pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
ERIC FRIEDMAN,	:	
Requester	:	
	:	
v.	:	**Docket No: AP 2019-1325**
	:	
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	:	
Respondent	:	
	:	
and	:	
	:	
ENERGY TRANSFER PARTNERS,	:	
Direct Interest Participant	:	

INTRODUCTION

Eric Friedman ("Requester") submitted a request ("Request") to the Pennsylvania Public Utility Commission ("Commission") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq.*, seeking, among other things, transmittal letters submitted to the Commission by Sunoco Pipeline. The Commission denied the Request, arguing, among other things, that the records relate to a noncriminal investigation, contain confidential security information, and that the disclosure of the records would jeopardize public safety and building security. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part,** and the Commission is required to take further action as directed.

FACTUAL BACKGROUND

On June 10, 2019, the Request was filed, seeking:

1. Any record(s) of the [Commission] that contain the names of "authorized Commission employees" as that term is used in 52 Pa. Code Section 102.3(a)(3).

2. All transmittal letters submitted to the [Commission] by Sunoco Pipeline, or any parent or subsidiary of Sunoco Pipeline, as the term "transmittal letter" is used in 52 Pa. Code Section 102.3(b)(1).

3. All records that were submitted to the [Commission] along with the transmittal letters specified in Item 2 above that fall in the category of "Records that are public in nature and subject to the [RTKL]," in accordance with 52 Pa. Code Section 102.3(b)(1)(i).

On June 12, 2019 the Commission invoked a thirty-day extension to respond to the Request. 65 P.S. § 67.902(b). On July 16, 2019, the Commission denied the Request, arguing that no records exist that are responsive to Item 1 of the Request, that the Request is insufficiently specific, 65 P.S. § 67.703, and that release of the records would endanger the safety or physical security of a public utility, 65 P.S. § 67.708(b)(3), and that the records relate to a noncriminal investigation, 65 P.S. § 708(b)(17). The Commission also argued that, to the extent the records contain confidential security information ("CSI") under the Public Utility Confidential Security Information Disclosure Protection Act ("Act"), 35 P.S. §§ 2141.1-2141.8, they are not subject to public disclosure.

On August 6, 2019, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.[1] The OOR invited both parties to supplement the record and directed the

[1] On August 13, 2019, the OOR granted Energy Transfer Partners' ("ET") request for an extension of time to submit a request to participate in this appeal pursuant to 65 P.S. § 67.1101(c) until August 20, 2019. On August 14, 2019, the OOR granted the Commission's request for an extension of time to make a submission on appeal until August 20, 2019. On August 19, 2019, the OOR granted the Requester's request for the opportunity to submit a reply to ET's and the Commission's submissions until August 23, 2019. *See* 65 P.S. § 1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute"). In addition, the Requester granted the OOR an extension of time to issue a Final Determination. *See* 65 P.S. § 67.1101(b)(1).

Commission to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

On August 14 and 16, 2019, the Requester submitted position statements asserting that the requested records are public records subject to the RTKL and also outlining the necessity that the public should be aware of the risk of danger in the event of a pipeline rupture.

On August 20, 2019, ET, owners of the Sunoco Pipeline, L.P. ("ET/SPLP"), a jurisdictional "public utility" holding a certificate of public convenience issued by the Commission and which operates the pipeline implicated by the Request, requested to participate in this appeal pursuant to 65 P.S. § 67.1101(c). ET/SPLP asserts that it has a direct interest in this matter because it is the owner of a record containing confidential or proprietary information. In support of ET/SPLP's request to participate, it submitted the declaration made under penalty of perjury of Todd Nardozzi, ET's Senior Manager of Department of Transportation. Mr. Nardozzi attests that he has knowledge of the records submitted to the Commission that are implicated in the Request and that, "since 2008, ET has submitted substantial information regarding the operation, location, and vulnerabilities of ET's pipeline, which it treats as confidential security information in accordance with the provisions of the [Act] (35 P.S. §§ 2141.1 to 2141.6)." On September 4, 2019, the Requester objected to ET/SPLP's request to participate asserting that, based on a Protective Order issued by the Pennsylvania Commonwealth Court, attorneys for ETP/SPLP are not permitted to contact him. Based upon a review of its submission, ET/SPLP's request to participate is granted and, as a result, the argument and evidence submitted by ET/SPLP has been made part of the record.

Also, on August 20, 2019, ET/SPLP submitted a position statement reiterating the arguments made by the Commission, as well as arguing that the responsive records contain

confidential proprietary information and/or trade secrets. 65 P.S. § 67.708(b)(11). ET/SPLP also argues that the Request implicates records that have already been determined to be exempt from disclosure in prior OOR Final Determinations involving the parties.[2]

On August 20, 2019, the Commission submitted a position statement reiterating its grounds for denial and also claiming that the records reflect internal, predecisional deliberations, 65 P.S. § 708(b)(10)(i)(A). The Commission also argues that the proper forum for a party to challenge the designation of the requested transmittal letters as confidential security information is before the Commission pursuant to 35 P.S. § 2141.3(c) and 52 Pa. Code § 102.4. Therefore, the Commission asserts that the OOR lacks authority to determine this issue. In support of its position, the Commission submitted the affidavits, made under penalty of perjury, of Rosemary Chiavetta, the Secretary of the Commission and Paul Metro, the Commission's Manager of the Safety Division, Bureau of Investigation and Enforcement ("BIE").

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).

[2] ET/SPLP cites to the following OOR Final Determinations in support of its position: *Friedman v. Pa. Pub. Util. Comm'n*, OOR Dkt. AP 2019-0502, *appeal pending*, No. 982 CD 2019; *Friedman v. Pa. Pub. Util. Comm'n*, OOR Dkt. AP 2019-0358, 2019 PA LEXIS O.O.R.D. 296; and *Friedman v. Thornbury Twp.*, OOR Dkt. AP 2017-0817, 2017 PA LEXIS O.O.R.D. 962.

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. Pa. Dep't of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the parties did not request a hearing; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

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)(1). 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 *Pa. Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)). "The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request." *Hodges v. Pa. Dep't of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011).

1. The Commission has proven that records responsive to Item 1 of the Request do not exist

The Commission argues that it does not maintain a record of employees who are authorized to review CSI held by public utilities. In support of the Commission's position, Secretary Chiavetta attests that "following a thorough search for all responsive records … I sent the Commission's response to [the] Request" and "the Commission does not maintain a record or list of employees who are authorized to review … CSI held by public utilities." Mr. Metro also attests that the requested record does not exist. Mr. Metro further attests that "[BIE] determines which employees are authorized to review CSI on a case-by-case basis, depending on the type of utility at issues, the employees assigned to the matter, and other relevant factors." Under the RTKL, a statement made under penalty of perjury is competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

The Requester has not submitted evidence to dispute the Commission's assertion that no records responsive to Item 1 of the Request exist within its possession, custody or control. In the absence of any evidence that the Department has acted in bad faith or that the record does, in fact, exist, "the averments in [the affidavits] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Based on a review of the language of Item

1, the Department has reasonably interpreted this portion of the Request, *Spatz v. City of Reading*, OOR Dkt. AP 2013-0867, 2013 PA O.O.R.D. LEXIS 513, and as the Requester has not presented competent evidence that the record does exist, the Department has met its burden of proof that it has does not possess any records responsive to Item 1.[3] *Hodges*, 29 A.3d at 1192.

2. Portions of Items 2 and 3 of the Request are sufficiently specific

The Commission asserts that Items 2 and 3 of the Request are insufficiently specific in that they do not contain a defined subject matter, scope or a limiting timeframe. 65 P.S. § 67.703. More specifically, the Commission argues that the records sought by Item 2 of the Request could encompass all transmittal letters received by SPLP or any affiliated company since the enactment of 52 Pa. Code Chapter 102 in August of 2008. Regarding Item 3, the Commission asserts that the responsive records could encompass the thousands of pages that SPLP has attached to the transmittal letters submitted since 2008.

ET/SPLP also argues that Items 2 and 3 of the Request are insufficiently specific. ET/SPLP argues that Items 2 and 3 seek an overbroad, undefinable universe of documents because the Request fails to contain a defined subject matter in the form of a transaction or activity of the agency. ET/SPLP asserts that it submits a large volume of information to various Commission bureaus for a variety of purposes, including applications for operating approvals, litigation, regulatorily-required compliance filing and responses to data requests made by BIE. ET/SPLP also asserts that Items 2 and 3 implicate a boundless scope in that a "transmittal letters" as defined in 52 Pa. Code § 102.3(b)(1), and the accompanying documents, could imply a large variety of

[3] Although not raised by the Requester, 52 Pa. Code § 102.4 states that "Commission employees that agree to the designation [of Authorized Commission employee] will have their names added to the Authorized Access List maintained by the Commission's Secretary's Bureau." However, the OOR makes no determination as to whether these records should exist, only that the Commission does not possess the record response to this Request. *See, e.g.*, *Troupe v. Borough of Punxsutawney*, OOR Dkt. AP 2010-0743, 2010 PA O.O.R.D. LEXIS 731 ("While ... evidence may establish that a [record] should exist, the OOR lacks jurisdiction to rule on the propriety of the lack of such [record] -- the OOR may only determine whether a responsive record does, in fact, exist").

documents including, technical reports, locational drawings, and operational standards submitted to the Commission for various purposes. Further, like the Commission, ET/SPLP asserts that the Request implicates all possible records submitted to the Commission since 2008 by SPLP and affiliates.

Section 703 of the RTKL states that "[a] written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested." 65 P.S. § 67.703. When interpreting a RTKL request, agencies should rely on the common meaning of words and phrases, as the RTKL is remedial legislation that must be interpreted to maximize access. *See Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012) (citing *Bowling*, 990 A.2d 813). In determining whether a particular request is sufficiently specific, the OOR uses the three-part balancing test employed by the Commonwealth Court in *Pa. Dep't of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121 (Pa. Commw. Ct. 2015), and *Carey v. Pa. Dep't of Corr.*, 61 A.3d 367, 372 (Pa. Commw. Ct. 2013). Specifically, the OOR examines to what extent the request sets forth (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. *Pa. Dep't of Educ.*, 119 A.3d at 1124-25. Finally, "[t]he fact that a request is burdensome does not deem it overbroad, although it may be considered as a factor in such a determination." *Pa. Dep't of Envtl. Prot. v. Legere*, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012) (*en banc*).

First, "[t]he subject matter of the request must identify the 'transaction or activity' of the agency for which the record is sought." *Id*. at 1125. In *Carey*, the Commonwealth Court found a request for unspecified records ("all documents/communications") related to a specific agency project ("the transfer of Pennsylvania inmates to Michigan") that included a limiting timeframe to

be sufficiently specific "to apprise [the agency] of the records sought." 61 A.3d 367. Second, the scope of the request must identify a discrete group of documents (e.g., type or recipient). *See Pa. Dep't of Educ.*, 119 A.3d at 1125. "The timeframe of the request should identify a finite period of time for which records are sought." *Id.* at 1126. This factor is the most fluid and is dependent upon the request's subject matter and scope. *Id.* Failure to identify a finite timeframe will not automatically render a sufficiently specific request overbroad; likewise, a short timeframe will not transform an overly broad request into a specific one. *Id.*

In support of the Commissions position, Mr. Metro attests, in pertinent part, the following:

> [BIE] is and has been, for more than five years, engaged in multiple noncriminal investigations of [ET/SPLP] and affiliated companies.
>
> To the best of my knowledge, in the last two years, [BIE] has received from [ET/SPLP] hundreds of transmittal letters with thousands of pages of attached documents.[] Every document submitted by [ET/SPLP] that contains confidential material – including CSI – must be identified through and attached to a transmittal letter. [ET/SPLP's] transmittal letters have multiple documents attached in many cases.
>
> To access and review all of the documents requested by [the Requester] would be unduly burdensome on the [BIE] staff.

Mr. Metro also notes, in his affidavit, that "[g]iven the number of documents and the extremely constricted timeframe for responding to a Right-to-Know Law appeal, [BIE] has not had sufficient time to confirm the exact number of documents" that comprise the transmittal letters and attached documents submitted by ET/SPLP.

In support of ET/SPLP's position, Mr. Nardozzi attests that he has knowledge of the records submitted to the Commission and possibly implicated by the Request. Mr. Nardozzi further attests, in pertinent part, the following:

> ET regularly submits information to the [Commission] through applications for operational approvals, through litigation of complaints and protests to which ET is a party, and through regulatorily-required compliance filings. These filings

> encompass a broad range of information in a variety of forms, including technical reports, locational drawings, and operational standards, submitted to the agency or its bureaus in applications, petitions, other pleadings, discovery responses, briefs, testimony, exhibits, letters, etcetera.
>
> Since 2008, ET has submitted substantial information regarding the operation, location, and vulnerabilities of ET's pipeline, which it treats as confidential security information in accordance with the provisions of the [Act]….

ET/SPLP also submitted a copy of a listing of the public dockets, obtained from a "cursory review" conducted on the Commission's website, in which ET/SPLP and/or its subsidiaries currently are or have been a party to before the Commission.

Items 2 and 3 of the Request seek respectively, transmittal letters as defined in 52 Pa. Code § 102.3(b)(1) and submitted to the Commission by ET/SPLP, and the documents submitted with the transmittal letters that are public in nature and subject to the RTKL in accordance with 52 Pa. Code § 102.3(b)(2)(i). The regulations referenced in the Request were enacted by the Commission to implement the requirements set forth in the Act, which must be followed in the event that a public utility is required to submit information to the Commission containing confidential security information. *See* 35 P.S. § 2141.3.

While the Request on its face does not state a definite timeframe, Items 2 and 3 seek records for an implied timeframe. Review of the regulations shows that Sections 102.3(b)(1) and (2)(i) were enacted in August 2008 and, thus, requiring the utilization of a transmittal letter and the designation of public and confidential material when submitting information to the Commission at that point in time. The parties acknowledge the implied timeframe in their arguments by asserting that Items 2 and 3 implicate the numerous amounts of records submitted by ET/SPLP to the Commission *since* the regulation's enactment in *2008*. Given the fact that Items 2 and 3 are specifically linked to Sections 102.3(b)(1) and (2)(i), a limiting timeframe may be gleaned from the overall context of the Request and is sufficiently identifiable by the Commission. *See Barry*

v. Bensalem Twp. Police Dep't, OOR Dkt. AP 2013-1151, 2013 PA O.O.R.D. LEXIS 690 (timeframe may be implied from the context of the records requested); *Getchius v. Pa. Dep't of Corr.*, OOR Dkt. AP 2017-1115, 2017 PA O.O.R.D. LEXIS 1112 (a request seeking the implementation of an identified policy was found to be sufficiently specific because the timeframe was necessarily limited to the period of time which the agency's policies went into effect); *Rand v. Pa. Dep't of Health*, OOR Dkt. AP 2019-0915, 2019 PA O.O.R.D. LEXIS 805.

The Commission and ET/SPLP also argue that Items 2 and 3 of the Request lack a specific subject matter because they do not identify a transaction, activity or docket number for which the transmittal letters and attached documents would have been submitted. With respect to the transmittal letters, the Commission argues that, due to the multiple investigations involving ET/SPLP, it has received hundreds of transmittal letters. ET/SPLP argues that it regularly submits information to the Commission for various purposes and, as an illustration of the potential number of filings implicated by the Request, provides a partial listing of the public dockets to which it and its subsidiaries are parties or have been parties.

In *Legere*, the requester sought "[a]ll Act 223, Section 208 determination letters issued by the Department of Environmental Protection [DEP] since January 1, 2008, as well as the orders issued by [DEP] to well operators in relation to those determination letters, as described in Section 208 of the Oil and Gas Act." 50 A.3d at 262. DEP partially granted the request and provided some responsive records, but denied the remainder of the request as insufficiently specific because it did not identify specific names, geographic locations, well or permit numbers, or complaint numbers. When reviewing the OOR's final determination, the Commonwealth Court affirmed the OOR's conclusion that the request was sufficiently specific, finding that, as compared to the request *Mollick v. Twp. of Worcester* for "(1) all emails between the Supervisors regarding any

Township business and/or activities for the past one and five years; and (2) all emails between the Supervisors and the Township employees regarding any Township business and/or activities for the past one and five years," that necessitated "files to be reviewed and judgments made as to the relation of the documents to the specific request" in order for the agency to respond, in *Legere*, the request to DEP was for "a clearly-defined universe of documents." The Court emphasized in *Legere* that "[t]here are no judgments to be made as to whether the documents are 'related' to the request." *Id*. at 264-65; *see also Pa. Dep't of Corr. v. St. Hilaire*, 128 A.3d 859, 864 (Pa. Commw. Ct. 2015).

Similar to *Legere*, by limiting the portion of Items 2 and 3 seeking records regarding the transmittal letters and attachments submitted by "Sunoco Pipeline" to the parameters defined by 52 Pa. Code §§ 102.3(b)(1) and (b)(2)(i), the Requester provides the Commission a sufficiently "defined universe of documents" to use when conducting a search. In Commission matters involving ET/SPLP, like the matters in *Legere*, submissions made by ET/SPLP either contain transmittal letters and attachments as defined under the regulations or they do not. As indicated by ET/SPLP's attachment listing dockets found on the Commission's website for example, the Commission would, at a minimum, be able to search its own electronic databases to determine the matters in which SPLP is involved and review the matters for transmittal letters and attachments submitted. Further, it is reasonable to infer that the Commission has a record keeping system to track the multiple ongoing investigations it has stated involve SPLP, that could also be searched for transmittal letters and attachments thereto.[4] While the types of filings or investigative matters involving ET/SPLP may be numerous in scope, the timeframe is limited to 2008 to the present,

[4] While not discussed by the Commission, the Act mandates that an agency "develop such protocols as may be necessary to protect public utility records or portions thereof that contain [CSI] from prohibited disclosure," including "(5) A document tracking system … to allow for records or copies thereof containing confidential security information to be traceable at all times to a single person." *See* 35 P.S. § 2141.3(d)(5).

and Items 2 and 3 seek a specific record that may be found in the matters being handled by the Commission involving ET/SPLP. Additionally, "the fact that a request is burdensome does not deem it overly broad." *Id.*; *see also Pa. State Sys. of Higher Educ. v. Ass'n of State College & Univ. Faculties*, 142 A.3d 1023, 1031 (Pa. Commw. Ct. 2016) ("Just because a request is for a large number of records does not mean that an agency is excused from its obligation to produce the requested documents").

However, regarding the portion of Items 2 and 3 seeking the same records for "any parent or subsidiary of [ET/SPLP]," without providing the names of the other entities that may have submitted transmittal letters and attachments to the Commission, as defined by 52 Pa. Code §§ 102.3(b)(1) and (b)(2)(i), the Request does not provide a "clearly-defined universe of records" for which a search may be conducted. Accordingly, this portion of Item 2 and 3 of the Request are insufficiently specific. *See* 65 P.S. § 67.703; *Legere*, *supra*.

3. The Commission and ET/SPLP have not proven that the requested records are confidential security information

The Commission and ET/SPLP argue that because the records requested in Item 2 of the Request may contain CSI material in accordance with Sections 2141.3(c)(4) and 2141.5 of the Act, they are exempt from disclosure under the RTKL. The Commission makes the same assertion regarding the records requested in Item 3. The Act provides, in pertinent part, the following:

> (a) GENERAL RULE.— The public utility is responsible for determining whether a record or portion thereof contains confidential security information. When a public utility identifies a record as containing confidential security information, it must clearly state in its transmittal letter, upon submission to an agency, that the record contains confidential security information and explain why the information should be treated as such.
>
> (b) SUBMISSION OF CONFIDENTIAL SECURITY INFORMATION.— An agency shall develop filing protocols and procedures for public utilities to follow when submitting records, including protocols and procedures for submitting records containing confidential security information. Such protocols and

> procedures shall instruct public utilities who submit records to an agency to separate their information into at least two categories: (1) PUBLIC.— Records or portions thereof subject to the provisions of the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law. (2) CONFIDENTIAL.— Records or portions thereof requested to be treated as containing confidential security information and not subject to the Right-to-Know Law.

35 P. S. §§ 2141.3(a), (b).

When a public utility is directed to submit records to the Commission that contain CSI, it is required to do the following:

> (1) Clearly state in its transmittal letter to the Commission that the record contains confidential security information and explain why the information should be treated as confidential. *The transmittal letter will be treated as a public record and may not contain any confidential security information*.
>
> (2) Separate the information being filed into at least two categories:
>
> > (i) Records that are public in nature and subject to the Right-to-Know Law.
> >
> > (ii) Records that are to be treated as containing confidential security information and not subject to the Right-to-Know Law.
>
> (3) Stamp or label each page of the record containing confidential security information with the words "Confidential Security Information" and place all pages labeled as containing confidential security information in a separate envelope marked "Confidential Security Information."
>
> (4) Redact the portion of the record that contains confidential security information for purposes of including the redacted version of the record in the public file.

52 Pa. Code § 102.3(b) (emphasis added).

Mr. Metro attests that, "in his capacity as Manager of the Safety Division of [BIE], [he] oversee[s] Commission investigations of gas and hazardous volatile liquid pipelines." Mr. Metro further attests the following:

> Many of the numerous records submitted to [BIE] under [ET/SPLP's] transmittal letters contain [CSI] within the meaning of the [Act]…. In my professional opinion, release of the records marked as CSI would compromise security against sabotage or criminal or terrorist acts regarding pipeline facilities by illustrating the extent of

> the impact zone, including casualty and damage assessments at various ranges, regarding an accident (or sabotage event) on a pipeline. These records explicitly identify how such an assessment can be made (as well as the assessments for these particular pipelines); information which could clearly be used by a terrorist to plan an attack on a pipeline (and particularly on these Sunoco pipelines, as they contain specific operating parameters of the pipelines) to cause the greatest harm possible and mass destruction to the public living near such facilities.

In support of ET/SPLP's position, Mr. Nardozzi declares that his job responsibilities include "ensur[ing] the protection and safety of ET assets, including ET and/or SPLP's records and other documents." Mr. Nardozzi declares that he has knowledge of records submitted to the Commission that may be implicated by the Request and, further:

> ET regularly submits information to the [Commission] through applications for operational approvals, through litigation of complaints and protests to which ET is a party, and through regulatorily-required compliance filings. These filings encompass a broad range of information in a variety of forms, including technical reports, locational drawings, and operational standards, submitted to the agency or its bureaus in applications, petitions, other pleadings, discovery responses, briefs, testimony, exhibits, letters, etcetera.
>
> Since 2008, ET has submitted substantial information regarding the operation, location, and vulnerabilities of ET's pipeline, which it treats as [CSI] in accordance with the [Act].
>
> Records in possession of the [Commission] that contain ET's [CSI] are of sufficient detail that, if disclosed, could be used to facilitate damage or disruption to ET's pipelines. While certain observations concerning the characteristics of ET's pipeline facilities – such as their general path or location of the above-ground valves – can be seen at the surface level, the types of [CSI] frequently provided to the [Commission] reflects far more detailed information than anything that could be obtained through surface-level observation. The release of this information would create more than a significant risk to the security and integrity of the ME 1 and ME 2 pipelines[5] than anything that could be obtained through surface-level observations. Specifically, public disclosure of ET's detailed [CSI] in possession of the [Commission] would give someone with malicious intent the knowledge necessary to breach, damage or destroy the pipelines, potentially resulting in the compromise of life, safety, public property, public utility facilities, and other private property.

[5] In his declaration, Mr. Nardozzi explains that ET owns SPLP, which operates the Mariner East 1 (ME1) and Mariner East 2 (ME2) pipelines.

Here, regarding the transmittal letters requested in Item 2, the Commission and ET/SPLP argue that records are part of a filing or are marked by ET/SPLP as containing CSI. Therefore, they argue, the records are exempt from disclosure under the Act. More specifically, the Commission argues that once a record has been designated as containing CSI, the Commission is prohibited from disclosing the documents pursuant to Section 2141.5(a) of the Act and only the Commission has the authority to entertain challenges to the CSI designation. Therefore, the Commission and ET/SPLP assert that the requested transmittal letters may not be accessed under the RTKL.

For a record to be designated as non-disclosable CSI under the Act, ET/SPLP and the Commission must comply with the "[p]rocedures for submitting … and protecting confidential security information" set forth in § 2141.3 and 52 Pa. Code §102.3(b)(1), as a condition precedent for nondisclosure. *See Friedman v. Pa. Public Utility Comm'n*, OOR Dkt. AP 2019-0502, PA O.O.R.D LEXIS 631, appeal pending, No. 982 CD 2019 (Pa. Commw. Ct.); *see also Schmitz and The Pittsburgh Post-Gazette v. Pennsylvania Emergency Management Agency et al.*, OOR Dkt. AP 2014-1055, 2014 PA O.O.R.D. LEXIS 1094, *22-23 (finding that because the evidence did not demonstrate that PEMA developed the compliance procedures by which records could be designated as confidential security information, the Act did not apply) (citing *Schumacher v. City of Scranton*, OOR Dkt. 2009-0280, 2009 PA O.O.R.D. LEXIS 153 (holding that the City could not avail itself of the protections under the Act when the City did not prove its compliance with the necessary requirements to designate records as confidential security information)). The regulations implementing the CSI designation procedures of the Act clearly state that a transmittal letter "may not contain any confidential security information." 52 Pa. Code § 102.3(b). In addition, the same regulation, which implements Section 2141.3(a) of the Act, provides that the

public utility "must clearly state in its transmittal letter, upon submission to an agency, that the record contains confidential security information and explain why the information should be treated as such"; most importantly, it expressly states that "*the transmittal letter will be treated as a public record*." 52 Pa. Code § 102.3(b) (emphasis added). Further, Section 102.3(c) provides that the "public utility has the responsibility to identify records as containing CSI" and if it fails to do so, "it does not obtain the protections offered in this chapter and in Act 156." 52 Pa. Code § 102.3(c).

Mr. Metro and Mr. Nardozzi attest that the Request for transmittal letters implicates records that may contain CSI and have been marked as such. ET/SPLP asserts that the affirmations of those individuals regarding the CSI status of transmittal letters containing such information should be enough to trigger the protections of the Act against public disclosure. Records in an agency's possession are presumed public unless exempt under an exception in the RTKL, a privilege, or another law. 65 P.S. §67.305(a). Also, the RTKL does not supersede the public nature of a record established by statute or regulation. Section 306 of the RTKL, 65 P.S. §67.306. The Commonwealth Court in *Pa. Dep't of Labor & Indus. v. Heltzel* distinguished the public nature of records (Section 306 of the RTKL) from public access to records (Section 3101.1 of the RTKL), stating:

> Section 306 of the RTKL provides that [state] law operates to supersede contrary provisions when that law establishes public nature. 'Establish' means 'to institute (as a law) permanently by enactment or agreement.' By its plain meaning, the 'nature' of a document implicates the innate or intrinsic characteristics of a record, its essence, without regard to surrounding circumstances.
>
> Once 'established' by statute as 'public,' a record is no longer subjected to the traditional public record analysis under the RTKL. Given this significant consequence, a statute should be clear when it establishes the public nature of records.

90 A.3d 823, 831-32 (Pa. Commw. Ct. 2014). In *Heltzel*, the Court considered whether the OOR had properly interpreted language governing access to Pennsylvania's Tier II hazardous chemicals inventory database under the federal Emergency Planning and Community Right-to-Know Act (EPCRA),[6] which provides that certain information "shall be made available to the general public" consistent with availability provisions in EPCRA. The Court concluded that the OOR erroneously determined that the EPRCA language established the public nature of the requested records under federal law such that the OOR was precluded from applying the provisions of the RTKL to deny access. *Heltzel*, 90 A.3d at 832. In making its determination regarding the public nature of the record sought, the Court emphasized that, "[n]owhere does EPCRA state that Tier II information 'shall be public,' or the like. *Id*.

The transmittal letters sought in Item 2 are the means by which a public utility provides information requested by the Commission that may contain CSI. Section 2141.3 of the Act makes clear that the Commission shall instruct public utilities that materials submitted are to be segregated in two categories – one of which is "*subject to* the provisions of the [RTKL]" and one which is not. In contrast to the Act, the protocols and procedures developed by the Commission for the submission of confidential documents, including CSI, include express language stating that "*[t]he transmittal letter will be treated as a public record"* without the limiting language 'and subject to the RTKL.' 52 Pa. Code § 102.3(b)(1) (emphasis added). Whereas, the subsection addressing the documents to be submitted as attachments to transmittal letters distinguishes between "[r]ecords that are public in *nature* and *subject to* the [RTKL]" and "records that are to be treated as containing [CSI] and *not subject to* the [RTKL]." 52 Pa. Code §§ 102.3(b)(2)(i)-(ii) (emphasis added).

[6] 42 U.S.C. §§11001-11050.

The regulatory language regarding the attachments, as compared to the transmittal letters, is more akin to the language examined by the Commonwealth Court in *Mission Pa., LLC v. McKelvey*, where the Medical Marijuana Act stated that permit applications "are public records and *shall be subject to* the [RTKL]." 212 A.3d 119, 131 (Pa. Commw. Ct. 2019); 35 P.S. §10231.302(b) (emphasis added). In *Mission Pa.*, in its application of Section 306 of the RTKL, the Commonwealth Court agreed with the OOR's interpretation that the phrase "subject to" renders the Applications public except when any RTKL exceptions or other exemptions apply. *Id*. However, here, the regulatory language applicable to the transmittal letters is not qualified by the "subject to" language; rather, the language clearly establishes the public nature of the transmittal letters, rather than just making the transmittal letters "subject to" the RTKL, such that the regulation supersedes the provisions of the RTKL based on 65 P.S. § 67.306. *See Heltzel* at 832 ("Once 'established' by statute as 'public,' a record is no longer subjected to the traditional public record analysis under the RTKL"). Therefore, the public status of the transmittal letters is established by regulation, and the RTKL's exemptions cannot apply.

Regarding Item 3, which seeks the records submitted to the Commission by ET/SPLP with the transmittal letters, the Commission argues that, based on the nondisclosure standards set forth in the Act, all records submitted by ET\SPLP with the transmittal letters are exempt CSI. The Act defines CSI as follows:

> "CONFIDENTIAL SECURITY INFORMATION." INFORMATION CONTAINED WITHIN A RECORD MAINTAINED BY AN AGENCY IN ANY FORM, THE DISCLOSURE OF WHICH WOULD COMPROMISE SECURITY AGAINST SABOTAGE OR CRIMINAL OR TERRORIST ACTS AND THE NONDISCLOSURE OF WHICH IS NECESSARY FOR THE PROTECTION OF LIFE, SAFETY, PUBLIC PROPERTY OR PUBLIC UTILITY FACILITIES, INCLUDING, BUT NOT LIMITED TO, ALL OF THE FOLLOWING:
>
> (1) A vulnerability assessment which is submitted to the Environmental Protection Agency or any other Federal, State or local agency.

(2) Portions of emergency response plans that are submitted to the Department of Environmental Protection, the Pennsylvania Public Utility Commission or any other Federal, State or local agency dealing with response procedures or plans prepared to prevent or respond to emergency situations, except those portions intended for public disclosure, the disclosure of which would reveal vulnerability assessments, specific tactics, specific emergency procedures or specific security procedures. Nothing in this term shall be construed to relieve a public utility from its public notification obligations under other applicable Federal and State laws.

(3) A plan, map or other drawing or data which shows the location or reveals location data on community drinking water wells and surface water intakes.

(4) A security plan, security procedure or risk assessment prepared specifically for the purpose of preventing or for protection against sabotage or criminal or terrorist acts.

(5) (i) Specific information, including portions of financial statements, about security devices or personnel, designed to protect against sabotage or criminal or terrorist acts.

(ii) Nothing in this definition shall be construed to prevent the disclosure of monetary amounts.

35 P. S. § 2141.2 (capitalization in original). As stated above, Mr. Metro and Mr. Nardozzi attest that due to the nature of the records submitted, release may compromise pipeline security and potentially result in a risk to public security and safety. However, Section 2141.3 of the Act contemplates that the records attached to a transmittal letter may include public as well as confidential information and places the onus on the Commission to instruct public utilities "who submit records to an agency to separate their information into at least two categories: (1) PUBLIC.— Records or portions thereof subject to the provisions of the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law. (2) CONFIDENTIAL.— Records or portions thereof requested to be treated as containing confidential security information and not subject to the Right-to-Know Law." 35 P.S. § 2141.3(b). The Act also provides that "[p]ublic

utility records or portions thereof which contain confidential security information, in accordance with the provisions of this act, shall not be subject to the…[RTKL]." 35 P.S. § 2141.4.

The Requester in Item 3 expressly limits the records he is seeking to "[r]ecords that are public in nature and subject to the [RTKL]." The regulatory provisions the Requester references to limit the Request require that the public utility submitting records that contain CSI material must do the following:

> (2) *[s]eparate* the information being filed *into at least two categories*:
>
> (i) Records that are public in nature and subject to the Right-to-Know Law.
>
> (ii) Records that are to be treated as containing confidential security information and not subject to the Right-to-Know Law.
>
> (3) *Stamp or label each page of the record containing confidential security information with the words "Confidential Security Information" and place all pages labeled as containing confidential security information in a separate envelope marked "Confidential Security Information*."
>
> (4) *Redact the portion of the record that contains confidential security information* for purposes of including the redacted version of the record in the public file.

52 Pa. Code § 102.3(b) (emphasis added). Based on a plain reading of these requirements, the records requested would not include non-disclosable material because ET/SPLP would have had to submit the records segregated in "public" and "non-public" categories, with the confidential material marked as CSI and placed in a separate envelope. Item 3 of Request is necessarily limited, by the express language, to the records designated as public under the Act and its implementing regulations. As ET/SPLP have not identified records responsive to Item 3 of the Request for which they have complied with the statutory and regulatory "[p]rocedures for submitting … and protecting confidential security information" set forth in § 2141.3, ET/SPLP and the Commission are, therefore, not entitled to the statutory protection of the Act. *See Schmitz, supra*; *Schumaker, supra*.

Both the Commission and ET/SPLP claim that because the records may contain CSI that was either inadvertently or erroneously included in a transmittal letter and under the Act, the Commission is prohibited from disclosing such information.[7] However, again, neither party has identified responsive records or presented nonconclusory evidence that any responsive transmittal letters records or attachments contain CSI, for which an argument for redaction may possibly be made under 35 P.S, § 2141.3(e),[8] and, further, the transmittal letters sought in Item 2 are expressly public in nature.

The Commission and ET/SPLP also argue that the OOR is without jurisdiction to determine the designation of CSI material in submissions by public utilities because the Act vests authority with the Commission to entertain any challenge to CSI designation. Review of Section 2141.3(c) of the Act reveals that challenges to a CSI designation "shall be made in writing to the agency in which the record or portions thereof were originally submitted" and, further, the Commission has promulgated regulations outlining the procedures for filing a challenge. *See* 35 P.S. § 2141.3(c); 52 Pa. Code § 102.4. However, as detailed above, the Act and the regulations specifically mandate that certain records are public and/or subject to the RTKL. Accordingly, in this adjudication, the

[7] Relying on *Keys v. Unemployment Comp. Bd. of Rev.*, 130 A.2d 262 (Pa. Super. 1957), ET/SPLP also advances the argument that the Commission may waive its regulation that states no CSI may be included in a transmittal letter. Notably, the Commission has not raised the argument regarding the waiver of its own regulation. Nevertheless, *Keys* is distinguishable from the matter here. In *Keys*, the Superior Court concluded that when the Unemployment Compensation Appeal Board remanded an appeal for a hearing on the merits, at a point when an appeal had been filed by letter, but had not been perfected by the timely resubmission of a standard agency form, that the Board action was considered "a decision to waive the *technical* violation of its regulation." 130 A.2d at 265. Here, however, ET/SPLP asserts that the Commission should waive the substantive requirement that CSI not be included in transmittal letters, which would transform the legal status of the transmittal letters under the Act and the RTKL. This position is wholly distinguishable from the waiver of the procedural rule addressed in *Keys*, especially if one considers that the Board was already on notice of the appeal and the reasons therefore, although the correct agency form had not used. In addition, ET/SPLP has not submitted any evidence for the proposition that an agency can decide to "waive" the public nature of a record.

[8] If an agency determines that a record or portions thereof contain confidential security information and information that is public, the agency shall redact the portions of the record containing confidential security information before disclosure. 35 P.S. § 2141.3(e).

OOR is not determining the propriety of a CSI designation; rather, we are analyzing applicability of the RTKL to the records requested, which are subject to the RTKL.

Accordingly, the Commission and ET/SPLP have not demonstrated that the transmittal letters sought in Item 2 and the documents attached to the transmittal letters segregated as public records and subject to the RTKL sought in Item 3 are exempt CSI.

4. The Commission and ET/SPLP have not demonstrated that records attached to the transmittal letters are exempt under Sections 708(b)(2) and (3) of the RTKL

The Commission and ET/SPLP also argue that the disclosure of the records would endanger public safety and compromise the physical security of the pipelines against sabotage, criminal or terroristic acts. 65 P.S. §§ 708(b)(2), (3). Section 708(b)(2) of the RTKL provides that records "maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity" are exempt from disclosure. 65 P.S. § 67.708(b)(2). In order to establish this exemption, an agency must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Pa. Dep't of Corr*., 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013); *Adams v. Pa. State Police*, 51 A.3d 322 (Pa. Commw. Ct. 2012). "Reasonably likely" has been interpreted as the likelihood that disclosure would cause the alleged harm "requiring more than speculation." *Carey*, 61 A.3d at 375. In order to show a reasonable likelihood of jeopardy under Section 708(b)(2) of the RTKL, "[a]n agency must offer more than speculation or conjecture." *California Borough v. Rothey*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018). The Commonwealth Court has "defined substantial and demonstrable [risk] as actual or real and apparent." *Borough of Pottstown*

v. Suber-Aponte, 202 A.3d 173, 180 (Pa. Commw. Ct. 2019) (emphasis in original) (quoting *Carey*, 61 A.3d at 373).

Meanwhile, Section 708(b)(3) of the RTKL exempts from disclosure "[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, *public utility*, infrastructure, facility or information storage system." 65 P.S. § 67.708(b)(3) (emphasis added); *see Crockett v. Southeastern Pa. Transp. Auth.*, OOR Dkt. AP 2011-0543, 2011 PA O.O.R.D. LEXIS 268 (holding that rail car inspection and repair records were not exempt under this exemption); *Moss v. Londonderry Twp.*, OOR Dkt. AP 2009-0995, 2009 PA O.O.R.D 724 (holding that records related to the Three Mile Island nuclear power plant were not subject to public access). In order for this exemption to apply, "the disclosure of" the records – rather than the records themselves – must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructure. *See* 65 P.S. § 67.708(b)(3); *see also Pa. State Police v. ACLU of Pa.*, 189 A.3d 37 (Pa. Commw. Ct. 2018) (holding that when an affidavit is legally sufficient to prove that the disclosure of a record at issue would likely cause the alleged harm under Section 708(b)(3) of the RTKL, *in camera* review of the records is unnecessary). The Commonwealth Court has held that "[a]n agency must offer more than speculation or conjecture to establish the security-related exemptions...." *Rothey*, 185 A.3d at 468 (internal citations omitted); *see also Mission Pa., LLC v. McKelvey*, 212 A.3d 119 (Pa. Commw. Ct. 2019).

As set forth above, Mr. Metro and Mr. Nardozzi attest to the nature of the information that ET/SPLP has submitted to the Commission for various reasons and how any records designated as CSI, if released, contain information that would "compromise security against sabotage or criminal or terroristic acts regarding pipeline facilities…" and could be used to devise a plan of

"attack on a pipeline…to cause the greatest possible harm and mass destruction to the public living near such facilities." However, although the Commission asserts that many of the records submitted by ET/SPLP contain CSI and other security-sensitive information, it has not identified any responsive records. In fact, Mr. Metro, in a footnote to his affidavit acknowledges that, while asserting that Sunoco has submitted hundreds of transmittal letters to the Commission with thousands of pages of attachments, "[g]iven the number of documents at issue … [BIE] has not had sufficient time to confirm the exact number of documents." As compared to *Friedman v. Pa. Pub. Util. Comm'n*, where the requester expressly sought "calculations or estimates of *blast radius* (Sunoco's term) or "buffer zone" ([Commission's] term) *regarding accidents or releases* from HVL pipelines," a particularly described record to which the Commission's evidence regarding risk of public safety or security of a public utility could be attributed, here, no records have been identified at all. OOR Dkt. AP 2019-0502, *appeal pending*, No. 982 CD 2019. As previously stated, while under the RTKL, an affidavit is generally competent evidence to sustain an agency's burden of proof, *Sherry*, 20 A.3d at 520-21; *Moore*, 992 A.2d 907 at 909, "a generic determination or conclusory statements are not sufficient to justify the exemption of public records." *Scolforo*, 65 A.3d at 1103. (Pa. Commw. Ct. 2013) (*en banc*); *see also Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d at 1130; *Rothey*, 185 A.3d at 468 ("[a]n agency must offer more than speculation or conjecture to establish the security-related exceptions under the [RTKL]"). Because the Commission has not identified the responsive transmittal letters and publicly designated documents attached to them, the conclusory and speculative statements made regarding the risk of harm in the release of all potential responsive records do not support the Commission's and ET/SPLP's position that the disclosure of the public portions of Item 3 would jeopardize public safety or the security of a public utility.

5. The Commission and ET/SPLP have not demonstrated that some records relate to a noncriminal investigation

The Commission and ET/SPLP also argue that the records implicated by Item 3 of the Request are related to multiple noncriminal investigations commenced by BIE involving "Sunoco Pipeline or any parent or subsidiary company." Section 708(b)(17) of the RTKL exempts from disclosure records of an agency "relating to a noncriminal investigation, including … [i]nvestigative materials, notes, correspondence and reports." 65 P.S. §§ 67.708(b)(17)(ii). In order for this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. *See Pa. Dep't of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be "conducted as part of an agency's official duties." *Id*. at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep't of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would "craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure." *Id*. at 259.

The Commonwealth Court has recognized the Commission's broad authority to conduct noncriminal investigations "to determine … if utilities are in compliance with the Public Utility Code, … the [United States Department of Transportation Pipeline and Hazardous Materials Safety Administration] and other applicable state and federal regulations." *Pa. Pub. Utility Comm'n v. Gilbert*, 40 A.3d 755, 760 (Pa. Commw. Ct. 2012).

In support of the Commission's position, Mr. Metro attests that, "[BIE] is and has been, for more than five years, engaged in multiple noncriminal investigations of Sunoco Pipeline and

affiliated companies" and " [BIE] does not have any requested records other than records that are part of a noncriminal investigation." Secretary Chiavetta also attests that, "[BIE] has initiated numerous noncriminal investigations against Sunoco Pipeline, L.P. a/k/a/ [ET/SPLP]" and "[t]he Commission does not have any responsive records other than those that are part of these [BIE] investigations."

In order to demonstrate that a record is subject to the exemption, the Department must provide evidence that an investigation was conducted. *See, e.g., Brown v. Office of Inspector Gen.*, 178 A.3d 975 (Pa. Commw. Ct. 2017) (unreported opinion); *Camarota v. Pa. Dep't of Envtl. Prot.*, OOR Dkt. AP 2019-0920, 2019 PA O.O.R.D. LEXIS 900; *cf. Friedman v. Pa. Pub. Util. Comm'n* OOR Dkt. AP 2019-0502, *appeal pending*, No. 982 CD 2019 (finding that evidence demonstrated that records identified as related to specifically docketed ongoing noncriminal investigations are exempt from disclosure under Section 708(b)(17) of the RTKL). Here, although Mr. Metro and Secretary Chiavetta attests to multiple ongoing investigations involving the Commission and ET/SPLP, which may implicate responsive records, based on a review of the Commission's evidence, it has not identified any individual investigation by number or general description. As a result, the Commission has not shown that the requested records relate to noncriminal investigations conducted by the Department. *See* 65 P.S. § 708(a).

6. ET/SPLP has not proven that the records contain confidential, proprietary information or trade secrets

ET/SPLP asserts that "to the extent [Items 2 and 3] implicates any record 'that constitutes or reveals a trade secret or confidential proprietary information' such information is exempt from disclosure under Section 708(b)(11) of the RTKL…." Section 708(b)(11) of the RTKL, which exempts from disclosure "[a] record that constitutes or reveals a trade secret or confidential

proprietary information." 65 P.S. § 67.708(b)(11). The RTKL defines these terms differently. First, a trade secret is defined as:

> Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other person who can obtain economic value from its disclosure or use; and
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. § 67.102. Confidential proprietary information, meanwhile, is defined as "[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information." *Id.* An agency must establish that both elements of either these two-part tests are met in order for the exemption to apply. *See Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). In determining whether certain information is "confidential," the OOR considers "the efforts the parties undertook to maintain their secrecy." *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), *rev'd in part*, *Pa. Dep't of Pub. Welfare v. Eiseman*, 125 A.3d 19 (Pa. 2015). "In determining whether disclosure of confidential information will cause 'substantial harm to the competitive position' of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released." *Id*.

Mr. Nardozzi attests, that ET/SPLP has, since 2008, provided the Commission with numerous records "containing commercial and financial information regarding ET's operations" within the competitive natural gas liquids pipeline industry. Mr. Nardozzi attests to being required to develop "procedures and plans for construction, operation, and maintenance of its pipeline

pursuant to 49 C.F.R. Part 195," and how ET/SPLP has invested significant time and resource to develop these "proprietary documents that have significant substantial economic value within the industry." Mr. Nardozzi further attests to the "valuable trade secret information, such as processes, formulas and plans[,]" and "business practices and operations that derive their value from not being generally known" that has come as a result of ET's years of experience in the pipeline industry and significant monetary investment in the development of "its proprietary processes." Mr. Nardozzi outlines the steps taken by ET/SPLP to treat proprietary and trade secret information as confidential, including "limiting access to authorized personnel and requiring non-disclosure agreement prior to disclosing such proprietary information to third parties."

As highlighted by ET/SPLP's assertion that the Section 708(b)(11) may apply "*to the extent that [Items 2 and 3] implicates*" such records, no responsive records have been identified; therefore, Mr. Nardozzi's declarations are merely conclusory and speculative and fail to demonstrate that implicated records, in fact, contain confidential proprietary or trademarked information. While Mr. Nardozzi generally attests to the types of records that, if submitted to the Commission, may be exempt confidential proprietary or trademarked information, as stated above, the Commission has not identified any responsive records for which ET/SPLP can provide factual evidence to establish the exemption and ET/SPLP cannot sustain its burden of proof by way of a conclusory declaration. *See Bagwell*, 155 A.3d at 1130.

In addition, ET/SPLP argues that to the extent the Request implicates records the OOR has already adjudicated the non-public nature of records involving the Sunoco Pipeline in prior final determinations, the Commission and ET/SPLP should not be required to "re-establish" and "re-defend" the non-public nature of the records. However, once again, the OOR is unable to consider this argument without the identification of the records at issue. Further, there are necessary

elements that an invoking party must establish to apply the doctrine of collateral estoppel, which have not been established her, namely: "(1) an issue decided in a prior action is identical to one presented in a later action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to the prior action or in privity with a party to the prior action, and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action." *Pa. Dep't of Corr. v. Maulsby*, 121 A.3d 585, 588 (citations omitted). The assertion that the requested records include records determined to be non-public under the RTKL in prior final determinations is merely speculative. *See Hous. Auth of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209, 216 (Pa. Commw. Ct. 2012) (holding that statements of counsel are not competent evidence).[9]

CONCLUSION

For the foregoing reasons, the appeal is **granted in part**, and **denied in part**, and the Commission is required to provide all responsive transmittal letters and attachments designated as public records and subject to the RTKL 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. 65 P.S. § 67.1303. 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.[10] This Final Determination shall be placed on the OOR website at: http://openrecords.pa.gov.

[9] In its position statement, the Commission also asserted that some of the records reflect deliberations by BIE regarding contemplated strategies and may contain privileged information, and are therefore exempt pursuant to 65 P.S. §§ 301(a) and 67.708(b)(10)(i)(A); however, the Commission has not provided any evidence to support the asserted exemption. *See* 65 P.S. § 67.708(a)(1).

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

FINAL DETERMINATION ISSUED AND MAILED: October 10, 2019

/s/ Kelly C. Isenberg

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APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Eric Friedman (via email only);
Scott Thomas, Esq. (via email only);
Whitney Snyder, Esq. (via email only);
Rosemary Chiavetta, AORO (via email only)