

COMMONWEALTH COURT OF PENNSYLVANIA
DOCKETING STATEMENT
PETITION FOR REVIEW

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SEP 14 2016

OFFICE OF OPEN RECORDS

Counsel for Petitioner(s) must complete this form and file it with the Chief Clerk of the Commonwealth Court within 10 days of the date of the Notice of Docketing.

Failure to timely file a docketing statement, with required attachments and certificate of service, may result in dismissal of the petition for review.

Attach additional sheets if needed.

Case Caption: Kendra Smith, on behalf of Smith Butz, LLC v. Pa. Dept. of Environmental Protection
Commonwealth Court Docket No.: 1431 CD 2016

Required Attachments:

- (1) Attach a copy of **all decisions and opinions, if any, and all pertinent orders in this case** (including, for example, the decision of the Workers Compensation Judge, or similar decision).
- (2) Attach a **Statement of Issues** of no more than *two pages* in length, containing a summary sufficient to explain the case, (*See* Order of September 15, 1999, 29 Pa. Bull. 5064, 210 Pa. Code §69.501) and indicating the relief requested.
- (3) Attach a **certificate of service** indicating service of the docketing statement, statement of issues, and all attachments on all other parties.

A. Appealability of Order

- (1) Is the order appealed a final order? Yes No
- (2) If not a final order, pursuant to what Rule of Appellate Procedure is this order being appealed, e.g., Pa. R.A.P. 311, 313, 341(c)? _____
Please explain: _____

B. Are there any related cases, including cross-appeals, pending in this court or any other federal or state court or agency? Yes No

If yes, please list below the court or agency, caption and docket number(s):

Haney et. al. v. Range Resources et. al.; Washington County Court of Common Pleas Docket No. 2012-3534;
Kiskadden v. Pa. Dept. of Env. Protection et. al.; Pa. Commonwealth Court No. 1167 CD 2015

C. Have there been any previous efforts to settle this matter? Yes No

If yes, please explain:

D. Are you aware of any conflict of interest that may exist with respect to any party, lawyer, or issue in this case that may suggest the need for recusal by any judge of this court?

Yes No

If yes, please explain:

Signature Kendra L. Smith /jls Date 9/12/2016

Name (Printed) Kendra L. Smith, Esq.

Address Smith Butz, LLC, 125 Technology Dr., Suite 202, Canonsburg, PA 15317

Telephone No. 724-745-5121 Fax No. 724-745-5125

Counsel for (Name of Party) Smith Butz LLC

STATEMENT OF ISSUES

Petitioner Kendra Smith, on behalf of Smith Butz, LLC (hereinafter "Requestor") submitted a Right-to-Know Law request (the "Request") to the Pennsylvania Department of Environmental Protection (the "Department"). The Request sought documents relating to the activities of Core Laboratories d/b/a ProTechnics ("ProTechnics") at various drill sites in the Commonwealth. Specifically, the Request sought, in part, licenses issued to ProTechnics by the Department for the use, storage, and possession of radioactive materials as well as any and all Radioactive Tracer Well Site Agreements made between ProTechnics and well site operators in Pennsylvania.

The Department assigned the Request to its seven (7) branch offices. Each office responded to the Request separately by denying or partially denying responsive records pursuant to certain exceptions raised under the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101 et seq., the Radiation Protection Act, 35 P.S. §§ 7110.101 et seq., and the attorney-client privilege and/or the attorney work product doctrine. Requestor appealed each of the Department responses to the Office of Open Records (the "OOR"). The Office of Open Records consolidated the appeals.

The OOR granted in part and denied in part the Request. In doing so, the OOR determined that Requestor's Request involved the "same" records and issues that were raised in a similar Right-to-Know Law request made by Pittsburgh Post-Gazette.

Therefore, rather than address the issues, arguments, and evidence raised by Petitioner in her appeal, the OOR incorporated by reference its adjudication in the Pittsburgh Post-Gazette's appeal - *Pittsburgh Post-Gazette v. Pa. Dep't of Env'tl. Prot. and ProTechnics*, OOR Dkt. AP 2016-0540, 2016 O.O.R.D. LEXIS 895 (the "*Pittsburgh Post-Gazette* Final Determination"). Thus, the *Pittsburgh Post-Gazette* Final Determination became binding upon Petitioner. Consequently, the OOR upheld the Department's redactions and/or withholding of many of the documents subject to Petitioner's Request.

Because the OOR simply incorporated its decision in the *Pittsburgh Post-Gazette* Final Determination, it failed to comport with the principles of basic fairness and justice by considering the evidence and arguments raised in support of Petitioner's Request. In fact, The *Pittsburgh Post-Gazette* appeal was quite different to the instant appeal. Due process dictates that the OOR was required to independently examine and evaluate Petitioner's claims on appeal. Furthermore, the OOR erred in determining that the Department demonstrated, by a preponderance of the evidence, that the records were properly withheld and/or redacted under the various exemptions claimed. Based upon the foregoing errors, Petitioner respectfully requests that this Honorable Court reverse the Final Determination of the OOR and order the Department to produce all records responsive to the Request.

ATTACHMENTS

Attachment 1: July 27, 2016 Final Determination of the Office of Open Records in *Kendra Smith v. Pa. Dept. of Environmental Protection and Core Laboratories, LP d/b/a ProTechnics*, OOR Docket No. AP 2016-0587

Attachment 2: June 24, 2016 Final Determination of the Office of Open Records in *Don Hopey and the Pittsburgh Post-Gazette v. Pa. Dept. of Environmental Protection and Core Laboratories, LP d/b/a ProTechnics*, OOR Docket No. AP 2016-0540

Attachment 3: March 7, 2016 Pa. Dept. of Environmental Protection Central Office Response to Smith Right-to-Know Request (letter only)

Attachment 4: March 9, 2016 Pa. Dept. of Environmental Protection Southcentral Office Response to Smith Right-to-Know Request (letter only)

Attachment 5: March 9, 2016 Pa. Dept. of Environmental Protection Southwest Office Response to Smith Right-to-Know Request (letter only)

Attachment 6: March 9, 2016 Pa. Dept. of Environmental Protection Northwest Office Response to Smith Right-to-Know Request (letter only)

Attachment 7: March 9, 2016 Pa. Dept. of Environmental Protection Northeast Office Response to Smith Right-to-Know Request (letter only)

Attachment 8: March 9, 2016 Pa. Dept. of Environmental Protection Northcentral Office Response to Smith Right-to-Know Request (letter only)

Attachment 1



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

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

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 Request¹ 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

¹ 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.² 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.³ The OOR invited both parties to supplement the record and

² The Department sent the Request to each of its Regional Offices.

³ 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).⁴ In support of its arguments, the Department provided the sworn affidavits of Dawn Schaeff ("Schaeff 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

⁴ 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 Envtl. 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 threaten 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.⁵ 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

APPEALS OFFICER
JILL S. WOLFE, ESQ.

Sent to: Kendra Smith, Esq. (via e-mail only);
Jacqueline Conforti Barnett, Esq. (via e-mail only);
Dawn Schaefer (via e-mail only);
Roy Arnold, Esq. (via e-mail only)

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

Attachment 2



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF :

DON HOPEY AND THE *PITTSBURGH* :
POST-GAZETTE, :
Requester :

v. :

Docket No.: AP 2016-0540

PENNSYLVANIA DEPARTMENT OF :
ENVIRONMENTAL PROTECTION, :
Respondent :

and :

CORE LABORATORIES LP d/b/a :
PROTECHNICS, :
Direct Interest Participant :

INTRODUCTION

Don Hopey, a reporter for the *Pittsburgh Post-Gazette* (collectively, the "Requester"), 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 certain investigations conducted by the Department. The Department partially denied the Request, arguing, among other things, that the records relate to a noncriminal investigation and that their disclosure would threaten public safety. 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 January 19, 2016, the Request was filed, seeking:

1. All unredacted Notices of Violation [{"NOV"}] ... issued by the [Department] to ProTechnics, a Division of Core [L]aboratories, L.P., including those issued Jan. 28, 2010; June 15, 2010 and Nov. 26, 2013.
2. [A]ll records and documents, including emails, in the possession of the [Department] from 2005 to the present that pertain in any way to ProTechnics' business activities in Pennsylvania, including, but not limited to, any and all involvement in supplying, providing, applying or working in any way with radioactive and chemical "fracking" tracers used by the unconventional shale gas drilling industry in Pennsylvania.

On January 28, 2016, the Department invoked a thirty-day extension of time to respond to the Request.¹ See 65 P.S. § 67.902(b). On February 29, 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 17, 2016, the Requester appealed to the OOR, challenging the partial denial and stating grounds for disclosure. The OOR invited the parties to supplement the record, and

¹ The Department was closed on January 26, 2016 and January 27, 2016 due to a weather-related emergency. Therefore, the Department had until January 28, 2016 to respond to the Request. See 65 P.S. § 67.901.

directed the Department to notify third parties of their ability to participate in the appeal. *See* 65 P.S. § 67.1101(c).

On March 30, 2016, Core Laboratories, L.P. d/b/a ProTechnics (“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 5, 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).² 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; Judy Lashley (“Lashley Affidavit”), Clerk III in the Department’s Southeast Regional Office; Colleen Stutzman (“Stutzman Affidavit”), Assistant Regional Director of the Department’s Northeast Regional Office; Ruth Ksiazek (“Ksiazek Affidavit”), Secretarial Supervisor II in 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

² 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).

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 Northwest Regions; and Staci Gustafson ("Gustafson Affidavit"), Assistant Regional Director of the Department's Northwest Regional Office.

Also on April 5, 2016, ProTechnics submitted a position statement and the sworn affidavit of Will Williams ("Williams Affidavit"), the Director of U.S. Operations for ProTechnics.³

On April 12, 2016 and April 13, 2016, respectively, the Requester responded to the arguments made by ProTechnics and the Department. In accordance with a briefing schedule agreed to by the parties, the Department replied to the Requester's submissions on April 19, 2016.

On May 27, 2016, following a request for clarification from the OOR, the Department provided a supplemental submission, which included additional statements made under the penalty of perjury from Mr. Allard and Ms. Forney.⁴

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

³ The Department also submitted an affidavit executed by Mr. Williams on appeal.

⁴ By correspondence dated May 31, 2016, the Requester objected to the OOR's request for additional information; however, the RTKL authorizes appeals officers to "admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute." 65 P.S. § 67.1102(b)(2).

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, the Requester asked the OOR to conduct an *in camera* review of the records; however, the request is hereby denied, as the OOR has the requisite information and evidence before it to properly adjudicate this 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).

1. The Department has demonstrated that certain records are protected from disclosure by the RPA

The Department denied access to certain records pursuant to the RPA and its implementing regulations, which empower the Department to “[d]evelop and conduct programs for evaluation of hazards associated with the use of radiation sources and with radiation source users[,]” and grant the Department with oversight of “the registration, licensing, control, management, regulation and inspection of radiation sources and radiation source users.” 35 P.S. §§ 7110.301(c)(1)-(2). Additionally, the Department is authorized to “[e]ncourage, participate in or conduct studies, investigations, training, research remedial actions and demonstrations relating to control, regulation and monitoring of radiation sources[,]” and to “[c]ollect and disseminate information related to nuclear power, the control of radiation sources, radiation protection, emergency response and the effects of radiation exposure.” 35 P.S. §§ 7110.301(c)(12)-(13). As part of its investigatory authority, the Department may conduct tests, inspect or examine any

radiation source records, or other physical evidence related to the use of a radiation source. 35 P.S. § 7110.305.

With respect to records collected and/or generated during an investigation conducted pursuant to the RPA, the Department's regulations provide, in pertinent part:

The following Department records are not available for public inspection, unless the Department determines that disclosure is in the public interest and is necessary for the Department to carry out its duties under the [RPA]: ...

- (2) *A report of investigations*, not pertaining to safety and health in industrial plants, which would disclose the institution, progress or results of an investigation undertaken by the Department.

25 Pa. Code § 215.14 (emphasis added). The Department, through the Allard Affidavit, attests that its "investigation of ProTechnics ... did not involve an 'industrial plant'. The well pads where the events took place resulting in [the Department's] investigation fell outside of the definition. Therefore, the records relating to the ProTechnics investigations are not public under 25 Pa. Code § 215.14(2)...." Under the RTKL, a sworn affidavit may constitute sufficient evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

The Requester argues that that the records cannot be protected by the RPA because the landfills associated with the Department's investigations of ProTechnics are "industrial plants." However, as noted by the Department, the investigations were initiated as a result of violations that occurred at natural gas well pads, and not landfills.⁵ The terms "industrial" and "plant" are not defined in the RPA or the Department's regulations, nor are they defined by the Pennsylvania

⁵ The Department explains that the investigations were "commenced when a shipment of residual waste triggered a landfill's radiation alarm. These triggering events required [the Department] to immediately track the shipment of radioactive residual waste back to its generator. In each case, the generator was a well site that had engaged ProTechnics."

Statutory Construction Act. Therefore, the “[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage....” 1 Pa.C.S. § 1903(a). The term “industrial” means, among other things, “a company engaged in industrial production or service.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 637 (11th ed. 2012). Similarly, a “plant” is defined as “a factory or workshop for the manufacture of a particular product.” *Id.* at 948. Thus, the term “industrial plant” can reasonably be considered to mean a factory engaged in industrial production or service.

Under Section 78.1 of the Pennsylvania Code, a “well site” is defined as an “area occupied by the equipment or facilities necessary for or incidental to the drilling, production or plugging of a well.” 25 Pa. Code § 78.1. In his supplemental affidavit, Mr. Allard attests as follows:

Nothing within the definition of “well site” falls within the meaning of the terms of “industrial” and “plant.” Unlike a factory, nothing is created or made from the site. Refining and processing, necessary steps for the creation of an end product, are done at a refinery, which is at another location and in a different type of facility. A well pad is not a plant. Unlike a building, it does not possess a roof and walls. A well pad is also not a factory because material is extracted, and not manufactured or created, at the site.

In the absence of any competent evidence that the Department acted in bad faith, “the averments in [the affidavit] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Because the record in this matter is devoid of evidence suggesting that a well site—or a landfill for that matter—constitutes an “industrial plant,” and is, therefore, excluded from the confidentiality provisions set forth in the Department’s regulations, the Department has established that responsive records constituting “report[s] of investigations” are expressly confidential. As such, these reports are not subject to public access under the

RTKL.⁶ See 65 P.S. § 67.306 (“Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree”). However, to the extent the Department denied access to records other than “reports of investigations” pursuant to the RPA, the Department has not proven that such records may be withheld.

2. The Department may redact telephone numbers, driver license numbers, and certain e-mail addresses from the records

The Department redacted telephone numbers⁷, e-mail addresses, and a driver’s license number from the responsive records pursuant to Section 708(b)(6) of the RTKL, which exempts from disclosure “personal identification information” including “driver’s license number[s] ... home, cellular or personal telephone numbers [and] personal e-mail addresses....” 65 P.S. § 67.708(b)(6)(i)(A). In *Office of the Governor v. Mohn* and *Office of the Governor v. Raffle*, the Commonwealth Court held that government issued e-mail addresses and telephone numbers are generally “personal” for purposes of this exemption. 67 A.3d 123, 133-34 (Pa. Commw. Ct. 2013) (finding that government-issued e-mail addresses are “personal” under Section 708(b)(6)); 65 A.3d 1105, 1111 (Pa. Commw. Ct. 2013) (finding that government-issued telephone numbers are “personal” under Section 708(b)(6)). However, in *Pa. State Sys. of Higher Educ. v. Fairness Ctr.*, No. 1203 C.D. 2015, 2016 Pa. Commw. Unpub. LEXIS 245 (Pa. Commw. Ct. 2016), the Commonwealth Court held that otherwise exempt e-mail addresses were public because the addresses were “held out to the public” by a government agency. Accordingly, the Department may redact “secondary” telephone numbers, personal e-mail addresses that have not been held out to the public, and driver’s license numbers from the responsive records.

⁶ While additional types of information, such as trade secrets and personnel files, are made confidential by 25 Pa. Code § 215.14, the Department does not argue that these types of information are at issue in this appeal.

⁷ The Department explains that the redacted telephone numbers are “secondary” numbers issued to Department employees, which are not held out for public use.

3. **The Department has demonstrated that certain records relate to noncriminal investigations conducted by the Department**

The Department denied access to records or portions of records under Section 708(b)(17) of the RTKL, which exempts from disclosure records of an agency “relating to noncriminal investigations,” including “[i]nvestigative materials, notes, correspondence and reports[,]” and records that, if disclosed, would “[r]eveal the institution, progress or result of an agency investigation.” 65 P.S. §§ 67.708(b)(17)(ii), (vi). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). Furthermore, the investigation must specifically involve an agency’s legislatively-granted fact-finding powers. *See Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

As discussed above, the Department is authorized to “[e]ncourage, participate in or conduct studies, *investigations*, training, research remedial actions and demonstrations relating to control, regulation and monitoring of radiation sources.” 35 P.S. § 7110.301(c)(12) (emphasis added). The Department is empowered to “conduct inspections and *investigations* of the facilities and regulated activities of radiation-producing machines and licensees of radioactive material necessary to demonstrate compliance with [the RPA].” *See* 25 Pa. Code § 215.12 (emphasis added). As such, the Department is clearly vested with “legislatively-granted, fact-finding powers.”

In support of its denial of access to records pursuant to the noncriminal investigative records exemption, the Department cites the Allard Affidavit⁸, which provides, in pertinent part:

[The Department] conducted an official investigation at the ProTechnics temporary job site ... because of the series of events detailed in Paragraphs 27-31 of this affidavit.

Records exist that pertain to the three noncriminal investigations [the Department] conducted and consist of inspection reports prepared by the Radiation Protection Program, photographs, internal pre-enforcement documents such as emails, draft enforcement documents, and staff reviews of ProTechnics['] radioactive materials license registration. These records do not contain purely factual information [and] exist and were solely created because of [the Department's] investigations into ProTechnics['] ... as required under the [RPA] and its regulations.

Releasing these records would reveal the institution and progress of [the Department's] noncriminal investigations ... of ProTechnics....

When citing Section 708(b)(17), the Commonwealth has cautioned that "it [is] incumbent upon [an agency] to determine whether records exist[] that [do] not fall within the exception or whether an exception to the noncriminal investigation [exemption] require[s] that certain documents be disclosed." *Heavens v. Pa. Dep't of Envir. Prot.*, 65 A.3d 1069, 1075 (Pa. Commw. Ct. 2013); *see also* 65 P.S. § 67.708(b)(17)(vi)(A). Therefore, the OOR must determine whether an exception to Section 708(b)(17) applies—namely, whether the records document "the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorized issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court." *See* 65 P.S. § 67.708(b)(17)(vi)(A). Here, the Department acknowledges that records subject to the exception of Section 708(b)(17) exist, but were withheld or redacted by the Department pursuant to other exemptions of the RTKL. In fact, the Allard Affidavit states that:

⁸ The Department also cites the Forney, Derstine, Bookser, and Shearer Affidavits, which make similar assertions regarding records possessed by the Department's respective regional offices.

Noncriminal investigative records redacted and provided to [the Requester] in response to his RTKL request memorialize the imposition of a fine or civil penalty; the suspension, modification, or revocation of a license, permit, registration, certification or similar authorization issued by [the Department]; or is an executed settlement agreement, redactions were required.

The information redacted within the noncriminal investigative records produced is subject to protection under the public safety and security exception of the RTKL.... The redacted information included the isotope type, activity concentration, quantities, licensee contact information, radioactive materials license number, specific license conditions, authorized locations of use, well owner/operator name and contact information, and internal [Department] tracking numbers.... However, [the Department] believed it was in the public interest, to the extent possible, to release redacted NOV's and Consent Order and Agreements because these records reflect [the Department's] final decisions.

Based upon the evidence provided, the Department has established that the records identified in the Allard Affidavit quoted above are exempt from disclosure, in whole or in part, pursuant to Section 708(b)(17) of the RTKL because they relate to noncriminal investigations conducted by the Department. *See* 65 P.S. § 67.708(a). However, to the extent these records were redacted for reasons other than Section 708(b)(17), these redactions are addressed in the balance of this Final Determination.

4. The Department has established that certain records are exempt as notes and working papers of Department employees/officials

The Department denied access to records under Section 708(b)(12) of the RTKL, which exempts from disclosure “[n]otes and working papers prepared by or for a public official or agency employee used solely for that official’s or employee’s own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.”

65 P.S. § 67.708(b)(12). This exemption protects “notes and working papers created by a[] public official or employee regarding agency-related business, but not for an ‘official function’.”

Escalera v. Adams County, OOR Dkt. AP 2011-0184, 2011 PA O.O.R.D. LEXIS 176.

The Department relies upon the Forney Affidavit, which asserts that approximately 42 records "contain the personal notes prepared by [Department] staff and [were] used solely for that employee's own personal use." The Forney Affidavit further states that "[t]he handwritten records were personal notes of Steven Acker, Radiation Protection Program Manager and myself" and "[r]emained in the takers['] sole and exclusive possession and [were] used to refresh recollections." Finally, the Forney Affidavit explains that "[t]he notes were not taken at the direction of anyone at [the Department] and were created in the sole discretion of each employee." As discussed above, a sworn affidavit is competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d at 520-21. Accordingly, the Department has established that these handwritten notes are exempt from disclosure under Section 708(b)(12) of the RTKL. *See* 65 P.S. § 67.708(b)(12).

5. The Department has established that certain records reflect the internal, predecisional deliberations of the Department

The Department argues that certain records, including e-mails discussing proposed enforcement actions against ProTechnics, draft notification letters, draft NOV's, and draft consent agreements, among other items, reflect the internal, predecisional deliberations of Department employees and officials. *See* 65 P.S. § 67.708(b)(10). Section 708(b)(10) of the RTKL exempts from public disclosure a record that reflects:

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, ...or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). To withhold a record under Section 708(b)(10)(i)(A), an agency must show: (1) the deliberations reflected are internal to the agency, including representatives,

(2) the deliberations reflected are predecisional, *i.e.*, before a decision on an action; and (3) the contents are deliberative in character, *i.e.*, pertaining to a proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011); *Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *Sansoni v. Pa. Hous. Fin. Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *Kyle v. Pa. Dep't of Cmty. & Econ. Dev.*, OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310.

In support of its argument, the Department points to the Allard Affidavit⁹, which identifies by name and title the recipients of the records, and states that the “[w]ithheld records for this RTKL exception did not include ProTechnics or any other third-party.” Additionally, the Allard Affidavit states that the issues deliberated by Department personnel included the “[s]teps to take ... regarding” the investigations of ProTechnics, “potential actions for [the Department] to take following [the] in-person meeting with ProTechnics[,]” “[the Department’s] enforcement options and possible actions” following the ProTechnics investigations, and “[the Department’s] review of reports submitted by ProTechnics[,]” among other things. The Allard Affidavit further states that “[n]one of the withheld ... records were created after the final decision to which they correlate....”¹⁰ Finally, the Department attests that “[t]he records do not contain purely factual information.” *See McGowan*, 103 A.3d at 385-88.

A review of the various affidavits and exemption log¹¹ submitted by the Department on appeal demonstrate that the records withheld by the Department under Section 708(b)(10) of the RTKL consist of internal communications between Department employees/officials, and are predecisional as they occurred during the course of the Department’s investigations of

⁹ The Department also references the Forney, Derstine, Bookser and Shearer Affidavits, which provide substantially similar information as the Allard Affidavit.

¹⁰ The Department notes that each of the NOV’s constitutes a final decision in a Department investigation of ProTechnics.

¹¹ A copy of the exemption log is attached as an exhibit to this Final Determination.

ProTechnics and prior to the Department's decision to issue each of the respective NOV's. See *Spatz v. City of Reading*, OOR Dkt. AP 2010-0655, 2010 PA O.O.R.D. LEXIS 717; *Lehigh Valley Planning Comm'n v. Pa. Dep't of Transp.*, OOR Dkt. AP 2010-0001, 2010 PA O.O.R.D. LEXIS 64. Likewise, the records are deliberative in nature as they relate to the course of action taken by the Department when investigating ProTechnics' violations, including the consideration of enforcement options and other actions, as well as the review of ProTechnics' license application and, ultimately, the issuance of the individual NOV's. Therefore, the Department has met its burden of proof that the records withheld pursuant to Section 708(b)(10) of the RTKL reflect the internal, predecisional deliberations of the Department. See 65 P.S. § 67.708(a)(1).

However, to the extent the records were sent to or received by individuals other than Department employees/officials, such as representatives of ProTechnics, the records are not internal to the Department and cannot be withheld under Section 708(b)(10). See *Quillen v. Lower Merion Twp.*, OOR Dkt. AP 2016-0024, 2016 PA O.O.R.D. LEXIS 725; *Cedar Realty Trust v. Lower Macungie Twp.*, OOR Dkt. AP 2013-1799, 2013 PA O.O.R.D. LEXIS 1072.¹²

6. The Department has demonstrated that records are protected by the attorney-client privilege and/or the attorney-work product doctrine

The Department claims that certain records are protected by privilege. The RTKL defines "privilege" as "[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." 65 P.S. § 67.102. The OOR gives paramount respect to both the attorney-client privilege and the attorney-work product doctrine and recognizes the importance of guarding both.

¹² For example, Record No. 12 of the exemption log submitted by the Department's Southeast Regional Office references an e-mail chain containing communications exchanged with ProTechnics' employees. Any correspondence that was sent to or received by employees of ProTechnics would not be internal to the Department under Section 708(b)(10) of the RTKL.

In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). An agency may not rely on a bald assertion that the attorney-client privilege applies. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to withhold records”). Instead, the agency must establish the first three prongs of the privilege for it to apply. *See Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 420 (Pa. Commw. Ct. 2014); *see also Office of the Governor v. Davis*, 122 A.3d 1185 (Pa. Commw. Ct. 2015). However, once the agency has done so, the requester has the burden of proving that the agency waived the privilege. *Bagwell*, 103 A.3d at 420-21.

The attorney-work product doctrine, on the other hand, prohibits disclosure “of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. The Pennsylvania Supreme Court has explained that the attorney-work product doctrine “manifests a particular concern with matters arising in anticipation of litigation.” *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011) (citing *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001) and stating that “[t]he ‘work product rule’ is closely related to the attorney-client privilege

but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation”); *see also Heavens v. Pa. Dep't of Envtl. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) (“[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked”).

The Department asserts, through the Allard, Forney and Derstine Affidavits, that certain records are protected from disclosure by the attorney-client privilege and attorney-work product doctrine. The Affidavits state that the records sought legal advice relating to the Department’s investigations of ProTechnics, including ProTechnics’ license application and reporting obligations, among other things, and were not shared with any third parties outside of the Department. The Affidavits further state that the records claimed to be privileged by the Department do not contain factual information that can be separated from that which is privileged. *See McGowan*, 103 A.3d at 385-88. Additionally, the Affidavits state that the records contain the mental impressions, conclusions, opinions, and written work product created by the Department’s legal counsel regarding the investigations of ProTechnics. As noted above, affidavits may serve as competent evidence to sustain an agency’s burden of proof. *See Sherry*, 20 A.3d at 520-21. Based on the foregoing, as well as a review of the exemption log provided by the Department on appeal, the Department has met its burden of proving that these records are protected by the attorney-client privilege and/or the attorney-work product doctrine.

7. The Department and ProTechnics have established that certain records constitute confidential proprietary information

The Department denied access to records pursuant to Section 708(b)(11) of the RTKL, which exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). The RTKL defines “confidential

proprietary information” as “[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.” 65 P.S. § 67.102. In determining whether certain information is “confidential,” the OOR must consider “the efforts the parties undertook to maintain their secrecy.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014). In determining whether “disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released.” *Id.*

On appeal, ProTechnics argues that certain documentation—Trace and Logging Services Filed Receipt Agreements (“Field Receipt Agreements”) and correspondence with the State of California (“Correspondence”)—submitted to the Department constitutes confidential proprietary information. In support of this assertion, ProTechnics has submitted an affidavit from Mr. Williams, who attests as follows:

7. Part of ProTechnics’ obligations as a regulated entity is to submit to the [Department] ... documentation related to its business activities.
8. Included within the information submitted by ProTechnics to the [Department] are copies of ProTechnics’ Trace and Logging Services Field Receipt Agreements.... Trace and logging services are cutting edge completion diagnostic services (measuring fracture height, zonal coverage, proppant distribution, wellbore connectivity and fracture fluid performance) that are accurate and proven, providing the information required to allow ProTechnics’ customers to:
 - Send more oil and gas down the pipeline
 - Deliver incremental production
 - Reduce production costs
9. These Field Receipt Agreements provide detailed descriptions of the trace and logging services rendered by ProTechnics for its clients, including

confidential customer information concerning the exact type and amount of tracer used in conjunction with ProTechnics' services at the clients' request.

10. The exact type and amount of tracer used in ProTechnics['] trace and logging services is confidential proprietary information because most job designs are unique and client specific. If this information [was] shared publicly, competitors could gain access to information regarding ProTechnics' completion designs, its clients' well dynamics, and production estimates. The release of the information to the public would negatively impact ProTechnics because ProTechnics' clients trust in ProTechnics' ability to maintain their confidential information and disclosure would likely cause ProTechnics' competitive position in the marketplace to suffer substantial harm.
11. Furthermore, the Field Receipt Agreements also reflect ProTechnics' confidential pricing information for its trace and logging services. The release of this information to the public would negatively impact ProTechnics because, given current market conditions, the disclosure of client confidentiality would result in substantial competitive harm to Core Laboratories and/or ProTechnics. Core Laboratories has taken extensive measures to ensure the services and data provided by all of its worldwide companies are of the highest quality and integrity.... The company would lose the competitive advantages it has gained through its substantial investment in innovative products if this information were disclosed. This loss of competitive advantage would occur worldwide. As a result, Core Laboratories and/or ProTechnics revenues would decline significantly.
12. The Correspondence contains confidential customer information including the location of ProTechnics' customer's facility, the materials stored there, and the radiation levels at that location. This reflects customer information that ProTechnics treats as confidential and proprietary and does not disclose publicly because ProTechnics is trusted by its customers to keep this sensitive customer information confidential.
13. Additionally, the Correspondence contains sensitive information regarding radioactive materials including a description of the exact type of radioactive material at issue, the amount of activity and radiation levels of those materials. Public disclosure of the existence of radioactive materials at a company's facility could cause unnecessary alarm and negative business implications.
14. The [c]onfidential [d]ocumentation at issue all include information about client names, specific projects and pricing for ProTechnics' work that is proprietary to ProTechnics and/or its clients and, as detailed below, is not information that is publicly released by ProTechnics.

15. Indeed, ProTechnics goes to great length to protect its confidential proprietary information, including the [c]onfidential [d]ocuments at issue here. Such information is only shared with third parties when legally obligated, in confidence and with those who ProTechnics provides services. ProTechnics has multiple service agreements and/or contracts that specify confidentiality terms between ProTechnics and its clients. All recipients of this sensitive information receive notification that is confidential proprietary information. This information within ProTechnics is accessible to only a limited number of individuals and on a "need-to-know" basis. ProTechnics has taken specific steps to protect confidentiality of this information, including the implementation of strict work practice requirements to ensure that the necessary internal company controls are in place to ensure the limited use of confidential information. Confidential information is maintained in a company password-protected system. Employees of ProTechnics that have access to such information have, in addition to their common law obligations, undertaken a written obligation to maintain the confidentiality and secrecy of the information.

Based upon the evidence provided, ProTechnics has demonstrated that the disclosure of the Field Receipt Agreements and the Correspondence is limited to only those individuals within the company that need to know the information and third parties, such as the Department, when legally obligated. Furthermore, ProTechnics has demonstrated that the disclosure of the information would be substantially harmful because it would allow competitors to ascertain ProTechnics' customer information, as well as pricing agreed to by ProTechnics and its customers. Moreover, the OOR has previously held client and pricing information constitute confidential proprietary information and may be protected as such when necessary facts are substantiated by the evidence submitted into the record. *See Hodges v. Pa. Dep't of Corr.*, OOR Dkt. AP 2015-0241, 2014 PA O.O.R.D. LEXIS 320; *Ropart Asset Mgmt. v. Pa. Turnpike Comm'n*, OOR Dkt. AP 2013-2380, 2014 PA O.O.R.D. LEXIS 55. Accordingly, ProTechnics has met its burden of proof that the release of the Field Receipt Agreements and Correspondence would result in substantial harm to its competitive position.

8. The Department has established that the disclosure of certain records would threaten public safety or security

The Department denied access to records based upon Sections 708(b)(2) and 708(b)(3) of the RTKL. See 65 P.S. §§ 67.708(b)(2)-(3). Section 708(b)(2) exempts from disclosure records “maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity[.]” 65 P.S. § 67.708(b)(2). To establish this exemption, an agency must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Id.* at 375.

Meanwhile, Section 708(b)(3) of the RTKL exempts from disclosure “[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, infrastructure, facility or information storage system.” 65 P.S. § 67.708(b)(3); see *Crockett v. Southeastern Pa. Transp. Auth.*, OOR Dkt. AP 2011-0543, 2011 PA O.O.R.D. LEXIS 268 (holding that rail car inspection and repair records were not exempt under this exemption); *Portnoy v. Bucks County*, OOR Dkt. AP 2009-1007, 2009 PA O.O.R.D. LEXIS 728 (finding that an agency did not establish that a log of card swipes was protected under this exemption). In order for this exemption to apply, “the disclosure of” the records—rather than the records themselves—must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructure. See 65 P.S. § 67.708(b)(3).

In *Bowling v. Office of Open Records*, the Commonwealth Court held that the knowledge of the location of some goods and services may pose a threat to public safety. 990 A.2d at 825.

The OOR has also recognized the dangers of disclosing records pertaining to the infrastructure of public utility systems. See *Schultz v. Pa. Hist. Museum Comm'n*, OOR Dkt. AP 2011-0102, 2011 PA O.O.R.D. LEXIS 243 (denying access to a report containing detailed design drawings and technical information for hydroelectric power project); *Moss v. Londonderry Twp.*, OOR Dkt. AP 2009-1088, 2010 PA O.O.R.D. LEXIS 50 (denying access to building plans for structures at nuclear facility); *Schumacher v. City of Scranton*, OOR Dkt. AP 2009-0280, 2009 PA O.O.R.D. LEXIS 153 (denying access to fire hydrant reports); but see *Pittsburgh Post-Gazette v. Pa. Emgcy. Mgmt. Agency*, OOR Dkt. AP 2014-1055, 2014 PA O.O.R.D. LEXIS 1094 (finding that general statistical information contained in reports relating to the transportation of crude oil was not exempt from disclosure under Section 708(b)(3)).

In its position statement, the Department suggests that “[t]here are a multitude of security reasons why radioactive material files should not be released [to the public] so as not to threaten public safety.” Specifically, the Allard Affidavit¹³ states:

Radioactive materials files cannot be released to the public for public safety and security reasons. If the information contained in the radioactive materials files were released to the public and obtained by an individual with criminal intent, the public’s health and safety could be severely compromised. An individual could potentially cause radioactive materials to be widely dispersed resulting in greater environmental contamination and public exposure to radioactive material potentially leading to harmful health effects.

Furthermore, the release of this sensitive information could pose a potential threat to the personal safety of individuals employed in the use of radioactive materials. If ProTechnics or the well owner/operator’s personal contact information was released, a person with malicious intent could target them to obtain unauthorized access to radioactive material.

...

In other states, individuals have manipulated information contained in a radioactive materials license and other files to unlawfully obtain radioactive materials resulting in the potential to use those radioactive materials to harm the

¹³ Similar assertions were made in the Forney and Derstine Affidavits.

public. The sensitive nature of the subject matter contained in all radioactive materials files provides an individual [with] insight into the radioactive materials license application process and the documentation needed to fraudulently obtain radioactive materials. This insight includes what a radioactive materials license looks like, the type of training licensees must complete as required by [the Department], specifics regarding radiation protection programs, and internal [Department] tracking numbers.

The Department further explains that its "radioactive materials files ... contain information regarding the current location and quantity of radioactive materials possessed by licensees." The Allard Affidavit provides, in relevant part:

Making this information available to the public presents a risk "reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity." Location and quantity information, should it be publicly available, could be used by terrorists or other criminals who want to obtain radioactive materials or could create an increased threat to the licensee housing the materials thus making it a target of criminal activity. An increased threat would exist of exposing other persons to radioactive materials, and the associated health risks, after the materials were taken from the licensee.

[The Department] granted ... [the Request] with respect to the NOV's, Consent Order and Agreements, and Addendum, but redacted information that could compromise public health, safety, and security. Among the redacted information w[as] the isotope type, activity concentration, quantities, license contact information, radioactive materials license number, specific license conditions, authorization locations of use, well owner/operator name and contact information, and internal [Department] tracking numbers. This information was redacted because its public release would create the potential for radioactive material to be fraudulently obtained, misused, or stolen resulting in harm to the public's health, safety, and environment....

Based upon the evidence provided, the Department has met its burden of proving that the disclosure of records reflecting the current location and quantity of radioactive materials possessed by licensees is reasonably likely to jeopardize public safety. *See generally Heltzel v. Pa. Dep't of Labor and Indus.*, OOR Dkt. 2014-1203, 2014 PA O.O.R.D. LEXIS 1107. Therefore, the Department may redact this information from the responsive records. *See* 65 P.S. § 67.706.

However, to the extent the Department seeks to withhold or redact records reflecting the location of gas well sites, the contact information of well site owners/operators, and contact information and licensing records relating to ProTechnics, including internal tracking numbers, the Department has failed to demonstrate how disclosure of this information would be reasonably likely to threaten public safety or the security of a building. Speculation, alone, is not sufficient to meet the burden. *See Carey*, 61 A.3d at 375; *Lutz v. City of Phila.*, 6 A.3d 669 (Pa. Commw. Ct. 2010); *see also Rome v. Exeter Borough*, OOR Dkt. AP 2016-0730, 2016 PA O.O.R.D. LEXIS 699. While the Department argues that releasing this information could allow a person with nefarious intent to obtain unauthorized access to radioactive materials, the evidence provided does not indicate that the disclosure of the location of gas well sites and the contact information of well site owners/operators, much of which is already available on the Department's website, would endanger public safety or pose a health risk to any particular person. *See, e.g., Abraham v. School Dist. of Phila.*, OOR Dkt. AP 2012-0070, 2012 PA O.O.R.D. LEXIS 47 ("Mere speculation of harm from the possible use of records, without more, does not demonstrate a reasonable likelihood of harm from the disclosure of records"); *Campbell v. Pa. Office of Admin.*, OOR Dkt. AP 2012-0283, 2012 PA O.O.R.D. LEXIS 183.

Moreover, the Department's concern about the potential increase in the submission of fraudulent license applications is belied by the fact that a blank copy of the license application, as well as general information form relating to the application, can be found on the Department's website. Further, as noted in Mr. Allard's supplemental sworn affidavit, the Department, which maintains control over the application process, has in place many protections to ensure a license application is legitimate, including, verification of the names and addresses of proposed licensees, review of the application by at least two Radiation Health Physicists, a pre-licensing

inspection¹⁴ and final approval of the license by a Department Supervisor. Because the Department has failed to establish that the information contained in these records would be reasonably likely to threaten public safety or endanger the physical security of a building, the Department has not met its burden of proving that the records (or parts of records) are exempt from disclosure under Sections 708(b)(2) or 708(b)(3) of the RTKL. See 65 P.S. § 67.708(a)(1).

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted in part and denied in part**, and the Department is required to provide all responsive records, subject to the redaction and withholding of records as authorized above, 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 according to court rules 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.¹⁵ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

¹⁴ The pre-licensing inspection is conducted to verify the location of the facility associated with the license application and that the facility meets its regulatory obligation to protect members of the public from radiation exposure.

¹⁵ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

FINAL DETERMINATION ISSUED AND MAILED: 24 June 2016

/s/ Joshua T. Young

JOSHUA T. YOUNG, ESQ.
APPEALS OFFICER

Sent to: Frederick Frank, Esq. (via e-mail only);
Jacqueline Conforti Barnett, Esq. (via e-mail only);
Dawn Schaefer (via e-mail only);
Roy Arnold, Esq. (via e-mail only)

Attachment 3



March 7, 2016

UPS Tracking Number 1Z16633X0395417308

Kendra L. Smith, Esquire
Smith Butz, LLC
125 Technology Drive, Suite 202, Bailey Center I
Canonsburg, PA 15317

Re: Right-to-Know Request Numbers: 1400-16-071 (CO), 4100-16-0027 (SE), 4200-16-023 (NE), 4300-16-019 (SC), 4400-16-010 (NC), 4500-16-018 (SW), 4600-16-029 (NW)

Dear Attorney Smith:

On February 1, 2016, the open-records officer of the Department of Environmental Protection (Department) received your written request for records and assigned it the tracking numbers listed above. The subject of your request required its assignment to the Department's Central Office (CO), and the Southeast (SE), Northeast (NE), Southcentral (SC), Northcentral (NC), Southwest (SW), and Northwest (NW) Regional Offices. However, for purposes of this final response, the Department's CO is responding on its own behalf to your request under the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-67.3104 (RTKL). You will receive final correspondence under separate cover from the other assigned offices.

You requested records for Core Laboratories d/b/a Protechnics, Division of Core Laboratories, LP located at the Yeager Drill Site, McAdams Road, Washington, Pennsylvania. You are 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 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.

By your email on February 3, 2016, to Department Legal Counsel, Edward Stokan of the Department's SW Regional Office, you amended your RTKL request to the following:

- All drill sites in the Commonwealth, including but not limited to the Yeager Drill site as indicated in attachment 1 of the original request. Your request is granted in part and denied in part for records held by the Department's CO and records responsive to your request are enclosed.

An initial response to your request was due on February 8, 2016. On that date, the Department notified you that it required an additional 30 days, until March 9, 2016, to respond to your request.

Your request is granted in part and denied in part for records held by the Department's CO and records responsive to your request are enclosed.

Your request covers 29 pages of material. The cost of fulfilling your request is \$27.21 (\$.25 per page for the duplication of 29 pages; \$.50 per page for redaction of 24 pages; and \$7.96 for postage).

Please remit payment in this amount by **March 28, 2016**, to the Department at the address listed. Checks should be made out to the Commonwealth of Pennsylvania and also reference the RTKL Request Number 1400-16-071. The remittance should be sent to me. Cash or credit card payment is not accepted.

Further, please note that failure to pay for records provided in response to a RTKL request to any executive agency will preclude you from obtaining further records from another executive agency, pursuant to the provisions of section 901 of the RTKL and Section IV (D) of the Department's RTKL Policy, published at <http://www.dep.pa.gov/Citizens/PublicRecords/RightToKnowLaw/Pages/default.aspx#.VobNGxwo7X4>.

Also, if payment is not received and you request the same records again the request may be disruptive under 65 P.S. § 67. 506(a)(1).

However, a portion of your request is denied. CO has withheld 3,232 pages of material and also redacted portions of 24 pages of material. Eight redacted pages were previously provided to you in 2015 from the Department's Central Office.

With respect to those records for which the Department is denying your request, the records are either exempt from production under Section 708 of the RTKL, 65 P.S. § 67.708, or protected by a privilege.

Section 305 of the RTKL provides that records shall not be presumed to be public records if they are exempt under section 708 or protected by a privilege. 65 P.S. § 67.305(a) and (b). The withholding and redacting of records are for the following legally permissible reasons:

Regulatory Preclusion to the Release of Records.

The Department's regulations pertaining to radiologic health specify that among those records not available for public inspection are "[a] report of an investigation ... which would disclose the institution, progress or results of an investigation undertaken by the Department." 25 Pa. Code § 215.14(2). Under the RTKL, the presumption of an agency record being public does not apply if a record is exempt from disclosure under any state law or regulation. 65 P.S. § 67.305(a)(3). Consequently, the regulatory inability to release inspection reports by the Department's radiation protection program and records for the radioactive materials general license registration, removes approximately 791 pages of responsive records from the RTKL definition of a public record. 65 P.S. § 67.102. Therefore, access to these records is denied by the CO due to a regulatory restriction.

Public Safety and Security.

Radioactive materials files cannot be released to the public for public safety and security reasons. A radioactive materials license, related complaint, incident report, inspection report, any notice of violation regarding radioactive materials and the company employees' names and contact information who manage the radioactive material are exempt from disclosure under multiple provisions of the RTKL. Disclosing the contents of these records would reveal specific information pertaining to the nature and location of radioactive materials.

Pursuant to Section 708(b)(2) of the RTKL, a record is exempt from access by a requester if the record is "maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity" 65 P.S. § 67.708(b)(2).

Furthermore, Section 708(b)(3) of the RTKL provides that a record is exempt from access by a requester if disclosure of the record "creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, [or] infrastructure" 65 P.S. § 67.708(b)(3).

The disclosure of a license's contents, incident report, and any inspection report could reasonably lead to public safety risks. The license and reports provide detailed information about the specific location and the security measures taken to protect radioactive materials. Moreover, radioactive materials files generally contain information identifying radioactive source possessed, the quantity or type of source, activity of the source, location of the source, identity of individuals authorized to have access to or use of the source, and similar sensitive information. Information contained within these files would give a determined adversary the means to actually do harm to others.

An individual could utilize the information contained in the license and reports to unlawfully obtain the radioactive materials for illicit purposes thus creating a major security and health breach. If an individual with criminal intent obtained these materials or should an individual re-publish the information contained within a license and reports which was subsequently obtained by someone with criminal intent, the public's health and safety could be severely compromised.

CO has withheld approximately 1,544 pages of records that would otherwise be responsive to your request. The information of concern within these records specifically includes the licensees' names, license numbers, physical addresses, ProTechnics' employees' identities, ProTechnics' employees' email addresses, types of sources, activities of sources, quantities of sources, locations of sources, use of sources or modalities, names of authorized users, contact names at the site, license-specific information, inspection reports, CO staff who have knowledge of the sources, and documentation of security controls implemented at the site to prevent unauthorized access to the sources.

Internal, Predecisional Deliberation Exception.

The Department denies your request to records that reflect its predecisional, internal deliberations, because such records are exempt from production under the RTKL. 65 P.S. § 67.708(b)(10).

Section 708(b)(10)(i)(A) of the RTKL states that a Commonwealth agency can withhold records that reflect, "The internal, pre-decisional deliberations of an agency, its members, employees or officials or pre-decisional deliberations between agency members, employees or officials and members, employees or officials of another agency . . . , contemplated or proposed policy or course of action of any research, memos or other documents used in the predecisional deliberations." 65 P.S. § 67.708(b)(10)(i)(A). According to the language of Section 708(b)(10)(i), protected records must be internal, predecisional, and deliberative. *McGowan v. Dep't of Env'tl. Protection*, 103 A.3d 374 (Pa. Cmwlth. 2014).

Furthermore, in addition to protecting records that are internal, predecisional deliberations, Section 708(b)(10)(i)(A) also protects records that "reflect" deliberations. Although "reflect" is not expressly defined in the RTKL, it was discussed at length by the Commonwealth Court in *Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Cmwlth. 2013) (*en banc*) (*Scolforo*). The Court stated:

[W]e recognize that the General Assembly utilized the specific term "*reflect*," 65 P.S. § 67.708(b)(10) (*emphasis added*), and did not use the term "*reveal*." The term *reflect* means "mirror" or "show," while the term *reveal* means "to make publicly or generally known" or, in other words, "disclose." *Webster's Third New International Dictionary* 1908, 1942 (2002). Given the broad meaning of the term *reflect*, as opposed to *reveal*, and the fact that the General Assembly chose the term *reflect* when providing for the predecisional deliberative exception, we must interpret the exception as written.

Scolforo, 65 A.3d at 1101-1102.

Accordingly, the General Assembly's specific use of the word "reflect" in the internal, predecisional deliberation exception of the RTKL signifies that there is no requirement that the deliberated course of action be detailed, set forth, or summarized in a record in order to confer this protection. 65 P.S. § 67.708(b)(10)(i)(A). Thus, a record is protected from disclosure even if it reflects the agency's deliberations.

Consequently, approximately 1,500 pages of records are exempted from disclosure because these records contain or reflect the CO's internal, predecisional deliberative records or were relied upon by the CO as part of its internal, predecisional deliberative process. The records withheld pertain to internal correspondence among CO employees reflecting the decision making process regarding enforcement actions, draft letters, draft notices of violations and meeting notes. These records are internal, prior to any final decision, and do not reflect the final determination of the Department.

Confidential Proprietary Information.

To the extent that your request identifies confidential proprietary information, the CO denies a portion of your request because such records are exempt from disclosure by the Radiological Health Regulations, 25 Pa. Code § 215.1 *et. seq.* and the RTKL, 65 P.S. § 67.708(b)(11).

Specifically, the CO has determined that approximately 128 pages of records reveal confidential proprietary information and constitute or reveal trade secrets. These responsive records are exempt pursuant to 25 Pa. Code § 215.14 of the Radiological Health Regulations, which states:

The following Department records are not available for public inspection, unless the Department determines that disclosure is in the public interest and is necessary for the Department to carry out its duties under the act:

- (1) Trade secrets or secret industrial processes customarily held in confidence.
- (2) A report of investigation, not pertaining to safety and health in industrial plants, which would disclose the institution, progress or results of an investigation undertaken by the Department.
- (3) Personnel, medical and similar files, the disclosure of which would operate to the prejudice or impairment of a person's reputation or personal safety.

"Confidential proprietary information" is defined under the RTKL as "[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information." 65 P.S. § 67.102.

Also, under the RTKL "trade secrets" is defined as:

Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

- (1) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

65 P.S. § 67.102.

Specifically, the CO has determined that the disclosure of approximately 128 pages, though responsive, would undermine ProTechnics' competitive position in the marketplace and would reveal a specialized framework that ProTechnics expended substantial time and money to develop.

Therefore, based on these legal authorities, the CO withheld approximately 128 pages of records. These records include patent information and well tracer presentation information.

Noncriminal Investigation.

The noncriminal investigation exceptions of 65 P.S. §§ 67.708(b)(17)(i) and (ii) exempt from disclosure: (i) Complaints submitted to an agency; and (ii) Investigative materials, notes, correspondence and reports. Section 708(b)(17)(vi)(A) through (E) further exempts records, that, if disclosed, would do one or more of the following:

- (A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.
- (B) Deprive a person of the right to an impartial adjudication.
- (C) Constitute an unwarranted invasion of privacy.
- (D) Hinder an agency's ability to secure an administrative or civil sanction.
- (E) Endanger the life or physical safety of an individual.

65 P.S. §§ 67.708(b)(17)(vi)(A-E).

Section 305(a) of the Radiation Protection Act states:

The department or its duly authorized representatives shall have the power to enter at all reasonable times with sufficient probable cause upon any public or private property, building, premise or place, for the purposes of determining compliance with this act, any license conditions or any rules, regulations or orders issued under this act. In the conduct of an investigation, the department or its duly authorized representatives shall have the authority to conduct tests, inspections or examination of any radiation source, or of any book, record, document or other physical evidence related to the use of a radiation source.

35 P.S. § 7110.305(a).

Section 215.12 of the Radiation Regulations states:

- (a) *Maintenance of records.* Licensees and registrants shall maintain records under this article and have these records available for inspection by the Department at

pertaining to routine inspections, noncompliance inspections or complaint-driven inspections, which are conducted within its statutory authority.

Attorney Client Privilege/Attorney Work Product.

The attorney-client privilege provides that:

In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa. C.S. § 5928.

According to the above statute, four elements must be satisfied in order to successfully invoke the protections of the attorney-client privilege: (1) the asserted holder of the privilege is or sought to become a client, (2) the person to whom the communication was made is a member of the bar of a court, or his subordinate, (3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort, and (4) that privilege has been claimed and is not waived by the client. It also covers confidential client to attorney communications and confidential attorney to client communications made for the purpose of obtaining or providing legal advice. *Gillard v. AIG Insurance Co.*, 15 A.3d 44 (Pa. 2011).

The RTKL defines "Privilege" as "the attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." 65 P.S. § 67.102. The OOR has properly acknowledged the attorney-client privilege even applies to less formal communications, such as e-mails, between a public agency and its attorneys. *Guster v. Jefferson Township*, No. AP-2009-0367 (Pa. O.O.R.D. June 5, 2009).

Consistent with these criteria, the CO has withheld 82 records because of attorney-client privilege and attorney-work product privileges. The withheld pages contain legal advice from Department counsel to staff regarding noncriminal investigations, enforcement actions, and media inquiries.

Personal Identification Information

The RTKL exempts personal identification information from disclosure. 65 P.S. § 67.708(b)(6). Personal identification information includes, but is not limited to a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number, or other confidential personal identification number.

March 7, 2016

The personal identification information of concern are Department employees' email addresses and internal telephone numbers. However, these records are the records previously accounted for and also withheld under the "regulatory preclusion," and the noncriminal investigation exception asserted within this response.

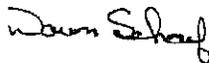
This rationale of telephone numbers being specific to an individual and thus being deemed personal extends to government-issued "personal" cellular telephones as well as assigned personal telephone extensions. The fact that government business may be discussed over an employee's government-issued personal cellular telephone does not make that telephone any less "personal" within the meaning of the RTKL. *Office of the Governor v. Raffle*, 65 A.3d 1105 (Pa. Cmwlth. 2013). Personal does not mean that it has to involve a public official's "personal affairs" but are personal to that official in carrying out public responsibilities. *City of Philadelphia v. Philadelphia Inquirer*, 52 A.3d 456, 461 (Pa. Cmwlth. 2012). Both government issued telephone numbers and direct desk telephone extensions, are clearly personal to that official for carrying out the duties of Commonwealth employment. The same analysis applies to government issued personal emails. Consequently, as PII, it is appropriate for the Department to withhold these records. *See also: Department of Public Welfare v. Clofine*, 706 C.D. 2013 (Pa. Cmwlth. February 20, 2014) (*unpublished*).

However, you have a right to appeal this response in writing to the Executive Director, Office of Open Records (OOR), Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) all Department responses;
- 2) your request; and
- 3) the reason why you think the Department is wrong in its response.

Also, the OOR has an appeal form available on the OOR website at: <http://www.openrecords.pa.gov/Using-the-RTKL/Pages/RTKLForms.aspx#.Voa6lRwo7X5>.

Sincerely,



Dawn Schaeff
Agency Open Records Officer

Enclosure

cc: RTK CO Legal via email
RTK CO COM, OG, RP via email
RTK SE NE SC NC SW NW via email

Attachment 4



pennsylvania

DEPARTMENT OF ENVIRONMENTAL PROTECTION
SOUTHCENTRAL REGIONAL OFFICE

March 9, 2016

UPS Tracking: 1Z1696310399852106

Kendra L. Smith, Esquire
Smith Butz, LLC
125 Technology Drive, Suite 202, Bailey Center 1
Canonsburg, PA 15317

Re: Right-to-Know Request Numbers: 1400-16-071 (CO), 4100-16-0027 (SE), 4200-16-023 (NE), **4300-16-019 (SC)**, 4400-16-010 (NC), 4500-16-018 (SW), 4600-16-029 (NW)

Dear Attorney Smith:

On February 1, 2016, the open-records officer of the Department of Environmental Protection (Department) received your written request for records and assigned it the tracking numbers listed above. Due to the nature of this request it was assigned to the Department's Central Office (CO), and the Southeast (SE), Northeast (NE), Southcentral (SC), Northcentral (NC), Southwest (SW), and Northwest (NW) Regional Offices.

For purposes of this letter, the Department's SC Regional Office is responding on its own behalf as to your request under the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-67.3104 (RTKL). You will receive final correspondence under separate cover from the other assigned offices.

You requested records for Core Laboratories d/b/a Protechnics, Division of Core Laboratories, LP located at the Yeager Drill Site, McAdams Road, Washington, Pennsylvania. You are 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

Southcentral Regional Office

300 Elmston Avenue, Harrisburg, PA 17110-8200 | 717.795.4704 | Fax 717.795.4930
www.dep.pa.gov

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 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.

By your email of February 3, 2016, to Edward Stokan, Legal Counsel for the Department's Southwest Regional Office, you amended your RTKL request to the following:

- All drill sites in the Commonwealth, including but not limited to the Yeager Drill site as indicated in attachment 1 of the original request.

A copy of your request, and your modification to the request, are enclosed and incorporated into this final response.

An initial response to your request was due on or before February 8, 2016. On February 8, 2016, we notified you that the Department required an additional thirty days, until March 9, 2016, to respond to your request.

Your request is granted in part and denied in part.

For records where your request has been granted, the SC Regional Office has produced 29 pages of responsive records.

The total cost of fulfilling your request is \$10.67 (\$7.25 for the cost of duplication of 29 pages of standard material at \$.25 per page; and \$3.42 for postage).

Please provide payment in this amount to Jesse Klick at the address contained within this letter by March 30, 2016. Checks are to be payable to the Commonwealth of Pennsylvania and reference the RTKL request number listed above. Cash or credit cards are not accepted.

Further, please note that failure to pay for records made available in response to a RTKL request to any executive agency will preclude you from obtaining further records from another executive agency, pursuant to the provisions of section 901 of the RTKL and Section IV (D) of the Department's RTKL Policy, as published at: <http://www.dep.pa.gov/Citizens/PublicRecords/RightToKnowLaw/Pages/default.aspx#.VobNGxwo7X4>.

Also, if payment is not received and you request the same records again the request may be considered a disruptive requester under 65 P.S. § 67. 506(a)(1) of the RTKL.

However, a portion of your request is denied. SC Regional Office has withheld 1,681 pages of material and also provided redacted portions of 24 pages of material.

With respect to those records for which the Department is denying your request, the records are either exempt from production under Section 708 of the RTKL, 65 P.S. § 67.708, or protected by a privilege.

Section 305 of the RTKL provides that records shall not be presumed to be public records if they are exempt under section 708 or protected by a privilege. 65 P.S. § 67.305(a) and (b). The withholding and redacting of records are for the following legally permissible reasons:

Regulatory Preclusion to the Release of Records.

The Department's regulations pertaining to radiologic health specify that among those records not available for public inspection are "[a] report of an investigation ... which would disclose the institution, progress or results of an investigation undertaken by the Department." 25 Pa. Code § 215.14(2). Under the RTKL, the presumption of an agency record being public does not apply if

a record is exempt from disclosure under any state law or regulation. 65 P.S. § 67.305(a)(3). Consequently, the regulatory inability to release inspection reports by the Department's radiation protection program and records for the radioactive materials general license registration, removes approximately 791 pages of responsive records from the RTKL definition of a public record. 65 P.S. § 67.102. Therefore, access to these records is denied due to a regulatory restriction.

Public Safety and Security.

Radioactive materials files cannot be released to the public for public safety and security reasons. A radioactive materials license, related complaint, incident report, inspection report, any notice of violation regarding radioactive materials and the company employees' names and contact information who manage the radioactive material are exempt from disclosure under multiple provisions of the RTKL. Disclosing the contents of these records would reveal specific information pertaining to the nature and location of radioactive materials.

Pursuant to Section 708(b)(2) of the RTKL, a record is exempt from access by a requester if the record is "maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity" 65 P.S. § 67.708(b)(2).

Furthermore, Section 708(b)(3) of the RTKL provides that a record is exempt from access by a requester if disclosure of the record "creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, [or] infrastructure" 65 P.S. § 67.708(b)(3).

The disclosure of a license's contents, incident report, and any inspection report could reasonably lead to public safety risks. The license and reports provide detailed information about the specific location and the security measures taken to protect radioactive materials. Moreover, radioactive materials files generally contain information identifying radioactive source possessed, the quantity or type of source, activity of the source, location of the source, identity of individuals authorized to have access to or use of the source, and similar sensitive information. Information contained within these files would give a determined adversary the means to actually do harm to others.

An individual could utilize the information contained in the license and reports to unlawfully obtain the radioactive materials for illicit purposes thus creating a major security and health breach. If an individual with criminal intent obtained these materials or should an individual re-publish the information contained within a license and reports which was subsequently obtained by someone with criminal intent, the public's health and safety could be severely compromised.

The SC Regional Office has withheld approximately 1,536 pages of records that would otherwise be responsive to your request. The information of concern within these records specifically includes the licensees' names, license numbers, physical addresses, ProTechnics' employees' identities, ProTechnics' employees' email addresses, types of sources, activities of sources, quantities of sources, locations of sources, use of sources or modalities, names of authorized users, contact names at the site, license-specific information, inspection reports, SC Regional Office staff who have knowledge of the sources, and documentation of security controls implemented at the site to prevent unauthorized access to the sources.

Internal, Predecisional Deliberation Exception.

The Department denies your request to records that reflect its predecisional, internal deliberations, because such records are exempt from production under the RTKL. 65 P.S. § 67.708(b)(10).

Section 708(b)(10)(i)(A) of the RTKL states that a Commonwealth agency can withhold records that reflect, "The internal, pre-decisional deliberations of an agency, its members, employees or officials or pre-decisional deliberations between agency members, employees or officials and members, employees or officials of another agency..., contemplated or proposed policy or course of action of any research, memos or other documents used in the predecisional deliberations." 65 P.S. § 67.708(b)(10)(i)(A). According to the language of Section 708(b)(10)(i), protected records must be internal, predecisional, and deliberative. *McGowan v. Dep't of Env'tl. Protection*, 103 A.3d 374 (Pa. Cmwlth. 2014).

Furthermore, in addition to protecting records that are internal, predecisional deliberations, Section 708(b)(10)(i)(A) also protects records that "reflect" deliberations. Although "reflect" is not expressly defined in the RTKL, it was discussed at length by the Commonwealth Court in *Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Cmwlth. 2013) (*en banc*) (*Scolforo*). The Court stated:

[W]e recognize that the General Assembly utilized the specific term "*reflect*," 65 P.S. § 67.708(b)(10) (*emphasis added*), and did not use the term "*reveal*." The term *reflect* means "mirror" or "show," while the term *reveal* means "to make publicly or generally known" or, in other words, "disclose." *Webster's Third New International Dictionary* 1908, 1942 (2002). Given the broad meaning of the term *reflect*, as opposed to *reveal*, and the fact that the General Assembly chose the term *reflect* when providing for the predecisional deliberative exception, we must interpret the exception as written.

Scolforo, 65 A.3d at 1101-1102.

Accordingly, the General Assembly's specific use of the word "reflect" in the internal, predecisional deliberation exception of the RTKL signifies that there is no requirement that the

deliberated course of action be detailed, set forth, or summarized in a record in order to confer this protection. 65 P.S. § 67.708(b)(10)(i)(A). Thus, a record is protected from disclosure even if it reflects the agency's deliberations.

Consequently, approximately 201 pages of records are exempted from disclosure because these records reflect the SC Regional Offices's internal, predecisional deliberative records or were relied upon by the SC Regional Office as part of its internal, predecisional deliberative process. The records withheld pertain to internal correspondence among Department employees reflecting the decision making process regarding enforcement actions, draft letters, draft notices of violations and meeting notes. These records are internal, prior to any final decision, and do not reflect the final determination of the Department.

Confidential Proprietary Information.

To the extent that your request identifies confidential proprietary information, the SC Regional Office denies a portion of your request because such records are exempt from disclosure by the Radiological Health Regulations, 25 Pa. Code § 215.1 *et. seq.* and the RTKL, 65 P.S. § 67.708(b)(11).

Specifically, the SC Regional Office has determined that approximately 128 pages of records reveal confidential proprietary information and constitute or reveal trade secrets. These responsive records are exempt pursuant to 25 Pa. Code § 215.14 of the Radiological Health Regulations, which states:

The following Department records are not available for public inspection, unless the Department determines that disclosure is in the public interest and is necessary for the Department to carry out its duties under the act:

- (1) Trade secrets or secret industrial processes customarily held in confidence.
- (2) A report of investigation, not pertaining to safety and health in industrial plants, which would disclose the institution, progress or results of an investigation undertaken by the Department.
- (3) Personnel, medical and similar files, the disclosure of which would operate to the prejudice or impairment of a person's reputation or personal safety.

"Confidential proprietary information" is defined under the RTKL as "[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information." 65 P.S. § 67.102.

Also, under the RTKL "trade secrets" is defined as:

Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

- (1) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

65 P.S. § 67.102.

Specifically, the SC Regional Office has determined that the disclosure of approximately 128 pages, though responsive, would undermine ProTechnics' competitive position in the marketplace and would reveal a specialized framework that ProTechnics expended substantial time and money to develop.

Therefore, based on these legal authorities, the SC Regional Office withheld approximately 128 pages of records. These records include patent information and well tracer presentation information.

Noncriminal Investigation.

The noncriminal investigation exceptions of 65 P.S. §§ 67.708(b)(17)(i) and (ii) exempt from disclosure: (i) Complaints submitted to an agency; and (ii) Investigative materials, notes, correspondence and reports. Section 708(b)(17)(vi)(A) through (E) further exempts records, that, if disclosed, would do one or more of the following:

- (A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.
- (B) Deprive a person of the right to an impartial adjudication.
- (C) Constitute an unwarranted invasion of privacy.
- (D) Hinder an agency's ability to secure an administrative or civil sanction.
- (E) Endanger the life or physical safety of an individual.

65 P.S. §§ 67.708(b)(17)(vi)(A-E).

Section 305(a) of the Radiation Protection Act states:

The department or its duly authorized representatives shall have the power to enter at all reasonable times with sufficient probable cause upon any public or private property, building, premise or place, for the purposes of determining compliance with this act, any license conditions or any rules, regulations or orders issued under this act. In the conduct of an investigation, the department or its duly authorized representatives shall have the authority to conduct tests, inspections or examination of any radiation source, or of any book, record, document or other physical evidence related to the use of a radiation source.

35 P.S. § 7110.305(a).

Section 215.12 of the Radiation Regulations states:

(a) *Maintenance of records.* Licensees and registrants shall maintain records under this article and have these records available for inspection by the Department at permanent sites or facilities of use identified in a license or registration issued under this article.

(b) *Rights of the Department.* The Department and its agents and employees will:

(1) Have access to, and require the production of, books, papers, documents and other records and physical evidence pertinent to a matter under investigation.

(2) Require a registrant or licensee to make reports and furnish information as the Department may prescribe.

(3) Enter the premises of a licensee or registrant for the purpose of making an investigation or inspection of radiation sources and the premises and facilities where radiation sources are used or stored, necessary to ascertain the compliance or noncompliance with the act and this chapter and to protect health, safety and the environment.

(c) *Inspections and investigations by the Department.* The Department, its employees and agents may conduct inspections and investigations of the facilities and regulated activities of registrants of radiation-producing machines and licensees of radioactive material necessary to demonstrate compliance with the act or this article.

(d) *Additional inspections and investigations.* The Department, its employees and agents may conduct additional follow-up inspections and investigations if violations of the act or regulations promulgated thereunder were noted at the time of the original inspection, or if a person presents information, or circumstances arise which give the Department reason to believe that the health and safety of a person is threatened or that the act or this article are being violated.”

25 Pa. Code § 215.12

To substantiate the RTKL noncriminal investigation exception under 65 P.S. § 67.708(b)(17), an agency must demonstrate that a systematic or searching inquiry, a detailed examination, or an official probe was conducted regarding a noncriminal matter. *Dep't of Env'tl. Protection v. Delaware Riverkeeper Network*, 113 A.3d 869 (Pa. Cmwlth. 2015). Additionally, records created by the Department, or gathered from outside sources and used as part of its investigation, are also exempt from disclosure. *John v. Dep't of Env'tl. Protection*, No. AP-2011-0657 (Pa. O.O.R.D. July 8, 2011).

Approximately 20 pages of responsive records include inspection reports prepared by the Department's radiation protection program, internal pre-enforcement documents, and reviews of the radioactive materials general license registration. These records prompted the SC Regional Office to conduct an official probe at the facility and conduct a detailed examination of the registration documents under the Department's statutory and regulatory authority within the Radiation Protection Act, 35 P.S. § 305(a) and Radiation Protection Regulations, 25 Pa. Code § 215.12. Consequently, the disclosure of those reports would reveal the SC Regional Office's institution, progress or result of an agency's investigations pertaining to routine inspections, noncompliance inspections or complaint-driven inspections, which are conducted within its statutory authority.

Personal Identification Information.

The RTKL exempts personal identification information from disclosure. 65 P.S. § 67.708(b)(6). Personal identification information includes, but is not limited to a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number, or other confidential personal identification number.

The SC Regional Office has withheld approximately 230 pages of records that would otherwise be responsive to your request. The information of concern within these records includes Department employees' internal telephone numbers. These records are the records previously accounted for and also withheld under the "regulatory preclusion" and noncriminal investigation exception contained within this response.

Section 708(b)(6)(a) of the RTKL, 65 P.S. § 67.708(b)(6)(a), lists what constitutes personal identification information. Based on the types of information listed, it clearly means information that is unique to a particular individual or which may be used to identify or isolate an individual from the general population. It is information which is specific to the individual, not shared in common with others, and which makes an individual distinguishable from another. *Delaware County v. Schaefer*, 45 A.3d 1149, 1153 (Pa. Cmwlth. 2011).

This rationale of telephone numbers being specific to an individual and thus being deemed personal extends to government-issued "personal" cellular telephones, as well as assigned personal telephone extensions. The fact that government business may be discussed over an employee's government-issued personal cellular telephone does not make that telephone any less "personal" within the meaning of the RTKL. *Office of the Governor v. Raffle*, 65 A.3d 1105, 1111 (Pa. Cmwlth. 2013). Personal does not mean that it has to involve a public official's "personal affairs" but that it is personal to that official in carrying out public responsibilities. *City of Philadelphia v. Philadelphia Inquirer*, 52 A.3d 456, 461 (Pa. Cmwlth. 2012).

Both government issued telephone numbers and direct desk telephone extensions are clearly personal to that official for carrying out the duties of Commonwealth employment. The same analysis applies to government issued personal email messages. Consequently, as personal identification information, it is appropriate for the Department to withhold these records. *See also Dep't of Public Welfare v. Clofine*, 2014 WL 688127 (Pa. Cmwlth. February 20, 2014).

However, you have a right to appeal this response in writing to Executive Director, Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) all Department responses;
- 2) your request; and
- 3) the reason(s) you believe the Department erred in its response.

Also, the OOR has an appeal form available on the OOR website at:
<http://www.openrecords.pa.gov/Using-the-RTKL/Pages/RTKLForms.aspx#.VpQKEBwo7X6>

Sincerely,



Robert E. Conrad
Assistant Regional Director

cc: Craig S. Lambeth, Esquire

Attachment 5



pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

March 9, 2016

CERTIFIED MAIL NO. 7003 2260 0005 8731 2497

Kendra L. Smith, Esquire
Smith Butz, LLC
125 Technology Drive, Suite 202, Bailey Center 1
Canonsburg, PA 15317

Re: Right-to-Know Request Numbers: 1400-16-071 (CO), 4100-16-0027 (SE), 4200-16-023 (NE), 4300-16-019 (SC), 4400-16-010 (NC), 4500-16-018 (SW), 4600-16-029 (NW)

Dear Attorney Smith:

On February 1, 2016, the open-records officer of the Department of Environmental Protection (Department) received your written request for records and assigned it the tracking numbers listed above. The subject of your request required its assignment to the Department's Central Office (CO), and the Southeast (SE), Northeast (NE), Southcentral (SC), Northcentral (NC), Southwest (SW), and Northwest (NW) Regional Offices. However, for purposes of this final response, the Department's SW Regional Office is responding on its own behalf to your request under the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-67.3104 (RTKL). You will receive final correspondence under separate cover from the other assigned offices.

You requested records for Core Laboratories d/b/a Protechnics, Division of Core Laboratories, LP located at the Yeager Drill Site, McAdams Road, Washington, Pennsylvania. You are 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 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.

By your email on February 3, 2016, to Department Legal Counsel Edward Stokan of the Department's SW Regional Office, you amended your RTKL request to the following:

- All drill sites in the Commonwealth, including but not limited to the Yeager Drill site as indicated in attachment 1 of the original request.

An initial response to your request was due on February 8, 2016. On that date, the Department notified you that it required an additional 30 days, until March 9, 2016, to respond to your request.

Your request is denied for the following legally permissible reasons:

Public Safety and Security.

Radioactive materials files cannot be released to the public for public safety and security reasons. A radioactive materials license, related complaint, incident report, inspection report, any notice of violation regarding radioactive materials and the company employees' names and contact information who manage the radioactive material are exempt from disclosure under multiple provisions of the RTKL. Disclosing the contents of these records would reveal specific information pertaining to the nature and location of radioactive materials.

Pursuant to Section 708(b)(2) of the RTKL, a record is exempt from access by a requester if the record is "maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity" 65 P.S. § 67.708(b)(2).

Furthermore, Section 708(b)(3) of the RTKL provides that a record is exempt from access by a requester if disclosure of the record "creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, [or] infrastructure" 65 P.S. § 67.708(b)(3).

The disclosure of a license's contents, incident report, and any inspection report could reasonably lead to public safety risks. The license and reports provide detailed information about the specific location and the security measures taken to protect radioactive materials. Moreover, radioactive materials files generally contain information identifying radioactive source possessed, the quantity or type of source, activity of the source, location of the source, identity of individuals authorized to have access to or use of the source, and similar sensitive information. Information contained within these files would give a determined adversary the means to actually do harm to others.

An individual could utilize the information in the license and reports to unlawfully obtain the radioactive materials for illicit purposes thus creating a major security and health breach. If an individual with criminal intent obtained these materials or should an individual re-publish the information contained within a license and reports which was subsequently obtained by someone with criminal intent, the public's health and safety could be severely compromised.

The SW Regional Office has withheld approximately 1,641 pages of records that would otherwise be responsive to your request. The information of concern within these records specifically includes the licensees' names, license numbers, physical addresses, ProTechnics' employees' identities, ProTechnics' employees' email addresses, types of sources, activities of sources, quantities of sources, locations of sources, use of sources or modalities, names of authorized users, contact names at the site, license-specific information, inspection reports, SW Regional Office staff who have knowledge of the sources, and documentation of security controls implemented at the site to prevent unauthorized access to the sources.

Internal, Predecisional Deliberation Exception.

The Department denies your request to records that reflect its predecisional, internal deliberations, because such records are exempt from production under the RTKL. 65 P.S. § 67.708(b)(10).

Section 708(b)(10)(i)(A) of the RTKL states that a Commonwealth agency can withhold records that reflect, "The internal, pre-decisional deliberations of an agency, its members, employees or officials or pre-decisional deliberations between agency members, employees or officials and members, employees or officials of another agency..., contemplated or proposed policy or course of action of any research, memos or other documents used in the predecisional deliberations." 65 P.S. § 67.708(b)(10)(i)(A). According to the language of Section 708(b)(10)(i), protected records must be internal, predecisional, and deliberative. *McGowan v. Dep't of Env'tl. Protection*, 103 A.3d 374 (Pa. Cmwlth. 2014).

Furthermore, in addition to protecting records that are internal, predecisional deliberations, Section 708(b)(10)(i)(A) also protects records that "reflect" deliberations. Although "reflect" is not expressly defined in the RTKL, it was discussed at length by the Commonwealth Court in *Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Cmwlth. 2013) (*en banc*) (*Scolforo*). The Court stated:

[W]e recognize that the General Assembly utilized the specific term "*reflect*," 65 P.S. § 67.708(b)(10) (*emphasis added*), and did not use the term "*reveal*." The term *reflect* means "mirror" or "show," while the term *reveal* means "to make publicly or generally known" or, in other words, "disclose." *Webster's Third New International Dictionary* 1908, 1942 (2002). Given the broad meaning of the term *reflect*, as opposed to *reveal*, and the fact that the General Assembly chose the term *reflect* when providing for the predecisional deliberative exception, we must interpret the exception as written.

Scolforo, 65 A.3d at 1101-1102.

Accordingly, the General Assembly's specific use of the word "reflect" in the internal, predecisional deliberation exception of the RTKL signifies that there is no requirement that the deliberated course of action be detailed, set forth, or summarized in a record in order to confer this protection. 65 P.S. § 67.708(b)(10)(i)(A). Thus, a record is protected from disclosure even if it reflects the agency's deliberations.

Consequently, of the approximately 1,641 pages of records that are being withheld, as described above, 35 pages are also exempted from disclosure because these records reflect the Department's internal, predecisional deliberative records or were relied upon by the Department as part of its internal, predecisional deliberative process. The records withheld pertain to internal correspondence among Department employees reflecting the decision making process regarding enforcement actions, draft letters, draft notices of violations, and meeting notes. These records

are internal, prior to any final decision, and do not reflect the final determination of the Department.

Regulatory Preclusion to the Release of Records.

The Department's regulations pertaining to radiologic health specify that among those records not available for public inspection are "[a] report of an investigation ... which would disclose the institution, progress or results of an investigation undertaken by the Department." 25 Pa. Code § 215.14(2). Under the RTKL, the presumption of an agency record being public does not apply if a record is exempt from disclosure under any state law or regulation. 65 P.S. § 67.305(a)(3). Consequently, the regulatory inability to release inspection reports by the Department's radiation protection program and records for the radioactive materials general license registration, constitutes an additional basis to withhold approximately 1,240 pages of the approximately 1,641 pages of records that are being withheld, as described above.

Noncriminal Investigation.

The noncriminal investigation exceptions of 65 P.S. §§ 67.708(b)(17)(i) and (ii) exempt from disclosure: (i) Complaints submitted to an agency; and (ii) Investigative materials, notes, correspondence and reports. Section 708(b)(17)(vi)(A) through (E) further exempts records, that, if disclosed, would do one or more of the following:

- (A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.
- (B) Deprive a person of the right to an impartial adjudication.
- (C) Constitute an unwarranted invasion of privacy.
- (D) Hinder an agency's ability to secure an administrative or civil sanction.
- (E) Endanger the life or physical safety of an individual.

Section 305(a) of the Radiation Protection Act states:

The department or its duly authorized representatives shall have the power to enter at all reasonable times with sufficient probable cause upon any public or private property, building, premise or place, for the purposes of determining compliance with this act, any license conditions or any rules, regulations or orders issued under this act. In the conduct of an investigation, the department or its duly authorized representatives shall have the authority to conduct tests, inspections or examination of any radiation source, or of any book, record, document or other physical evidence related to the use of a radiation source.

35 P.S. § 7110.305(a).

Section 215.12 of the Radiation Regulations states:

(a) *Maintenance of records.* Licensees and registrants shall maintain records under this article and have these records available for inspection by the Department at permanent sites or facilities of use identified in a license or registration issued under this article.

(b) *Rights of the Department.* The Department and its agents and employees will:

(1) Have access to, and require the production of, books, papers, documents and other records and physical evidence pertinent to a matter under investigation.

(2) Require a registrant or licensee to make reports and furnish information as the Department may prescribe.

(3) Enter the premises of a licensee or registrant for the purpose of making an investigation or inspection of radiation sources and the premises and facilities where radiation sources are used or stored, necessary to ascertain the compliance or noncompliance with the act and this chapter and to protect health, safety and the environment.

(c) *Inspections and investigations by the Department.* The Department, its employees and agents may conduct inspections and investigations of the facilities and regulated activities of registrants of radiation-producing machines and licensees of radioactive material necessary to demonstrate compliance with the act or this article.

(d) *Additional inspections and investigations.* The Department, its employees and agents may conduct additional follow-up inspections and investigations if violations of the act or regulations promulgated thereunder were noted at the time of the original inspection, or if a person presents information, or circumstances arise which give the Department reason to believe that the health and safety of a person is threatened or that the act or this article are being violated."

25 Pa. Code § 215.12

To substantiate the RTKL noncriminal investigation exception under 65 P.S. § 67.708(b)(17), an agency must demonstrate that a systematic or searching inquiry, a detailed examination, or an official probe was conducted regarding a noncriminal matter. *Dep't of Env't. Protection v. Delaware Riverkeeper Network*, 113 A.3d 869 (Pa. Cmwlth. 2015). Additionally, records created by the Department, or gathered from outside sources and used as part of its investigation, are also exempt from disclosure. *John v. Dep't of Env't. Protection*, No. AP-2011-0657 (Pa. O.O.R.D. July 8, 2011).

March 9, 2016

Of the approximately 1,641 pages of records that are being withheld, as described above, approximately 40 pages are also exempted from disclosure because they include inspection reports prepared by the Department's radiation protection program, internal pre-enforcement documents, and reviews of the radioactive materials general license registration. These records prompted the SW Regional Office to conduct an official probe at the facility and conduct a detailed examination of the registration documents under the Department's statutory and regulatory authority within the Radiation Protection Act, 35 P.S. § 305(a) and Radiation Protection Regulations, 25 Pa. Code § 215.12. Consequently, the disclosure of those reports would reveal the SW Regional Office's institution, progress or result of an agency's investigations pertaining to routine inspections, noncompliance inspections or complaint-driven inspections, which are conducted within its statutory authority.

However, you have a right to appeal this response in writing to the Executive Director, Office of Open Records (OOR), Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) all Department responses;
- 2) your request; and
- 3) the reason why you think the Department is wrong in its response.

Also, the OOR has an appeal form available on the OOR website at: <http://www.openrecords.pa.gov/Using-the-RTKL/Pages/RTKLForms.aspx#.Voa6lRwo7X5>.

Sincerely,



Ronald A. Schwartz, P.E., BCEE
Assistant Regional Director
Southwest Regional Office

Enclosure

Attachment 6



pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

March 9, 2016

CERTIFIED MAIL NO. 91 7199 9991 7033 8586 4259

Kendra L. Smith, Esquire
Smith Butz, LLC
125 Technology Drive, Suite 202, Bailey Center 1
Canonsburg, PA 15317

Re: Right-to-Know Request Numbers: 1400-16-071 (CO), 4100-16-027 (SE), 4200-16-023 (NE), 4300-16-019 (SC), 4400-16-010 (NC), 4500-16-018 (SW), 4600-16-029(NW)

Dear Attorney Smith:

On February 1, 2016, the open-records officer of the Department of Environmental Protection (Department) received your written request for records and assigned it the tracking numbers listed above. Due to the nature of this request it was assigned to the Department's Central Office (CO), and to the Department's Southeast (SE), Northeast (NE), Southcentral (SC), Northcentral (NC), Southwest (SW), and Northwest (NW) Regional Offices. Each Office has its own tracking number under the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-67.3104 (RTKL).

The Department's Northwest Regional Office is responding to your request under the RTKL on its own behalf. Under separate covers, you will receive the final responses from the other assigned Offices.

Your request is, as follows verbatim:

- 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 Pennsylvania Department of Environmental Protection ("PA DEP") 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 PA DEP and/or between Protechnics and the PA DEP 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 PA DEP to Protechnics, including but not limited to Notices of Violation dated 06/15/10, 01/28/10, 11/26/13, 09/13/13 and 10/14/13, 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 PA DEP and Protechnics, including, but not limited to, Consent Orders and Agreements dated November 2, 2013 and November 2, 2010.

- Additionally, this request includes a request for copies of all enforcement activity taken by the PA DEP against Protechnics, including but not limited to Enforcement ID Numbers 305057, 259202 and 263973, as well as all inspection reports completed by the PA DEP regarding Protechnics, including, but not limited to, Inspection ID Numbers 1891418, 1919964, 2147772, 2204156 and 2221258.
- This request further seeks 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 PA DEP, including, but not limited to, the April 7, 2013, Radioactive Tracer Well Site Agreement between Protechnics and a well operator.
- In addition to the above, this request seeks any and all notifications submitted to the PA DEP by Protechnics or the associated operator or subcontractor regarding Protechnics confirmation that licensed material, including, but not limited to, radioactive material, was returned to the surface at any well site in which Protechnics operated/performed work or services in the Commonwealth of Pennsylvania.
- Additionally, this request seeks any and all documents, correspondence, e-mails and any other communication(s) between Protechnics and the PA DEP and/or Range Resources and the PA DEP regarding Protechnics and any and all work/services performed in the Commonwealth of Pennsylvania by Protechnics.
- Further, this request seeks any and all MSDS/SDS (material data safety sheets and safety data sheets) in the possession of the PA DEP 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 3, 2016, you modified your request by email to Assistant Counsel Edward Stokan of the Department's Southwest Regional Office, to include all drill sites in the Commonwealth including, but not limited to, the Yeager Drill site.

An initial response to your request was due on or before February 8, 2016. On that date, you were notified that the Department required an additional 30 days, until March 9, 2016, to respond to your request. A copy of your request, and your e-mail message, dated February 3, 2016,

modifying your request, are enclosed and incorporated in full into this final response for the Department's Northwest Regional Office.

Your request is granted in part and denied in part.

Except as described below, your request is granted for records that the Department's Northwest Regional Office has in its possession, custody, or control. These records are enclosed and cover 10 pages of paper records. In accordance with Department policy, no fee has been charged because of the limited number of pages.

With respect to those records for which the Department's NW Regional Office is denying your request, the records are either exempt from production under Section 708 of the RTKL, 65 P.S. § 67.708, or protected by a privilege. Section 305 of the RTKL provides that records shall not be presumed to be public records if they are exempt under section 708 or protected by a privilege. 65 P.S. § 67.305(a) and (b).

The Department's Northwest Regional Office is withholding a total of 19 pages for the following legally permissible reasons:

Public Safety and Security.

Records containing information about radioactive materials cannot be released to the public for public safety and security reasons. A radioactive materials license, related complaint, incident report, inspection report, and any notice of violation regarding radioactive materials is exempt from disclosure under multiple provisions of the RTKL. Disclosing the contents of these records would reveal specific information pertaining to the nature and location of radioactive materials.

Pursuant to Section 708(b)(2) of the RTKL, 65 P.S. § 67.708(b)(2), a record is exempt from access by a requester if the record is "maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity"

Furthermore, Section 708(b)(3) of the RTKL, 65 P.S. § 67.708(b)(3), provides that a record is exempt from access by a requester if disclosure of the record "creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, [or] infrastructure"

The disclosure of a license's contents, incident report, and any inspection report could reasonably lead to public safety risks. The license and reports provide detailed information about the specific location and the security measures taken to protect radioactive materials. Moreover, radioactive materials files generally contain information identifying radioactive source possessed, the quantity or type of source, activity of the source, location of the source, identity of individuals authorized to have access to or use of the source, and similar sensitive information. Information contained within these files would give a determined adversary the means to actually do harm to others.

An individual could utilize the information in the license and reports to unlawfully obtain the radioactive materials for illicit purposes thus creating a major security and health breach. If an individual with criminal intent obtained these materials or should an individual re-publish the information contained within a license and reports which was subsequently obtained by someone with criminal intent, the public's health and safety could be severely compromised.

The Northwest Regional Office has withheld 19 pages of records that would otherwise be responsive to your request. The information of concern within these records specifically includes the license number, licensees' names, physical addresses, employee identities or information, types of sources, quantities of sources, locations of sources, names of authorized users, contact names at the site, inspection reports, Department staff who have knowledge of the sources, and documentation of security controls implemented at the site to prevent unauthorized access to the sources.

Personal Identification Information.

The RTKL exempts personal identification information from disclosure. 65 P.S. § 67.708(b)(6). Personal identification information includes, but is not limited to a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number, or other confidential personal identification number.

The Northwest Regional Office has withheld 14 pages of records that would otherwise be responsive to your request. The information of concern within these records includes Elk Waste Services employee's driver's license number and Department employees' internal telephone numbers.

Section 708(b)(6)(a) of the RTKL, 65 P.S. § 67.708(b)(6)(a), lists what constitutes personal identification information. Based on the types of information listed, it clearly means information that is unique to a particular individual or which may be used to identify or isolate an individual from the general population. It is information which is specific to the individual, not shared in common with others, and which makes an individual distinguishable from another. *Delaware County v. Schaefer*, 45 A.3d 1149, 1153 (Pa. Cmwlth. 2011).

This rationale of telephone numbers being specific to an individual and thus being deemed personal extends to government-issued "personal" cellular telephones, as well as assigned personal telephone extensions. The fact that government business may be discussed over an employee's government-issued personal cellular telephone does not make that telephone any less "personal" within the meaning of the RTKL. *Office of the Governor v. Raffle*, 65 A.3d 1105, 1111 (Pa. Cmwlth. 2013). Personal does not mean that it has to involve a public official's "personal affairs" but that it is personal to that official in carrying out public responsibilities. *City of Philadelphia v. Philadelphia Inquirer*, 52 A.3d 456, 461 (Pa. Cmwlth. 2012).

Both government issued telephone numbers and direct desk telephone extensions are clearly personal to that official for carrying out the duties of Commonwealth employment. The same

March 9, 2016

analysis applies to government issued personal email messages. Consequently, as personal identification information, it is appropriate for the Department to withhold these records. *See also Dep't of Public Welfare v. Clofine*, 2014 WL 688127 (Pa. Cmwlth. February 20, 2014).

You have a right to appeal this response in writing to: Executive Director, OOR, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response, and send to the OOR:

- 1) all Department responses;
- 2) your request, as modified; and
- 3) the reason(s) why you think the Department is wrong in its response.

Also, the OOR has an appeal form available on the OOR website at:
<http://www.openrecords.pa.gov/Using-the-RTKL/Pages/RTKLForms.aspx#.Voa6lRwo7X5>.

Sincerely,



Staci Gustafson
Assistant Regional Director

cc: RTK Attorneys and Staff (via e-mail)

Enclosures

Attachment 7



pennsylvania

DEPARTMENT OF ENVIRONMENTAL PROTECTION
NORTHEAST REGIONAL OFFICE

March 9, 2016

VIA EMAIL

Kendra L. Smith, Esquire
Smith Butz, LLC
125 Technology Drive, Suite 202, Bailey Center I
Canonsburg, PA 15317
klsmith@smithbutzlaw.com

Re: Right-to-Know Request Numbers: 1400-16-071 (CO), 4100-16-0027 (SE), 4200-16-023 (NE), 4300-16-019 (SC), 4400-16-010 (NC), 4500-16-018 (SW), 4600-16-029 (NW)

Dear Attorney Smith:

On February 1, 2016, the open-records officer of the Department of Environmental Protection (Department) received your written request for records and assigned it the tracking numbers listed above. The subject of your request required that it be assigned to the Department's Central Office (CO), and the Southeast (SE), Northeast (NE), Southcentral (SC), Northcentral (NC), Southwest (SW), and the Northwest (NW) Regional Offices. For purposes of this letter, the Department's NE Regional Office is responding on its own behalf as to your request under the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-67.3104 (RTKL). You will receive final responses under separate cover from the other assigned offices.

You requested records for Core Laboratories d/b/a Protechnics, Division of Core Laboratories, LP located at the Yeager Drill Site, McAdams Road, Washington, Pennsylvania. You are 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

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www.dep.pa.gov

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 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.

By your email on February 3, 2016, to Department Legal Counsel, Edward Stokan, you amended your RTKL request to the following:

- All drill sites in the Commonwealth including, but not limited to, the Yeager Drill site as indicated in attachment 1 of the original request.

An initial response to your request was due on February 8, 2016. On February 8, 2016, you were notified that the Department required an additional 30 days, until March 9, 2016, to respond to your request.

The Department's NE Regional Office does not have the records that you request in its possession, under its custody or in its control.

March 9, 2016

Pursuant to the Office of Open Records' Final Decision in *Jenkins v. Pa. Dep't of State*, No. AP-2009-0065 (Pa. O.O.R.D, April 2, 2009), "It is not a denial of access when an agency does not possess records and [there is no] legal obligation to obtain them." Further, an agency is not required "to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record." 65 P.S. § 67.705.

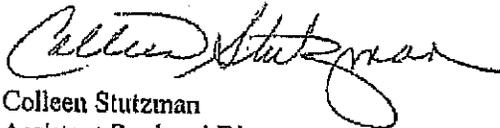
However, you have a right to appeal this response in writing to the Executive Director, Office of Open Records (OOR), Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) all Department responses;
- 2) your request; and
- 3) the reason why you think the record exists under the custody or control of the Department.

Also, the OOR has an appeal form available on the OOR website at:

<http://www.openrecords.pa.gov/Using-the-RTKL/Pages/RTKLForms.aspx#.VpQKEBwo7X6>

Sincerely,



Colleen Stutzman
Assistant Regional Director
Northeast Regional Office

Attachment 8



pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

March 9, 2016

Certified Mail Number 7014 1820 0002 3638 0353

Kendra L. Smith, Esquire
Smith Butz, LLC
125 Technology Drive, Suite 202, Bailey Center I
Canonsburg, PA 15317

Re: Right-to-Know Request Numbers: 1400-16-071 (CO), 4100-16-0027 (SE), 4200-16-023 (NE), 4300-16-019 (SC), **4400-16-010 (NC)**, 4500-16-018 (SW), 4600-16-029 (NW)

Dear Attorney Smith:

On February 1, 2016, the open-records officer of the Department of Environmental Protection (Department) received your written request for records and assigned it the tracking numbers listed above. The subject of your request required its assignment to the Department's Central Office (CO) and the Southeast (SE), Northeast (NE), Southcentral (SC), Northcentral (NC), Southwest (SW), and Northwest (NW) Regional Offices. The Department's NC Regional Office is responding on behalf of itself under the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-67.3104 (RTKL). You will receive final correspondence from the other offices under separate cover.

You requested the following records for Core Laboratories d/b/a Protechnics, Division of Core Laboratories, LP, located at the Yeager Drill Site, McAdams Road, Washington, Pennsylvania:

- 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 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.

By your email on February 3, 2016, to Department Legal Counsel, Edward Stokan, of the Department's SW Regional Office, you amended your RTKL request to the following:

- All drill sites in the Commonwealth, including but not limited to the Yeager Drill site as indicated in attachment 1 of the original request.

An initial response to your request was due on or before February 8, 2016. On that date, you were notified you that the Department required an additional thirty days, until March 9, 2016, to respond to your request.

Your request is granted in part and denied in part with respect to records located in the Department's NC Regional Office. The records enclosed with this response consist of a two page Notice of Violation, (NOV), which has been redacted for the reasons that follow. No fee has been charged in accordance with agency policy, as our fee waiver applies due to the small number of records produced.

However, your request is denied in part, and some produced records were redacted. The Department redacted portions of the January 28, 2010, NOV.

Additionally, ten emails and an NOV Response dated February 8, 2010, are being withheld for the following legally permissible reasons:

Public Safety and Security. Records containing information about radioactive materials cannot be released to the public for public safety and security reasons. A radioactive materials license, related complaint, incident report, inspection report, and any notice of violation regarding radioactive materials is exempt from disclosure under multiple provisions of the RTKL. Disclosing the contents of these records would reveal specific information pertaining to the nature and location of radioactive materials.

Pursuant to Section 708(b)(2) of the RTKL, 65 P.S. § 67.708(b)(2), a record is exempt from access by a requester if the record is "maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity"

Furthermore, Section 708(b)(3) of the RTKL, 65 P.S. § 67.708(b)(3), provides that a record is exempt from access by a requester if disclosure of the record "creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, [or] infrastructure"

The disclosure of a license's contents, incident report, and any inspection report could reasonably lead to public safety risks. The license and reports provide detailed information about the specific location and the security measures taken to protect radioactive materials. Moreover, radioactive materials files generally contain information identifying radioactive source possessed, the quantity or type of source, activity of the source, location of the source, identity of individuals authorized to have access to or use of the source, and similar sensitive information. Information contained within these files would give a determined adversary the means to actually do harm to others.

An individual could utilize the information in the license and reports to unlawfully obtain the radioactive materials for illicit purposes thus creating a major security and health breach. If an individual with criminal intent obtained these materials or should an individual re-publish the information contained within a license and reports which was subsequently obtained by someone with criminal intent, the public's health and safety could be severely compromised.

The NC Regional Office has redacted an NOV and withheld 12 pages of records that would otherwise be responsive to your request. The information of concern within these records specifically includes the license number, licensees' names, physical addresses, employee identities or information, types of sources, quantities of sources, locations of sources, names of authorized users, contact names at the site, inspection reports, Department staff who have knowledge of the sources, and documentation of security controls implemented at the site to prevent unauthorized access to the sources.

Noncriminal Investigation. To the extent that your request for records relates to the Department's non-criminal investigations, it is denied. The noncriminal investigation exceptions of 65 P.S. §§ 708(b)(17)(i) and(ii) exempts from disclosure: (i) Complaints submitted to an agency; and (ii) investigative materials, notes, correspondence and reports. Section 708(b)(17)(vi)(A) through (E) further exempts records, that, if disclosed, would do one or more of the following:

- (A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.
- (B) Deprive a person of the right to an impartial adjudication.
- (C) Constitute an unwarranted invasion of privacy.
- (D) Hinder an agency's ability to secure an administrative or civil sanction.
- (E) Endanger the life or physical safety of an individual.

65 P.S. §§ 67.708(b)(17)(vi)(A-E).

Section 305(a) of the Radiation Protection Act states:

The department or its duly authorized representatives shall have the power to enter at all reasonable times with sufficient probable cause upon any public or private property, building, premise or place, for the purposes of determining compliance with this act, any license conditions or any rules, regulations or orders issued under this act. In the conduct of an investigation, the department or its duly authorized representatives shall have the authority to conduct tests,

inspections or examination of any radiation source, or of any book, record, document or other physical evidence related to the use of a radiation source.

35 P.S. § 7110.305(a).

Section 215.12 of the Radiation Regulations states:

- (a) *Maintenance of records.* Licensees and registrants shall maintain records under this article and have these records available for inspection by the Department at permanent sites or facilities of use identified in a license or registration issued under this article.
- (b) *Rights of the Department.* The Department and its agents and employees will:
 - (1) Have access to, and require the production of, books, papers, documents and other records and physical evidence pertinent to a matter under investigation.
 - (2) Require a registrant or licensee to make reports and furnish information as the Department may prescribe.
 - (3) Enter the premises of a licensee or registrant for the purpose of making an investigation or inspection of radiation sources and the premises and facilities where radiation sources are used or stored, necessary to ascertain the compliance or noncompliance with the act and this chapter and to protect health, safety and the environment.
- (c) *Inspections and investigations by the Department.* The Department, its employees and agents may conduct inspections and investigations of the facilities and regulated activities of registrants of radiation-producing machines and licensees of radioactive material necessary to demonstrate compliance with the act or this article.
- (d) *Additional inspections and investigations.* The Department, its employees and agents may conduct additional follow-up inspections and investigations if violations of the act or regulations promulgated thereunder were noted at the time of the original inspection, or if a person presents information, or circumstances arise which give the Department reason to believe that the health and safety of a person is threatened or that the act or this article are being violated."

25 Pa. Code § 215.12

To substantiate the RTKL noncriminal investigation exception at 65 P.S. § 67.708(b)(17), an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe was conducted regarding a noncriminal matter." *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515 (Pa. Cmwlth. 2011), quoting *Dept. of Health v. OOR*, 4 A.3d 803 (Pa. Cmwlth. 2010) (internal quotation marks omitted). See also *O'Brien v. Pennsylvania State Police*, Dkt. AP 2011-1051. Information that is created by the Department or gathered from outside sources

and used by an agency as part of its investigation is exempt from disclosure. *John v. DEP*, OOR Dkt. AP 2011-0657; *Dept. of Health*, 4 A.3d 803, 810-11; *Coulter v. Pennsylvania Department of Public Welfare*, OOR Dkt. AP 2011-0699; *Slaby v. Northumberland County*, OOR Dkt. AP 2011-0331. *Heavens v. Pennsylvania Department of Environmental Protection*, 65 A.3d 1069 (Pa. Cmwlth. 2013).

The records that are being withheld as described above were created as a result of a probing inquiry into the Department's official noncriminal investigation into the disposal of radioactive waste related to gas drilling activity. To release these records would reveal the institution, progress, or result of the Department's investigation. 65 P.S. § 708(b)(17)(vi)(A).

Internal, Predecisional Deliberation Exception. The Department denies your request to records that reflect its predecisional, internal deliberations, because such records are exempt from production under the RTKL. 65 P.S. § 67.708(b)(10). Section 708(b)(10)(i)(A) of the RTKL states that a Commonwealth agency can withhold records that reflect, "The internal, pre-decisional deliberations of an agency, its members, employees or officials or pre-decisional deliberations between agency members, employees or officials and members, employees or officials of another agency..., contemplated or proposed policy or course of action of any research, memos or other documents used in the predecisional deliberations." 65 P.S. § 67.708(b)(10)(i)(A). According to the language of Section 708(b)(10)(i), protected records must be internal, predecisional, and deliberative. *McGowan v. Dep't of Env'tl. Protection*, 103 A.3d 374 (Pa. Cmwlth. 2014).

In addition to protecting records that are internal, predecisional deliberations, Section 708(b)(10)(i)(A) also protects records that "reflect" deliberations. Although "reflect" is not expressly defined in the RTKL, it was discussed at length by the Commonwealth Court in *Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa. Cmwlth. 2013) (*en banc*) (*Scolforo*). The Court stated:

[W]e recognize that the General Assembly utilized the specific term "reflect," 65 P.S. § 67.708(b)(10) (*emphasis added*), and did not use the term "reveal." The term *reflect* means "mirror" or "show," while the term *reveal* means "to make publicly or generally known" or, in other words, "disclose." *Webster's Third New International Dictionary* 1908, 1942 (2002). Given the broad meaning of the term *reflect*, as opposed to *reveal*, and the fact that the General Assembly chose the term *reflect* when providing for the predecisional deliberative exception, we must interpret the exception as written.

Scolforo, 65 A.3d at 1101-1102.

Accordingly, the General Assembly's specific use of the word "reflect" in the internal, predecisional deliberation exception of the RTKL signifies that there is no requirement that the

deliberated course of action be detailed, set forth, or summarized in a record in order to confer this protection. 65 P.S. § 67.708(b)(10)(i)(A). A record is protected from disclosure even if it reflects the agency's deliberations.

Consequently, approximately 5 pages that consist of 10 emails are exempted from disclosure because these records are or reflect the Department's internal, predecisional deliberative records or were relied upon by the Department as part of its internal, predecisional deliberative process. The records withheld pertain to internal correspondence among Department employees reflecting the decision making process regarding enforcement actions, draft letters, draft notices of violations and meeting notes. These records are internal, prior to any final decision, and do not reflect the final determination of the Department.

Personal Identification Information. The RTKL exempts personal identification information from disclosure. 65 P.S. § 67.708(b)(6). Personal identification information includes, but is not limited to a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number, or other confidential personal identification number.

The NC Regional Office has withheld approximately 1 record page that would otherwise be responsive to your request. The information of concern are Department employees' internal telephone numbers. These records are the records previously accounted for and also withheld under the "regulatory preclusion" and noncriminal investigation exception contained within this response.

Section 708(b)(6)(a) of the RTKL, 65 P.S. § 67.708(b)(6)(a), lists what constitutes personal identification information. Based on the types of information listed, it clearly means information that is unique to a particular individual or which may be used to identify or isolate an individual from the general population. It is information which is specific to the individual, not shared in common with others, and which makes an individual distinguishable from another. *Delaware County v. Schaefer*, 45 A.3d 1149, 1153 (Pa. Cmwlth. 2011).

This rationale of telephone numbers being specific to an individual and thus being deemed personal extends to government-issued "personal" cellular telephones as well as assigned personal telephone extensions. The fact that government business may be discussed over an employee's government-issued personal cellular telephone does not make that telephone any less "personal" within the meaning of the RTKL. *Office of the Governor v. Raffle*, 65 A.3d 1105, 1111 (Pa. Cmwlth. 2013). Personal does not mean that it has to involve a public official's "personal affairs" but that it is personal to that official in carrying out public responsibilities. *City of Philadelphia v. Philadelphia Inquirer*, 52 A.3d 456, 461 (Pa. Cmwlth. 2012).

Both government issued telephone numbers and direct desk telephone extensions are clearly personal to that official for carrying out the duties of Commonwealth employment. The same analysis applies to government issued personal email messages. Consequently, as personal identification information, it is appropriate for the Department to withhold these records. *See also Dep't of Public Welfare v. Clofine*, 2014 WL 688127 (Pa. Cmwlth. February 20, 2014).

Kendra Smith, Esquire

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March 9, 2016

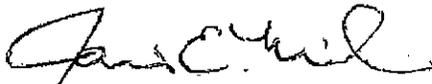
You have a right to appeal this response in writing to Executive Director, Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) all Department responses;
- 2) your request; and
- 3) the reason(s) you believe the Department erred in its response.

Also, the OOR has an appeal form available on the OOR website at:

<http://www.openrecords.pa.gov/Using-the-TKL/Pages/RTKLForms.aspx#.VpOKEBwo7X6>

Sincerely,



James E. Miller
Assistant Regional Director

Enclosure

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

KENDRA SMITH on behalf of)
Smith Butz, LLC,) No. 1431 CD 2016
)
Petitioner,)
)
vs.)
)
PENNSYLVANIA DEPARTMENT)
OF ENVIRONMENTAL)
PROTECTION)
)
Respondent.)

PROOF OF SERVICE

I hereby certify that I am, on this 12th day of September, 2016, serving the foregoing Docketing Statement, Statement of Issues and All Attachments, upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by U.S. mail upon the following:

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Date: 9/12/2016

/s/ Kendra L. Smith, Esquire
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September 12, 2016

OFFICE OF OPEN RECORDS

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**Re: Smith v. Pa. Dept. of Environmental Protection
Pa. Commonwealth Court No. 1431 CD 2016
Docketing Statement**

Dear Counsel:

Please find enclosed herein a copy of Petitioner's Docketing Statement, including the Statement of Issues and all Attachments, which was electronically filed with the Commonwealth Court on today's date relative to the above-captioned matter.

Should you have any questions, please contact our office accordingly.

Very truly yours,

Kendra L. Smith

Enclosure

cc: John M. Smith, Esq. (w/o encl.)