

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DANIEL SCHWARTZ,)	
)	
Petitioner,)	Docket No. _____
)	
v.)	
)	
PENNSYLVANIA STATE POLICE,)	Office of Open Records
)	Docket No. AP 2021-0916
Respondent.)	

PETITION FOR ENFORCEMENT OF FINAL DETERMINATION OF OFFICE OF OPEN RECORDS

AND NOW comes the Petitioner, Daniel Schwartz, by and through his undersigned counsel and hereby submits this Petition for Enforcement of the Final Determination of the Office of Open Records (“OOR”), issued on June 22, 2021, as follows:

I. INTRODUCTION

1. Freelance investigative journalist Daniel Schwartz seeks intervention from this Court to enforce an OOR Final Determination ordering the Pennsylvania State Police to produce certain law enforcement officers’ emails, voicemails, and text messages related to the Mariner East Pipeline protests. A true and correct copy of the OOR Final Determination is attached as **Exhibit A**.

2. The OOR Final Determination became final and enforceable on July 22, 2021, the last date on which the Pennsylvania State Police could appeal to this Court from the OOR Final Determination.

3. The Final Determination ordered that the PSP either produce all text messages, voicemails, and appropriately redacted emails responsive to the Petitioner's request or provide an affidavit describing its search and attesting that the voicemails and text messages do not exist.¹

4. Despite the Order, Respondent willfully or with wanton disregard failed to produce the requested text messages and voicemails or, alternatively, provide the required affidavit.

5. The documents that Petitioner requested are subject to production as a matter of law and relate to a matter of significant public interest: the Mariner East pipeline protests and the interaction of police with such protests.

6. The Mariner East pipelines carry highly explosive natural-gas liquids across Pennsylvania to be shipped to Europe.² Mariner East 1 converted an existing pipeline built in the 1930's.³ Mariner East 2 was designed to expand this capacity.⁴ The

¹ See Ex. A at 8.

² Eliza Griswold, *A Pipeline, a Protest, and the Battle for Pennsylvania's Political Soul*, NEW YORKER, (Oct. 26, 2018), <https://www.newyorker.com/news/dispatch/a-pipeline-a-protest-and-the-battle-for-pennsylvanias-political-soul>.

³ *Explainer: Mariner East: A Pipeline Project Plagued by Mishaps and Delays*, STATEIMPACT PENN., <https://stateimpact.npr.org/pennsylvania/tag/mariner-east-2/>.

⁴ *Id.*

Commonwealth approved Mariner 2 in early 2017 despite notable “deficiencies” in the permit applications.⁵

7. After the Pennsylvania Attorney General opened an inquiry into the approval process, news outlets reported in 2019 that the FBI had opened a similar inquiry.⁶ The Attorney General ultimately filed 48 criminal charges, mostly related to spilling industrial waste, against the owner of the Mariner East 2 Pipeline.⁷

8. In the wake of the pipeline’s approval, some Pennsylvania residents adapted to life with “spills of drilling mud,” like those identified by the Attorney General, “water contamination,” and “intimidating contractors.”⁸ Others “live[d] in fear of” gas leak explosions and the sudden appearance of sinkholes.⁹

⁵ *DEP Approved Mariner East 2 Permits Despite Deficiencies, Documents Show*, STATEIMPACT PENN., (Mar. 10, 2017), <https://stateimpact.npr.org/pennsylvania/2017/03/10/dep-approved-mariner-east-2-permits-despite-deficiencies-documents-show/>.

⁶ *See, e.g.,* Marc Levy, *AP Exclusive: FBI Eyes How Pennsylvania Approved Pipeline*, ASSOCIATED PRESS, (Nov. 12, 2019), <https://apnews.com/article/ffd3c53d855445cebfd0d5148b3860fa>; Andrew Maykuth and Jeremy Roebuck, *FBI now investigating the way in which Pennsylvania approved Mariner East Pipeline*, The PHILADELPHIA INQUIRER, (Nov. 12, 2019), <https://www.inquirer.com/business/energy/mariner-east-pipeline-fbi-investigation-pennsylvania-governor-tom-wolf-20191113.html>.

⁷ *See AG Shapiro Charges Mariner East Developer with Environmental Crimes*, OFF. ATT’Y GEN. JOSH SHAPIRO, (Oct. 5, 2021), <https://www.attorneygeneral.gov/taking-action/press-releases/ag-shapiro-charges-mariner-east-developer-with-environmental-crimes/>.

⁸ Claire Sasko, *Should We Be Afraid of the Mariner East Pipeline?*, PHILA. MAG. (July 6, 2019), <https://www.phillymag.com/news/2019/07/06/mariner-east-pipeline-sunoco-pennsylvania/>.

⁹ Claire Sasko, *Should We Be Afraid of the Mariner East Pipeline?*, PHILA. MAG. (July 6, 2019), <https://www.phillymag.com/news/2019/07/06/mariner-east-pipeline-sunoco-pennsylvania/>; Jon Hurdle, *‘It’s Crazy, Man’: Sinkholes, Sunoco’s Pipeline Inspection Stir Safety Fears in Chester County*, NAT’L PUB. RADIO: STATEIMPACT PENN., (Mar., 9, 2018), <https://stateimpact.npr.org/pennsylvania/2018/03/09/its-crazy-man-sinkholes-sunocos-pipeline-inspection-stir-safety-fears-in-chester-county/>.

9. After “a fortress-like metal barricade was erected” in one resident’s backyard, she demanded to exercise her “right to know what is going on back there[.]”¹⁰ And others, while exercising their right to protest peacefully,¹¹ have been met with “repressive tactics.”¹² For example, criminal charges were filed against an employee of the Mariner 2 pipeline owner and security employees after the owner allegedly “bought . . . [State Constables’] badges and authority” through a “buy-a-badge” scheme “as a weapon to intimidate citizens.”¹³ Two Constables were ultimately convicted of misdemeanor counts of failing to disclose money they earned as private security guards for the pipeline.¹⁴

10. Reporting on the pipelines can help hold elected officials like these State Constables accountable and keep residents informed about potential threats to their communities’ safety and wellbeing.

¹⁰ Claire Sasko, *Should We Be Afraid of the Mariner East Pipeline?*, PHILA. MAG. (July, 6, 2019), <https://www.phillymag.com/news/2019/07/06/mariner-east-pipeline-sunoco-pennsylvania/>.

¹¹ Bill Rettew, *Demonstrators Rally Against Mariner East 2 Pipeline Outside Courthouse*, POTTSTOWN MERCURY, (June 14, 2017), <https://www.pottsmmerc.com/2017/06/14/demonstrators-rally-against-mariner-east-2-pipeline-outside-courthouse-2/> (last updated Sept. 23, 2021).

¹² Alleen Brown, Will Parrish & Alice Speri, *Dakota Access-Style Policing Moves to Pennsylvania’s Mariner East 2 Pipeline*, INTERCEPT, (June 21, 2017), <https://theintercept.com/2017/06/21/dakota-access-style-policing-moves-to-pennsylvanias-mariner-east-2-pipeline/>.

¹³ Marc Levy, *Prosecutor: ‘Buy-a-Badge’ Pipeline Security Plan Was Illegal*, ASSOCIATED PRESS, (Dec. 3, 2019), <https://apnews.com/article/976b99d6288f4dbcb9553df8740d214b>.

¹⁴ *Constables convicted on lesser count after charges dismissed*, ASSOCIATED PRESS, (July 17, 2021), <https://apnews.com/article/business-2251f6022acd4f686eafa8731555e741>.

11. Investigative journalists covering natural gas and oil pipeline projects, like Petitioner here, rely heavily on public records in their reporting. For example, investigative reporters have used public records to unearth inadequacies in pipeline safety measures and to shed light on an intelligence-sharing network between law enforcement and a private drilling agency.¹⁵

12. For the reasons stated herein, the Court should order Respondent to comply with Petitioner's request pursuant to the RTKL and the clear mandates of the OOR Final Determination by producing the remaining documents or affidavit as identified below; awarding attorney's fees and costs pursuant to the RTKL for having to bring this enforcement action; and paying other such penalties as are proper under the RTKL.

¹⁵ Rebecca Moss, *Are We Prepared?*, SPOTLIGHT PA, (Oct. 15, 2020), <https://www.spotlightpa.org/news/2020/10/pa-mariner-east-pipeline-accident-emergency-plans-investigation/>; Adam Federman, *State Police Documents Show Intelligence-Sharing Network Between Law Enforcement and Marcellus Shale Drillers*, PITTSBURGH CITY PAPER, (Oct. 8, 2014), <https://www.pghcitypaper.com/pittsburgh/state-police-documents-show-intelligence-sharing-network-between-law-enforcement-and-marcellus-shale-drillers/Content?oid=1782447>.

II. THE PARTIES

13. Petitioner Daniel Schwartz is an independent journalist based in Colorado. His work has appeared in news outlets with national and local circulation including *VICE*, *Type Investigations*, and *Vermont Digger*.

14. Respondent, the Pennsylvania State Police, is the chief law enforcement agency of the Commonwealth of Pennsylvania. Respondent's core purpose is "[t]o seek justice, preserve peace, and improve the quality of life for all."¹⁶

15. The PSP is a Commonwealth Agency pursuant to Section 102 of the Pennsylvania Right to Know Law ("RTKL"), *see* 65 P.S. § 67.102, that is required to disclose public records pursuant to Section 301 of the RTKL. *See* 65 P.S. § 67.301.

16. The PSP is headquartered at 1800 Elmerton Avenue, Harrisburg, Pennsylvania 17110.

III. JURISDICTION

17. This Court has jurisdiction to enforce a Final Determination of the Pennsylvania Office of Open Records. *See* 42 PA. CONS. STAT. ANN. § 763; Pa.R.A.P. 3761.

¹⁶ STRATEGIC PLAN 2019-2022, PA. STATE POLICE: BUREAU RSCH. DEV. 5 (2019), <https://www.psp.pa.gov/About-PSP/Documents/Strategic%20Plan.pdf>.

IV. FACTUAL AND PROCEDURAL HISTORY

A. Petitioner's Initial RTKL Request and the PSP's Response.

18. On March 24, 2021, Mr. Schwartz made a request to the PSP pursuant to the RTKL. A true and correct copy of the request and the PSP's initial response attaching an extension letter is attached as **Exhibit B**. The first part of the request sought the unredacted versions of certain correspondence and attachments of Lt. James Hennigan that had been previously produced to Petitioner. The documents Petitioner had already received were "seemingly indiscriminately redacted, and [in his] opinion, [] the redactions [we]re unlawful."¹⁷

19. The second part requested certain text messages and voice messages and respective attachments received by the work-issued cell phones of Lt. James Hennigan and Lt. Stephen J. U'Selis III pertaining to the "Mariner East pipeline or the activities of state residents as they may relate to the pipeline or its construction." Petitioner provided the following search terms: "Sunoco," "Energy Transfer," "Mariner," "suspicious activity," "protesters," "pipeline," and "construction."¹⁸

20. On April 30, 2021, the PSP partially denied the Request. A true and correct copy of the PSP's denial is attached as **Exhibit C**. The PSP rejected the first part of the request concerning certain reports about the activities surrounding the Mariner

¹⁷ Ex. B at 1.

¹⁸ *Id.*

East pipeline and relied on a prior response it had provided to Mr. Schwartz.¹⁹ The PSP then claimed with respect to the second part of the request that no text messages exist, certain emails were appropriately redacted, and other records were criminal investigative records and subject to Pennsylvania’s Criminal History Record Information Act, 18 PA. C.S. §§ 9101-9183.²⁰

21. Notably, the OOR in May 2021 requested an affidavit from Respondent describing its search and supporting its position that certain records were exempt and others did not exist.²¹ But Respondent never provided the requested affidavit.²² Respondent instead submitted a “verification”²³ that contained insufficient evidence to sustain either of the PSP’s positions.²⁴ The OOR described the “verification” as providing mere “conclusory statements,” without enough “factual evidence regarding how the records [] are exempt” in Part I to sustain its burden of proof.²⁵ The “verification” also failed to “sufficiently describe the search for” the voicemails and text messages requested in Part 2.²⁶

¹⁹ See Ex. C at 5.

²⁰ Ex. C at 5 (citing 65 P.S. §67.708(b)(16)(ii)).

²¹ Ex. A at 6–7.

²² *Id.* at 3.

²³ *Id.*

²⁴ *Id.* at 6–7.

²⁵ *Id.* at 7.

²⁶ *Id.*

B. Petitioner's Appeal and OOR Final Determination.

22. Petitioner timely appealed the PSP's denial to the Pennsylvania Office of Open Records on or about May 7, 2021.²⁷

23. The Office of Open Records considered the PSP's response, rejected its alleged defenses to disclosure except as to personal identification information, and issued the OOR Final Determination on June 22, 2021, requiring Respondent to "provide unredacted emails responsive to Part 1 and text messages or voicemails responsive to Part 2 or provide the Requester with a statement describing the search and affirming that no responsive records exist within 30 days."²⁸

C. The PSP Failed to Comply with the Clear Terms of the Final Determination and Petitioner's RTKL Request.

24. The PSP failed to appeal the Final Determination within thirty days as required by 65 P.S. § 67.1301(a) and, therefore, the Final Determination became binding on both parties.

25. With respect to Part 1 of the request, the PSP produced two batches of emails totaling 350 pages, which were largely unredacted, aside from certain e-mail addresses.

²⁷ *Id.* at 3, 5.

²⁸ *See* Ex. A at 5–8 (rejecting PSP's alleged defenses).

26. With respect to Part 2 of the request, Respondent failed to produce the text messages and voice mails, or, alternatively, the requested affidavit as required by the Final Determination.

27. Petitioner has a clear legal right to the documents or, alternatively, the affidavit. Respondent violated its mandatory statutory obligation by failing to comply with the Final Determination.

D. The PSP Operated in Bad Faith and Willfully or Wantonly Disregarded Petitioner's Rights Pursuant to the RTKL and the Clear Mandates of the OOR Final Determination.

28. Not only did the PSP fail to comply with Petitioner's RTKL Request, but it also refused in bad faith to comply with the OOR's order in the Final Determination to produce the text messages and voice mails or, alternatively, an affidavit. This refusal came in the wake of the OOR's prior unsuccessful "attempts to develop the record" after the PSP claimed that no text messages exist.²⁹

29. In response to the OOR's invitation to supplement the record in May 2021, the PSP merely provided a conclusory verification that failed to sufficiently describe the search for records.³⁰ But, as the OOR correctly determined, the verification's unsworn testimony cannot serve as sufficient evidence that the records in fact do not exist.³¹

²⁹ See Ex. A at 3, 5.

³⁰ See *id.* at 7.

³¹ See *id.* at 5-7.

30. When an agency, such as the PSP, willfully or with wanton disregard deprives a requester of access to public records, the requester is entitled to reimbursement of its costs and attorneys' fees. *See* 65 P.S. § 67.1304(a)(1).

31. Moreover, an agency's bad faith refusal to grant access to public records permits the imposition of civil penalties against the entity. *See* 65 P.S. § 67.1305(a).

32. Because the PSP in bad faith refused to comply with the Final Determination, this Court should award Petitioner his reasonable costs and attorney's fees and impose civil penalties against the agency.

V. Conclusion

33. For the reasons set forth above, the PSP violated the provisions of the RTKL, thereby depriving Petitioner of his right to access public records. The PSP acted willfully, with wanton disregard, and in bad faith in failing to comply with an OOR order to produce text messages and voicemails or a statement affirming the records do not exist and a description of the search.

34. Petitioner is therefore entitled to all relief available under the RTKL, including immediate access to the information requested from the PSP; reimbursement for his costs and attorneys' fees; and the imposition of civil penalties against the PSP.

WHEREFORE, Petitioner Daniel Schwartz respectfully requests that this Court enter an Order providing the following relief:

1. Directing the Pennsylvania State Police to produce all documents required to be produced in the Final Determination, or, alternatively, the affidavit, within seven days of issuance of the Order of the Court;
2. Awarding Petitioner reasonable attorneys' fees and costs incurred in this matter pursuant to Section 1304 of the RTKL;
3. Imposing an appropriate civil penalty; and
4. Granting any further relief that this Court deems appropriate.

Dated: December 20, 2021

Respectfully submitted,

By: /s/Paula Knudsen Burke

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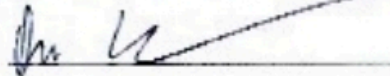
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³² Cornell student Steven Marzagalli drafted portions of the Petition. The Cornell Clinic is housed within Cornell Law School and Cornell University. Nothing in this Petition should be construed to represent the views of these institutions, if any.

VERIFICATION

I, Daniel Schwartz, hereby state that the facts above set forth in the Petition for Enforcement of Final Determination of Office of Open Records are true and correct to the best of my knowledge, information and belief and I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. §4904 (relating to unsworn falsification to authorities).



(signature)

Date: 12/17/2001

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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

Submitted by: Paula Knudsen Burke
Signature: /s/*Paula Knudsen Burke*
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December 20, 2021