

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

1431 CD 2016

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OFFICE OF OPEN RECORDS

KENDRA SMITH on behalf of Smith Butz, LLC,

Petitioner,

vs.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

**PETITIONER'S DESIGNATION OF CONTENTS OF REPRODUCED
RECORD AND BRIEF STATEMENT OF ISSUES INTENDED FOR
PRESENTATION IN APPEAL PURSUANT TO Pa. R.A.P. 2154(a)**

| | |
|------------------------------|-------------------------------------|
| Agency Below: | Pennsylvania Office of Open Records |
| Date of Order Appealed From: | July 27, 2016 |
| Order Type: | Final Determination |
| Division and Docket No: | AP-2016-0587 |
| | John M. Smith, Esquire |
| | Pa. I.D. No.: 75663 |
| | Kendra L. Smith, Esquire |
| | Pa. I.D. No.: 77217 |
| | Brendan A. O'Donnell, Esquire |
| | Pa. I.D. No.: 309007 |
| | Smith Butz, LLC |
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| | <i>Counsel for Petitioner</i> |

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kendra Smith on behalf of Smith :
Butz, LLC v. Pennsylvania : 1431 CD 2016
Department of Environmental :
Protection :

**PETITIONER’S DESIGNATION OF CONTENTS OF
REPRODUCED RECORD AND BRIEF STATEMENT OF ISSUES
INTENDED FOR PRESENTATION IN APPEAL PURSUANT TO Pa.
R.A.P. 2154(a)**

The Petitioner, Kendra Smith on behalf of Smith Butz, LLC (hereinafter, “Ms. Smith”), hereby designates the following documents filed in the Pennsylvania Office of Open Records at Docket No. AP-2016-0587 to be included in its Reproduced Record which will be filed with the Commonwealth Court in the above-captioned appeal, pursuant to Pa. R.A.P. 2154(a):

A. Designation of Contents of Reproduced Record

1. OOR Dkt. AP 2016-0587: The Appeal, including all exhibits and attachments thereto, filed by Ms. Smith received by the Office of Open Records (hereinafter, the “OOR”) on March 24, 2016 and docketed as AP 2016-0587.

2. OOR Dkt. AP 2016-0587: Official Notice of Appeal dated March 25, 2016, sent to both parties advising them of the docket number and identifying the Appeals Officer for the matter.

3. OOR Dkt. AP 2016-0602: The Appeal, including all exhibits and attachments thereto, filed by Mrs. Smith received by the OOR on March 29, 2016 and docketed as AP 2016-0602.

4. OOR Dkt. AP 2016-0602: Official Notice of Appeal dated March 30, 2016, sent to both parties advising them of the docket number and identifying the Appeals Officer for the matter.

5. OOR Dkt. AP 2016-0603: The Appeal, including all exhibits and attachments thereto, filed by Mrs. Smith received by the OOR on March 29, 2016 and docketed as AP 2016-0603.

6. OOR Dkt. AP 2016-0603: Official Notice of Appeal dated March 30, 2016, sent to both parties advising them of the docket number and identifying the Appeals Officer for the matter.

7. OOR Dkt. AP 2016-0604: The Appeal, including all exhibits and attachments thereto, filed by Mrs. Smith received by the OOR on March 29, 2016 and docketed as AP 2016-0604.

8. OOR Dkt. 2016-0604: Official Notice of Appeal dated March 30, 2016, sent to both parties advising them of the docket number and identifying the Appeals Officer for the matter.

9. OOR Dkt. AP 2016-0605: The Appeal, including all exhibits and attachments thereto, filed by Mrs. Smith received by the OOR on March 29, 2016 and docketed as AP 2016-0605.

10. OOR Dkt. AP 2016-0605: Official Notice of Appeal dated March 30, 2016, sent to both parties advising them of the docket number and identifying the Appeals Officer for the matter.

11. OOR Dkt. AP 2016-0606: The Appeal, including all exhibits and attachments thereto, filed by Mrs. Smith received by the OOR on March 29, 2016 and docketed as AP 2016-0606.

12. OOR Dkt. AP 2016-0606: Official Notice of Appeal dated March 30, 2016, sent to both parties advising them of the docket number and identifying the Appeals Officer for the matter.

13. OOR Dkt. AP 2016-0607: The Appeal, including all exhibits and attachments thereto, filed by Mrs. Smith received by the OOR on March 29, 2016 and docketed as AP 2016-0607.

14. OOR Dkt. AP 2016-0607: Official Notice of Appeal dated March 30, 2016, sent to both parties advising them of the docket number and identifying the Appeals Officer for the matter.

15. Core Laboratories', doing business as ProTechnics (hereinafter, "ProTechnics"), request to participate as a third party participant dated March 31, 2016.

16. OOR e-mail chain dated March 31, 2016, granting the Pennsylvania Department of Environmental Protection's request to consolidate matters AP 2016-0587 and 2016-0602 through 2016-0607 as AP 2016-0587 and granting ProTechnics' third party participation request.

17. ProTechnics' position statement, including all exhibits and attachments thereto, dated April 22, 2016.

18. The Pennsylvania Department of Environmental Protection's (hereinafter, "PA DEP") position statement, including all exhibits and attachments thereto, dated April 22, 2016.

19. Mrs. Smith's agreement to allow an extension to issue the Final Determination dated April 26, 2016.

20. Final Determination in OOR Dkt. AP 2016-0587 dated July 27, 2016, issued by the OOR.

B. Brief Statement of Issues to be Raised on Appeal

Mrs. Smith hereby presents the following issues to be raised on appeal, based identified by the relevant Final Determination that is the basis of the complained-of issues:

1. The OOR failed to rule on Mrs. Smith's appeal on the basis of justice and fairness because it did not consider the specific requests Mrs. Smith made in her Pennsylvania Right-to-Know Law Request (the "Request") directed to the PA DEP the arguments made by any of the parties, or the evidence Mrs. Smith presented, which evidence included copious amounts of records the PA DEP sought to preclude disclosure of yet which were already available to the public. As such, the OOR's decision was not made based upon justice and fairness. *See* Exhibits attached to Mrs. Smith's appeal to each PA DEP Regional Office.

2. The OOR failed to address the specific evidence presented by Mrs. Smith to refute the PA DEP's basis for withholding and/or redacting the information it did. In fact, because the OOR incorporated Mrs. Smith's Final Determination into the *Pittsburgh Post-Gazette* Final Determination, which did not offer the same evidence Mrs. Smith offered to refute the PA DEP's reasons for withholding and/or redacting records, the OOR failed to address each of Mrs. Smith's arguments and evidence while still finding the PA DEP met its

burden and was justified in withholding and/or redacting the responsive records Mrs. Smith requested.

3. The OOR failed to rule on Mrs. Smith's appeal on the basis of justice and fairness when it simply incorporated by reference another "related" appeal, *Pittsburgh Post-Gazette v. Pa. Dep't of Evntl. Prot. and ProTechnics*, and never addressed, considered, or evaluated the evidence submitted by Mrs. Smith that clearly contradicted the PA DEP's reasons for nondisclosure.

4. The OOR erred in relying solely on the Affidavits submitted by the PA DEP because the evidence submitted by Mrs. Smith contradicted the sworn allegations contained in the Affidavits, and the OOR failed to address the inconsistency demonstrated by the documented evidence presented by Mrs. Smith and the allegations made in the Affidavits submitted by the PA DEP.

5. The OOR erred in deliberately failing to consider any of the relevant evidence presented by Mrs. Smith that clearly contradicted the evidence submitted by the PA DEP, thus depriving Mrs. Smith of her opportunity to be heard and violating her constitutional rights.

6. The OOR erred in finding that the PA DEP met its burden of proof by a preponderance of the evidence in relying on various exceptions within the Pennsylvania Right-to-Know Law, privileges, and doctrines as well as Affidavits as the basis for excluding from disclosure and/or redacting

responsive records under both Mrs. Smith's Final Determination and the *Pittsburgh Post-Gazette* Final Determination.

7. The OOR erred in determining that the PA DEP demonstrated, by a preponderance of the evidence, that the records withheld and/or redacted under the Public Safety and Security Exception of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.708(b)(2)-(3), are reasonably likely to jeopardize the public's safety and security and/or to cause imminent harm because the PA DEP presented far-fetched doomsday scenarios based on unfounded speculations. See Allard Affidavit. Rather, the PA DEP withheld and/or redacted certain information that is already available within the public domain as evidenced by the documents attached as exhibits to Mrs. Smith's appeals to each PA DEP Regional Office. These documents blatantly contradict and undermine the PA DEP's position when it withholds such information for "fear" that such information in the wrong hands would be reasonably likely to danger citizens' safety and security where the same type of information is available for public consumption. Still further, the PA DEP's and the OOR's rationale for withholding records under the Public Safety and Security Exception is undermined by the fact that records requested by Mrs. Smith are records pertaining to events and information from the past and not sites currently storing or utilizing radioactive materials. Contrary to the OOR's

findings and opinions, the PA DEP did not meet its burden of demonstrating that the public's safety would be jeopardized by disclosing information from five or six years ago.

8. The OOR erred in improperly construing and applying the Public Safety and Security Exception of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.708(b)(2)-(3).

9. The OOR erred in determining that the PA DEP demonstrated, by a preponderance of the evidence, that records were properly withheld and/or redacted under the Personal Identification Information Exception of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.708(b)(6), because much of the information withheld and/or redacted is available within the public domain, as evidenced by, among other things, the PA DEP's own website, *see* Exhibits attached to Mrs. Smith's appeals. Still further, many of the redactions claimed under this exception were sloppy and inconsistent in that some of the PA DEP Regional Offices did not redact personal identification information while other PA DEP Regional Offices did. *See* Exhibits attached to Mrs. Smith's appeals. Such haphazard and inconsistent disclosure undermines the PA DEP's position that disclosure of such information would be damaging to the PA DEP.

10. The OOR erred in improperly construing and applying the Personal Identification Information Exception of the Pennsylvania Right-to-

Know Law, 65 P.S. § 67.708(b)(6).

11. The OOR erred in determining that the PA DEP demonstrated, by a preponderance of the evidence, that records were properly withheld and/or redacted under the Internal, Predecisional Deliberations Exception of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.708(b)(10), because it defies belief to accept that the PA DEP generated thousands of pages of records as part of its internal, predecisional deliberations that resulted in only a few dozen pages of records being released and some of the records the PA DEP withheld and/or redacted were not prior to agency decision or course of action.

12. The OOR erred in failing to apply each of the three elements - (1) the information is internal to the government agency; (2) the information is prior to government agency decision or course of action; and (3) the information is deliberative in character - to justify withholding records and/or redacting information from records under the Internal, Predecisional Deliberations Exception of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.708(b)(10).

13. The OOR erred in determining that the PA DEP demonstrated, by a preponderance of the evidence, that records were properly withheld and/or redacted under the Internal, Predecisional Deliberations Exception of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.708(b)(10), because based

upon the redactions made, it is impossible to determine if it is internal, predecisional deliberations, and none of the Affidavits allege that a review of each page withheld was performed.

14. The OOR erred in improperly construing and applying the Internal, Predecisional Deliberations Exception of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.708(b)(10).

15. The OOR erred in determining that the PA DEP demonstrated, by a preponderance of the evidence, that records were properly withheld and/or redacted under the Confidential Proprietary Information Exception of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.708(b)(11), because the records withheld could not cause substantial harm to ProTechnics' competitive position. The information contained in them is available within the public domain as evidenced by the same information being available on the United States Patent and Trademark Office's website, the hearing testimony transcript of ProTechnics' President wherein the President testified in open court about the way the ZeroWash radioactive tracer product is used, and the 2013 Journal of Chemical and Pharmaceutical Research article entitled "Study and Application of ZeroWash Tracer Fracture Monitoring," which discloses how the ZeroWash radioactive tracer product that was used at the Yeager Drill Site performs. *See* Exhibits attached to each of Mrs. Smith's appeals to the PA DEP

Regional Offices.

16. The OOR erred in determining that the PA DEP demonstrated, by a preponderance of the evidence, that records were properly withheld and/or redacted under the Notes and Working Papers Exception of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.708(b)(12).

17. The OOR erred in improperly construing and applying the Notes and Working Papers Exception of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.708(b)(12).

18. The OOR erred in determining that the PA DEP demonstrated, by a preponderance of the evidence, that records were properly withheld and/or redacted under the Noncriminal Investigation Exception of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.708(b)(17), because the withheld and/or redacted records did not relate to a systematic or searching inquiry and a detailed examination but rather only evidence that the PA DEP's interaction with ProTechnics with regard to this matter involved merely issuing violations.

19. The OOR erred in improperly construing and applying the Noncriminal Investigation Exception of the Pennsylvania Right-to-Know Law, 65 P.S. § 67.708(b)(17).

20. The OOR erred in determining that the PA DEP demonstrated, by a preponderance of the evidence, that records were properly withheld and/or

redacted under the Regulatory Preclusion Exception (pursuant to the Radiation Protection Act, 35 P.S. §§ 7110.101 et seq.) because the PA DEP did not prove that the withheld and/or redacted records are trade secrets or secret industrial processes customarily held in confidence and/or 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 PA DEP.

21. The OOR erred in improperly construing and applying the Regulatory Preclusion Exception because in her Request, Mrs. Smith did not seek information that can be construed as disclosing one of ProTechnics' trade secrets since the information redacted by the PA DEP was the name of ProTechnics' radioactive tracer product – ZeroWash – which is used as a marketing tool of ProTechnics' own website. *See* Exhibits attached to Mrs. Smith's appeals to each PA DEP Regional Office. Further, the information requested was already available in the public domain, *see, e.g.*, the hearing testimony transcript of ProTechnics' President and the 2013 Journal of Chemical and Pharmaceutical Research article attached as Exhibits to each of Mrs. Smith's appeals to the PA DEP Regional Offices. Due to the fact that the product's name and information is already available in the public domain, there cannot be a finding that such information, if disclosed, would hurt ProTechnics' economic value.

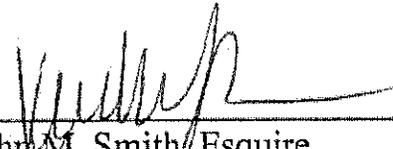
22. The OOR erred in determining that the PA DEP demonstrated, by a preponderance of the evidence, that records were properly withheld and/or redacted under the Attorney-Client Privilege and/or the Attorney Work Product Doctrine because the attorney-client privilege does not apply between the PA DEP and ProTechnics. There is no attorney-client privilege established between the PA DEP and a permittee or licensee like ProTechnics.

23. The OOR erred in improperly construing and applying the Attorney-Client Privilege and/or the Attorney Work Product Doctrine.

Dated: 10/20/16

Respectfully submitted,

SMITH BUTZ, LLC



John M. Smith, Esquire

Pa. I.D. No.: 75663

Kendra L. Smith, Esquire

Pa. I.D. No.: 77217

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Counsel for Petitioner

PROOF OF SERVICE

I, John M. Smith, Esquire, hereby certify that I am this 20th day of October, 2016, serving the foregoing Petitioner's Designation of Contents of Reproduced Record and Brief Statement of Issues Intended for Presentation in Appeal Pursuant to Pa. R.A.P. 2154(a) upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by United States First-Class Mail, postage pre-paid upon the following:

Jacqueline Conforti Barnett, Esq.
Director, General Law Division, Chief Counsel
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9th Floor, Rachel Carson State Office Building
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Telephone Number: (717) 787-1956
Counsel for the Pennsylvania Department of Environmental Protection

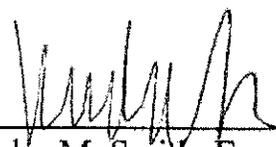
Dawn Schaeff
Agency Records Coordinator/Open Records Officer
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Pennsylvania Department of Environmental Protection
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Appeals Officer for Docket No.: AP 2016-0587

The Honorable Bruce R. Beemer
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Date: 10/16/20



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SMITH BUTZ
A LIMITED LIABILITY COMPANY
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October 20, 2016

Commonwealth Court of Pennsylvania
Michael F. Krimmel, Chief Clerk
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 2100
P.O. Box 69185
Harrisburg, PA 17106

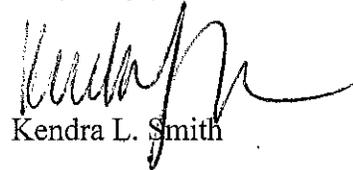
**Re: Kendra Smith on behalf of Smith Butz, LLC v. Pennsylvania Department
of Environmental Protection, 1431 CD 2016**

Dear Mr. Krimmel:

Please find enclosed herein a copy of Petitioner's Designation of Contents of Reproduced Record and Brief Statement of Issues Intended for Presentation in Appeal Pursuant to Pa. R.A.P. 2154(a) which was electronically filed with the Commonwealth Court of Pennsylvania on today's date.

Should you have any questions, please contact the undersigned.

Very truly yours,



Kendra L. Smith

KLS/seb
Enclosures

cc: John M. Smith, Esq. (w/o encl.)
Brendan A. O'Donnell, Esq. (w/o encl.)
Jacqueline Conforti Barnett, Esq. (w/o encl.)
Dawn Schaefer (w/o encl.)
✓ Jill S. Wolfe, Esquire (w/o encl.)
The Honorable Bruce R. Beemer (w/o encl.)
Roy W. Arnold, Esq. (w/o encl.)
Caitlin R. Garber, Esq. (w/o encl.)



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OFFICE OF OPEN RECORDS

October 20, 2016

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Commonwealth of Pennsylvania
Office of Open Records
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Harrisburg, PA 17120

**Re: Smith v. PA DEP, Docket No. 1431 CD 2016; Petitioner's Designation
of Contents of Reproduced Record and Brief Statement of Issues
Intended for Presentation in Appeal Pursuant to Pa. R.A.P. 2154(a)**

Dear Attorney Wolfe:

Please find enclosed herein a copy of Petitioner's Designation of Contents of Reproduced Record and Brief Statement of Issues Intended for Presentation in Appeal Pursuant to Pa. R.A.P. 2154(a) which was filed with the Commonwealth Court of Pennsylvania on today's date.

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.)
Brendan A. O'Donnell, Esq. (w/o encl.)