

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

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OFFICE OF OPEN RECORDS

Pennsylvania Public Utility
Commission, :

Petitioner :

v. :

Sunrise Energy, LLC, :

Respondent :

No. 504 C.D. 2017

PETITION FOR REVIEW
(Appellate Jurisdiction)

The Pennsylvania Public Utility Commission (Commission/PUC) petitions for review of the final determination of the Office of Open Records (OOR) docketed at AP: 2017-0079 and asserts:

STATEMENT OF JURISDICTION

1. This Honorable Court has *de novo* appellate jurisdiction over this appeal from the OOR's Final Determination pursuant to Section 1301(a) of the Right-to-Know Law (RTKL), 65 P.S. § 67.1301(a), and Section 763(a)(2) of the Judicial Code, 43 Pa. C.S. § 763(a)(2).

PARTIES

2. The Commission is an independent Commonwealth agency as defined in Section 102 of the RTKL, 65 P.S. § 67.102, and is subject to the RTKL pursuant to Section 301 of the RTKL, 65 P.S. § 67.301.

3. The OOR is a governmental unit established within the Pennsylvania Department of Community and Economic Development to receive and determine appeals of agency RTKL decisions pursuant to Sections 1102 and 1310 of the RTKL, 65 P.S. §§ 67.1102 and 67.1310.

4. Sunrise Energy, LLC (Sunrise Energy) is a Domestic Limited Liability (LLC) Company issued a Certificate of Organization by the Pennsylvania Department of State, Corporations Bureau. The public record of the LLC reflects that David N. Hommrich is President and sole organizer of Sunrise Energy LLC.

GENERAL STATEMENT OF MATERIAL FACTS

A. Original RTK Law Request Of David N. Hommrich

5. This case originates from the RTK Law request filed on 11/23/2016,¹ using the OOR-issued “Standard Right-To-Know Request Form,” designating the “Name of the Requester” as an individual, David N. Hommrich, seeking access to:

“...copies of all e-mail and other forms of correspondence between FirstEnergy Corp., or West Penn Power Company and PUC employees *between November 23, 2016 and October 17, 2016*, regarding Commonwealth Court docket 1282 CD 2015.”

(Emphasis added). (Hommrich’s RTK Law request).²

6. The PUC’s Open Records Officer, Rosemary Chiavetta, conducted a search of Commission records and retrieved 31 responsive emails, all of which were communication regarding the Commonwealth Court case between the PUC’s counsel and counsel for FirstEnergy.

¹ Hommrich filed a prior identical request covering a different time period on 10/17/2016 (again, using the OOR-issued “Standard Right-To-Know Request Form”) specifying the “Name of the Requester,” as “David N. Hommrich,” the individual seeking access to:

[C]opies of all e-mail and other correspondence between PUC staff and FirstEnergy Corp., regarding [*Sunrise Energy, LLC v. FirstEnergy*] Commonwealth Court docket 1282 CD 2015 for the last year. I am interested in any correspondence which involves this case as well as any e-mails in response to the recent ruling by Commonwealth Court.

² This appeal pertains to one of two essentially identical RTK requests filed by Hommrich, seeking the same records covering different time periods. The OOR refused the PUC’s request to consolidate the matters, and issued two separate, substantively identical orders.

7. The Commission denied Hommrich’s RTK Law request on the basis that all responsive communications between counsel for the PUC and counsel for FirstEnergy pertaining to representation in ongoing litigation constitute privileged attorney work product excluded from the definition of “public record” under the RTK Law, 65 P.S. §§ 67.102.

B. Attorney Work Product Communication Between Counsel For FirstEnergy And Counsel For The PUC

8. The records sought by Hommrich’s RTK Law request are attorney consultations between counsel for FirstEnergy and counsel for the PUC regarding the legal strategy, including draft documents, addressing the question of PUC jurisdiction to determine whether an entity was a “customer generator” under the Alternative Energy Portfolio Standards Act (AEPS Act),³ thereby qualifying for net metering benefits. *See, Sunrise Energy, LLC v. FirstEnergy Corp. and West Penn Power Company*, No. 1282 C.D. 2015 (October 14, 2016).

9. The question of PUC jurisdiction under the AEPS Act came before Commonwealth Court on interlocutory appeal of FirstEnergy Corp., from the

³ The PUC elected to participate in Commonwealth Court *amicus curiae* due to the important legal question of the agency’s own jurisdiction. The PUC did not participate in the Court of Common Pleas action between Sunrise Energy, LLC and FirstEnergy, which pertains to payments under private contractual rights arising between those parties under agreements authorized by the AEPS Act, in which the Commission has no legal interest.

Washington County Court of Common Pleas' denial of preliminary objections in *Sunrise Energy, LLC v. FirstEnergy Corp. and West Penn Power Company*.⁴

10. Commonwealth Court agreed to hear FirstEnergy's interlocutory appeal on the basis of the Trial Court's certification that its order "involves a controlling question of law as to which there is substantial ground for difference of opinion." *Id.* at 7. The PUC filed an *amicus curiae* brief in support of FirstEnergy which argued that the PUC had primary jurisdiction to decide whether an entity qualifies for net metering under the AEPS.

11. The sole question before Commonwealth Court was a "pure question of law" whether the Trial Court erred in its analysis of the doctrine of primary jurisdiction by failing to cede jurisdiction to the PUC to initially decide the question of statutory construction of the term "customer-generator" within the meaning of the AEPS Act.

12. The PUC's legal interest in the outcome of the sole legal question before Commonwealth Court was *identical* to that of FirstEnergy: whether the doctrine of primary jurisdiction required the trial court to transfer the case to the PUC to determine what constitutes as a "customer generator" under the AEPS Act and thereby qualifying that entity for net metering benefits.

⁴ Sunrise Energy, LLC, is the plaintiff in litigation underlying the Commonwealth Court appeal on the legal issue of PUC jurisdiction, initiated by Sunrise Energy LLC in the Washington County Court of Common Pleas (Trial Court) seeking a declaratory order and damages for breach of contract from FirstEnergy Corp., and West Penn Power (collectively, FirstEnergy) under the AEPS Act.

13. In the context of representing the PUC's ongoing legal interest in the outcome of Commonwealth Court's decision on the legal question of primary jurisdiction, attorneys for the Commission sought and obtained the client agency's authority to participate as *amicus curiae* in the case pending before Commonwealth Court.

14. Attorneys for FirstEnergy consulted with PUC attorneys on the legal question of the PUC's jurisdiction.

15. As explained in the affidavits presented to the OOR, in furtherance of the client-agency's legal interests, attorneys for the PUC consulted with attorneys for FirstEnergy in developing a common legal strategy and in drafting legal arguments and briefs in support of FirstEnergy's position, that the PUC had primary or exclusive jurisdiction to define "customer generator" under the AEPS Act pursuant to the regulatory authority under the AEPS Act and the Public Utility Code.

C. Sunrise Energy, LLC's RTK Law Appeal To OOR

16. On January 18, 2017, Sunrise Energy, LLC (Sunrise Energy), by and through its counsel, filed an appeal docketed with OOR at AP: 2017-0079, from the PUC's denial of Hommrich's RTK Law request.⁵

17. Sunrise Energy's appeals did not reference Hommrich in any capacity, as an individual, organizer/president of the corporation, or otherwise.

18. OOR found standing for Sunrise Energy LLC to appeal, despite the fact that "the Requester filed the request without identifying that it was being filed on behalf of Sunrise Energy LLC..." based upon the fact that the requester had "...used a Sunrise Energy, LLC email address." (*OOR's Order* at p. 6).

19. The Commission twice requested a hearing on the record, first by letter dated January 26, 2017 and again in the Supplemental submission to the records, in the event the OOR Hearing Officer questioned whether the Commission's filings did not satisfy the burden of proof.

20. The OOR did not hold a hearing as authorized in Sections 1101(b)(3) and 1102(b)(2) of the RTKL, 65 P.S. §§ 1101(b)(3) and 1102 (b)(2), to take additional evidence or resolve any purported disputed issues of material fact.

⁵ This is the second appeal filed by Sunrise Energy. On December 7, 2016 Sunrise Energy, LLC, by and through its counsel, filed an appeal from the PUC's denial of Hommrich's RTK Law request for identical records, covering different time periods. (OOR Dkt. AP: 2016-2010).

ORDER OR DETERMINATION FOR WHICH REVIEW IS SOUGHT

21. By Final Determination dated March 27, 2017, an appeals officer for the OOR determined that attorney work product communications between counsel for FirstEnergy and counsel for the PUC sought by Hommrich's RTK Law request are "public records," and directed the Commission to make those privileged attorney communications available to Hommrich. A true and correct copy of the Final Determination is attached hereto as "Exhibit A." (*Order of OOR at AP:2017-0079*).

GENERAL STATEMENTS OF OBJECTIONS TO THE ORDER OR DETERMINATION

A. OOR Committed Errors Of Fact And Law Regarding The Legal Privilege Of Attorney Work Product Communication

22. On appeal, Commonwealth Court should reverse the OOR's determination that a party to ongoing litigation before a trial court may use the RTK Law as a means to gain access to an opposing counsel's confidential communication regarding legal strategy, draft legal arguments and briefs in that ongoing litigation, effectively circumventing the trial court's jurisdiction to decide questions of discovery under the Pennsylvania Rules of Civil Procedure and the law of legal privilege afforded attorney work product.

23. OOR erroneously found that legal consultation between counsel for the PUC and counsel for FirstEnergy operates as waiver of attorney work product

privilege where the communication was to coordinate legal strategy and briefing as *amicus curiae* in support of a shared and *identical* legal interest in the ultimate outcome of the Commonwealth Court proceeding: establishing the PUC's jurisdiction to define "customer generator" pursuant to regulatory authority over the alternative energy issues within the AEPS Act and the Public Utility Code.

24. OOR erroneously found that PUC counsel's waiver of legal privilege operates to waive the separate and independent legal privilege of counsel for FirstEnergy in violation of the constitutional rights of counsel for FirstEnergy, and its client, FirstEnergy Corp. No notice and opportunity to be heard was provided by OOR prior to deciding the question of FirstEnergy's claim of legal privilege for attorney work product communication.

25. In a case of first impression analyzing whether the PUC attorneys' legal consultation with attorneys for FirstEnergy constituted waiver of legal privilege for attorney work product communication, OOR erroneously applied the standard for "common legal interest" in finding that the PUC did not establish that the legal interests of the Commission and FirstEnergy were sufficiently aligned to demonstrate a common interest, and that the Commission had thereby waived the attorney-work product privilege. On the contrary, the PUC and FirstEnergy were firmly aligned and share a common interest on the application of the doctrine of primary jurisdiction to determine whether the PUC or Common Pleas Courts are

the correct forum to address whether a given entity is a “customer generator” under the AEPS and thereby qualifies for net metering benefits.

26. OOR’s application of the “common interest doctrine” was in error and effectively created new law in matters of legal privilege. It appears that the practical and immediate impact of the OOR’s order is that Commonwealth attorneys would be required to enter into *express written confidentiality agreements* with any non-Commonwealth counsel to conduct a legal consultation on matters regarding representation of the state agency.

27. In discussing the issue of PUC jurisdiction and developing a common legal strategy, the PUC and FirstEnergy attorneys intended for all such communications to be confidential, especially as to their common opponent in the ongoing litigation. However, according to the OOR, in the absence of an express written agreement, all previous legal consultation between *any* Commonwealth attorney and any non-Commonwealth counsel will be subject to disclosure upon request under the RTK Law.

28. Further, because the OOR’s order impermissibly infringes upon and narrows the rights of attorneys in the Commonwealth to claim legal privilege, the OOR exceeds the scope of its jurisdiction. While OOR has jurisdiction to apply existing law regarding the scope of legal privilege, OOR is not vested with jurisdiction to define a new, narrower, scope to the law of legal privilege. The

attorneys' claim of legal privilege falls within the practice of law, which is under the sole jurisdiction of the Pennsylvania Supreme Court. *Gmerek v. State Ethics Commission*, 807 A2d 812 (2002).

B. OOR Committed Errors Of Fact And Law Regarding A Corporation's Legal Standing To Appeal Under The RTK Law

29. On appeal, Commonwealth Court should reverse the OOR's determination that Sunrise Energy, LLC, has standing to appeal as a "requester" under the RTK Law.

30. The OOR-issued "Standard Right-To-Know Law Request" form initiating the RTK Law request with the PUC specified the requester as "David Hommrich" as an individual, not Sunrise Energy, LLC.

31. On the RTK Law request form, Hommrich did not assert or specify his representative capacity as "David N. Hommrich, President Sunrise Energy LLC."

32. Under the RTK Law, a "requester" as the term is defined in Section 102 of the RTK Law, 65 P.S. § 67.102, has a right of appeal under Section 1101(a)(1) of the RTKL, 65 P.S. § 67.1101(a)(1). In the present case, the "requester" was David Hommrich, in his individual capacity.

33. The OOR erred in holding that an original RTK Law request by an individual person, which does not specify the individual's representative capacity

as an officer of an LLC, grants the corporate entity standing to appeal, solely based upon the use of an email address.⁶

34. OOR's conclusion under the facts that a RTK Law requester's use of an email address may bind a corporate entity for purposes of legal standing conflicts with the long line of case law establishing that LLC corporate entities are separate and distinct parties from the individual officers of the corporation, unless the officers are expressly acting in their representative capacity.

35. Further, OOR erred as a matter of law in applying its own prior decisions to the question of legal standing of a Limited Liability Corporation to appeal under the RTK Law.

36. Finally, where any disputed issues of fact existed in the appeal before the OOR, the OOR's resolution of the disputed issues of fact without a hearing violated the procedural due process rights of the Commission.

⁶ The use of an email address to transmit the RTK Law request form does not supersede the name of the individual specified as "requester" on the form. Further, the email address used by Hommrich, DavidNHommrich@SunriseEnergy.net, does not use the full name of the corporate entity, "Sunrise Energy, LLC."

WHEREFORE, Petitioner, Pennsylvania Public Utility Commission,
respectfully requests that this Honorable Court Reverse the Final Determination
dated March 27, 2017 of the Office of Open Records.

Respectfully submitted,

/s/ Elizabeth Lion Januzzi
Elizabeth Lion Januzzi
Assistant Counsel
Attorney ID # 69487

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Dated: April 26, 2017

EXHIBIT A



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
DAVID HOMMRICH AND SUNRISE	:
ENERGY, LLC,	:
Requester	:
	:
v.	:
	:
	:
PENNSYLVANIA PUBLIC UTILITY	:
COMMISSION,	:
Respondent	:

Docket No.: AP: 2017-0079

INTRODUCTION

David Hommrich, on behalf of Sunrise Energy, LLC, (collectively, the "Requester") submitted a request ("Request") to the Pennsylvania Public Utility Commission ("Commission" or "PUC") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking records related to an identified Commonwealth Court proceeding. The Commission denied the Request, claiming that the requested records are privileged. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is granted, and the Commission is required to take further action as directed.

FACTUAL BACKGROUND

On November 23, 2016, the Request was filed, seeking, in pertinent part:

[C]opies of all e-mail and other forms of correspondence between First Energy Corporation or West Penn Power Company and PUC employees between November 23, 2016 and October 17, 2016 regarding [*Sunrise Energy, LLC v.*

First Energy Corporation,] Commonwealth Court Docket 1282 CD 2015. I'm interested in any correspondence that involves this case, or discusses the court's ruling on this case.

On December 28, 2016, after extending the response period, 65 P.S. § 67.902, the Commission denied the Request. The Commission explained that it participated in the identified litigation as an *Amicus Curiae* and identified 31 responsive e-mails and claimed that they were privileged under the attorney-work product doctrine.

On January 17, 2017, the Requester appealed to the OOR, challenging the Commission's denial and stating grounds for disclosure. The OOR invited both parties to supplement the record and directed the Commission to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c). The Commission did not indicate that it notified any third parties of the pendency of this appeal, and the OOR received no requests to participate.

On January 26, 2017, the Commission filed a position statement, arguing that the responsive e-mails are privileged under the attorney-work product doctrine. The Commission reiterated its claim that it did not waive the attorney-work product privilege because its e-mail exchanges with FirstEnergy Corporation ("FirstEnergy") and West Penn Power Company ("West Penn") relate to the Commission's submission of an *amicus* brief in the Requester's proceedings against FirstEnergy related to the Alternative Energy Portfolio Standards Act ("Alternative Energy Act" or "AEPS Act"), 73 P.S. §§ 1648.1-1648.8. In addition, the Commission explained that the Request seeks communications related to ongoing litigation between the Requester and FirstEnergy, and it had reason to believe that the Requester would litigate to challenge the Commission's implementation of the Alternative Energy Act. The Commission also claimed that the Requester lacks standing to appeal because Sunrise Energy,

LLC was not named in the original Request.¹ Finally, the Commission argued that this matter should be resolved as a discovery issue in ongoing proceedings before the court of common pleas and not before the OOR. In support of its position, the Commission submitted the affidavits of Rosemary Chiavetta, the Commission's Open Records Officer; Robert Young, Deputy Chief Counsel of the Commission's Law Bureau; and Kriss Brown, Assistant Counsel for the Commission's Law Bureau.

In response to a request for clarification from the OOR, the Commission submitted supplemental affidavits from Deputy Chief Counsel Young and Assistant Counsel Brown on February 2, 2017, confirming that West Penn is a wholly-owned subsidiary of FirstEnergy and that both West Penn and FirstEnergy are represented by the same legal counsel.

On February 8, 2017, the OOR established a briefing schedule to further develop the issue of waiver of the attorney-work product doctrine.

On February 15, 2017, the Requester filed a brief in support of his position that the Commission waived the attorney-work product doctrine by exchanging the withheld e-mails with FirstEnergy. The Requester explained that the Commonwealth Court determined that an administrative agency could waive its claim of work product privilege in *Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409 (Pa. Commw. Ct. 2014), *petition for allowance of appeal denied*, 117 A.3d 1282 (Pa. 2015). Ultimately, the *Bagwell* court held that the agency did not waive the privilege because the records at issue were not shared with a third party outside of the attorney-client relationship. In this case, the Requester argues that, unlike *Bagwell*, the Commission does not dispute that the records at issue were exchanged with a third party outside of a direct attorney-client relationship with the Commission—namely, FirstEnergy. Further, the Requester noted

¹ The Commission is permitted to assert this new reason for denying access to records on appeal to the OOR. See *Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

that the Commission's communications with FirstEnergy were exchanged in the Commission's capacity as an *amicus curiae* on behalf of FirstEnergy and were not exchanged as co-parties in litigation. The Requester also argued that the Commission did not meet its burden to prove that the withheld records satisfy the elements of the attorney-work product doctrine.

On February 22, 2017, the Commission filed a brief in support of its position that it did not waive the attorney-work product doctrine because the Commission shared a common legal interest with FirstEnergy. The Commission argued that the common interest doctrine serves as an exception to the waiver of the attorney-work product doctrine for these records. The Commission also cited to Pa.R.P.C. 1.6(a), which states that "[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation."

On February 27, 2017, the Requester submitted a response, challenging the Commission's reliance on the common interest doctrine as an exception to the waiver of the attorney-work product doctrine.

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. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the Commission requested that the OOR conduct a hearing should the Appeals Officer determine that the Commission did not meet its burden of proof on the evidence presented. However, the OOR has the requisite evidence before it to properly adjudicate the matter, and the Commission’s request for a hearing is denied.

The Commission is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed 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 respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL 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). 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 *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The Requester has standing to appeal

The Commission argues that the Requester does not have standing to pursue this appeal. The RTKL defines “Requester” as “[a] person that is a legal resident of the United States and requests a record pursuant to [the RTKL].” 65 P.S. § 67.102. Section 1101(a)(1) of the RTKL provides that “[i]f a request for access to a record is denied or deemed denied, the *requester* may file an appeal with the Office of Open Records[.]” 65 P.S. § 67.1101(a)(1) (emphasis added). Thus, to appeal to the OOR, a party must qualify as a “requester” under the RTKL. *See Bains v. State Employees’ Ret. Sys. of Pa.*, OOR Dkt. AP 2015-2667, 2016 PA O.O.R.D. LEXIS 428.

Here, the Requester filed the Request without identifying that it was being filed on behalf of Sunrise Energy, LLC but used a Sunrise Energy, LLC e-mail address. On appeal, the Requester clarifies that the Request was made on behalf of Sunrise Energy, LLC. The Commission has not submitted any evidence demonstrating that Mr. Homrnich is not an officer or employee of Sunrise Energy, LLC. Thus, the present appeal is not prohibited under the RTKL. *See Ruderman v. City of Phila. Dep’t of Health*, OOR Dkt. AP 2016-1259, 2016 PA O.O.R.D. LEXIS 1386; *Spatz v. City of Reading*, OOR Dkt. AP 2013-0210, 2013 PA O.O.R.D. LEXIS 189.

2. The Commission waived its claim that the attorney-work product doctrine applies to the responsive records

The Commission claims that it withheld 31 responsive e-mails under the attorney-work product doctrine. The attorney-work product doctrine 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 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*, 65 A.3d at 1077 (“[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”).

While the attorney-work product doctrine and the attorney-client privilege are related and both require an analysis of whether waiver occurred, the attorney-work product doctrine is broader in scope “because it protects any material, regardless of whether it is confidential” revealing an attorney’s mental impressions. *Gillard*, 15 A.3d at 59 n.16 (citing *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001)). In *Bagwell v. Pa. Dep’t of Educ.*, the Commonwealth Court noted that “the work-product doctrine is not absolute but, rather, is a qualified privilege that may be waived..... What constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances.” *Bagwell*, 103 A.3d 409,

The Commission has established that some of the responsive e-mails contain the legal and factual analysis of its attorneys. However, as there is no dispute that the withheld e-mails were revealed to a third party and include e-mails received from non-Commission attorneys, the question becomes whether the Commission waived the attorney-work product doctrine by sharing the withheld e-mails with FirstEnergy and whether the attorney-work product doctrine applies to e-mails received from FirstEnergy.

The Commission claims that it did not waive the attorney-work product doctrine because its e-mail exchanges with FirstEnergy related to the Commission's submission of an *amicus* brief in the Requester's proceedings against FirstEnergy related to the Alternative Energy Act. Specifically, the communications related to the proceedings before the Commonwealth Court in *Sunrise Energy, LLC v. FirstEnergy Corp.*, 148 A.2d 894 (Pa. Commw. Ct. 2016).

In *Sunrise Energy*, the Commonwealth reviewed the Washington County Court of Common Pleas' decision overruling FirstEnergy's preliminary objections to a breach of contract complaint by the Requester. *Id.* at 896. The issue decided by the *Sunrise Energy* court was whether the breach of contract complaint related to net metering and whether the refusal to pay should be transferred to the Commission because the dispute required the construction of the Alternative Energy Act. *Id.* The Commonwealth Court ultimately upheld the lower court's decision and held that the trial court was competent to construe the provisions of the Alternative Energy Act. *Id.* at 909. During the proceedings, the Commission was granted *amicus curiae* status and argued in support of the position that the Commission was the body with proper jurisdiction over the proceedings. The Commission argues that its shared legal interest with FirstEnergy in the *Sunrise Energy* proceedings makes the common interest doctrine applicable to the responsive records.

A review of Pennsylvania case law shows that the common interest doctrine may act as an exception to waiver of the attorney-client privilege. *See In Re: Condemnation by the City of Phila.*, 981 A.2d 391 (Pa. Commw. Ct. 2009) (applying the joint defense/common interest doctrine as an exception to waiver of the attorney-client privilege). Specifically, the doctrine has been applied to cases where parties are represented by different counsel and share a common legal interest against a common adversary as established based on the circumstances of the case. *See Gelman v. W2 Limited*, 2016 U.S. Dist. LEXIS 14787 (E.D. Pa. Feb. 5, 2016). Although the common interest doctrine has not been specifically adopted by the Pennsylvania Supreme Court, both the Pennsylvania Superior Court and the Commonwealth Court have analyzed waiver of the application of the attorney-client privilege under the doctrine. *See In re Condemnation of 16.2626 Acre Area*, 981 A.2d 391 (Pa. Commw. Ct. 2009); *see also Gelman*, 2016 U.S. Dist. LEXIS 14787 (predicting that Pennsylvania would recognize the common interest doctrine, but noting that it “has not been explicitly adopted by the Pennsylvania Supreme Court, nor codified by the state legislature, and it has received very little attention in Pennsylvania courts”). While not binding authority, the United States District Court for the Western District of Pennsylvania summarized the elements of the common interest doctrine as follows:

(1) the parties’ agreement to same; (2) a common interest in the litigation or a jointly shared litigation strategy; (3) the communications were made pursuant to such agreement, and (4) the continued confidentiality of the communications, i.e., the communications were not disclosed to other third parties such that the privileges were waived.

Rosser Intern., Inc. v. Walter Moore & Associates, Inc., 2013 U.S. Dist. LEXIS 108561 (W.D. Pa. August 2, 2013) (citing *Young v. Presbyterian Homes, Inc.*, 50 D&C 4th 190 (C.P. Lehigh Cty. 2001)). Although an express written agreement is not required by all jurisdictions to

establish the privilege, it is strong evidence of the parties' intent that they expected protection. *See id.* at *57.

In *In re Condemnation of 16.2626 Acre Area*, the Commonwealth Court analyzed whether the City of Philadelphia and the Philadelphia Redevelopment Authority ("RDA") shared a common legal interest in a condemnation proceeding sufficient to protect their communications under the attorney-client privilege. 981 A.2d 391 (Pa. Commw. Ct. 2009). In holding that the parties did not satisfy the requirements under the common interest doctrine, the Court noted that the City and RDA were "not co-defendants or even defendants in similar actions," but were, in fact, "adverse parties in the ... condemnation proceedings," and the parties provided no evidence to explain how the RDA would benefit from the City's success in the condemnation action. *See id.* at 398. The Court also noted that evidence that the City and RDA supported each other's separate efforts by sharing information and legal strategy was not evidence that the two shared a common legal interest. *Id.*

Here, the Commission has not met its burden to prove that the common interest doctrine applies to the instant matter.² Notably, the Commission has not presented any evidence demonstrating that our courts have applied the common interest doctrine as an exception to waiver of the attorney-work product doctrine. The parties do not dispute that the withheld records were exchanged with a third party who was not a client of the Commission's attorneys.

Even if the common interest doctrine acted as an exception to waiver of the attorney-work product doctrine, the Commission has not established that the elements of the common interest doctrine have been satisfied. Specifically, the Commission has not submitted evidence that it entered into a common interest agreement and does not claim that the Commission and

² As the parties do not contest that the e-mails were exchanged with a third party that is not the client of Commission attorneys, the burden of proof shifts back to the Commission to prove that an exception to waiver applies.

FirstEnergy operated with the understanding that the e-mails exchanged between them would remain confidential.

In addition, the Commission does not cite to any authority establishing that the common interest doctrine applies to communications between a regulator and an entity that it regulates. The Commission explains that it exchanged e-mails with FirstEnergy “for the limited purpose of the furtherance of identical common legal interest of their respective clients in the outcome of potential future litigation of the PUC’s jurisdiction and implementation of specific provisions of the AEPS Act[.]” However, the Requester argues that Commission and FirstEnergy’s interests differ significantly—FirstEnergy is in a payment dispute with the Requester and the Commission seeks to assert its jurisdiction to adjudicate disputes under the Alternative Energy Act. Further, an *amicus curiae* is not a party and cannot assume the functions of a party. *Commonwealth v. Cotto*, 708 A.2d 806, 808 (Pa. Super. Ct. 1998) (noting that an *amicus curiae* “has no control over the litigation and no right to institute any proceedings therein; he must accept the case before the court with the issues made by the parties”). As a result, the legal interests between the parties are not sufficiently aligned to hold that they share a common interest for purposes of the common interest doctrine.³ See *In Re: Condemnation by City of Philadelphia*, 981 A.2d 391, 396-99 (Pa. Commw. Ct. 2009) (“Evidence parties supported each other’s separate efforts by

³ In *Sunrise Energy*, the Commonwealth Court quoted the trial court’s reasoning in support of its holding that the Commission did not have jurisdiction to consider the underlying litigation:

Under the Public Utility Code, [66 Pa.C.S. §§101-3316,] the PUC is vested with supervisory and regulatory power over all public utilities doing business in the Commonwealth, 66 Pa. C.S. §501(b). While [the trial court] acknowledges that “initial jurisdiction over matters involving the reasonableness, adequacy or sufficiency of a public utility’s service, facilities or rates is vested in the PUC,” the controversy before the court is not of that kind; it is whether West Penn’s net metering termination, and refusal to pay Sunrise [Energy] net metering proceeds, violates [the Alternative Energy Act]. Resolution of this question depends on, and appears to be wholly dependent on, whether Sunrise [Energy] is a customer-generator, as defined under the [Alternative Energy] Act.

148 A.2d at 899 (citations omitted).

sharing information and/or legal strategy is not evidence that the two shared a common legal interest"). Thus, the withheld e-mails sent to and received from FirstEnergy are not subject to withholding under the attorney-work product doctrine.

3. Article V, Section 10(c) of the Pennsylvania Constitution does not protect the record from public disclosure in this matter

The Commission also argues that the e-mails exchanged with FirstEnergy are not subject to public access under the Commonwealth Court's ruling in *City of Pittsburgh v. Silver*, 50 A.3d 296 (Pa. Commw. Ct. 2012). In *Silver*, the Commonwealth Court held that "correspondence contained in the file of an assistant city solicitor between attorneys for the estate of Curtis Mitchell and city officials regarding efforts to negotiate a settlement of pending litigation" was not subject to public access under the RTKL because the release of such records would violate the ethics-based rule of confidentiality under Rule 1.6(a) of the Pennsylvania Rules of Professional Conduct, although the Court noted that a fully-executed settlement agreement would be subject public access. 50 A.3d at 301. In *Office of Open Records v. Center Township*, the Commonwealth Court clarified *Silver*, stating:

[T]he OOR's involvement in the RTKL process does not implicate, much less infringe upon, the Supreme Court's exclusive authority to govern the conduct of attorneys practicing law in this Commonwealth. Accordingly, we conclude that when the OOR exercises subject matter jurisdiction and determines whether a request is covered by the attorney-client privilege, the work product doctrine, or the ethics-based rule of confidentiality, the OOR does not infringe upon the Supreme Court's authority under Article V, Section 10(c). Pursuant to *Silver*, it is error for the OOR to order disclosure of documents that contravene the ethics-based rule of confidentiality. However, *Silver* does not preclude the OOR from deciding, in the first instance, whether any of the privileges enunciated in the RTKL or the ethics-based rule of confidentiality in Pa. R.P.C 1.6 are applicable.

95 A.3d 354, 365 (Pa. Commw. Ct. 2014).

In this matter, Mr. Young attests that "[a]ll of the emails constitute attorney work product as the pertain [to] the Law Bureau counsel's representation of the Commission's legal interests in

the subject matter of ongoing legal actions and potential future challen[ge]s to the PUC's policy and implementation of the AEPS Act....” This matter is unlike *Silver*, where the request sought correspondence, contained in the file of an assistant City solicitor, regarding the negotiation of a settlement of pending litigation over an individual's death. Here, as stated above, the withheld correspondence relates to the filing of an *amicus* brief; the correspondence does not relate to the Commission's participation as a party in litigation, and there is no evidence that the withheld e-mails are contained only in the litigation file of a Commission attorney. See *Kearney v. Worcester Twp.*, OOR Dkt. AP 2014-1564, 2014 PA O.O.R.D. LEXIS 1385 (holding that the ethics-based rule of confidentiality did not apply because the records were not in a solicitor's file related to pending litigation); *Callari v. Phila. Parking Auth.*, OOR Dkt. AP 2014-0226, 2014 PA O.O.R.D. LEXIS 267 (holding that records reflecting contract negotiation were contained in an attorney's case file, but, as there was no pending litigation, *Silver* did not apply). Therefore, the Commission's mere assertion that the withheld e-mails are contained in an attorney's litigation case file is not enough to establish that the withheld e-mails are exempt from disclosure when the Commission was not a litigant in the underlying proceedings.⁴

CONCLUSION

For the foregoing reasons, the Requester's appeal is granted, and the Commission is required to provide the Requester with all records responsive to the Request 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).

⁴ Mr. Young attests that Mr. Hommrich threatened to sue the Commission regarding its interpretation of the Alternative Energy Act, that the Requester sued two different electric distribution companies in federal court and the court of common pleas, and that “[Mr.] Hommrich has brought legal action against the Commission, by initiating a *pro se* action against the Commission in Commonwealth Court's original jurisdiction.” See *Hommrich v. PUC*, 674 M.D. 2016 (filed Dec. 6, 2016). However, the Commission does not allege that the withheld e-mails exchanged with FirstEnergy relate to any proceeding in which the Commission is a party.

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: March 27, 2017

/s/ Magdalene C. Zeppos

APPEALS OFFICER
MAGDALENE C. ZEPPOS, ESQ.

Sent to: Michael Gianantonio, Esq. (via e-mail only);
Robert Daley, Esq. (via e-mail only);
Elizabeth Lion Januzzi, Esq. (via e-mail only);
Rosemary Chiavetta (via e-mail only)

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

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document, Petition for Review, upon the persons listed and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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