

Right To Know

I. Introduction

The Borough of Abbottstown (hereafter, Abbottstown) is a political subdivision of the Commonwealth of Pennsylvania. Abbottstown is governed under The Borough Code, Reenacted May 17, 2012, P.L. 262, No. 43, 53 P.S. §45101 et seq. As such, Abbottstown is a local agency for purposes of Pennsylvania's Right-to-Know Law, 65 P.S. §67.101 et seq.

All local agencies shall provide public records in accordance with the Right-to-Know Law. Therefore, any record in the possession of Abbottstown shall be presumed to be a public record, except in the following circumstances:

- (a) The record is exempt under section 708 of the Right-to-Know Law;
- (b) The record is protected by the attorney-work product doctrine, the attorney-client privilege, or another privilege recognized by the laws of the Commonwealth of Pennsylvania (i.e., statute, regulation or case law); or
- (c) The record is exempt from disclosure under any other federal or state law or regulation, or judicial order or decree.

Records are broadly defined under the Right-to-Know Law. The term includes documents, papers, letters, maps, books, tapes, photographs, film or sound recording, information stored or maintained electronically, as well as data-processed or image-processed documents.

Requests for public records can be made by any person or who is a legal resident of the United States, including resident aliens. Requests to Abbottstown can also be made by other local agencies, Commonwealth agencies (e.g., the Department of the Community and Economic Development or the Department of Revenue), judicial agencies (i.e., the courts), or legislative agencies (e.g., the Senate or House of Representatives).

II. Access and Procedure

Requesters may make oral requests for access to records. If the requester, however, wishes to pursue the relief and remedies provided in the Right-to-Know Law, the request for access to records must be a written request. A written request for access to records may be submitted in person, by mail, by e-mail, or by facsimile in one of the following manners:

- (i) on a form prescribed by the Officer of Open Records.
- (ii) on a form prescribed by Abbottstown; or
- (iii) in a manner that describes the records requested with specificity. In such event,

the written request must also include an address to which Abbottstown can provide a response. Abbottstown has designated April Trivitt, to act as the Open-Records Officer ("Officer"). The Officer's contact information is set forth below:

April Trivitt c/o Abbottstown Borough Office
4 West Water Street
Abbottstown PA 17301
717-259-0965 - phone
717-259-6213 - fax
Abbottstown@comcast.net - email

Questions regarding this policy may be directed to the Officer at the telephone number or e-mail address listed above.

All written requests must be addressed to the Officer. In the event that a written request for records is addressed to an employee of Abbottstown or representative other than the Officer, the respective employee or representative is hereby directed to promptly forward that request to the Officer.

Written requests should identify or describe the record sought with sufficient specificity to enable Abbottstown to ascertain which records are being requested. Unless otherwise required by law, a written request need not include any explanation of the requester's reason for requesting the records or the intended use of such records. A form which may be used to file a request is posted on Abbottstown's internet website at www.abbottstownPa.net. Abbottstown shall assign a tracking number to each filed form so as to track its progress in responding to requests under the Right-to-Know Law.

Prior to granting a request for access in accordance with the Right-to-Know Law, Abbottstown may require a requester to prepay an estimate of the fees authorized by law if the fees required to fulfill the request are reasonably expected to exceed \$100.00. The fees must be reasonable and based on prevailing fees for comparable duplication services provided by local business entities. Except as otherwise provided by statute, no other fees may be imposed unless Abbottstown necessarily incurs costs for complying with the request, and all such fees must be reasonable.

In all circumstances, the requester must agree to pay applicable fees authorized by the Right-to-Know Law, such as (but not limited to) postage (not to exceed actual cost of mailing), duplication and certification. **All applicable fees shall be paid before a requester receives access to the record(s) requested.**

A record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists. **In other words, Abbottstown shall not be required to create a record which, at the time of the request, does not exist; nor is it otherwise required to compile, maintain, format or organize a record in a manner in which it does not currently compile, maintain, format or organize such record.** Abbottstown may impose reasonable fees for official certification of copies if the certification is at the behest of the requester and for the purpose of legally verifying the public record.

Upon receipt of a written request for a public record, the Officer shall do the following:

- (a) Note the date of the receipt on the written request;
- (b) Compute the day on which the five-day period (see discussion of response, below) will expire, and make a notation of that date on the written request; and
- (c) Create a file for the retention of the original request, a copy of the response, records of written communications with the requester, and a copy of other relevant communications.

III. Abbottstown's Response

Upon receipt of a written request for access to a record, Abbottstown shall make a good faith effort to determine if the record requested is a public record and whether it has possession, custody or control of the identified record. When doing so, Abbottstown will respond as promptly as possible under the circumstances existing at the time of the request. **Under the Right-to-Know Law, Abbottstown must send a response within five (5) business days of receipt of the written request for access, or else the written request shall be deemed denied.** For purposes of this policy, a business day is any Monday, Tuesday, Wednesday, Thursday or Friday on which there is no federal holiday. However, in accordance with state law, the five (5) day requirement to respond begins when the request is received by the Officer, who is not an employee of Abbottstown; nor does the Officer visit Abbottstown's office (see contact information, supra) on a daily basis. Therefore, while Abbottstown does respond in good faith to all requests made under the Right-to-Know Law, no requestor should assume that the Officer will respond within five (5) days of delivery of the request to Abbottstown's Office.

Upon receipt of a written request for access, the Officer shall determine whether one of the following applies:

- (a) The request for access requires redaction of a record in accordance with the Right-to-Know Law;
- (b) The request for access requires the retrieval of a record stored in a remote location;
- (c) A timely response to the request for access cannot be accomplished due to bonified and specified staffing limitations;
- (d) A legal review is necessary to determine whether the record is a record subject to access under the Right-to-Know Law;
- (e) The requester has not complied with Abbottstown's policies regarding access to records;
- (f) The requester refuses to pay applicable fees authorized by the Right-to-Know Law; or
- (g) The extent or nature of the request precludes a response within the required time period of five (5) business days.

Upon a determination that one of the factors listed above applies, the Officer shall send written notice to the requester within five (5) business days of receipt of the request for access. The notice shall include a statement notifying the requester that the request for access is being reviewed, the reason for the review, a reasonable date that a response is expected to be provided, and an estimate of applicable fees owed when the record becomes available. Information which Abbottstown redacts in accordance with the Right-to-Know Law shall be deemed a denial.

If the date that a response is expected to be provided is in excess of thirty (30) calendar days following the five (5) business days allowed for above, then, the request for access shall be deemed denied unless the requester has agreed in writing to an extension to the date specified in the notice. If the requester agrees to the extension, the request shall be deemed denied on the day following the date specified in the notice if Abbottstown has not provided a response by that date.

For purposes of this policy, the "mailing date" shall be the date affixed to a: (1) response from the Officer to a request, which is to be the date the response is deposited in the U.S. mail; (2) final determination from the Officer, which is to be the date the final determination is deposited in the U.S. mail.

A requester shall have sixty (60) days to retrieve requested records that have been produced and are available for delivery from Abbottstown. If the records are not retrieved within this time frame, Abbottstown may dispose of such copies and retain any fees paid in connection therewith.

IV. Appeal of Abbottstown's Determination

If a written request for access to a record is denied or deemed denied, the requester may file an appeal with the Office of Open Records within fifteen (15) business days of the mailing date of Abbottstown's response or within fifteen (15) business day of a deemed denial. The appeal shall state the grounds upon which the requester asserts that the record is a public record, and shall address any grounds stated by Abbottstown for delaying or denying the request.

The Office of Open Records has established an internet website with information relating to the Right-to-Know Law, including information on fees, advisory opinions and decisions, plus the name and address of all Open-Records Officers in the Commonwealth of Pennsylvania. For information on the Office of Open Records, please go to openrecords.state.pa.us. (Please note: among other matters, the Office of Open Records shall establish fees for duplication by photocopying, printing from electronic media or microfilm, copying onto electronic media, and other means of duplication.)

V. Retention of Records

By adoption of Resolution No. 2013-07, Abbottstown has publicly declared its intention to follow the Municipal Records Act, 53 Pa. C.S.A. § 1381 et seq., with respect to the retention and disposition of public records.

Abbottstown has addressed the issue of records retention and disposition by adopting the Municipal Records Manual ("Manual") as its authority for all public records, including those e-mail messages that

constitute public records.¹ Abbottstown reserves the right to dispose of public records according to the Manual's various disposition schedules. It does so with the understanding that, under the new Right-to-Know Law, " * * * if there is a request for a record prior to destruction, it must be preserved and provided even if it is on a disposition schedule.² It also does so with the understanding that not every public record identified in the Manual is "public" for purposes of the new Right-to-Know Law. That determination is reserved for Abbottstown and will be based upon the advice of counsel.

Nothing in the Right-to-Know Law shall be construed to modify, rescind or supersede Abbottstown's lawfully adopted record(s) retention and disposition policy. Moreover, nothing in the Right-to-Know Law shall be construed to require access to any computer of Abbottstown, or that of an individual or employee of Abbottstown.

VI. Administrative and Legal Records

Under the Manual, Abbottstown is required to permanently retain all administrative records "that summarize the origin and administration of major municipal policies and programs." (Manual @ AL-1(1).) This includes "correspondence documenting agency policy." (Manual @ AL-1.) Administrative records consisting of "routine correspondence and program files" need only be kept "as long as of administrative value." (Manual @ AL-1(2).)

Minutes of each Abbottstown Council meeting are routinely prepared and promptly approved. Draft minutes will only be preserved until the next meeting of Abbottstown's Council at which the official minutes are adopted. Similarly, if Abbottstown determines to record its public meetings, it will only maintain such tape recordings until the official minutes are adopted.

To the best of its ability, Abbottstown retains various legal documents (e.g., contracts, bonds, etc.) in accordance with the Manual's schedules for such public documents. Closed litigation files will be kept only "as long as of administrative and legal value." (Manual @ AL-19.) Only in "cases of precedential value" will such litigation files be permanently kept. (Id.)

VII. E-mail Messages

The Manual establishes policy and detailed guidelines for the management of electronic records, including e-mail messages. The stated purpose of the policy and guidelines is to "[e]stablish and clarify * * * records management * * * with respect to the creation, use, maintenance, scheduling and disposition of electronic records including those created on e-mail systems." (Emphasis added; E-mail Policy at section 1.)

Based upon a review of that policy and applicable law, Abbottstown has determined the following:

(1) e-mail communications between a quorum of Abbottstown Council members are presumptively public if the communications concern the deliberation of agency business, regardless of whether such messages are sent from or received at home computers or hand-held devices; and

(2) such communications shall not be presumed to be public if restricted to less than a quorum of Abbottstown Council members.

Abbottstown actively discourages the use of its computers for personal or non-agency business matters. E-mail messages concerning such matters should not be saved. Rather, in accordance with the Manual's direction, "[e]-mail messages and attachments that do not meet the definition of records and are not subject to litigation and other legal proceedings should be deleted immediately after they are read." (Emphasis added; E-mail Policy at section 5.8.)

VIII. Conclusion

Under the new Right-to-Know Law, OOR has the power to issue advisory opinions (i.e., an interpretation of the law without binding effect) and final determinations (i.e., decisions on actual cases and controversies).

Abbottstown is reviewing the advisory opinions and final determinations as OOR posts such documents on its web site. It reserves the right to supplement, amend or change its Right-to-Know policy in response to such opinions and determinations, or upon the advice of counsel.

Original Date: March 7, 2013
Amended: March 21, 2013

¹The Manual was approved on December 16, 2008 by the Local Government Records Committee under the aegis of the Pennsylvania Historical and Museum Commission.

²See OOR's Advisory Opinion 2009-003.