



submitted in support of its redactions were valid, and asks for the OOR to reverse its determination directing that the records be released.

For the reasons set forth below, we **reverse** the Final Determination granting the appeal and the Department is not required to take any further action.

### **FACTUAL BACKGROUND**

On December 30, 2009, the Requester filed the Request with the Department. He sought electronic copies of the cover sheets titled “Quarterly Continuous Source Monitoring Report,” (QCSMR), the Facility Summary cover sheet for each company and each quarter, and a complete list of enforcement actions taken against each Pennsylvania cement company by the Department from 2004 - present. In his Request he stated that the requested records are provided for public review in the Department’s public files. He reasoned that since there was no need for redaction, he should be provided with the records in electronic format. The Requester suggested that even if the redactions were appropriate they could be performed electronically.

On January 6, 2010, the Department extended the response time to 30 days as permitted under the RTKL. On February 8, 2010, the Department partially granted the Request and provided the Requester with a list of enforcement actions from 2004 through the present. The Department provided the Requester with .pdf’s of the cover sheets. Finally, the Department manually redacted information on some of the paper records given. The Department stated that the redacted records contained information reflecting indications of violations that have not yet been resolved and associated preliminary penalty calculations. The Department asserted that the disclosure will negatively affect its ability to bring those open cases to acceptable resolution by enforcement or settlement.

The Department concluded that the redacted information is exempt under 65 P.S. § 67.708(b)(10) and the deliberative process privilege under Pennsylvania common law.

The Requester filed a timely appeal with the OOR on February 16, 2010. He initially challenged the redactions. In support, he stated that the reports are sent to each company's public file at regional Department offices. He claimed that after the reports are generated, enforcement deliberations are carried out by the Continuous Compliance Section in consultation with other Department personnel. He contended that the Department's basis for denial misunderstands the monitoring process and contradicts the Department's actual practices. He asserted that the fact the reports are subsequently considered during deliberations in a separate decision-making process does not protect them. He also argued that the reports are factual. The Requester reasoned that the redactions are unnecessary and that he should be provided with electronic copies of the records, thus avoiding any paper copying fees. The Requester also argued that \$7 charged for a CD is excessive.

In response to the appeal, the Department reiterated that the records were properly redacted and that the \$7 fee was appropriate as compared to what local copy services charged for scanning data onto a CD and the cost of the CD. As support, the Department provided the sworn statements of Ronald Gray, Chief of the Continuous Compliance Section within the Department, and Dawn Schaefer, the Department's Open Records Officer.

Mr. Gray certified the following under penalty of perjury. The cover sheets summarize the data contained in the full report including the Department's preliminary determinations of violations of emission limits and preliminary penalty calculations as

well as comments on the analysis by Department personnel. The requested records reflect indications of violations that have not been resolved and associated preliminary penalty calculations, the disclosure of which can negatively affect the Department's ability to bring those open cases to acceptable resolution by enforcement settlement. The information regarding penalties incurred by emissions, report penalties incurred by data availability and report penalties incurred by late submission are treated as pre-decisional and enforcement confidential until the associated violations and penalty considerations are resolved and as pre-decisional thereafter.

The Affidavit also set forth procedure by which the requested records are compiled. The Department collects the data submitted by Portland cement plants and produces reports based on that data which include preliminary determinations of violations of emission limits and preliminary penalty calculations. While the emissions data is public information, the Department's preliminary calculations and determinations based on the data and summarized on the cover sheets are not public. Those preliminary calculations and determinations are forwarded to the Department regional office where the particular Portland cement plant may be located for use by that office in determining what if any compliance actions are required and as a basis to begin such discussions with the regulated entity.

The Portland cement plant at issue may be able to demonstrate to the department that the data was unreliable or that some other circumstance suggests a lower penalty than that preliminarily recommended by the Bureau of Air quality in the report is appropriate. Only when those decisions are made does the Department take a final action. Prior to that time, the redacted information is part of the Department's pre-

decisional deliberation process. The development of the reports by his section is the first step in the deliberative process of determining whether any violations occurred and if so what penalty might be appropriate under the circumstances.

In regards to the fee charged for the CD, Ms. Schaefer stated that the \$7 fee was developed by a Department committee that surveyed private copy services as consistent with the fees charged for those services. As part of updating the Department fee schedule, she stated that she personally contacted copy services regarding charges for scanning data on a CD and the cost of the CD. She determined that \$7 was the average fee. She also affirmed that the Department does not use electronic redaction for security reasons and instead performs redaction manually, which requires creating a printout of the information requested. It can then be put back into electronic format, but the requester is still responsible to pay the duplication cost for the redaction.

The notarized statements were verified and attested to be true to the best of the affiants' knowledge, information and belief. At that time, the OOR determined that the Department provided insufficient factual support for its arguments because the affidavits did not state that they were made under penalty of perjury or subject to the penalties of 18 Pa.C.S § 4904. The OOR did not consider the affidavits and granted the appeal. The Department filed a petition for reconsideration with the Office of Open Records arguing that the affidavits should have been considered because while they did not include the words "under penalty of perjury", they were in fact made under that penalty.

### **LEGAL ANALYSIS**

The Office of Open Records Interim Guidelines adopted the reconsideration provisions of Pennsylvania's General Rules of Administrative Practice and Procedure, 1

Pa. Code § 35.241. It is by this authority that the OOR entertains the Petition for Reconsideration submitted by the Department.

The Rules of Civil Procedure and Appellate Procedure accept two alternatives as far as verifying documents/pleadings and their truthfulness/accuracy: (1) “the usual oath or affirmation before a notary or other person authorized to administer oaths,” or (2) “a statement by the signer that it is made subject to the penalties of 18 Pa. C.S. §4904” relating to unsworn falsification to authorities. As the affidavits were affirmed before a notary, the OOR will accept affidavits/attestations made before a notary and those made subject to the penalties of 18 Pa.C.S. §4904. Therefore, the OOR will reconsider the issues of whether the redactions were appropriate under 65 P.S. 67.708(b)(10) and whether the \$7 fee for the CD was appropriate.

The RTKL is clear that agencies bear the burden of proving the applicability of any exceptions by a preponderance of the evidence. See 65. P.S. § 67.708. Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (8th ed. West 2004). See also *Commonwealth v. Williams*, 615 A.2d 716 (PA. 1992).

Pursuant to § 708(b)(10)(i)(A), a record *reflecting* the “internal, predecisional deliberations of an agency... or predecisional deliberations between agency members, employees or officials...” are protected from mandatory disclosure under the RTKL. 65 P.S. §67.708(b)(10)(i)(A). To qualify for protection under this exception, a record must *reflect* an agency’s deliberations, and relate to a proposed policy or course of action for the agency. The OOR has consistently held that in order to establish that this exception applies, an agency must show the following three elements: (1) the communication must

be *internal* to the agency, including its representatives, (2) the communication must be *predecisional*, meaning it was made before the deliberative process of decision-making was completed; and (3) the communication must be *deliberative in character* in that it makes recommendations or expresses opinions on legal or policy matters, and is not purely factual in nature. See e.g. Kyle v. DCED, OOR Dkt. AP 2009-0801

Here, the Department argues that while the data is public, the Department's manipulation and analysis of that data is exempt from disclosure as predecisional. The OOR agrees. As Mr. Gray's affidavit sets forth, the redacted information reflects the indications of violations that have not yet been resolved and preliminary penalty calculations. Further, the Portland cement plant at issue may be able to demonstrate that the data was unreliable or that some other circumstance suggest a lower penalty than the preliminary recommendation thus affecting the final decision by the Department. According to Mr. Gray's affidavit, the decision of whether a penalty applies and how much that penalty will be has not yet been made and the Department is still in the deliberative process.

In response, the Requester argues that the Department has released other similar reports in the past and that the requested reports are therefore public. Under the RTKL, an agency has discretion to release records that are exempt under the RTKL. Its decision or mistaken release of nonpublic records does not prejudice it from withholding similar records that are also exempt under the RTKL.

The Requester also challenged the Department's \$7 fee for the CD. He argues that he can purchase a pack of 25 CDs for \$15 - \$25 and that \$7 for one CD is excessive. In response, the Department stated that it determined its fee by contacting local copy

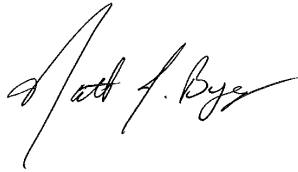
services regarding their charges for scanning data onto a CD and the cost of the CD. The average was \$7. Under the RTKL, a fee for copying onto electronic media must be “reasonable” and “based on prevailing fees for comparable duplication services provided by local business entities.” See 65 P.S. § 1307(b)(2). Ms. Schaefer certified under penalty of perjury that she has contacted local businesses and that the average for copying data onto a CD was \$7. As such, the OOR finds the \$7 fee charged by the Department to be reasonable. The OOR notes that this determination is limited to the specific facts in this appeal. Such fee determinations are fact driven and are made on a case by case basis.

Finally, the Requester argues that the redaction should be done electronically. The Department stated that it does not use electronic redaction for security purposes. The OOR will not require the Department to electronically redact the records per its determination in *Smith/Miller v. Pennsylvania Gaming Control Board*, OOR Dkt. AP 2009-0243.

## CONCLUSION

For the foregoing reasons the OOR's determination is reversed and the Requester's appeal is denied. The Department is not required to take any further action. The parties are advised that this is a Final Determination. Within thirty (30) days of the mailing date of this determination, either party may appeal to the Commonwealth Court. All parties must be served with notice of any appeal. In addition, the Office of Open Record shall be served notice of any appeal and have an opportunity to respond according to court rules. 65 P.S. §67.1302. Please also be advised that a copy of this Final Determination will appear on our website at <http://openrecords.state.pa.us>

**FINAL DETERMINATION ISSUED AND MAILED** April 30, 2010



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APPEALS OFFICER  
NATHANAEL J. BYERLY, Esquire

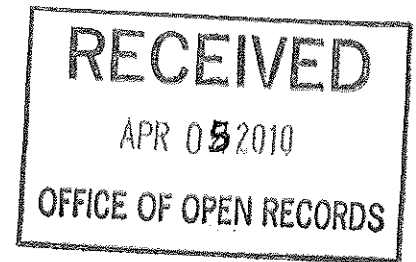
Final Determination Sent To:  
Christopher Baxter  
Susan Shinkman, Esquire



# pennsylvania

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BUREAU OF OFFICE SERVICES



April 2, 2010

**VIA ELECTRONIC MAIL and FIRST-CLASS MAIL**

Nathaniel J. Byerly, Esquire  
Appeals Officer  
PA Office of Open Records  
Commonwealth Keystone Building  
400 North Street, 4<sup>th</sup> Floor  
Harrisburg, PA 17120-0225

Re: Baxter/The Morning Call v. Dept. of Environmental Protection  
OOR Docket No. AP 2010-0139

Dear Appeals Officer Byerly:

Enclosed for filing is the Department of Environmental Protection's Petition for Reconsideration in the above-referenced matter. A copy has been served per the attached Certificate of Service.

Thank you for your consideration.

Sincerely,

Dawn Schaeff  
Agency Open Records Officer

Enclosure

cc: Christopher Baxter (via e-mailed PDF and first class mail)

**BEFORE THE PENNSYLVANIA OFFICE OF OPEN RECORDS**

IN THE MATTER OF

CHRISTOPHER BAXTER and THE  
MORNING CALL

Complainant

v.

PENNSYLVANIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION

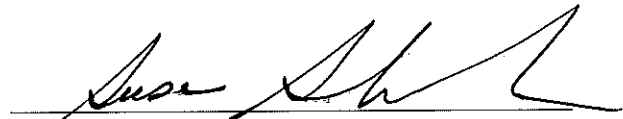
Respondent

Docket No. AP 2010-0139

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Department of Environmental Protection's Petition for Reconsideration has been served on the person listed below via electronic mail at [cbaxter@mcall.com](mailto:cbaxter@mcall.com) and by USPS first-class mail, postage pre-paid:

Mr. Christopher Baxter  
The Morning Call  
101 N. 6th St., Allentown, PA 18101



Susan Shinkman,  
Chief Counsel  
Attorney I.D. No. 21655  
Department of Environmental Protection  
16<sup>th</sup> Floor, RCSOB  
P. O. Box 8464  
Harrisburg, PA 17105-8464  
Phone: 717-787-4449

Dated: April 2, 2010

**BEFORE THE PENNSYLVANIA OFFICE OF OPEN RECORDS**

IN THE MATTER OF

CHRISTOPHER BAXTER and THE  
MORNING CALL

Complainant

v.

PENNSYLVANIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION

Respondent

Docket No. AP 2010-0139

**DEPARTMENT OF ENVIRONMENTAL PROTECTION'S PETITION FOR  
RECONSIDERATION**

The Pennsylvania Department of Environmental Protection (Department) hereby petitions for reconsideration of the Pennsylvania Office of Open Records' (OOR) March 18, 2010 Final Determination (FD) in the above-captioned matter. In that FD, the OOR rejected as insufficient two notarized Affidavits produced by the Department, concluding that they "were not made under penalty or perjury or subject to the penalties of 18 Pa. C.S. § 4904." However, as a matter of law both Affidavits were made under penalty of perjury, even if not expressly stated in the Affidavits. A review of: 1) the requirements for affidavits; 2) penalties for perjury; 3) applicable statutes; 4) a recent Commonwealth Court decision providing guidance of what affidavits are sufficient in the context of an OOR appeal; and, 5) consideration of the fact that the OOR has previously accepted affidavits that were identical in form, supports reconsideration of the OOR FD in this case, prior to the Commonwealth Court appeal deadline of April 19, 2010, and a determination in favor of the Department.

## I. Background

Christopher Baxter, on behalf of The Morning Call, filed an appeal with the OOR from the Department's partial denial of his December 30, 2009 records request submitted pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* ("RTKL"). The Department's partial denial consisted of redactions under the predecisional exemption of the RTKL, 65 P.S. §67.708(b)(10).

By letter dated February 18, 2010, OOR Appeals Officer Nathaniel J. Byerly advised the parties that he was the assigned appeals officer, provided the date by which additional submissions were due, requested that the Department respond to the arguments raised in Mr. Baxter's appeal by providing the legal and factual basis for the partial denial of records and stated that the response "should be supported by sufficient factual background and a detailed legal analysis . . . ." Mr. Byerly further advised that "[a]ll facts relied upon **must be supported by an Affidavit** made under penalty of perjury by a person with knowledge." (emphasis in original) There was no request or requirement by Mr. Byerly that specific language appear in the affidavits.

The Department filed a comprehensive ten page response covering each of the arguments raised by Mr. Baxter in his appeal. The response contained a detailed discussion of the factual and legal bases for the Department's partial denial with citations to OOR Final Determinations and to relevant appellate decisions, as well as paragraph by paragraph references to the two notarized Affidavits attached to the response.

Those Affidavits were made by Dawn Schaefer, the Department's Agency Open Records Officer (AORO), and by Ronald Gray, the Chief of the Continuous Compliance Section in the Department's Bureau of Air Quality. True and correct copies of those

affidavits are attached hereto as Exhibit A. In their Affidavits, both Ms. Schaef and Mr. Gray stated that they “do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief.” The Affidavits were notarized and the notary certified that both Ms. Schaef and Mr. Gray “acknowledged that [s]he executed the same for the purposes therein contained.”

In a Final Determination issued on March 18, 2010, OOR granted the appeal and directed the Department to “release the requested records with any nonpublic information redacted or an affidavit meeting the criterion in the above legal analysis.” Slip op. at 3. In that analysis, the OOR concluded that “[t]he affidavits provided to the OOR were not made under penalty of perjury or subject to the penalties of 18 Pa. C.S. § 4904. As such they cannot be considered.” Slip op. at 2. Further, the OOR stated that “the requester is not precluded from filing a request for unredacted records if the legal and factual bases provided are not sufficient.” *Id.*

The Department has 30 days to appeal the March 18 Final Determination to Commonwealth Court, with the final date for filing being April 19, 2010. Therefore, if this Motion for Reconsideration is not timely granted by the OOR, the Department will be compelled to file an appeal with Commonwealth Court by that date. Under Pa. R.A.P 1701(b)(3), a government unit such as OOR may grant reconsideration of a final order if reconsideration is granted within the applicable appeal period. However, a motion for reconsideration does not act as a stay of the appeal period. *Moore v. Moore*, 535 Pa. 18, 634 A.2d 163 (1993).

## **II. The Schaef and Gray Affidavits Were Made Under Penalty of Perjury.**

The notarized Schaef and Gray Affidavits subject the affiants to the penalties for perjury, as a matter of law, both Affidavits were made under penalty of perjury, even if not expressly stated in the Affidavits. A statement providing that the affiant made the affidavit under penalty of perjury or subject to the penalties under 18 Pa. C.S. § 4904 is not only superfluous but was not requested specifically by the Appeals Officer Byerly. However, the lack of that express language seems to have been the basis for rejecting the Affidavits as insufficient. As explained more fully below, both of the Affidavits submitted in this case were made under penalty of perjury and were sufficient to carry the Department's burden of proof.

The Schaef and Gray Affidavits fall within the definition of "affidavit" found in Section 1991 of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1991, which provides that an affidavit is:

A statement in writing of a fact or facts signed by the party making it, sworn to or affirmed before an officer authorized by the laws of this Commonwealth to take acknowledgments of deeds, or authorized to administer oaths, or before the particular officer or individual designated by law as the one before whom it is to or may be taken, and officially certified to in the case of an officer under his seal of office.

Here, Ms. Schaef and Mr. Gray appeared before a notary and said, verified and attested that the statements in their Affidavits were true. Their signatures and the jurat were accompanied by the notary's official seal.

By statute, Ms. Schaef and Mr. Gray are subject to the penalties for perjury where they appear before an officer authorized by the laws of this Commonwealth to administer oaths, such as a notary, and "do hereby say, verify and attest to the following as true and

accurate to the best of my knowledge, information and belief.” Section 4903 of the Crimes Code, 18 Pa. C.S. § 4903, “**False swearing,**” provides as follows:

**(a) False swearing in official matters.**--*A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true is guilty of a misdemeanor of the second degree if:*

- (1) the falsification occurs in an official proceeding; or
- (2) the falsification is intended to mislead a public servant in performing his official function.

**(b) Other false swearing.**--*A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true, is guilty of a misdemeanor of the third degree, if the statement is one which is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths.*

**(c) Perjury provisions applicable.**--Section 4902(c) through (f) of this title (relating to perjury) applies to this section.

(emphasis added). Section 4903 specifically provides that the prohibition against perjury found in 18 Pa. C.S. § 4902 applies to statements *under oath or equivalent affirmation*. Here, Ms. Schaef and Mr. Gray appeared before a notary and said, verified and attested that the statements in their Affidavits were true. Section 4903 thus subjects them to the penalties for perjury regardless of whether the Affidavit specifically so states. As such, even absent a specific reference to perjury, as a matter of law the Affidavits provided by the Department in this matter fully comported with OOR’s February 18 letter where they “made under penalty of perjury by a person with knowledge.”

In addition, under Section 4904 of the Crimes Code, 18 Pa. C.S. § 4904, the result is the same. Section 4904, **Unsworn falsification to authorities**, provides as follows:

**(a) In general.**--A person commits a misdemeanor of the second degree if, with intent to mislead a public servant in performing his official function, he:

- (1) *makes any written false statement which he does not believe to be true;*
- (2) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or
- (3) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

**(b) Statements "under penalty."**--*A person commits a misdemeanor of the third degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.*

**(c) Perjury provisions applicable.**--Section 4902(c) through (f) of this title (relating to perjury) applies to this section.

**(d) Penalty.**--In addition to any other penalty that may be imposed, a person convicted under this section shall be sentenced to pay a fine of at least \$1,000.

(emphasis added). Just as does Section 4903, Section 4904 specifically provides that the prohibition against perjury found in 18 Pa. C.S. § 4902 applies to a person who *makes any written false statement which he does not believe to be true*. Here, Ms. Schaefer and Mr. Gray appeared before a notary and said, verified and attested that the statements in their Affidavits were true. Section 4904 thus subjects them to the penalties for perjury regardless of whether the Affidavit specifically so states.

Finally, the statute governing notary publics provides additional support for the conclusion that Ms. Schaefer and Mr. Gray made their Affidavits under penalty of perjury, regardless of whether those specific words were included in the affidavits. Section 16 of The Notary Public Law of 1953, Act of Aug. 21, 1953, P.L. 1323, *as amended*, 57 P.S. § 162, provides as follows:

**§ 162. Power to administer oaths and affirmations**

(a) Notaries shall have power to administer oaths and affirmations, certify

copies and take depositions, affidavits, verifications, upon oath or affirmation and acknowledgments according to law, in all matters belonging or incident to the exercise of their notarial office.

*(b) Any person who shall be convicted of having wilfully and knowingly made or taken a false oath, affirmation, deposition, affidavit, certification or acknowledgment before any notary in any matters within their official duties shall be guilty of perjury under and shall be subject to the penalties set forth in 18 Pa.C.S. § 4902 (relating to perjury).*

(emphasis added). Section 16 plainly applies to this matter where Ms. Schaefer and Mr. Gray appeared before a notary and said, verified and attested that the statements in their Affidavits were true, further making their Affidavits subject to penalty for perjury.

### **III. Commonwealth Court Has Addressed What Constitutes a Sufficient Affidavit in the Context of RTKL Appeals**

In a recent decision from Commonwealth Court, in *Moore v. Office of Open Records*, No. 1638 C.D. 2009 (Slip Op. issued March 25, 2010), the Court states that the sworn and unsworn affidavits submitted by the agency “are enough” to satisfy the agency's burden of proof. (Slip op. at 4) At page 3, the Court describes the agency submissions as “an unsworn attestation made subject to the penalty of perjury and a notarized Affidavit of Nonexistence of Record . . . .” While the decision notes the “under penalty of perjury” aspect of the attestation, it merely recites what was submitted, and does not hold that that superfluous language is necessary. This recent guidance further substantiates the position of the Department and the sufficiency of its notarized affidavits for carrying the burden of proof in this case. In addition, the Department is unaware of any case law where an affidavit of the extent produced in this case was deemed insufficient or incompetent evidence due to the failure to have the under penalty of perjury language stated specifically in the affidavit.

#### **IV. The Form Of Affidavit Submitted Previously Has Been Accepted By The OOR In Other Appeals Involving The Department.**

In a number of previous appeals, the Department has submitted to OOR the precise form of Affidavit submitted in this matter and those Affidavits have been relied upon by OOR as support for material facts. In *Creenan v. DEP*, Docket No. AP 2009-0345, OOR denied an appeal from the Department's partial denial of records exempt from disclosure under the non-criminal investigation exception of the RTKL. In doing so, the OOR relied extensively on the Affidavit of Edward Motycki that had the same language as the affidavits in this case, stating therein that "I . . . do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief." The Affidavits were notarized and the notary certified that Mr. Motycki "acknowledged that he executed the same for the purposes therein contained." A true and correct copy of the Motycki Affidavit is attached hereto as Exhibit B. The OOR relied upon this affidavit and specifically found that the Department "satisfied its burden of proving that the requested records are the subject of an investigation and properly exempt pursuant to Section 708(b)(17) of the RTKL." (Slip op. at 8) This conclusion was based upon the affidavit submitted in which "Mr. Motycki attests that damage claim files consist of 'complaints, investigative materials, correspondence and reports' related to the investigation of those claims and that disclosure of the records would 'reveal the institution, progress or result of such investigations.'" (quotations in original).

In *Reinhart v DEP*, Docket No. AP 2009-0842, OOR granted in part and denied in part an appeal from the Department's partial denial of records. In support of its response to the appeal, the Department submitted five Affidavits to the OOR. True and

correct copies of those affidavits are attached hereto as Exhibit C. In those Affidavits, all affiants stated that he they “do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief.” The Affidavits were notarized and the notary certified that all affiants “acknowledged that [s]he executed the same for the purposes therein contained.” A review of the *Reinhart* decision shows that OOR relied on one or more of these affidavits for each part of the appeal denied

In *Slate v. DEP*, Docket No. AP 2009-1143, OOR denied an appeal from the Department’s denial of a repeat RTKL request under 65 P.S. § 67.506(a)(1). In order to prevail, the Department was required to demonstrate that the repeated request had placed an unreasonable burden on the agency. To meet its burden, the Department submitted the Affidavit of Ms. Schaeff. In her Affidavit, Ms. Schaeff stated that “I . . . do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief.” The Affidavits were notarized and the notary certified that Ms. Schaeff “acknowledged that she executed the same for the purposes therein contained.” A true and correct copy of the Schaeff Affidavit is attached hereto as Exhibit D. As to the unreasonable burden issue, OOR stated:

Here, the Department provided the notarized affidavit of Dawn Schaeff, the Department’s AORO and Chief of the Records Management Library Support Section in the Department’s Bureau of Office Services, stating it will need to duplicate all its efforts to respond to the re-submitted Request(s). This would entail another 400+ hours of work and reproduction of another 2,500+ pages. Such an endeavor is clearly burdensome.

Slip op. at 5.

In these three appeals, the Department submitted affidavits to OOR using precisely the same form and language found in the Schaeff and Gray Affidavits in this

matter. In each of its Final Determinations in those appeals, OOR relied on those affidavits to establish the material facts that supported denial of the appeals.

## **V. Conclusion**

In this appeal, the Affidavits produced by the Department were competent evidence of their contents and established facts sufficient for the Department to meet its burden of proof. The affiants said, verified and attested that the contents were true and did so before a notary. Under any of the provisions discussed herein, that is sufficient as a matter of law and makes the affiants subject to penalties for perjury. In addition, as a matter of fairness, the Appeals Officer did not initially state that there was a requirement for specific words in the affidavit. Rather, he stated that the Affidavits were to be made under penalty of perjury and by a person with knowledge, later adding in the FD that the Affidavits could alternatively be made subject to the penalties of 18 Pa. C.S. § 4904. The Affidavits produced by the Department were made under penalty of perjury under whichever Crimes Code provision (Section 4903 or Section 4904) one applies, as well as under Section 16 of the Notary Public Law, 57 P.S. § 162, and were made by persons with knowledge.

WHEREFORE, the Department respectfully requests that OOR grant reconsideration of the March 18 Final Determination, credit the Department's Affidavits and deny this appeal for the reasons stated in the Department's response.

Respectfully submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



Susan Shinkmah,  
Chief Counsel  
Attorney I.D. No. 21655

Department of Environmental Protection  
16<sup>th</sup> Floor, RCSOB  
P. O. Box 8464  
Harrisburg, PA 17105-8464  
Phone: 717-787-4449

Dated: April 2, 2010

# EXHIBIT A

## AFFIDAVIT OF DAWN SCHAEF

I, Dawn Schaeff, do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief:

1. I have worked for the Department for over 22 years.
2. I currently serve as the Chief of the Records Management and Library Support Section in the Pennsylvania Department of Environmental Protection's ("Department") Bureau of Office Services, in Harrisburg, Pennsylvania. Among my duties in that position, I serve as the Department's Agency Open Records Officer (AORO).
3. In my capacity as Department AORO, I received and processed the December 4, 2009 records request submitted by Ms. Leigh Anne Slate pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*
4. On July 2 and 7, 2009, I received two RTKL requests from Mr. S. Shiva Arati with a return address of 132 Maiden Choice Lane, Catonsville, Maryland 21228. I assigned those requests tracking numbers 1400-09-045 and 1400-09-046. On July 7, 2009, I received another RTK request from Mr. Arati to which I assigned tracking number 1400-09-047. All three requests were sent to the Department's Bureau of Radiation Protection in the Rachael Carson State Office Building (RCSOB) and to the Southcentral and Northcentral Regional Offices on the day of receipt. True and correct copies of those requests are attached hereto as Exhibits 1-3
5. On July 14, 2009 I mailed three 30 Day Extension letters to Mr. Arati. Requests 1400-09-045 and 1400-09-046 letters had a final response date of August 10, 2009. Request 1400-09-047 had a final response date of August 14, 2009.
6. As there was substantial overlap of the records responsive to Mr. Arati's three requests, I combined the requests into one and on August 10, 2009 I mailed an Estimated Fee letter to Mr. Arati. The August 10 letter advised Mr. Arati that an estimated fee of \$652.54 that was due by August 24, 2009 or the three requests would be considered withdrawn.
7. On August 24, 2009, a person who identified himself as being from Mr. Arati's office hand delivered to me a check for \$652.54. I then notified staff that the money had been paid and to start working on gathering, copying and redacting records. All offices agreed on a due date of September 18, 2009. However, due to the volume and the duplication of records plus the redaction this timeframe was extended several different times.
8. On October 29, 2009, I mailed a package (2,575 pages) containing the records responsive to RTKL requests 1400-09-045, 1400-09-046 and 1400-09-047 to Mr. S. Shiva Arati at 132 Maiden Choice Lane, Catonsville, Maryland 21228.

9. On October 30, 2009, Leigh Anne Slate telephoned me and inquired about the records responsive to RTKL requests 1400-09-045, 1400-09-046 and 1400-09-047. I advised her that the records were mailed to Mr. Arati on October 29, 2009 at the address specified in those requests. Ms. Slate advised me that Mr. Arati no longer worked for the company, that Ms. Slate had taken over his position and that she would get the records from Mr. Arati.

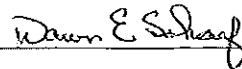
10. Ms. Slate telephoned me on or about the second week in November and inquired if it was possible to get another copy of the records previously mailed to Mr. Arati. Ms. Slate advised me that Mr. Arati was refusing to give the records to the company. Ms. Slate stated that they had told Mr. Arati that they would send someone down to pick up the documents but that he was not cooperating with them. I advised Ms. Slate that gathering this information had taken several months and that the Department did not have a duplicate set of the records provided to Mr. Arati in response to the earlier RTKL requests.

11. On December 4, 2009, The Department received from Ms. Slate a new RTKL request that combined Mr. Arati's original RTKL requests 1400-09-045, 1400-09-046 and 1400-09-047 into one request. Ms. Schaef assigned the December 4 request tracking number 1400-09-096. A copy of the December 4 request (dated December 1, 2009) is attached to Ms. Slate's appeal.

12. As of December 11, 2009, The Department denied Ms. Slate's December 4 RTKL request pursuant to section 506(a)(1) of the RTKL because the December 4 request was duplicative of earlier requests made by Mr. Arati on behalf of the same person/entity and replicating the search, retrieval, review, redaction and copying of the records would place an unreasonable burden on the Department. A copy of the Department's December 11 letter is attached to Ms. Slate's appeal.

13. The Department spent considerable time and effort responding to this request. The response involved the Department's Bureau of Radiation Protection in three offices, the RCSOB, and the Southcentral and Northcentral Regions, as well as the Environmental Cleanup Program in the Northcentral Region. As reported to me, personnel in the RCSOB spent an estimated 416 hours performing the search for, retrieval of, review of, redaction of and copying of the responsive records. Northcentral personnel estimated that they spent an additional 45 hours. The time referenced includes over 100 hours of attorney time.

14. In addition, the Department, due to the volume of records produced, did not keep copies of the records produced. The records have been refiled and the entire process from the earlier requests would need to be repeated to respond to the December 4 request.

  
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## AFFIDAVIT OF RONALD GRAY

I, Ronald Gray, do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief:

1. I have worked for the Department for 23 years.
2. I currently serve as the Chief of the Continuous Compliance Section in the Pennsylvania Department of Environmental Protection's ("Department") Bureau of Air Quality in Harrisburg, Pennsylvania. I have served in this position for the past 3 years.
3. In my capacity as Chief of the Continuous Compliance Section, I am familiar with the manner in which the Department monitors emissions from Portland Cement Plants and with the manner in which the Department receives this information and the reports generated to track and review compliance with the applicable laws and regulations. I reviewed Mr. Christopher Baxter's December 30, 2009 records request submitted pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*
4. Mr. Baxter requested electronic copies (.pdf sufficient) of the cover sheets titled "Quarterly Continuous Source Monitoring Report," (QCSMR) as prepared by the Bureau of Air Quality based upon the Continuous Source Monitoring System data, for all cement companies in Pennsylvania on a quarterly basis from 2004 through the present in a commonly understood electronic alphanumeric format.
5. Portland cement plants are generally required by law or by Plan Approval or Operating Permit issued by the Department of Environmental Protection to continuously measure and record certain air contaminant emissions in the exhausts of the cement kilns and clinker coolers. The owners or operators are required to report this data to the Department quarterly, and the Department produces Quarterly Continuous Source Monitoring Reports based on that data. In addition to the emissions data, which is public record, the Quarterly Continuous Source Monitoring Reports contain preliminary determinations of violations of emission limits and preliminary penalty calculations which are treated by the Bureau of Air Quality as pre-decisional records.
6. The Department only produces the final Quarterly Continuous Source Monitoring Reports in Adobe (.pdf) format which is not machine-readable. As stated on each Facility Summary page, "The Bureau prepared this report based on the Continuous Source Monitoring System (CSMS) data submitted by the company. The Facility Summary appears below. The individual Continuous Source Monitoring System Reports contain summary and daily data and appear on the remaining pages." As such, the cover sheets summarize the data contained in the full report including the Department's preliminary determinations of violations of emission limits and preliminary penalty calculations, and contain as well comments on the analysis by Department personnel. A true and correct copy of one of the redacted pages showing the redacted information and comments is attached hereto as Exhibit 1.

7. The records requested by Mr. Baxter reflect indications of violations that have not yet been resolved, and associated preliminary penalty calculations, the disclosure of which can negatively affect the Department's ability to bring those open cases to acceptable resolution by enforcement or settlement. Specifically, information regarding report penalties incurred by emissions, report penalties incurred by data availability and report penalties incurred by late submission, is treated by the Bureau of Air Quality as pre-decisional and enforcement-confidential until the associated violations and penalty considerations are resolved, and as pre-decisional thereafter.

8. In its response to the prior request by Jacob Fenton, the Department asserted that the cover sheet entries containing information regarding emission violation days and excess invalid averages also was exempt from disclosure as predecisional. However, upon further review, the Bureau of Air Quality determined that release of that information would not compromise the Department's enforcement and settlement efforts, so that information was not redacted from the records provided to Mr. Baxter, although it was referenced as such in the Department's February 8, 2010 final response.

9. The Department collects the data submitted by Portland cement plants and produces reports based on that data which include preliminary determinations of violations of emission limits and preliminary penalty calculations. While the emissions data is public information, the Department's preliminary calculations and determinations based on that data and summarized on the cover sheets are not public. Those preliminary determinations and calculations are forwarded to the Department regional office where the particular Portland cement plant may be located for use by that office in determining what if any compliance actions are required and as a basis to begin such discussions with the regulated entity.

10. The Portland cement plant at issue may be able to demonstrate to the Department that the data was unreliable or that some other circumstance suggests a lower penalty than that preliminarily recommended by the Bureau of Air Quality in the report is appropriate.

11. Only when those decisions are made does the Department take a final action. Prior to that time however, the information redacted from the records provided to Mr. Baxter is part of the Department's predecisional deliberative process.

12. The development of the reports by my section is the first step in the deliberative process of determining whether any violations occurred, and if so, what civil penalty might be appropriate under the circumstances as they unfold.



# EXHIBIT B

### AFFIDAVIT OF EDWARD J. MOTYCKI

I, Edward J. Motycki, do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief:

1. I have worked for the Department for nearly 28 years.
2. I currently serve as a Mining Engineer Manager in the Pennsylvania Department of Environmental Protection's ("Department") District Mining Office in California, Pennsylvania. Since 1990, I have served as the Mine Subsidence Section Chief in the Bureau of District Mining Operations.
3. Since 1990, in my capacity as Mine Subsidence Section Chief in the Bureau of District Mining Operations, I have worked directly with damage claims filed under the Mine Subsidence Insurance Fund ("MSIF") program and with damage claims filed under the Bituminous Mine Subsidence and Land Conservation Act ("BMSLCA").
4. I am intimately familiar with MSIF and BMSCLA damage claim investigation and settlement procedures. I am intimately familiar with the content of MSIF and BMSCLA claim files.
5. The Department administers the MSIF in accordance with the Gramm-Leach-Bliley Financial Modernization Act of 1999 ("GLBA") and, in its administration of the MSIF, is bound by the requirements of the GLBA.
6. Consistent with the requirements of the GLBA, all Certificates of Mine Subsidence Insurance issued by the Department under the MSIF program contain a statement guaranteeing "Confidentiality of Nonpublic Personal Information." I am attaching a sample of such a Certificate containing this statement.
7. James W. Creenan's March 2, 2009 request to the Department under the Right-to-Know Law ("RTKL") sought all records of any mine subsidence damage claims received, investigated, or known to the Department between January 1, 2000 and the present, within Allegheny, Armstrong, Westmoreland and Butler Counties.
8. Thereafter, the Department ascertained that it had 1,231 files on mine subsidence damage claims within the cited time frame and within the cited counties: 1,202 claims filed under an individual's MSIF policy and 29 claims filed under the BMSLCA.
9. One of the 29 BMSLCA claim files sought by Mr. Creenan was determined to have been erroneously recorded in the Department's data base as located in Allegheny County, when in fact it is located in a county that does not figure in Mr. Creenan's RTKL request.

10. One of the 29 BMSCLA claim files sought by Mr. Creenan related to his client and has been made available to Mr. Creenan in response to his RTKL request.

11. The Department denied access to the 1,202 MSIF damage claim files and denied access to 5 of the 29 BMSLCA damage claims filed.

12. Not one of the 1,202 MSIF damage claim files contains a record responsive to Mr. Creenan's request that is not nonpublic personal information the Department is bound to keep confidential by the GLBA and the "Confidentiality of Nonpublic Personal Information" statement contained in each policy holder's Certificate of Mine Subsidence Insurance.

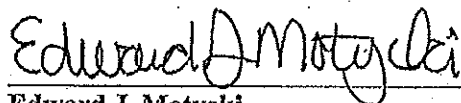
13. Mr. Creenan's RTKL request seeks records of mine subsidence damage claims received, investigated or known to the Department. As a result of each of these claims, the Department instituted an investigation.

14. All the records denied Mr. Creenan, both the 1,202 MSIF damage claim files and the 5 BMSLCA damage claim files, consist of complaints, investigative materials, correspondence and reports that relate to the aforementioned investigations. The records requested by Mr. Creenan would reveal the institution, progress or result of such investigations.

15. I am a principal Department staff person involved in ongoing litigation between an individual represented by Mr. Creenan and the Department. In that litigation, Mr. Creenan's client disputes the amount of claim to be paid him under the BMSLCA for mine subsidence damage he sustained to his home.

16. Mr. Creenan's RTKL request seeks the same records he sought and, on the basis of unreasonable burden, was refused in discovery in his client's ongoing litigation with the Department.

17. As did his discovery request, Mr. Creenan's RTKL request here has placed an unreasonable administrative burden upon the Department.



Edward J. Motycki

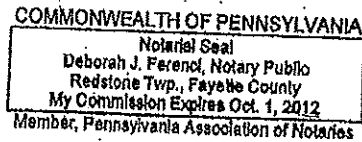
COMMONWEALTH OF PENNSYLVANIA )  
 )  
COUNTY OF WASHINGTON )

SS:

On this 21<sup>st</sup> day of MAY, 2009, before me, a Notary Public, the undersigned officer, personally appeared Edward J. Motyoki, the person named above, known to me, or satisfactorily proven to be, the persons whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Deborah J. Ferenc  
Notary Public



# EXHIBIT C

## AFFIDAVIT OF SCOTT HORRELL

I, Scott Horrell, do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief:

1. I have worked for the Department for nearly <sup>34 JS# 10/15/09</sup> 33 years.
2. I currently serve as the Environmental Program Manager in the Pennsylvania Department of Environmental Protection's ("Department") Bureau of Abandoned Mine Reclamation ("BAMR"), Office of Mineral Resources, in Ebensburg, Pennsylvania. I have served in this position for the past nine years.
3. In my capacity as Environmental Program Manager in BAMR, I have reasonably comprehensive knowledge of the existence of any reports, written communications, and any other decision-making documents between the Southwest Regional Office ("SWRO") of the Department and BAMR relating to Total Dissolved Solids ("TDS"), sulfate, and/or chloride concentrations in the Monongahela River watershed," as described in Bullet 4 of the August 3, 2009 information request of Joseph K. Reinhart pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* ("Reinhart Request").
4. In my capacity as Environmental Program Manager in BAMR, I have reasonably comprehensive knowledge of BAMR staff besides myself who might possess information responsive to Bullet 4 of the Reinhart Request.
5. Shortly after the Department's receipt of the Reinhart Request, I was contacted by Department counsel Edward S. Stokan, who shared with me a copy of the request and advised me to collect any responsive information I possessed and to canvass my staff at BAMR for any additional responsive information.
6. Per Mr. Stokan's instruction, I canvassed my staff at BAMR and learned that, besides myself, BAMR staff who might possess information responsive to Bullet 4 of the Reinhart Request included Pamela Milavec, Environmental Services Section Chief; Richard Beam, Professional Geologist, Environmental Services Section; Art Crossman, Geologic Specialist Planning, Development and Abandoned Mine Discharge ("AMD") Operations Section; Dan Sammarco, Planning, Development and AMD Operations Section Chief.
7. After consultation with those BAMR staff listed in Paragraph 6, I ascertained that the only information held by BAMR staff responsive to Bullet 4 of the Reinhart Request was the report entitled "Aquatic Survey of Lower Dunkard Creek" ("Dunkard Creek Report"), published on the Department's web site, and approximately thirty e-mails sent to SWRO by those BAMR staff or received by those BAMR staff from SWRO.



## AFFIDAVIT OF WILLIAM S. ALLEN, JR.

I, William S. Allen, Jr., do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief:

1. I have worked for the Department for 26 years.
2. I currently serve as the Environmental Program Manager in the Pennsylvania Department of Environmental Protection's ("Department") Bureau of Mining and Reclamation ("M & R"), Office of Mineral Resources, in Harrisburg, Pennsylvania. I have served in this position for the past four years.
3. In my capacity as Environmental Program Manager in M & R, I have reasonably comprehensive knowledge of the existence of any reports, written communications, and any other decision-making documents between the Southwest Regional Office ("SWRO") of the Department and M & R relating to Total Dissolved Solids ("TDS"), sulfate, and/or chloride concentrations in the Monongahela River watershed," as described in Bullet 4 of the August 3, 2009 information request of Joseph K. Reinhart pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* ("Reinhart Request").
4. In my capacity as Environmental Program Manager in M & R, I have reasonably comprehensive knowledge of M & R staff besides myself who might possess information responsive to Bullet 4 of the Reinhart Request.
5. Shortly after the Department's receipt of the Reinhart Request, I was contacted by Department counsel Edward S. Stokan, who shared with me a copy of the request and advised me to collect any responsive information I possessed and to canvass my staff at M & R for any additional responsive information.
6. I possess no information responsive to Bullet 4 of the Reinhart Request.



## AFFIDAVIT OF DANA K. AUNKST

I, Dana K. Aunkst, do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief:

1. I have worked for the Department for nearly 18 and one-half years.
2. I currently serve as the Director of the Bureau of Water Standards and Facility Regulation in the Pennsylvania Department of Environmental Protection ("Department"), in Harrisburg, Pennsylvania. I have served in this position for the past nearly three years.
3. In my capacity as Director of the Bureau of Water Standards and Facility Regulation, I oversaw the Bureau's drafting of the April 11, 2009 "Permitting Strategy for High Total Dissolved Solids (TDS) Wastewater Discharges" ("Strategy"), referenced in Bullet 7 of the August 3, 2009 information request of Joseph K. Reinhart pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* ("Reinhart Request").
4. In my capacity as Director of the Bureau of Water Standards and Facility Regulation, and as supervisor of the Strategy's drafting, I have knowledge of the research report titled "Trihalomethane Speciation and the Relationship to Elevated Total Dissolved Solid Concentrations Affecting Drinking Water Quality at Systems Utilizing Monongahela River as a Primary Source During the 3rd and 4th Quarters of 2008" and identified in the Strategy, as well as the relevant supporting field notes, laboratory reports, data and calculations collected or produced by Department staff to prepare that report, as described in Bullet 7 of the August 3, 2009 information request of the Reinhart Request.
5. In my capacity as Director of the Bureau of Water Standards and Facility Regulation, I have reasonably comprehensive knowledge of Department staff besides myself who might possess information responsive to Bullet 7 of the Reinhart Request.
6. Shortly after the Department's receipt of the Reinhart Request, I was contacted by Department counsel Edward S. Stokan, who shared with me a copy of the request and advised me to collect any responsive information I possessed and to canvass relevant Department staff for any additional responsive information.
7. I possess no information responsive to Bullet 7 of the Reinhart Request not already provided per the Department's September 11, 2009 response.
8. I have canvassed relevant Department staff and have confirmed that no Department staff possesses information responsive to Bullet 7 of the Reinhart Request not already provided per the Department's September 11, 2009 response.



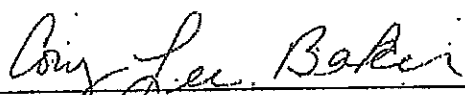
Dana K. Aunkst

COMMONWEALTH OF PENNSYLVANIA )  
 )  
COUNTY OF CAMBRIA )

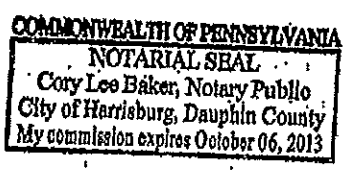
SS:

On this 16 day of October, 2009, before me, a Notary Public, the undersigned officer, personally appeared Dana K. Aunkst, the person named above, known to me, or satisfactorily proven to be, the persons whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.



Notary Public




## AFFIDAVIT OF PAMELA MILAVEC

I, Pamela Milavec, do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief:

1. I have worked for the Department for 26 years.
2. I currently serve as the Environmental Services Section Chief in the Pennsylvania Department of Environmental Protection's ("Department") Bureau of Abandoned Mine Reclamation ("BAMR"), Office of Mineral Resources, in Ebensburg, Pennsylvania. I have served in this position for the past 7 years.
3. In my capacity as Environmental Services Section Chief, I was the principal author of the benthic study entitled "Aquatic Survey of Lower Dunkard Creek."
4. In my capacity as Environmental Services Section Chief, I supervised Department staff in the preparation of the "Dunkard Creek" benthic study.
5. As principal author of the "Dunkard Creek" benthic study, and as supervisor of Department staff who helped in the preparation of the study, I have reasonably comprehensive knowledge of Department staff besides myself who might possess field notes, laboratory reports, data and calculations used in support of the "Dunkard Creek" benthic study, as described in Bullet 7 of the August 3, 2009 information request of Joseph K. Reinhart pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* ("Reinhart Request").
6. The field notes, laboratory reports, data and calculations used in support of the Dunkard Creek benthic study, as described in Bullet 7 of the Reinhart request, may reflect ongoing internal, predecisional deliberations among Department employees that relate to a contemplated or proposed policy or course of action as to how the Department addresses Abandoned Mine Discharges ("AMD") discharges, including those containing high TDS, on Dunkard Creek.
7. The field notes, laboratory reports, data and calculations used in support of the Dunkard Creek benthic study, as described in Bullet 7 of the Reinhart request, constitute investigative materials, notes, correspondence and/or reports the disclosure of which may reveal the institution, progress or result of a Department investigation that has been triggered by the discovery of AMD discharges containing high TDS on Dunkard Creek.
8. The field notes, laboratory reports, data and calculations used in support of the benthic study listed in Paragraph 3(c), as described in Bullet 7 of the Reinhart request, to the best of my knowledge, contain no factual information not already provided per the

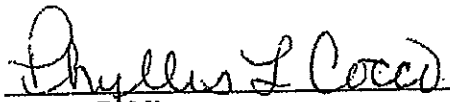
Department's September 11, 2009 response to the Reinhart Request.

  
Pamela Milavec

COMMONWEALTH OF PENNSYLVANIA )  
COUNTY OF CAMBRIA ) SS:

On this 19<sup>th</sup> day of October, 2009, before me, a Notary Public, the undersigned officer, personally appeared Pamela Milavec, the person named above, known to me, or satisfactorily proven to be, the persons whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

  
Notary Public

NOTARIAL SEAL  
PHYLLIS L. COCCO, Notary Public  
Ebensburg Boro, Cambria County, PA  
My Commission Expires April 11, 2010

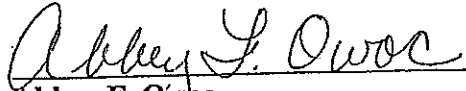
## AFFIDAVIT OF ABBEY F. OWOC

I, Abbey F. Owoc, do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief:

1. I have worked for the Department for over 12 years.
2. I currently serve as the Assessment and Planning Section Chief in the Pennsylvania Department of Environmental Protection's ("Department") Watershed Management Program, Southwest Regional Office, in Pittsburgh, Pennsylvania. I have served in this position for the past 3.5 years.
3. In my capacity as Assessment and Planning Section Chief, I have knowledge of the three benthic studies used in generating the April 11, 2009 "Permitting Strategy for High Total Dissolved Solids (TDS) Wastewater Discharges": (a) A Comprehensive Ichthyofaunal Survey of Tenmile Creek Watershed - Phase I (b) A Comprehensive Ichthyofaunal Survey of Tenmile Creek Watershed - Phase II; and (c) A Comprehensive Cause and Effect Stream Survey of South Fork Tenmile Creek.
4. The benthic studies listed in Paragraph 3(a) and (b) were generated not by the Department but by the California University of Pennsylvania. No Department staff possesses supporting field notes, laboratory reports, data or calculations used to prepare these reports.
5. In my capacity as Assessment and Planning Section Chief, I supervised Department staff in the preparation of the benthic study listed in Paragraph 3(c).
6. In my capacity as Assessment and Planning Section Chief, and as supervisor of Department staff who prepared the benthic study listed in Paragraph 3(c), I have reasonably comprehensive knowledge of Department staff besides myself who might possess field notes, laboratory reports, data and calculations used in support of the benthic study listed in Paragraph 3(c), as described in Bullet 7 of the August 3, 2009 information request of Joseph K. Reinhart pursuant to the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* ("Reinhart Request").
7. The field notes, laboratory reports, data and calculations used in support of the benthic study listed in Paragraph 3(c), as described in Bullet 7 of the Reinhart request, reflect ongoing internal, predecisional deliberations among Department employees that relate to a contemplated or proposed policy or course of action as to how the Department addresses elevated TDS levels in the Monongahela River.
8. The field notes, laboratory reports, data and calculations used in support of the benthic study listed in Paragraph 3(c), as described in Bullet 7 of the Reinhart request, constitute investigative materials, notes, correspondence and/or reports the disclosure of which will reveal the institution, progress or result of a Department investigation that has been triggered by the discovery of elevated TDS levels in the Monongahela River.

Further, the disclosure will hinder the Department's ability to secure an administrative sanction against third parties.

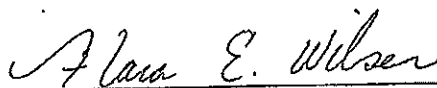
9. The field notes, laboratory reports, data and calculations used in support of the benthic study listed in Paragraph 3(c), as described in Bullet 7 of the Reinhart request, contain no factual information not already provided per the Department's September 11, 2009 response to the Reinhart Request.

  
Abbey F. Owoc

COMMONWEALTH OF PENNSYLVANIA    )  
  )  
COUNTY OF ALLEGHENY            )        SS:

On this 19<sup>th</sup> day of October, 2009, before me, a Notary Public, the undersigned officer, personally appeared Abbey L. Owoc, the person named above, known to me, or satisfactorily proven to be, the persons whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

  
Notary Public

COMMONWEALTH OF PENNSYLVANIA  
Notarial Seal  
Flora E. Wilson, Notary Public  
City Of Pittsburgh, Allegheny County  
My Commission Expires April 26, 2011  
Member, Pennsylvania Association of Notaries

# EXHIBIT D

## AFFIDAVIT OF DAWN SCHAEF

I, Dawn Schaeff, do hereby say, verify and attest to the following as true and accurate to the best of my knowledge, information and belief:

1. I have worked for the Department for over 22 years.
2. I currently serve as the Chief of the Records Management and Library Support Section in the Pennsylvania Department of Environmental Protection's ("Department") Bureau of Office Services, in Harrisburg, Pennsylvania. Among my duties in that position, I serve as the Department's Agency Open Records Officer (AORO).
3. In that capacity, I am familiar with the procedures developed by the Department regarding records management generally and the RTKL specifically.
4. The Department does not use electronic redaction methods for security reasons and instead the Department performs redaction manually, which would require creating a printout of the information sought. That information could (and here would) be put back into electronic format, but the requestor still has to pay the duplication cost for the redaction.
5. The Department's long established "Schedule of Charges for Access to Public Records provides for a charge of \$0.25 per page for copying consistent with the copying charge established by OOR.
6. The \$99.50 copying fee charged by the Department in this matter was based upon and is consistent with the OOR fee structure.
7. The Department's Schedule provides for a charge of \$7.00 for each CD the Department provides with information loaded thereon. The fee was arrived at by a Department committee that surveyed private copy services as consistent with the fees charged by those services.
8. As the Department is in the process of updating its Schedule, and I am the principal involved in that update, I contacted local copy services regarding charges for scanning data onto a CD and the cost of the CD. I determined that the \$7.00 fee was the average price for a CD.

Dawn Schaefer

**Dawn Schaefer**

COMMONWEALTH OF PENNSYLVANIA )

COUNTY OF DAUPHIN )

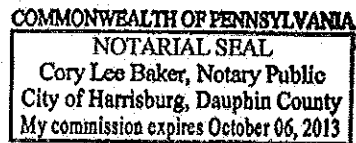
SS:

On this    day of March, 2010, before me, a Notary Public, the undersigned officer, personally appeared Dawn Schaefer, the person named above, known to me, or satisfactorily proven to be, the person whose name is subscribed to the within instrument, and acknowledged that she executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

Cory Lee Baker





April 7, 2010

Dawn Schaef  
Agency Open Records Officer  
Department of Environmental Protection  
RCSOB  
PO Box 8473  
Harrisburg, PA 17105-8473

*VIA EMAIL AND FIRST CLASS US MAIL*

RE: Petition for Reconsideration dated April 2 / OOR Dkt. AP 2010-0139

Dear Ms. Schaef:

We are in receipt of your Petition for Reconsideration dated April 2 in connection with the Office of Open Records Final Determination in *Baxter v. DEP*, OOR Dkt. AP 2010-0139. We hereby grant your motion.


We note here that in the absence of applicable Office of Open Records interim regulations regarding petitions for reconsideration, this office will follow the procedures set forth in Pennsylvania's General Rules of Administrative Practice and Procedure, 1 Pa. Code Section 35.241.

We note that the Christopher Baxter and The Morning Call may file a response in the nature of an answer within 15 days of the issuance of this order granting reconsideration, or by Thursday April 22, 2010.

This office will issue a determination responsive to this Petition for Reconsideration no later than 30 days from the "mailing date" of your petition, or by Friday April 30, 2010.

Please contact me if you have any further questions.

Respectfully,



Terry Mutchler  
Executive Director

cc: Christopher Baxter, The Morning Call *VIA EMAIL AND FIRST CLASS US MAIL*



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>CHRISTOPHER BAXTER and THE</b>	:	
<b>MORNING CALL,</b>	:	
<b>Complainant</b>	:	
	:	<b>Docket No.: AP 2010-0139</b>
<b>v.</b>	:	
	:	
	:	
<b>DEPARTMENT OF ENVIRONMENTAL:</b>	:	
<b>PROTECTION</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Christopher Baxter (the “Requester”) filed a right-to-know request (the “Request”) on behalf of the Morning Call newspaper with the Pennsylvania Department of Environmental Protection (the “Department”) seeking copies of Department monitoring reports. The Department denied the Request. The Requester filed a timely appeal with the Office of Open Records (the “OOR”). For the reasons set forth in this Final Determination, the Requester’s appeal is **granted** and the Department is directed to proceed as set forth below.

**FACTUAL BACKGROUND**

On December 30, 2009, the Requester filed the Request with the Department. He sought electronic copies of the cover sheets titled “Quarterly Continuous Source

Monitoring Report,” (QCSMR), the Facility Summary cover sheet for each company and each quarter, and a complete list of enforcement actions taken against each Pennsylvania cement company by the Department from 2004 - present. On January 6, 2010, the Department extended the response time to 30 days as permitted under the RTKL. On February 8, 2010, the Department partially granted the Request and provided the Requester with a list of enforcement actions from 2004 through the present. The Department also provided the Requester with redacted records. The Department stated that the records were exempt under 65 P.S. § 67.708(b)(1) and the deliberative process privilege under Pennsylvania common law.

The Requester filed a timely appeal with the OOR on February 16, 2010. In support of his appeal, he contends that the Department’s basis for denial misunderstands the monitoring process and contradicts the Department’s actual practices. He also argues that the reports are factual.

In response to the appeal, the Department reiterated that the records were properly redacted and provided the statements of Ronald Gray, Chief of the Continuous Compliance Section within the Department, and Dawn Schaefer, the Department’s Open Records Officer. The statements were verified and attested to be true to the best of the affiants’ knowledge, information and belief but did not indicate they were under penalty of perjury as requested by the OOR in its letter of February 18, 2010.

## LEGAL ANALYSIS

The Office of Open Records 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. *See* 65 P.S. § 67.301.

The RTKL is clear that agencies bear the burden of proving the applicability of any exceptions by a preponderance of the evidence. *See* 65 P.S. § 67.708. Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (8th ed. West 2004). *See also Commonwealth v. Williams*, 615 A.2d 716 (PA. 1992).

The Department argues that the redacted portions are exempt from release under 65 P.S. § 708(b)(10). However, the Department provided insufficient factual support for its arguments. The affidavits provided to the OOR were not made under penalty of perjury or subject to the penalties of 18 Pa.C.S § 4904. As such, they cannot be considered.

The law requires objective indicia that the exemption is applicable. The Department has not provided specific legal and factual support regarding the requested records to support a denial of access. Therefore, it fails to meet the burden of proving that the records are exempt from disclosure. It is directed to provide unredacted records or, in the alternative, an affidavit meeting the criterion above. The Requester is not precluded from filing a request for unredacted records if the legal and factual bases provided are not sufficient.

**CONCLUSION**

For the foregoing reasons the Requester's appeal is **granted** and the Department is directed to release the requested records with any nonpublic information redacted or an affidavit meeting the criterion in the above legal analysis. The parties are advised that this is a Final Determination. Within thirty (30) days of the mailing date of this determination, either party may appeal to the Commonwealth Court. All parties must be served with notice of any appeal. In addition, the Office of Open Record shall be served notice of any appeal and have an opportunity to respond according to court rules. 65 P.S. §67.1302. Please also be advised that a copy of this Final Determination will appear on our website at <http://openrecords.state.pa.us>

**FINAL DETERMINATION ISSUED AND MAILED** March 18, 2010



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APPEALS OFFICER  
NATHANAEL J. BYERLY, Esquire

Final Determination Sent To:  
Christopher Baxter  
Susan Shinkman, Esquire