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OFFICE OF OPEN RECORDS

Docket No. 980 C.D. 2019

(Consolidated with 982 C.D. 2019)

BRIEF OF THE RESPONDENT

ERIC FRIEDMAN

Megan K. Shannon, Esq.
PA Id. No. 319131
Offit Kurman, PA
1801 Market Street, Suite 2300
Philadelphia, PA 19103
Tel.: (267) 338-1328
Fax: (267) 338-1335
mshannon@offitkurman.com
Attorney for Eric Friedman

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STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the Office of Open Records properly determined that the Public Utility Commission's ME1 investigative records are a public record subject to disclosure pursuant to the Public Utility Code, 66 Pa.C.S. § 335(d) where the PUC's filing of a formal complaint constitutes a "decision" triggering § 335(d)'s disclosure requirement?

Suggested answer: Yes.

2. Whether the OOR had authority to determine whether records are Confidential Security Information and properly ordered the release of investigative records that are not Confidential Security Information?

Suggested answer: Yes.

3. Whether the OOR properly ordered the release of records within the scope of the Appellee's original Request when the Appellee sought records relating to the calculation or estimate of HVL pipeline blast radii and/or "buffer zones" and the ME1 investigative records analyze the blast radii/buffer zone of ME1?

Suggested answer: Yes.

4. Whether the OOR properly concluded that the Public Utility Commission's ME1 investigative records are not exempt under any other section of the RTKL?

Suggested answer: Yes.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

The Court's standard of review is *de novo* and its scope of review is broad or plenary. *Bowling v. Office of Open Records*, 621 Pa. 133, 75 A.3d 453 (Pa. 2013).

The Court may make findings of fact and conclusions of law based upon the evidence as a whole. 65 P.S. § 67.1301(a).

STATEMENT OF THE CASE

Appellee Eric Friedman submitted a request to the Pennsylvania Public Utility Commission (“Commission”) for all records “that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced” in the possession of Paul Metro, his superiors, or his subordinates at the Commission on February 4, 2019. (R. at 6a.) Mr. Friedman submitted his request after an exchange with Mr. Metro at a community hearing in East Goshen Township during which Mr. Metro stated that the PUC had its own estimate of the “buffer zone” or “blast radius” associated with accidents on HVL pipelines. (R. at 6a.) The subject of one of these Hazard Assessment Reports, the Mariner East 1 (“ME1”) Pipeline, runs through Mr. Friedman’s neighborhood.

On March 11, 2019, the Commission denied Mr. Friedman’s request. (R. at 24a.) Mr. Friedman filed a timely appeal to the Office of Open Records (“OOR”).

In support of its position before the OOR, the Commission identified three hazard assessments (one each for ME1; the proposed ME2; and the workaround re-route of ME2 using a 1930s-era 12-inch pipeline between the Fairfield Road valve site in Wallace Township, Chester County, and the Glen Riddle valve site in Middletown Township, Delaware County, the so-called GRE or “Glen Riddle to Elverson” segment) and the Commission Inspection Reports of those pipelines

referencing those Hazard Assessments as responsive to Mr. Friedman's request. (R. at 89a.) The Commission's Bureau of Investigation & Enforcement's ("BIE") ME1 investigative report is the basis for a complaint BIE filed with the Commission on December 13, 2018. (R. at 102a-104a.)

The Commission submitted an April 15, 2019 affidavit from Paul Metro in support of its position before the OOR. (R. at 102a.) Mr. Metro attested that the responsive records are Confidential Security Information pursuant to the Public Utility Confidential Security Information Disclosure Protection Act because the records illustrate the impact zone regarding accident or sabotage on a pipeline, which could be used by a terrorist "to cause the greatest possible harm and mass destruction to the public living near such facilities."

Mr. Metro further stated in his affidavit that the Commission commenced an "official investigation" of ME1 on April 1, 2017, the date on which a Morgantown resident discovered this pipeline leaking highly volatile liquids on his property. (R. at 102a.) The Commission's Bureau of Investigation and Enforcement filed its Formal Complaint C-2018-3006534 against Sunoco Pipeline, L.P., a/k/a Energy Transfer Partners on December 13, 2018. (R. at 102a.)

Energy Transfer submitted a request to participate before the OOR on April 11, 2019. (R. at 32a.) In support of its position, Energy Transfer submitted an affidavit from its Senior Vice President of Project Services Engineering and

Construction, Joseph Perez. (R. at 42a.) Mr. Perez’s affidavit asserted that “to the extent the Requested Records exist, ET and SPLP treat this material as confidential security information in accordance with the provisions and procedures specified by the Public Utility Confidential Security Information Disclosure Protection act...” (R. at 43a, ¶ 5.) He further asserted that he believed “that the Requested Records are of sufficient detail that, if disclosed, could be used to facilitate damage or disruption to ET’s HVL pipelines.” (R. at 42a, ¶ 7.)

On May 31, 2019, the OOR requested that the PUC provide “the transmittal letters for the records submitted by ET/SPLP ...– Hazard Assessment for ME1, Hazard Assessment for proposed ME2 and Hazard Assessment for Re-route of ME2 – and that it asserts as being confidential security information...” for review by the OOR, stating that they are public records by definition (R. at 132a.) In response, the Commission sent redacted transmittal letters to the OOR, claiming they are presented for *in camera* review, and failed to serve copies on Appellee. (R. at 135a.) As such, the OOR was unable to fully develop the record and did not review or consider the transmittal letters.

On June 26, 2019, the OOR issued a Final Determination ordering the Commission to provide Mr. Friedman with a copy of its ME1 investigative records, redacted to exclude information that would jeopardize the safety of a public utility. (R. at 160a.)

SUMMARY OF THE ARGUMENT

The OOR properly ordered the release of the Commission's Bureau of Investigation & Enforcement ME1 Report because it is a public record subject to disclosure under the Right to Know Law ("RTKL"), its disclosure is required under the Public Utility Code, and it is not exempt as Confidential Security Information under the Public Utility Code. A record in the possession of a Commonwealth agency is presumed public. 65 P.S. § 67.305(a). The Commonwealth agency must establish a record is exempt from disclosure by a preponderance of the evidence. 67 P.S. § 67.708(a)(1).

The ME1 Report is a record subject to disclosure under the Public Utility Code. Pursuant to Section 335(d) of the Public Utility Code, 66 Pa.C.S. § 335(d), the Commission must produce public records. BEI's filing of a formal complaint is a "decision" of the PUC requiring public release of records pursuant to 66 Pa.C.S. § 335(d).

The OOR properly determined that the ME1 investigative records are not Confidential Security Information. The OOR has the authority to make determinations about whether a record is public under both the RTKL as well as other state and federal statutes. The OOR cannot administer another statute's program for accessing public records, but it has the authority to make determinations about the public nature of a record. *Dep't of Labor & Indus. v.*

Heltzel, 90 A.3d 823 (Cmwlth. Ct. 2014). The OOR is the proper agency to determine whether a record is Confidential Security Information under the Public Utility Confidential Security Information Disclosure Protection Act (35 P.S. § 2141.1 *et seq.*). Further, the OOR made the correct decision that the ME1 investigative records are not CSI material. The Commission and ET have not offered any evidence into the record showing their compliance with the PUC CSI Disclosure Protection Act, therefore the records they seek to withhold are not protected by that Act.

Further, the OOR did not order the release of records beyond the scope of Appellee's request. Appellee requested "all records... that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced." The ME1 investigative records are the underlying basis for the December 17, 2013 Hazard Assessment, and were identified as responsive by the Commission's Safety Division Manager. (R. at 103a.)

Finally, no exemption in § 708(b) of the RTKL exempts a redacted version of the ME1 investigative records. These records resulted in civil action by the Commission, therefore the noncriminal investigation exemption of the RTKL does not apply. The public safety exemptions of § 708(b)(2) and § 708(b)(3) do not apply because the OOR directed that information that poses a risk to public safety

be redacted. Finally, the Commission and ET have not established that these records reflect the Commission's internal, predecisional deliberative process; therefore § 708(b)(10) cannot apply.

ARGUMENT

I. The OOR properly ordered the release of records pursuant to Section 335(d) of the Public Utility Code, 66 Pa.C.S. § 335(d) because the PUC Bureau of Investigation & Enforcement’s filing of a formal complaint is a “decision” of the PUC requiring public release of records pursuant to 66 Pa.C.S. § 335(d).

The OOR properly ordered the Commission to disclose the BIE report citing the ME1 Hazard Assessment Report because the Public Utility Code requires their disclosure even if the RTKL exempts those records. The Commission has an obligation to disclose records “above and beyond that which is required by the RTKL”. *Pa. Pub. Util. Comm’n v. Seder*, 139 A.3d 165, 174 (Pa. 2016). The *Seder* Court held that “[b]y providing that the disclosure mandates of Subsection 335(d) supplement access to records provided by the RTKL, the General Assembly signaled that transparency is of particular importance in the context of the PUC’s governing relationship with public utilities.” *Id.* at 174-5.

The PUC’s Subsection 335(d) states:

(d) Release of Document. – In addition to any other requirements imposed by law, including the act of June 21, 1957 (P.L. 390, No. 212) referred to as the Right-to-Know Law, and the act of July 3, 1986 (P.L. 388, No. 84), known as the Sunshine Act, whenever the commission conducts an investigation of an act or practice of a public utility and makes a decision, enters into a settlement with a public utility or takes any other official action, as defined in the Sunshine Act, with respect to its investigation, it shall make part of the

public record and release publicly any documents relied upon by the commission in reaching its determination, whether prepared by consultants or commission employees, other than documents protected by legal privilege...

The Commission's BIE evaluated records before making the decision to file a formal complaint with the Commission regarding Public Utility Code violations related to the Mariner 1 East pipeline. (R. 158-160a.) The BIE's decision to file a formal complaint against appellant Energy Transfer Partners triggers the disclosure requirement under Subsection 335(d) of the PUC. As such, the records BIE relied upon in making the decision to file a formal complaint must be released, namely, the Hazard Assessment Report for the Mariner 1 East Pipeline and the BIE inspection reports citing that Report, must be disclosed.

On April 1, 2017, the Commission initiated "an official investigation" of the Mariner East 1 pipeline. (R. at 102a.) On December 13, 2018, Commission's BIE filed Formal Complaint C-2018-3006534 against Energy Transfer Partners regarding the ME1 pipeline. (R. at 102a.)

In *Seder*, the Pennsylvania Supreme Court held that a tip letter submitted to the PUC regarding a utility's violation of the PUC's priority-ranking policy in restoring power after an October 2011 snowstorm, and the materials from the ensuing investigation, were subject to disclosure. *Seder* at 175. The PUC and the public utility that was the subject of the PUC's investigation, PPL, unsuccessfully

argued that the PUC only required disclosure of records that the PUC Commissioners relied on in support of their official actions. *Id.* at 580-1. The Pennsylvania Supreme Court rejected a narrow reading of that the disclosure requirement only applied to materials used by the Board of Commissioners, instead concluding that the disclosure requirement extended to actions taken by any subpart of the PUC. Here, the Court should likewise reject an overly narrow reading of the PUC’s use of the word “decision.”

PUC and ETP’s argument that BIE’s “official investigation” and filing of Formal Complaint C-2018-3006534 with the Commission is not a “decision” within the meaning of Subsection 335(d) is misguided. The statute’s triggering events are (1) the Commission conducts an investigation of an act or practice of a public utility and (2) “makes a decision, enters into a settlement with a public utility, or takes any other official action, as defined in the Sunshine Act.” Here, the Commission conducted an “official investigation” and made a decision to move forward with a formal complaint based on that investigation.

The Sunshine Act defines “official action” as

- (1) Recommendations made by an agency pursuant to statute, ordinance or executive order.
- (2) The establishment of policy by an agency.
- (3) The decisions on agency business made by an agency.
- (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

65 Pa.C.S. § 703.

The Public Utility Code offers no definition of “decision”. A decision to formally investigate and the filing of a formal complaint are arguably “official actions” under the Sunshine Act. However, the Sunshine Act does not specifically state whether the decision to file a formal complaint is an “official action.”

The PUC statute separately lists three discrete triggering events (1) the Commission “makes a decision”, (2) the Commission enters into a settlement with a public utility, and (3) the Commission takes an official action as defined in the Sunshine Act. The first triggering event – the Commission’s decision-making – is not tethered to any definition in the PUC or the Sunshine Act.

Accordingly, both prongs of the test set out in Subsection 335(d) are met. First, the Commission, acting through BIE, conducted an investigation of the risks from ME1 when it reviewed the impact radius of a potential incident along the pipeline route. Second, the Commission, acting through BIE, made a decision to file formal complaint against Sunoco/ET concerning the ME1 pipeline’s design, commissioning, and operations. Once the Commission authorized formal complaint C-2018-3006534, it made a decision that triggered the RTKL and Appellee’s right to request records related to that decision. Any argument that the Commission did not take all steps set out in Subsection 335(d) to trigger the statute’s disclosure requirement must fail.

II. The OOR properly determined that the records are not CSI

The RTKL does not apply to the extent its access provisions conflict with another law. *See* 65 P.S. § 67.3101.1 (“If the provisions of this act regarding access to public records conflict with any other Federal or State law, the provisions of this act shall not apply”). However, the RTKL does not conflict with another law merely because both address public access to records, and here, the RTKL does not conflict with the Confidential Security Information Act.

A. The OOR may determine whether a record is CSI.

The Office of Open Records may properly conclude whether a record is Confidential Security Information material pursuant to Sections 2141.3(c)(4) and 2141.5 of the Confidential Security Act.

The OOR has the authority to determine the public nature of records under laws beyond the RTKL. *Dep’t of Labor & Indus. v. Hetzel*, 90 A.3d 823 (Pa. Commw. 2014). In *Hetzel*, this Court wrote that “[t]he RTKL contemplates OOR’s interpretation of statutes other than the RTKL when evaluating the public nature of records. Otherwise, it would not define ‘public record’ in a way that implicates other laws.” *Id.* at 828. “OOR is the body created to adjudicate disputes concerning denials of agency records requested under the RTKL. The RTKL thus vests OOR with jurisdiction over challenges to the public nature of

records in possession of a Commonwealth agency.” *Id* at 828-9 (citations omitted).

The Public Utility Confidential Information Disclosure Protection Act does not preempt the RTKL’s disclosure requirement or limit the Office of Open Records’ authority to adjudicate issues involving public records. The Commission has broad authority to regulate public utilities in the Commonwealth. *See PPL Elec. Utils. Corp. v. City of Lancaster*, 125 A.3d 837, 844 (Cmwlth. Ct. 2015) (“The courts of this Commonwealth have long recognized the intent of our General Assembly that public utilities be regulated on a uniform basis by a statewide regulator and not be subject to the varied regulation of the many cities, townships, and boroughs throughout the Commonwealth.”)

Likewise, the RTKL grants the Office of Open Records broad authority to “[a]ssign appeals officers to review appeals of decisions by Commonwealth agencies....” 65 P.S. § 67.1310(a)(5). The RTKL’s only limit on the agencies whose records decisions the OOR may review provides that only law enforcement agencies, the Attorney General, the State Treasurer, and Auditor General’s decisions regarding whether a record is exempt under the RTKL are not subject to OOR review. *See* 65 P.S. § 67.503(d).

The Commission and ETP incorrectly argue that the Office of Open Records has no authority to determine whether a record is properly designated as

Confidential Security Information under the Public Utility Confidential Security Information Disclosure Protection Act (“CSI Act”), 35 P.S. § 2141.1 *et seq.* The Right to Know Law grants the OOR authority to review “decisions by Commonwealth agencies”, and the Public Utility Commission is a Commonwealth agency.

The CSI statute instructs public utilities to separate documents they submit to Commonwealth agencies into two categories of documents:

- (1) PUBLIC. – Records or portions thereof subject to the provisions of the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law.
- (2) CONFIDENTIAL. -- Records or portions thereof requested to be treated as containing confidential security information and not subject to the Right-to-Know Law.

The CSI Act further calls for challenges to a public utility’s designation of information as “confidential”: challenges to a public utility’s designation of confidential security information “shall be in writing to the agency” and the “agency shall develop protocols and procedures to address challenges to the designations or requests to examine records containing confidential security information.” 35 P.S. § 2141.3(c). Agency protocols must include written notifications to interested parties and the CSI statute calls for review of the public utility’s determination to be reviewed by the Commonwealth Court. 35 P.S. § 2141.3(c)(6).

Even though the CSI act sets out requirements for review of a designation of documents as CSI, the RTKL still allows the OOR to review the Commission's decision because the Public Utility Commission statute does not conflict with the RTKL. *See Brown v. Pennsylvania Dep't of State*, 123 A.3d 801, 806 (Pa. Cmwlth. 2015) (stating that the RTKL's access provisions, including its exceptions to access, apply in the absence of a conflicting provision in another applicable state law).

While the OOR may not have authority to administer another statute and its preconditions to access, it does have the authority to construe other statutes. *See Advancement Project v. Department of Transportation*, 60 A.3d 891 (Pa. Cmwlth. 2013) (holding that the OOR had authority to construe the federal Driver's Privacy Protection Act but not to administer that statute and its preconditions to access).

Whether a record is public in nature is governed by the RTKL; when there is a conflict as to the means to access a report between the RTKL and another state or federal law, the conflicting state or federal law controls. *See Dept' of Labor & Indus. v. Heltzel*, 90 A.3d 823, 832 ("The phrase 'availability to the public' imposes a duty on an agency to provide public access to certain records as that agency sees fit to fulfill its duty. The focus is on the manner of providing the record, not the nature of the record").

This case does not present an issue of state law preemption over a local ordinance, but rather, a potential conflict between competing laws passed by the General Assembly. Field preemption exists “where analysis of the entire statute reveals the General Assembly’s implicit intent to occupy the field completely and to permit no local enactments.” *PPL Elec. Corp. v. City of Lancaster*, 125 A.3d 837, 844 (Pa. Cmwlth. Ct. 2015). Here, the General Assembly’s intent for the RTKL to occupy the entire field of public records determinations from Commonwealth agencies other than law enforcement and certain statewide officials is clear. The RTKL states that a record in the possession of a Commonwealth agency is presumed public unless “the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree.” 65 P.S. § 67.305(a)(3). The General Assembly’s inclusion of reference to other Federal or State laws addressing the public nature of records makes it clear that it intended the Office of Open Records include those other laws in its analyses of issues under the RTKL.

“Conflicts as to public access, as opposed to public nature, are governed by Section 3101.1 of the RTKL. Specifically, Section 3101.1 of the RTKL provides ‘[i]f the provisions of [the RTKL] regarding access to records conflict with any other federal or state law, the provisions of this act shall not apply.’ *Dep’t of Labor & Indus. V. Heltzel*, 90 A.3d 823, 832 (Pa. Cmwlth. 2014). In *Heltzel*, this

Court found a conflict between the Emergency Planning and Community Right-to-Know Act (“ECPRA”) and the RTKL in a dispute over records relating to hazardous chemicals in possession of the Department of Labor & Industry (“L&I”). This Court rejected L&I’s argument that the OOR lacked authority to determine the public nature of records under federal law, holding that the “RTKL contemplates OOR’s interpretation of statutes other than the RTKL when evaluating the public nature of records.” *Id.* at 828.

In *Heltzel*, this Court explained the interplay between the RTKL and other statutes:

The RTKL distinguishes between the public nature of records and access to records. In particular, Section 306 of the RTKL, entitled “Nature of document,” states: ‘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, in Section 3101.1 of the RTKL, separate reference is made to access to records. 65 P.S. § 67.3101.1 (when provisions of the RTKL ‘regarding access to records conflict’ with federal statutes, the RTKL is superseded.) We treat these concepts as distinct; otherwise, one of the RTKL provisions would be superfluous, contrary to presumed legislative intent. See 1 Pa.C.S. § 1921 (“Every statute shall be construed, if possible, to give effect to all its provisions.”

Id. at 831.

The Public Utility Confidential Security Information Disclosure Protection Act places a burden on public utilities submitting information to the Commission

to determine whether their record is CSI, and the Act instructs the agency “to develop protocols and procedures to address challenges to the designations or requests to examine records containing confidential security information.” 35 P.S. § 2141.3(c). The Act defines “Confidential Security Information” but does not establish any information as “public” in nature. 35 P.S. § 2141.2. As such, information submitted to the Commission is subject to the OOR’s review.

Conflicts as to public access to a record are governed by § 3101.1 of the RTKL: “if the provisions of [the RTKL] regarding access to records conflict with any other federal or state law, the provisions of this act shall not apply.” This Court has recognized “the distinction between interpreting terms of a federal statute and effectuating public access under a separate statutory scheme.” *Heltzel, supra*, at 832. The PUCSIDP Act instructs agencies such as the Commission to develop protocols and procedures to address challenges to the designation of CSI or requests to examine records including CSI, but nowhere in the record have ET or the Commission provided the protocols or procedures for such a challenge.

As no conflicting statutory scheme actually exists under which CSI challenges are decided, the OOR may properly adjudicate whether information is properly designated as CSI.

B. The OOR’s determination that BIE’s investigative records are not CSI is correct.

The Commission and ET have not put forth any competent evidence to support their position that the ME1 investigative records are Confidential Security Information. The PUC CSI Act defines “Confidential Security Information” as “information contained within a record maintained by an agency in any form, the disclosure of which would compromise security against sabotage or criminal or terrorist acts...” 35 P.S. § 2141.2.

Further, the Commission and ET have waived their argument that the ME1 investigative materials are CSI because they failed to provide evidence to the OOR demonstrating that they followed the CSI process set forth in the Public Utility Commission CSI Act when prompted by the OOR. (R. at 117a-118a.) *See Dep't of Env'tl. Prot. v. Cole*, 52 A.3d 541, 551 (Pa. Cmwlth. 2012) (“Any grounds for denial or defenses not raised at the asserting party's first opportunity are waived.”)

When a public utility submits records to the Commission, the utility must state in its transmittal letter whether the record contains CSI, separate the information into CSI and non-CSI categories, label the records accordingly, and provide a redacted copy for the public record. 52 Pa.C.S. § 102.3(b). Transmittal letters themselves will be treated as public records. 52 Pa.C.S. § 102.3(b)(1). The OOR attempted to develop the record by soliciting copies of the transmittal letters for the information submitted by ET, but the PUC failed to comply. (R. at 136a.) The Commission provided an affidavit from Paul Metro asserting, without

explanation, that the requested records contain CSI, but the OOR found this affidavit wholly conclusory. (R. at 102a.) “[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013); *see also West Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Cmwlth. 2015) (“The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions”).

The Public Utility CSI Disclosure Protection Act defines “confidential security information” as

Information contained within a record maintained by an agency in any form, the disclosure of which would compromise security against sabotage or criminal or terrorist acts and the nondisclosure of which is necessary for the protection of life, safety, public property or public utility facilities...

35 P.S. § 2141.2.

There is little information in the record regarding what the ME1 investigative materials actually consist of because the Commission and ET refused to supplement the record. (R. at 136a.) The Commission and ET provided little more than conclusory affidavits claiming that the records consist of CSI. Without any evidence in the record demonstrating that ET and the Commission complied with the Public Utility CSI Disclosure Protection Act’s procedures to designate

material as CSI, there is no basis for a finding that any records are in fact CSI under the Act.

The OOR properly concluded that there is no evidence showing that ET and the Commission complied with the CSI procedures set forth in the PUC CSI Act, and therefore the relevant records are not exempt from disclosure under the CSI. The PUC CSI procedures are a condition precedent for withholding CSI records, and noncompliance with that act requires disclosure of the relevant record.

III. The OOR properly ordered the release of records that fall within the scope of Appellee's original Request.

Contrary to ETP's assertion that the OOR ordered the PUC to provide a record beyond the scope of the Appellee's original request, the BIE investigative report which the OOR directed the Commission to produce is a record "relat[ed] to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous... (HVL) pipelines may be experienced" in the possession of Paul Metro, his superiors, and his subordinates at the PUC, which is precisely the type of record Appellee requested.

Appellee requested all of the Commission's records "containing or related to calculations or estimates of blast radius (Sunoco's term) or 'buffer zone' (PUC's term) regarding accidents or releases from HVL pipelines. (R. at 6a.) The OOR directed the Commission to produce BIE's Inspection Report for ME1 with all

information that would jeopardize public safety if released – calculations or estimates of blast radius – redacted. BIE’s Inspection Report for ME1, even if partially redacted, is responsive

Pursuant to the RTKL, a Requester is entitled to request records, not to have questions answered by an agency. *See Murphy v. Pa. Turnpike Comm’n*, 25 A.3d 1295 (Pa. Cmwlth. 2011 (affirming OOR denial of appeal, including that questions do not trigger an agency’s requirement to respond under the RTKL). Appellee requested all records “related to calculations or estimates of blast radius” – his request seeks more than just the raw numbers calculated by the Commission. Even if the actual calculations of blast radius are redacted from the responsive records, those records are still responsive to Appellee’s underlying request and thus are subject to disclosure to Appellee.

IV. Assuming § 335(d) of the Public Utility Code does not apply, the Commission’s ME1 Report is not exempt under the RTKL.

Appellee reiterates his argument that Subsection 335(d) of the Public Utility Code provides independent grounds for the release of the BEI ME1 Report. However, even if the Public Utility Code does not provide a basis for the release of the Report, the RTKL provides no rationale for the Commission to withhold the Report.

- A. BIE’s ME1 investigative report is not exempt under § 708(b)(17) of the RTKL because it reveals the imposition of a civil penalty.**

A record is not exempt from disclosure pursuant to § 708(b)(17) of the RTKL when it reveals “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.” RTKL § 708(b)(17)(vi)(A).

This report led to the BEI’s formal complaint with the Commission against ETP; it reveals the imposition of a civil penalty. Once the Commission filed formal complaint C-2018-3006534 against Sunoco/ET, the final reports it relied on to support its complaint are necessarily public documents that must be available for inspection and review. Further, these documents must be public so that the Commission can properly complete its duties for formal proceedings, which necessarily require the Commission to offer the public the opportunity to comment. The public cannot properly comment on any proceeding without access to the same information the Commission relied upon. At no point did ET or the Commission offer any rationale why such final reports relied upon by the Commission should not be available to the public, nor did they document why such documents should be held confidentially. Therefore, there is no way the Commission and ET can hide behind an exemption the Commission failed to claim when it filed its formal complaint against ET.

B. BIE's ME1 investigative report is not exempt under the public safety exemptions in § 708(b)(2) and § 708(b)(3) of the RTKL because the OOR directed that information that poses a risk to public safety be redacted.

Appellee maintains that the release of information regarding the “blast zones” of the ME1 pipeline would not jeopardize public safety. Indeed, ME1 lies less than 500 feet from Appellee’s home, and Sunoco has constructed a highly visible above-ground valve site for it on the property of his homeowner’s association; he more than anyone else is aware of the threat of a terroristic attack on the pipeline. Further, detailed information relating to the calculation of pipeline blast zones is already in the public domain, even if those calculations vary slightly from source to source. (R. at 49a-87a.) Moreover, information on population densities in specific areas is publicly available from sources such as the U.S. Census. Mr. Metro’s affidavit simply concludes, without evidence or explanation, that the release of *any* information contained in the ME1 investigative report would compromise security against sabotage or criminal or terrorist attacks. (R. at 102a.) This conclusory statement simply ignores the fact that all this information is already in the public domain.

C. BIE's ME1 investigative report is not exempt under § 708(b)(10) of the RTKL because it does not reflect the agency's internal, predecisional deliberations.

Nothing in the record supports a finding that the BIE ME1 investigative report reflects the Commission’s deliberative process and therefore the RTKL’s

exemption for internal predecisional deliberations does not apply. A record reflecting an agency's internal, predecisional deliberations "relating to a proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations" is exempt from disclosure pursuant to § 708(b)(10)(a) of the RTKL.

To withhold a record under § 708(b)(10)(i)(A), an agency must show that 1) the deliberations reflected are internal to the agency, 2) the deliberations reflected are predecisional, meaning before a decision to take a particular action was made, and 3) the contents are deliberative in character, meaning that they pertain to a proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209(1214) (Pa. Commw. Ct. 2011).

Here, the Commission and ETP have not established by any competent evidence that BEI's ME1 investigative report was internal to the Commission and its representatives, that it reflects the Commission's deliberations prior to an action being taken, or that it is deliberative in character. With no affidavit evidence in its support, § 708(b)(10) provides no grounds for the Commission to withhold the ME1 report.

CONCLUSION

The primary rationale provided by PUC and ETP for withholding the ME1 Report – that releasing it would threaten public safety – rings untrue to Appellee Eric Friedman, whose community sits atop the pipeline that is the subject of this report. PUC and ETP can point to fine distinctions between their methods of calculating risk and other methods. But whether a criminal used already publicly available formulas or calculations contained in the PUC's report to implement an attack is of the least concern to Appellee, who actually stands in harm's way.

The Commission's and ET's justification for withholding these records went away the day the Commission's BIE filed formal complaint C-2018-3006534. While BIE's working papers may not be subject to disclosure, the final ME1 investigative report BIE used to justify its formal complaint must be released.

The Right To Know Law is meant to hold government agencies accountable to their citizens. Appellee Eric Friedman requested information from his government about a direct physical threat to him, his neighborhood and the wider impacted community which the PUC is meant to be overseeing, only to be stonewalled. Indeed, the Legislature recognized the special importance of transparency to the Public Utility Commission's dealings with public utilities, writing into the Public Utility Code a disclosure duty greater than that in the

RTKL. Appellee seeks precisely the type of information meant to be disclosed under the RTKL and the Public Utility Code's subsection 335(d).

For the foregoing reasons, Respondent, Eric Friedman, respectfully requests that this Honorable Court uphold the Office of Open Records' Final Determination of June 26, 2019 and order the Commission's release of the ME1 investigative records.

Respectfully submitted,



Megan K. Shannon
Attorney ID No. 319131

1801 Market Street
Philadelphia, PA 19103
(267) 338-1328
Dated: December 16, 2019

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that requires filing confidential information and documents differently than non-confidential information and documents.

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