

2. Any and all notifications, inspection reports, notices of violation, enforcement orders, applications, permit review letters, sample results, remediation plans, progress reports, monetary reports, permits, approvals, denials, public comments, civil penalty assessments, consent orders, closure reports, pollution prevention plans, monitoring well records, internal and external correspondence and other communications and documents whether in written, electronic or tape recorded format, for Blue Mountain Cooperative, 64 North Fuller Street, Hamburg, Berks County, Pennsylvania, 19526, from 1995 to the present.
3. Any and all notifications, reports, orders, applications, review letters, progress reports, monetary reports, permits, approvals, denials, public comments, internal and external correspondence and documents, whether in written, electronic or tape recorded format, relative to the Act 537 Plan for Tilden Township, Berks County, Pennsylvania from 1995 to the present.
4. Any and all notifications, reports, orders, applications, review letters, progress reports, monetary reports, permits, approvals, denials, public comments, internal and external correspondence and documents, whether in written, electronic or tape recorded format, relative to the public water and/or sewer service to all properties located in Tilden Township, Berks County, Pennsylvania from 1995 to the present.

("Request").

On January 23, 2009, Lynn Langer, Assistant Regional Director of the Department, timely responded within five (5) business days. She advised that the Department required an additional thirty days to respond, as permitted under Section 902 of the RTKL, for legal review and as the extent of the Request precluded a response in the five days ("Response"). In the Response, Ms. Langer advised that it appears that the Request "will be fully granted Documents responsive to your Request have been and continue to be collected in the Department's Southcentral Regional File Room and in our Reading District Office for your review and copying."

By letter dated February 20, 2009, for the first time, Mr. Zubey advised that he was seeking certified copies of the documents being prepared for his inspection and copying, as per Section 904, 65 P.S. §67.904. He also requested an estimate of the applicable fees under §1307.

On February 23, 2009, Ms. Langer advised that the Request was granted in part, and denied in part. With regard to the documents to which access was granted, Ms. Langer advised the documents may be reviewed at either of the locations, provided he scheduled inspection within ten (10) days. Information about scheduling at each Office was provided. The Request was denied in that “several documents [are] subject to an attorney-client privilege.” (“Denial”). The Denial did not specify which of the four types of documents, nor sub-requests in each type, were being protected as attorney-client privileged. Within the prescribed ten-day timeframe, Mr. Zubey contacted each of the Department Offices by letter on March 5th restating his request for certification and seeking an estimate of fees for copying and certification.

On March 2, 2009, Mr. Zubey timely appealed the Denial. In support of his appeal, Mr. Zubey states that he cannot contest the Denial because it is too vague and does not refer to which documents sought in his Request are “privileged” as attorney-client communications or work product (“Appeal”).¹ He states he advised the Department, prior to its substantive Denial, that he sought copies and certification, and reiterates his request for the documents in that format.

The OOR’s March 4th acknowledgement letter invited each party to submit any additional material within seven days. On March 10, 2009, Craig Lambeth, Esquire, Assistant Counsel for the Department, requested and received an extension to supplement the record by March 16th. By letter dated March 16, 2009, the Department reduces the Appeal to two issues: (1) whether certified copies can be requested after the original Request; and (2) whether certain documents were properly withheld as protected by the attorney-client privilege. He addresses each issue.

¹ As neither the Request nor the Denial was sent with the Appeal, Mr. Zubey supplemented the record March 9th.

With regard to certified copies, the Department contends that seeking copies more than a month after submission of the original request, which was compiled during the thirty-day extension, was inappropriate and is outside the scope of the Appeal. He explained that certification of records by the Department involves stamping each page with its seal, and advised that the Department will certify the records once Mr. Zubey determines which documents he would like duplicated. He further advised that to the extent Mr. Zubey is

demanding that the Department itself copy and mail the requested documents to Mr. Zubey, the Department takes exception to this argument. Under the RTKL, the Department has no obligation to mail records or otherwise physically provide access to records at the requester's location. 65 P.S. §67.701(a); *Carter v. Dept. of Corrections*, 962 A.2d 21, 24 (Pa. Commw. 2008)...see also *Owens v. Horn*, 684 A.2d 208, 210 (Pa Commw. 1996). Although *Carter* was decided under the previous RTKL, the holding is equally applicable under the new RTKL where the relevant statutory language has not changed....there is no statutory mandate that requires that agencies mail the records. 65 P.S. §67.1307. Accordingly, the agency's action in making the records accessible for review at its respective offices during its regular business hours satisfies its obligations under the law. 65 P.S. §67.701.

("March 16 Letter"). With regard to the allegedly privileged documents, Mr. Lambeth supplied an index noting the date of the record, type of record, and the sender/recipient to show application of the privilege. The index did not indicate the subject nor substance of communication, nor indicate to which of the records sought in the Request it pertained.

The OOR requested the Department to clarify its legal position with regard to provision of copies and to supplement the index to include the subject or substance to show the attorney-client privilege applied to the communications protected. On March 27th, the Department confirmed its position on copies and advised that less than twenty pages are being withheld as privileged. It submitted a revised index with subject/purpose, ("Index") and noted to which records the privilege pertained. An affidavit of Mr. Lambeth attesting to the privileged nature of the emails being withheld was also supplied ("Affidavit").

LEGAL ANALYSIS

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. §67.503(a). The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. §67.301. Records of a Commonwealth agency are presumed to be “public” unless: (1) the record is exempt under Section 708(b); (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. *See* 65 P.S. §67.305. The two issues before the OOR in this Appeal are (1) whether the Department fulfilled its obligations under the RTKL in its response to Mr. Zubey, including requiring inspection at its two regional offices rather than copying and/or certifying the records; and (2) whether the Department effectively showed the application of the attorney-client privilege as to the ten email communications by or between agency counsel with respect to records sought in the Request, by providing an Index showing the subject and purpose of the communication, and the Affidavit. Each is addressed in turn.

1. The Department’s Response and Denial did not comply with the RTKL.

The Department contends that the new RTKL does not require an agency to copy and send records to a requester. In its Response, notably, while the extension was properly asserted, the notice did not include each of elements required by Section 902(b)(2), 65 P.S. §67.902(b). Pursuant to Section 902(b), the Response should have included “an estimate of applicable fees owed when the record becomes available.” The RTKL’s requirement that notice of fees owed be included shows that the Legislature contemplated the agency’s duplication and readying of the requested documents during the thirty-day extension. Despite the clear statutory requirement, which the Department ignored, the Department strenuously objects to providing copies of the records requested to Mr. Zubey on two legal grounds: (1) the RTKL does not compel copying

and mailing of documents requested; and (2) Mr. Zubey did not request copies or certification until February 20th, making his request outside the scope of this Appeal.

In support of its argument that the RTKL does not compel copying and mailing of documents to a requester, the Department cites two Commonwealth Court cases interpreting the prior Right-to-Know Law, (“Old Law”), *Carter v. DOC, supra* and *Owens v. Horn, supra*, and the Final Determination in *Rodland v. Department of Corrections*, AP 2009-0040. None of these three prisoner cases is applicable to these facts, and none of them hold that an agency is relinquished of any duty to provide copies when copies are requested under the similar statutory language. *Carter* notes that at the time *Owens* was decided, prior to the 2002 RTKL amendments, the Old Law provided that records needed only to be made available for examination or inspection, *not for duplication* as the post-2002 amended Old Law provided. Section 2 of the Old Law, relied upon by the Commonwealth Court in *Carter* and the equivalent provision asserted by the Department, clearly specifies that “a public record shall be accessible for inspection and duplication” and notes the records *shall be provided* in the medium requested.

The heart of the Commonwealth Court’s holding in *Carter* and *Owens* was that prisoners are not entitled to greater rights than other requesters under the RTKL. The OOR’s decision in *Rodland* is consistent with that holding, and in relevant part provides that prisoners are not entitled to the records without paying the applicable charges. The Court reasoned “Carter still had the option...to pay to have the documents duplicated and mailed to him.” *Carter supra* at 24.

Statutory construction principles dictate that full effect be given to each provision, as none should be superfluous. 1 Pa. C.S. §1922. Were the Department’s construction of the RTKL correct, then the provision regarding postage costs (§1307(a)), record discard (§905) and estimated costs and provision of records (§902) would be superfluous and the phrase “shall

provide” would have no meaning. To give full effect to these provisions, the current RTKL must be construed to entail the agency duplicate the records requested, and furnish copies to a requester once the appropriate fees are paid. *See* 65 P.S. §67.901; *Rodland*, AP 2009-0040. Based upon proper statutory construction of the RTKL to effectuate its intent, and guidance offered by the Commonwealth Court in *Carter*, the OOR concludes that the Department must duplicate and mail the records to which it has asserted no exemption to Mr. Zubey.²

The Department’s argument that it has no duty to certify records sought in the Request because Mr. Zubey did not seek certification originally has merit, but misses the mark. The Department is correct that Mr. Zubey cannot alter his Request after its submission and expect the agency to comply with the Request “as edited.” The OOR agrees and often must advise requesters that an appeal is limited to the original request and denial in response to it. However, the OOR notes that in this case, since the substance of the Request is unchanged, and the Department has a policy for certification and Mr. Zubey is willing to pay the attendant costs, that a request for certification subsequent to the granting of access is appropriate.

Section 904 provides: “*if an agency’s response grants a request* for access, **the agency shall, upon request**, provide the requester with a certified copy of the record if the requester pays the applicable fees.” 65 P.S. §67.904 (emphasis added). By its very terms, the certification provision contemplates a request will be granted *before* a request for certification is made. Here, the Request was granted in part on February 23rd. Upon his request— made both February 20th and March 5th— certification became mandatory for the Department as the provision states an “agency *shall* ... provide” certified copies. The OOR emphasizes use of the word “provide” and concludes the Department must certify copies of the public records upon payment of its fees.

² Mr. Zubey advised he wanted an estimate of fees for duplicating the entirety of the Request. Until an estimate is provided, the Department cannot assume that Mr. Zubey would prefer to inspect and mark records for copying.

The Department's Denial is unclear and does not comport with Section 903 in that it does not explain the reasons for denial as applied to the specific records requested. 65 P.S. §67.903. From the correspondence by and between Mr. Zubey and the Department, it was not apparent until Assistant Counsel Lambeth revised the Index and supplemented the record on March 27th how the attorney-client privilege applied to protect the records, nor which specific records were protected. However, an agency cannot be deemed to have waived the privilege and compelled to produce privileged documents due to its non-specific assertion here as an agency can only be compelled to provide *public* records, which, by definition, cannot include privileged records.

2. The Department showed the emails are privileged and properly protected.

The Department asserts the attorney-client privilege as its sole basis for withholding a total of ten email communications to or from agency counsel from disclosure. As the OOR reasoned within *Mollick v. Worcester Township*, AP 2009-0042 and AP 2009-0058, application of the attorney client privilege must be shown, not merely asserted. Pennsylvania case law holds that the attorney-client privilege has a number of requirements that must be satisfied in order to trigger its protections, including a showing that the communications at issue are confidential and made by a client to an attorney related to provision of legal services. *Slater v. Rimar, Inc.*, 462 Pa. 138, 147, 338 A.2d 584, 589 (1975). The Department has shown its application here by satisfying the four criteria: (1) the holder of the privilege is a client; (2) the attorney is an integral party to communication; (3) the communication is made confidentially for the purpose of securing or providing legal advice; and (4) the privilege is not waived.

The Department supplied the Index which describes each of the ten emails at issue by stating the date of the communication, the method of communication (email), and identifying the sender and recipient, one of whom was counsel to the agency. Upon request by the OOR, the

Department included an explanation of the subject matter for each communication, consisting of the topic and its connection to the Request, and specifying the purpose of the communication, *i.e.*, to request or to provide legal advice. The Department included the subject to show how the privileged communication related to the Request, relating to the provision of public water/sewer in Tilden Township, and relating to Pleasant Hills Mobile Home Park, or to Blue Mountain Cooperative in (2) of the Request. In addition, the Department supplied an Affidavit of Assistant Counsel Lambeth attesting to the accuracy of the Index and the application of the privilege to the ten emails. The Department represents to the OOR that these ten emails are the only documents withheld from the entirety of Mr. Zubey's Request. Because the Department established the privilege applied here, the OOR concludes the emails are not public and were properly protected.

The OOR cautions the Department to assert the privilege more specifically in the future to enable the requester to assess whether the privilege is properly invoked, and allow the requester to discern which records requested will be privileged as a result. Proper presentation of the exemption, in this case, attorney-client privilege, may reduce issues raised on appeal.

CONCLUSION

For the foregoing reasons, Mr. Zubey's Appeal is **granted in part** and **denied in part**. The OOR concludes the Department did not fully comply with its duties under the RTKL, which include copying and certifying the documents requested, and submitting them to a requester upon payment of all applicable fees; to that extent the Appeal is granted. The Department showed that ten items of internal correspondence, sent to/from agency counsel, were privileged as attorney-client communications and thus do not qualify as public records under 65 P.S. §67.102. Other than the ten emails to which the attorney-client privilege attaches, the Department is directed to

duplicate and certify the records sought in the Request and, upon receipt of payment for same, including postage costs, to mail the records to Mr. Zubey within thirty (30) days.

This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal or petition for review to the Commonwealth Court. 65 P.S. §67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules. This Final Determination shall be placed on the website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED: April 3, 2009



**APPEALS OFFICER
LUCINDA GLINN, ESQ.**