



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION ON RECONSIDERATION**

<b>IN THE MATTER OF:</b>	:	
	:	
<b>DENNIS M. HOLT</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2010-0460</b>
	:	
<b>BOROUGH OF MONTOURSVILLE</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Dennis M. Holt (the “Requester”) filed a right-to-know request pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, (“RTKL”) with the Borough of Montoursville (the “Borough”) seeking records related to a public meeting. The Borough denied the Request, citing Section 708(b)(10). The Requester appealed to the Office of Open Records (the “OOR”). The OOR issued a Final Determination in the above-captioned appeal on June 17, 2010 and a request Petition for Reconsideration was filed on July 9, 2010 and granted on July 13, 2010.

For the reasons set forth in this Final Determination on Reconsideration the appeal is **denied** and the Borough is not required to take further action.

## FACTUAL BACKGROUND

On May 14, 2010, the Requester sent two letters to the Borough; one entitled "Right to Know REQUEST" (emphasis in original) and the other simply "Request." The right-to-know request (the "Request") sought the following:

- 1) Memo, e-mail, etc., regarding scheduling a meeting with representatives of the Lycoming County Water and Sewer Authority (LCWSA) and members of Borough Council, Borough employees, etc., during the week of May 10th.
- 2) Copy of the legal ad, if a meeting notice was published.
- 3) Copy of any meeting minutes.
- 4) Copy of any documents distributed for use or reference at the meeting.
- 5) Copy of the attendance record if one was created.

The second letter was entitled "REQUEST" and did not mention the RTKL or seek records. It contained five questions with space allotted for the Borough to provide answers.

Robert C. Brobson, Council President, timely responded for the Borough on May 20, 2010 in part as follows:

With respect to your letter of "REQUEST", the Borough has no response and has no requirement to respond to the interrogations.

With respect to your other letter containing a "Right to Know" request, please take the following as the Borough's response to your request for records, Section 708 (b) of the Pennsylvania's Right to Know Law contains exceptions to an agency's requirement to provide records.

"(10) (i) A record that reflects:

(A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations."

It is the Borough's determination that your request falls within the above exception. Therefore, your request for records is denied.

The Requester timely appealed on May 25, 2010. The undersigned wrote to the Borough on May 26, 2010 requesting a legal and factual basis substantiating denial under Section 708(b)(10)(i) (internal, predecisional deliberations of an agency). The letter confirmed that the appeal references only the request for records and the OOR would not consider the second letter sent on May 14.

The OOR invited the Borough to provide a legal and factual basis for its position that the requested records are exempt. The Borough's response was received by the OOR, but not by the undersigned, and was submitted prior to the record closing.

On June 2, 2010 Borough Solicitor Garth D. Everett, Esquire, swore under penalty of perjury as follows:

- The meeting on May 10 was informal for purposes of information gathering;
- There are no records, emails or memos regarding scheduling or advertisement of the meeting;
- No documents were distributed; and
- No attendance record was created

### **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 Borough is a local agency subject to the RTKL. See 65 P.S. § 67.302. Records of a local agency are presumed to be public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. §67.305. However, an agency cannot provide a record that is not in

its possession, custody or control or does not exist. See 65 P.S. §67.305. Further, an agency is not required to create a record that does not exist. See 65 P.S. §67.705.

The June 2 submission from the Borough was received within the deadline established by the OOR and is considered part of the record. The Attestation of Garth D. Everett demonstrates that no records responsive to the Request exist. Notwithstanding the principle espoused in *Signature Information Solutions v. Aston Twp.*, 995 A.2d 510 (Pa. Cmwlth. 2010) that no other bases for denial will be considered other than those raised in the original response, it would create an absurd result for the OOR to order disclosure of nonexistent records.

The OOR notes that the Borough failed to comply with the procedural requirements of the RTKL and is cautioned regarding same. When access to records is denied, Section 903, requires a written response to include: (1) A description of the record requested; (2) The specific reasons for the denial, including a citation of supporting legal authority; (3) The typed or printed name, title, business address, business telephone number and signature of the open-records officer on whose authority the denial is issued; (4) Date of the response; and (5) The procedure to appeal the denial of access under this act.

### **CONCLUSION**

For the foregoing reasons, the appeal is **denied**. The Borough is not required to take further action. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Lycoming County Court of Common Pleas. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to

respond according to court rules. 65 P.S. §67.1301. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

**FINAL DETERMINATION ON RECONSIDERATION ISSUED AND MAILED:**

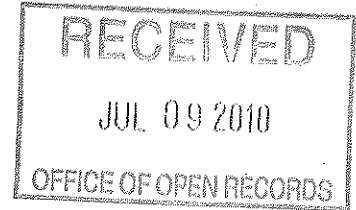
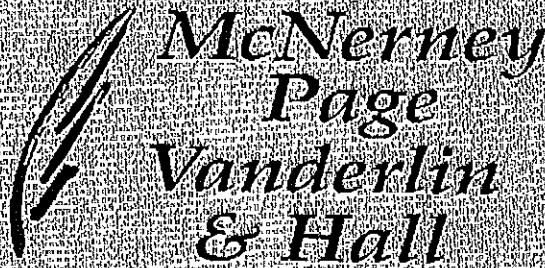
**August 2, 2010**

A handwritten signature in black ink, appearing to read 'Dena Lefkowitz', written in a cursive style.

---

APPEALS OFFICER  
Dena Lefkowitz, Esquire

Final Determination Sent To: Dennis M. Holt; Robert C. Brobson, Borough Council



**SENDER:** Garth D. Everett, Esquire  
**TO:** Terry Mutchler, Executive Director  
**COMPANY:** Pennsylvania Office of Open Records  
**FAX NO.:** 1-717-425-5343  
**DATE:** July 9, 2010

**TOTAL NUMBER OF PAGES INCLUDING THIS PAGE:** 7

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Halls Station Office  
 21 Kristi Road, Suite 1, Pennsdale, Pennsylvania 17756  
 Phone: (570) 546-5111 • Fax: (570) 546-7561

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Rebecca L. Reinhardt  
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Of Counsel  
Garth D. Everett\*

\*PA House of Representatives

Joseph M. McNerney 1939-1967  
Allen P. Page, Jr. 1949-1975  
O. William Vanderlin 1950-1999  
Charles J. McKelvey 1969-2000

REPLY TO:  
HALLS STATION

DIRECT E-MAIL ADDRESS  
[geverett@mpvhlaw.com](mailto:geverett@mpvhlaw.com)

July 9, 2010

**Via Facsimile 1-717-425-5343 and U.S. Mail**

Terry Mutchler, Executive Director  
Pennsylvania Office of Open Records  
Commonwealth Keystone Building  
400 North Street, 4<sup>th</sup> Floor  
Harrisburg, PA 17120-0225

Re: Docket AP 2010-0460

Dear Ms. Mutchler:

I write to you directly with respect to this matter as I am unable to reach the Appeals Officer assigned to this case, Ms. Dena Lefkowitz. Since receiving the Final Determination issued by Ms. Lefkowitz on June 17, 2010, I have made multiple attempts to speak with Ms. Lefkowitz, left her voice messages and have received no reply.

My concern is that the Final Determination states at the top of page 3, that, "There was no response from the Borough and no further information was received".

Enclosed is a copy of a letter I sent to Ms. Lefkowitz on behalf of the Borough on June 2, 2010, along with a copy of the facsimile cover sheet and transaction report indicating that the letter was transmitted to your office.

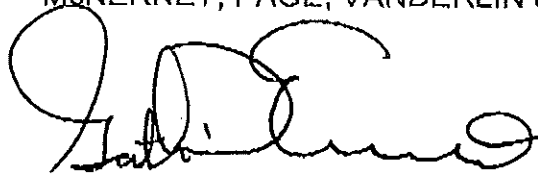
Terry Mutchler, Executive Director  
Pennsylvania Office of Open Records  
July 9, 2010  
Page 2

I would ask that my letter of June 2, 2010, be made part of the record in this matter and that this appeal be reconsidered and an amended Final Determination be issued reflecting the information set forth in my letter.

Should you or Ms. Lefkowitz have any questions or wish to discuss this matter, please feel free to contact me.

Very truly yours,

McNERNEY, PAGE, VANDERLIN & HALL

A handwritten signature in black ink, appearing to read "Garth D. Everett", written in a cursive style.

Garth D. Everett

GDE/klb  
Enclosures

cc: Montoursville Borough Council  
Dennis Holt

**McNERNEY, PAGE, VANDERLIN & HALL**  
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REPLY TO:  
HALLS STATION

DIRECT E-MAIL ADDRESS  
[geverett@mpvhlaw.com](mailto:geverett@mpvhlaw.com)

June 2, 2010

**Via Facsimile 1-717-425-5343**

Dena Lefkowitz, Esquire  
Appeals Officer  
Pennsylvania Office of Open Records  
Commonwealth Keystone Building  
400 North Street, 4<sup>th</sup> Floor  
Harrisburg, PA 17120-0225

Re: Docket # AP 20100460

Dear Ms. Lefkowitz:

I am the Solicitor for the Borough of Montoursville. In addition to the response from the Borough dated May 20, 2010, please accept this letter as a supplement to that response.

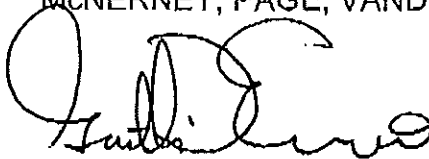
Members of Borough Council and employees of the Borough Council did have an informal, information gathering meeting and discussion with Board members and employees of the Lycoming County Water and Sewer Authority during the week of May 10, 2010. The purpose of this meeting was simply to explore and discuss possible options for cooperation between the two organizations. This meeting was not an "official" decision making meeting of either Council or the Board and, therefore, there are no records to include memos or emails regarding the scheduling the meeting; there was no legal ad noticing the meeting; there were no minutes taken; there were no documents distributed at the meeting; and there was no attendance record created.

Dena Lefkowitz, Esquire  
Appeals Officer  
June 2, 2010  
Page 2

I swear or affirm, subject to the penalties provided by the statutes of the Commonwealth of Pennsylvania, that the foregoing statements are true and complete to the best of my knowledge and belief.

Very truly yours,

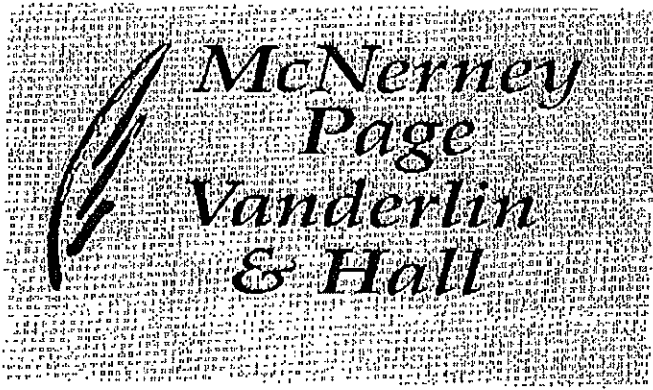
McNERNEY, PAGE, VANDERLIN & HALL

A handwritten signature in black ink, appearing to read "Garth D. Everett", written over the printed name below.

Garth D. Everett

GDE/klb

cc: Montoursville Borough Council  
Dennis Holt



**SENDER:** Garth D. Everett, Esquire  
**TO:** Dena Lefkowitz, Esquire  
 Appeals Officer  
**COMPANY:** Pennsylvania Office of Open Records  
**FAX NO.:** 1-717-425-5343  
**DATE:** June 2, 2010

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 FAX NO.: 1-717-425-5343  
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July 13, 2010

Garth Everett  
McNerney, Page, Vanderlin & Hall  
433 Market Street  
PO Box 7  
Williamsport, PA 17701

RE: Petition for Reconsideration dated July 9, 2010

Dear Mr. Everett:

We are in receipt of your Request for Consideration dated July 9, 2010 in connection with the office of Open Records Final Determinations in *Holt v. Borough of Montoursville*, OOR Dkt. 2010-0460. We hereby grant your Request.

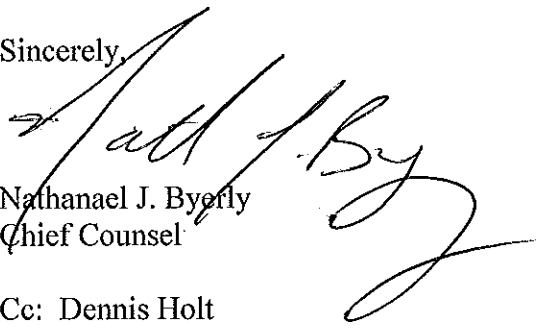
We note here that in the absence of applicable Office of Open Records interim regulations regarding petitions for reconsideration, this office will follow the procedures set forth in Pennsylvania General Rules of Administrative Practice and Procedure, 1 Pa. Code Section 35.241.

We note that the Dennis Holt may file a response in the nature of an answer within 15 days of the issuance of this order granting reconsideration or by Wednesday, July 28, 2010.

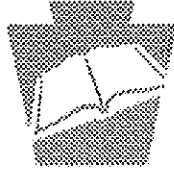
This office will issue a determination responsive to this Petition for Reconsideration no later than 30 days from the "mailing date" of your petition or by Monday, August 9, 2010.

Please contact me if you have any further questions.

Sincerely,

  
Nathanael J. Byerly  
Chief Counsel

Cc: Dennis Holt



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF:</b>	:	
	:	
<b>DENNIS M. HOLT</b>	:	
<b>Complainant</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2010-0460</b>
	:	
<b>BOROUGH OF MONTOURSVILLE</b>	:	
<b>Respondent</b>	:	

## **INTRODUCTION**

Dennis M. Holt (the "Requester") filed a right-to-know request pursuant to the Right-to-Know Law, 65 P.S. §§67.101 *et seq.*, ("RTKL") with the Borough of Montoursville (the "Borough") seeking records related to a public meeting. The Borough denied the Request, citing Section 708(b)(10). The Requester appealed to the Office of Open Records (the "OOR").

For the reasons set forth in this Final Determination, the appeal is **granted** and the Borough is required to take action as set forth below.

## **FACTUAL BACKGROUND**

On May 14, 2010, the Requester sent two letters to the Borough; one entitled "Right to Know REQUEST" (emphasis in original) and the other simply "Request." The right-to-know request (the "Request") sought the following:

- 1) Memo, e-mail, etc., regarding scheduling a meeting with representatives of the Lycoming County Water and Sewer Authority (LCWSA) and members of Borough Council, Borough employees, etc., during the week of May 10th.
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The second letter was entitled "REQUEST" and did not mention the RTKL or seek records. It contained five questions with space allotted for the Borough to provide answers.

Robert C. Brobson, Council President, timely responded for the Borough on May 20, 2010 in part as follows:

With respect to your letter of "REQUEST", the Borough has no response and has no requirement to respond to the interrogations.

With respect to your other letter containing a "Right to Know" request, please take the following as the Borough's response to your request for records, Section 708 (b) of the Pennsylvania's Right to Know Law contains exceptions to an agency's requirement to provide records.

"(10) (i) A record that reflects:

(A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations."

It is the Borough's determination that your request falls within the above exception. Therefore, your request for records is denied.

The Requester timely appealed on May 25, 2010. The undersigned wrote to the Borough on May 26, 2010 requesting a legal and factual basis substantiating denial under Section 708(b)(10)(i) (internal, predecisional deliberations of an agency). The letter

confirmed that the appeal references only the request for records and the OOR would not consider the second letter sent on May 14.

There was no response from the Borough and no further information was received.

### **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 Borough is a local agency subject to the RTKL. See 65 P.S. § 67.302.

Records of a local agency are presumed to be public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. §67.305. Under Section 708(a), the Borough bears the burden of proving its asserted exceptions by the preponderance of the evidence, meaning by the “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001).

The Borough offered no evidence to refute the presumption that the requested records are public. Most of the records, on their face, are public including meeting minutes, published advertisements of meetings and attendance records. Documents distributed at public meetings are generally public as the OOR previously held:

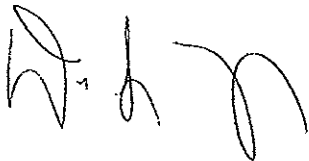
The Requester argues that the Audit became a public record when the Finance Committee received it, discussed it and a decision was made to recommend it. The Requester contends that the RTKL defines the Audit as public record because it was presented to and deliberated by a quorum at a public meeting and votes were recorded recommending its approval and acceptance by the Board. Therefore, based upon Section 708(b)(10)(ii), he argues, the record presented [\*11] to the Finance Committee is public. The OOR agrees. *Martin v. Warren County School District*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285, 10-11 (PA O.O.R.D. 2010)

Finally, the Borough failed to comply with the procedural requirements of the RTKL. When access to records is denied, Section 903, requires a written response to include: (1) A description of the record requested; (2) The specific reasons for the denial, including a citation of supporting legal authority; (3) The typed or printed name, title, business address, business telephone number and signature of the open-records officer on whose authority the denial is issued; (4) Date of the response; and (5) The procedure to appeal the denial of access under this act.

### CONCLUSION

For the foregoing reasons, the appeal is **granted**. The Borough is directed to provide all of the records requested. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Determination, either party may appeal to the Lycoming County Court of Common Pleas. All parties must be served with notice of the appeal. The Office of Open Records also shall be served notice and have an opportunity to respond according to court rules. 65 P.S. §67.1301. The parties are further advised that a copy of this Final Determination will appear on the Office of Open Records website, <http://openrecords.state.pa.us>

**FINAL DETERMINATION ISSUED AND MAILED** June 17, 2010



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APPEALS OFFICER  
Dena Lefkowitz, Esquire

Final Determination Sent To: Dennis M. Holt; Robert C. Brobson, Borough Council