Pennsylvania professional engineering](#) responsibilities under [Pennsylvania professional engineer law](#).

¹ Pennsylvania Building Departments are hiring plan review and inspection companies under contract to act as their agents in performance code mandated plan review and inspections.

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Additionally, Pennsylvania has a very liberal [open records law and office](#) where all PA citizens have the “[right-to-know](#)” [through statute](#). This appears to be a straightforward path for a competitor to gain access to key proprietary IP through a Pennsylvania freedom of governmental information request.

SBCA would appreciate the opinion of the Pennsylvania Attorney General’s office about the importance of protecting proprietary knowledge and intellectual property in the context of providing competitive advantages in the market. It is assumed that the Pennsylvania Attorney General’s office is an advocate of professional engineering and product innovation through enforcement of the [Pennsylvania concept of fair trade](#). This certainly is intended to advance Pennsylvania consumer’s best interest. Any clarification contrary to our reading of the law would be appreciated.

One of the functions of an [ANSI ISO/IEC 17065 accredited product certification listed body](#) is to create [research reports](#)², which conform to the “research report/evaluation report” approval requirements of “[IBC Section 1703 Approvals](#).” Given this, there are 80 organizations that provide certified evaluation reports under the [ANSI accreditation](#) process for given scopes of certification.

Research report work performed under an [ANSI accreditation](#) or as a [PA professional engineer](#) is intended to protect the intellectual property rights of companies as they comply with the alternative materials, designs or methods of construction provisions that are included in Pennsylvania law similarly stated in the [International Building Code](#) as follows:

[A] 104.11 Alternative materials, design and methods of construction and equipment.

The provisions of this code are not intended to prevent the installation of any material or to prohibit any design or method of construction not specifically prescribed by this code, provided that any such alternative has been *approved*. An alternative material, design or method of construction shall be *approved* where the *building official* finds that the proposed design is satisfactory and complies with the intent of the provisions of this code, and that the material, method or work offered is, for the purpose intended, not less than the equivalent of that prescribed in this code in quality, strength, effectiveness, *fire resistance*, durability and safety. Where the alternative material, design or method of construction is not *approved*, the *building official* shall respond in writing, stating the reasons why the alternative was not *approved*.

Professional engineering and the building code are intended to encourage innovation and promote the [Pennsylvania concept of fair trade](#).

The business logic path then suggests that, in all cases where an [ANSI accredited firm](#) or a [PA professional engineer](#) is involved,

2. An [ANSI accredited firm](#) or a [PA professional engineer](#) shall gain immediate PABO approval of a product evaluation (i.e., [IBC 1703.4.2 Research reports](#))
3. Any testing undertaken is proprietary IP that has been reviewed and affirmed by an [ANSI ISO/IEC 17065](#) report which is then [IBC section 1703 compliant](#).
4. This approach is intended to certify compliance with the relevant Pennsylvania building code or building specifications adopted by the local jurisdiction.
5. To amplify:
 - a. The work of an [ANSI accredited firm](#) or a [PA professional engineer](#) shall be approved by a PABO unless a PABO, upon denial of this work, provides key provisions of the administrative law, building code, and/or professional engineering law that have not been complied with in writing.
 - i. This includes all specific citations along with commentary on what specifically is in non-compliance with appropriate evidence supporting the item of non-compliance.

² [Evaluation Reports = 1703.4.2 Research reports](#). Supporting data, where necessary to assist in the approval of materials or assemblies not specifically provided for in this code, shall consist of valid research reports from approved sources.

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- b. Since the building code and any administrative law is essentially a legal contract, any PABO shall also provide the specific path to cure any deficiency so that the [ANSI accredited firm](#) or a [PA professional engineer](#) can take specific actions to cure.
 - i. Failure to approve without providing specific actions to cure can be a denial of a professional engineer's license to work in their area of expertise.
- c. When each deficient element is fully cured in writing, approval shall be granted.
- d. If not fully cured, approval will remain denied until cured.

This is a review of the Pennsylvania Building Code, Pennsylvania Administrative law and Professional Engineering law. Given this review, implementing the use of alternative materials, designs or methods of construction by any group listed on the [ANSI Accredited Product Certification Body website](#) or by any [PA professional engineer](#) shall be allowed to be used and approved for use by any PABO as systematically defined in item 5 above. The goal is to ensure that all [ANSI 17065 accredited organizations](#) or a [PA professional engineer](#) are treated consistently.

Please let us know if any of the above information is incorrect. Otherwise SBCA will encourage our members to expect that these concepts are accurate, and SBCA members will take corresponding action and will expect outcomes accordingly as well.

Thank you for your consideration and timely feedback if anything presented is incorrect and any further insight/counsel that can be provided so that SBCA members assuredly comply with Pennsylvania laws.

Respectfully yours,

A handwritten signature in blue ink that reads "Kirk Grundahl". The signature is written in a cursive, flowing style.

Kirk Grundahl, P.E.
Executive Director

[Pennsylvania PE License No. PE084281](#)