



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>KENDRA SMITH,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>PENNSYLVANIA DEPARTMENT OF</b>	:	
<b>ENVIRONMENTAL PROTECTION,</b>	:	<b>Docket No.: AP 2016-0587</b>
<b>Respondent</b>	:	
	:	
<b>and</b>	:	
	:	
<b>CORE LABORATORIES LP d/b/a</b>	:	
<b>PROTECHNICS,</b>	:	
<b>Direct Interest Participant</b>	:	

**INTRODUCTION**

Kendra Smith, Esquire, (“Requester”), an attorney with Smith Butz, LLC, submitted a request (“Request”) to the Pennsylvania Department of Environmental Protection (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking various records relating to Core Laboratories d/b/a ProTechnics (“ProTechnics”). The Department partially denied the Request, asserting that the records relate to a noncriminal investigation, reflect internal predecisional deliberations of the Department, contain confidential proprietary information, and disclosure would threaten public safety and security. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final

Determination, the appeal is **granted in part** and **denied in part**, and the Department is required to take further action as directed.

### **FACTUAL BACKGROUND**

On February 3, 2016, the Request<sup>1</sup> was filed, seeking

- Any and all approvals, permits, licenses/licensures, applications for permits and/or licenses, reciprocity letters, reciprocity licenses, reciprocity agreements and/or reciprocity arrangements, including, but not limited to all licenses issued by the Department to Core Laboratories d/b/a Protechnics, Division of Core Laboratories, LP (hereinafter, “Protechnics”) For use, storage and possession of radioactive materials and/or other licensed material. Additionally, this request seeks any and all investigation reports, Notices of Violation(s), Consent Order and Agreement(s) issued to Protechnics by the Department and/or between Protechnics and the Department for any and all work or services performed by Protechnics at any natural gas well site in the Commonwealth of Pennsylvania. Included in this request is a request for copies of all Notices of Violation issued by the Department to Protechnics, including but not limited to Notices of Violation dated June 15, 2010, January 28, 2010, November 26, 2013, September 13, 2013 and October 14, 2013, Violation Numbers 677913, 677915, 677914, 682834, 682833, 682829, 682835 and all corresponding inspection reports, field notes and other related writings. Further, this request seeks any and all Consent Order and Agreements between the Department and Protechnics, including, but not limited to, Consent Orders and Agreements dated November 2, 2013 and November 2, 2010.
- Copies of all enforcement activity taken by the Department against Protechnics, including but not limited to Enforcement ID Numbers 305057, 259202 and 263973, as well as all inspection reports completed by the Department regarding Protechnics, including, but not limited to, Inspection ID Numbers 1891418, 1919964, 2147772, 2204156 and 2221258.
- Any and all Radioactive Tracer Well Site Agreements made between Protechnics and any well site operator(s) for each and every well traced in the Commonwealth of Pennsylvania that is or was submitted to the Department, including, but not limited to, the April 7, 2013, Radioactive Tracer Well Site Agreement between Protechnics and a well operator.
- Any and all notifications submitted to the Department by Protechnics or the associated operator or subcontractor regarding Protechnics confirmation that licensed material, including, but not limited to, radioactive material, was returned

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<sup>1</sup> The original request was submitted on February 1, 2016 and modified on February 3, 2016 to include all Commonwealth drill sites.

to the surface at any well site in which Protechnics operated/performed work or services in the Commonwealth of Pennsylvania.

- Any and all documents, correspondence, e-mails and any other communication(s) between Protechnics and the Department and/or Range Resources and the Department regarding Protechnics and any and all work/services performed in the Commonwealth of Pennsylvania by Protechnics.
- Any and all MSDS/SDS (material data safety sheets and safety data sheets) in the possession of the Department regarding any and all products utilized by Protechnics at any well site in Pennsylvania, including, but not limited to, all MSDS/SDS for Protechnics Radioactive Tracer Products, as well as any and all Chemical Frac Tracer (“CFT”) products, including, but not limited to, CFT 1000, CFT 1100, CFT 1200, CFT 1300, CFT 2000, CFT 2100, CFT 1900, CFT 1700.

On February 8, 2016, the Department invoked a thirty-day extension to respond to the Request.<sup>2</sup> 65 P.S. § 67.902(b). On March 9, 2016, the Department partially denied the Request, arguing that records contain personal identification information, 65 P.S. § 67.708(b)(6); reflect the internal, predecisional deliberations of the Department, 65 P.S. § 67.708(b)(10); constitute or would reveal confidential proprietary information, 65 P.S. § 67.708(b)(11); relate to a noncriminal investigation, 65 P.S. § 67.708(b)(17); and, if disclosed, would be reasonably likely to threaten public safety, 65 P.S. § 67.708(b)(2), or endanger the safety and physical security of a building, public utility, resource, or infrastructure, 65 P.S. § 67.708(b)(3). The Department further argues that records are protected from disclosure by the Radiation Protection Act (“RPA”), 35 P.S. §§ 7110.101 *et seq.*, and by the attorney-client privilege and attorney-work product doctrine.

On March 28, 2016, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure.<sup>3</sup> The OOR invited both parties to supplement the record and

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<sup>2</sup> The Department sent the Request to each of its Regional Offices.

<sup>3</sup> The Requester appealed each individual response of the Department’s Regional Offices which were docketed by the OOR at: OOR Dkts. AP 2016-0587, 2016-0602, 2016-0603, 2016-0604, 2016-0605, 2016-0606 and 2016-0607.

directed the Department to notify any third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c). On March 28, 2016, the OOR consolidated the appeals

On March 31, 2016, ProTechnics requested to participate in this appeal as a direct interest participant, which the OOR granted on April 1, 2016. As a result, the argument and evidence submitted by ProTechnics has been made part of the record of the appeal.

On April 22, 2016, the Department submitted a position statement, reiterating the arguments set forth above and further arguing that some records are exempt from disclosure as notes and working papers of Department employees/officials, 65 P.S. § 67.708(b)(12).<sup>4</sup> In support of its arguments, the Department provided the sworn affidavits of Dawn Schaefer (“Schaefer Affidavit”), the Department’s Open Records Officer; David Allard (“Allard Affidavit”), Director of the Department’s Bureau of Radiation Protection Program; Lisa Forney (“Forney Affidavit”), Radiation Protection Supervisor of the Radioactive Materials and Special Projects Section of the Department’s Southcentral Regional Office; Terry Derstine (“Derstine Affidavit”), Environmental Program Manager of the Radiation Protection Program in the Department’s Southeast Regional Office; Colleen Stutzman (“Stutzman Affidavit”), Assistant Regional Director of the Department’s Northeast Regional Office; Patrick Brennan (“Brennan Affidavit”), Environmental Program Manager of the Waste Management Program in the Department’s Northcentral Regional Office; Jennifer Means (“Means Affidavit”), Program Manager of the Oil and Gas Management Program in the Department’s Northcentral Regional Office; Barbara Bookser (“Bookser Affidavit”), Section Chief of the Bureau of Radiation Protection for the Department’s Southwest and Northwest Regions; Dwight Shearer (“Shearer Affidavit”), Program Manager of the Bureau of Radiation Protection for the Department’s Southwest and

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<sup>4</sup> The Department is permitted to raise this additional reason for denying access to records on appeal. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

Northwest Regions; and Staci Gustafson (“Gustafson Affidavit”), Assistant Regional Director of the Department’s Northwest Regional Office.

Also on April 22, 2016, ProTechnics submitted a position statement and the sworn affidavit of Will Williams (“Williams Affidavit”), the Director of U.S. Operations for ProTechnics.

### **LEGAL ANALYSIS**

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal; however, the decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, neither party requested a hearing; however, the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth

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. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Similarly, the burden of proof in claiming a privilege from disclosure is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa. Commw. Ct. 2011); *Pa. Dep’t of Transp. v. Drack*, 42 A.3d 355, 364 (Pa. Commw. Ct. 2012) (“[T]he RTKL places an evidentiary burden upon agencies seeking to deny access to records even when a privilege is involved”); *In re: Subpoena No. 22*, 709 A.2d 385 (Pa. Super. Ct. 1998). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). “The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

In a related appeal, *Pittsburgh Post-Gazette v. Pa. Dep’t of Env’t. Prot. and ProTechnics* (“*Post-Gazette*”), the Department submitted a privilege log identifying the withheld records. In the instant matter, the privilege log submitted by the Department is the same privilege log

identifying the same records that have been withheld under the asserted exemptions and law. OOR Dkt. AP 2016-0540, 2016 PA O.O.R.D. LEXIS 895. In the *Post-Gazette* appeal, the OOR determined that the “reports” were protected from disclosure under the Department’s regulation, 25 Pa. Code § 215.14; and, that certain records are exempt as notes and working papers of the Department, 65 P.S. § 67.708(b)(12), internal, predecisional deliberations of the Department, 65 P.S. § 67.708(b)(10), contain confidential proprietary information, 65 P.S. § 67.708(b)(11) and disclosure of certain records would threat public safety and security, 65 P.S. §§ 67.708(b)(2)-(3). The OOR also determined that the Department may redact personal identification information pursuant to 65 P.S. § 67.708(b)(6) and that the Department properly withheld records pursuant to the attorney-client privilege and attorney-work product doctrine. The instant matter involves the same records as those already adjudicated by the OOR in the *Post-Gazette* appeal, which is incorporated herein by reference. Accordingly, the OOR determines that certain records are subject to public access as held in the *Post-Gazette* final determination.

Collateral estoppel prevents a party from re-litigating an issue if: 1) the issue decided in the earlier case is identical to the issue presented in the latter case; 2) there was a final judgment on the merits; 3) the party against whom estoppel is asserted was a party to the prior case; and 4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior case. *City of Pittsburgh v. Zoning Bd. of Adjustment*, 599 A.2d 896 (Pa. 1989). Collateral estoppel does not require mutuality of parties in both cases; but rather, only the party against whom collateral estoppel is asserted need be a party in the prior case. *In re: Stevenson*, 40 A.3d 1212 (Pa. 2012). In this case, the issues are identical to those raised in *Post-Gazette*; there was a final judgment on the merits of the case; the Department and ProTechnics, against which collateral estoppel is asserted, were parties in *Post-Gazette*; and the Department had a full

and fair opportunity to litigate the issues. Accordingly, the Department is collaterally estopped from claiming the requested records are exempt from disclosure.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part**, and the Department is required to provide the Requester with the records in accordance with the OOR's determination in *Pittsburgh Post-Gazette v. Pa. Dep't of Env'tl. & Prot. and ProTechnics*, OOR Dkt. AP 2016-0540, 2016 PA O.O.R.D. LEXIS 895 within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>5</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: July 27, 2016**

/s/ Jill S. Wolfe

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<sup>5</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).