

**COMMONWEALTH COURT OF PENNSYLVANIA
DOCKETING STATEMENT
PETITION FOR REVIEW**

Complete this form and return an original and one copy to the Chief Clerk of the Commonwealth Court within 10 days of the date of the attached notice.

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

Attach additional sheets if needed.

Case Caption: Pa. Public Utility Commission v. Sunrise Energy, LLC



Commonwealth Court Docket No. 503 C.D. 2017

Required Attachments:

(1) **Attach a copy of all decisions and opinions, if any, and all pertinent orders in this case (including, for example, the decision of the Workers Compensation Judge, or similar decision).**

(2) **Attach a Statement of Issues of no more than two pages in length, containing a summary sufficient to explain the case, (See Order of September 15, 1999, 29 Pa. Bull. 5064, 210 Pa. Code §67.71) and indicating the relief requested.**

(3) **Attach a certificate of service indicating service of the docketing statement, statement of issues, and all attachments on all other parties.**

A. Appealability of Order

(1) Is the order appealed a final order? Yes No

(2) If not a final order, pursuant to what Rule of Appellate Procedure is this order being appealed, e.g., Pa. R.A.P. 311, 313, 341(e)? _____

Please explain: _____

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

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

Office of Open Records - AP: 2017-0079 - David Hommrich & Sunrise Energy, LLC

v. Pennsylvania Public Utility Commission

Commonwealth Court of Pennsylvania - 504 C.D. 2017 - PUC v Sunrise Energy

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

If yes, please explain: _____

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

_____ Yes X No

If yes, please explain: _____

Signature /s/ Elizabeth A. Lion Januzzi Date May 8, 2017

Name (Printed) Elizabeth A. Lion Januzzi

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Counsel for (Name of Party) Pennsylvania Public Utility Commission

Rev. 3/2007

APPENDIX A
(Statement of Issues)

Statement of Issues

1. This case arises under the PUC's appeal of the final determinations of the Office of Open Records (OOR) at Dkt. Nos. AP: 2016-2010 and AP: 2-0170079, concurrently, which ordered the release of records of PUC attorneys' privileged work product communication. The OOR erroneously rejected the PUC's argument that Pennsylvania's Right-To-Know Law 65 P.S. §§ 67.101 *et seq.*, (RTK Law) expressly excludes attorney work product from the definition of "public record." 65 P.S. § 67.101. Because PUC counsel's communication was in furtherance of representation of the PUC's legal interest in present and foreseeable future litigation, that communication is confidential attorney work product and not subject to disclosure. Further, because neither counsel for the PUC nor counsel for FirstEnergy waived the attorney work product privilege related to that communication, the records are not "public records" as defined under the RTK Law and not subject to disclosure.

2. The OOR erred as a matter of law in concluding that any communication by an agency's attorney with a "third party" non-client operates to waive the legal privilege for attorney work-product. OOR misapplied the holding *Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409,417(Pa. Cmwlth. Ct. 2014) in contradiction of case law establishing that the work-product doctrine is more inclusive than attorney-client privilege. Unlike the attorney-client privilege, where communication with a third party other than the client operates to waive that privilege, attorney work-product often includes attorney communication with non-client third parties. Such communication, *itself*, is attorney work product. Where, as here, the communication with the third party is for the purpose of representing a client's legal interest as *amicus curie* in the present proceeding as well foreseeable future litigation, communication with that third party is itself attorney work-product, subject to legal privilege.

3. OOR further erred in finding PUC counsel waived attorney-work product privilege by communication with a non-client third party (counsel for FirstEnergy) despite having concluded that the PUC had provided sufficient evidence to establish that the communication between PUC counsel and counsel for FirstEnergy *was* attorney work product. *OOR's Order* at p. 8. Having concluded that the third party communication in question constituted "attorney work product," it was legal error for OOR to analyze that communication for waiver of legal privilege due to "third party communication."

4. OOR erred as a matter of law in failing to shift the burden of proof to Sunrise Energy, LLC, as the party asserting waiver, once OOR found the PUC offered sufficient evidence to support a finding that the records in question were attorney work-product. Under the facts of this case, in order for OOR to find waiver of attorney work product privilege applicable to the communication between PUC counsel and counsel for FirstEnergy, Sunrise would have had to have asserted that the PUC had disclosed *the communication in question* (attorney work product communication between the PUC and FirstEnergy) with a third party.

5. Even if OOR could find that PUC counsel's communication with a non-client third party constitutes waiver of the attorney work product privilege, OOR should

have found that the PUC's legal privilege was preserved under the exception to waiver described as the "common legal interest doctrine." The rationale applicable in case law establishing an exception to waiver of legal privilege via communication with a third party (typically applicable for preservation of attorney-client privilege for communication with a third party) illustrates that the legal interests of the Commission and FirstEnergy, in this case, identical, demonstrated a "common legal interest" which warrants preservation of the PUC's attorney work product privilege.

6. OOR erred as matter of law in finding that Sunrise Energy, LLC, could assert statutory standing as a "requester" to appeal under Section 1101 (a)(1) of the RTK Law, 65 P.S. § 67.1101(a)(1), where the "requester" in the underlying RTK Law request was Hommrich in his individual capacity. The appeal brought to OOR was filed by and through counsel for Sunrise Energy, LLC, and did not represent Hommrich in his individual capacity. OOR erroneously concluded that an LLC may establish standing to appeal under the RTK Law, despite not having been the "requester" before the state agency, so long as the original requester below is in fact, an officer of the corporation.

7. OOR erred as a matter of law in finding that Hommrich, a party to ongoing litigation with FirstEnergy Corp., was entitled to access the privileged attorney work product of counsel for FirstEnergy, based on OOR's finding of PUC counsel's waiver, rather than requiring a separate finding of waiver by counsel for First Energy and its client. OOR's holding impermissibly supersedes the confidential nature of attorney work related to the ongoing Common Pleas Court proceeding and Commonwealth Court appeal. Further, OOR usurps the jurisdiction of the trial court to decide discovery matters by rendering as "public documents" records of FirstEnergy's attorney work product in ongoing litigation. The type of records which OOR orders disclosed, FirstEnergy's memoranda, draft briefs, and communications by counsel for use in litigating their client's case are typically *never* discoverable by an opposing party.

8. OOR further erred in failing to provide FirstEnergy Corp., and its counsel, notice and opportunity to be heard on the issue of Hommrich's access to attorney work product communication and the waiver of the legal privilege. Even if a state agency's attorney may be found to have waived attorney work product privilege via communication with counsel for a third party, counsel for the third party and its client retains a separate legal right to claim legal privilege.

9. OOR's order exceeds the scope of OOR's statutory jurisdiction. OOR's erroneous finding that agency counsel's communication with a third party is *ipso facto*, waiver of attorney work product is an unprecedented holding applied by OOR. Because the OOR's order impermissibly narrows Commonwealth attorneys' rights to claim legal privilege, the OOR exceeds the scope of its jurisdiction. 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 A.2d 812 (Pa. 2002).

10. **Relief Requested:** Reversal of the OOR based on the forgoing and a finding that the agency attorney's work product communication in question is not "public record" as defined under the RTK Law and not subject to disclosure.

APPENDIX B
(OOR Decision)



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
DAVID HOMMRICH AND SUNRISE	:
ENERGY, LLC,	:
Requester	:
	:
v.	: Docket No: AP: 2016-2010
	:
PENNSYLVANIA PUBLIC UTILITY	:
COMMISSION,	:
Respondent	:

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, arguing, among other reasons, that the 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 October 17, 2016, the Request was filed, seeking, in pertinent part:

[C]opies of all e-mail and other correspondences between PUC staff and FirstEnergy Corporation regarding [*Sunrise Energy, LLC v. FirstEnergy Corporation,*] Commonwealth Court Docket 1282 CD 2015 for the last year. I’m

interested in any correspondence that involves this case as well as e-mails in response to the recent ruling by Commonwealth Court.

On November 22, 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 *amicus curiae* and identified 64 responsive e-mails. The Commission claimed that the e-mails were not subject to access because they were related a noncriminal investigation, 65 P.S. § 67.708(b)(17); 52 Pa. Code § 54.8 (relating to privacy of customer information); and were protected by the attorney-work product doctrine and the attorney-client privilege.

On December 9, 2016, 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 December 20, 2016, the Commission filed a position statement limiting its basis for denial to the attorney-work product doctrine.¹ The Commission reiterated its claim that it did not waive the attorney-work product privilege 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 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

¹ As the Commission limited the basis of withholding the responsive records to the attorney-work product doctrine, the OOR will not consider other grounds for denial raised in its response for purposes of this final determination.

the Requester lacks standing to appeal because Sunrise Energy, LLC was not named in the original Request. 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.

On December 22, 2016, the Requester filed a supplemental position statement responding to the Commission's argument that it lacked standing to appeal its response.

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 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.”²

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

² The Commission is permitted to assert these new reasons for denying access to records on appeal to the OOR. *See Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013).

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. Hommrich 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 64 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 attorney-work product doctrine and 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*, 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.’” *See Bagwell v. Pa. Dep’t of Educ.*, 103 A.3d 409, 417 (Pa. Commw. Ct. 2014) (citations omitted). Courts have held that where it is the focus of the dispute, a requester bears the burden to prove that the privilege has been waived. *Id.* at 420.

In support of the Commission application of the attorney-work product doctrine, Ms. Chiavetta attests that:

- 7) All 64 emails consist of communication between PUC counsel and counsel for FirstEnergy regarding the litigation. Therefore, the only issue on appeal is the application of attorney-work product privilege to those communications....
- 10) All PUC counsel’s communication was for the purpose of representation of the Commission’s legal interest in ongoing litigation and in anticipation of potential legal challenges to the Commission’s policy and regulations implementing the Alternative Energy Portfolio Standards Act (Alternative

Energy Act), Act of November 30, 2004, P.L. 1672, 73 P.S. §§ 1648.1-1648.8. Therefore, those communications are excluded from discovery as privileged attorney-work product.

Mr. Young describes the purpose and the content of the responsive records as follows:

- 11) The emails at issue in the instant appeal were generated as [the] Commission's Counsel in Law Bureau monitored the common pleas proceeding with regards to legal and factual issues which we believed could affect ongoing Commission proceedings, and for the purpose of representation of the Commission's interest in the subject matter of the Commonwealth Court case identified in ... [the R]equest.
- 12) All of the emails constitute attorney work product as they 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....
- 15) At no time has the Commission waived the legal privilege for these communications to remain confidential. The communication of factual and legal analysis between PUC counsel and counsel for FirstEnergy was in furtherance of the PUC counsel's legal duties on behalf of the Commission and was obtained for the specific and express purpose of (1) providing legal advice to the Commission whether or not it was in the Commission's interest to monitor the Sunrise Energy common pleas case (and subsequent appellate action) or participate by intervention or other means; (2) providing legal advice and recommendation to our client as to the nature and extent of Commission participation; and (3) representing the Commission as an *amicus curiae*....

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.³ 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 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*,

³ 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.

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.⁴ 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 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,

⁴ In *Sunshine 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).

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 they 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 challenge[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 emails 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.⁵

CONCLUSION

For the foregoing reasons, Requester's appeal is granted, and the Commission must provide 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). 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.⁶ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: March 27, 2017

/s/ Benjamin Lorah, Esq.

APPEALS OFFICER
BENJAMIN A. LORAH, ESQ.

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

⁵ Mr. Young attests 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.

⁶ *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, Docketing Statement, upon the persons listed and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Notification by PACFile:

Robert F. Daley, Esquire
Michael Gianantonio, Esquire
2500 Gulf Tower
707 Grant Street
Pittsburgh, PA 15219-1918

Notification by first class mail addressed as follows:

PA Office of Open Records
Commonwealth Keystone Building
400 North Street, Plaza Level
Harrisburg, PA 17120-0225

/s/ Elizabeth Lion Januzzi
Elizabeth Lion Januzzi
Assistant Counsel
Attorney ID # 69487
(Counsel for Pa. Public Utility Commission)

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

Dated: May 8, 2017

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania Public : 503 CD 2017
Utility Commission, :
Petitioner :
v. :
Sunrise Energy, LLC, :
Respondent :

PROOF OF SERVICE

I hereby certify that this 8th day of May, 2017, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served: Anthony Michael Gianantonio
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Representing: Respondent Sunrise Energy, LLC

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

/s/ Elizabeth A. Lion Januzzi

(Signature of Person Serving)

Person Serving: Januzzi, Elizabeth A. Lion
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