



## FACTUAL BACKGROUND

On February 4, 2019, the Request was filed, seeking:

... all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous ... (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" ([Commission]'s term) regarding accidents or releases from HVL pipelines in the possession of the [Commission], including (but not limited to) information that was produced for [the Commission] by an external source or that was developed internally.<sup>1</sup>

On February 8, 2019 the Commission invoked a thirty-day extension to respond to the Request. 65 P.S. § 67.902(b). On March 11, 2019, the Commission denied the Request, arguing that the requested information is confidential security information ("CSI") under the Public Utility Confidential Security Information Disclosure Protection Act ("Act"), 35 P.S. §§ 2141.1-2141.8. The Commission also argued that release of the records would jeopardize public safety, 65 P.S. § 67.708(b)(2), 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).

On April 1, 2019, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.<sup>2</sup> 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. 65 P.S. § 67.1101(c).

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<sup>1</sup> The Request included an introductory passage containing background information that was admitted to the record and considered for purposes of adjudication.

<sup>2</sup> On April 2, 2019, the OOR issued an Interim Order notifying the Requester that the appeal was deficient because it failed to include a complete copy of the Commission's final response. The OOR informed the Requester of the requirement to cure the deficiency and directed him to file a complete copy of the Request pursuant to 65 P.S. § 67.1303(b). That same day, the Requester cured the deficiency by providing a complete copy of the Commission's response. Additionally, the Requester granted the OOR and extension of time to issue a Final Determination until June 26, 2019. *See* 65 P.S. § 67.1101(b)(1).

On April 2, 2019, the Commission notified Energy Transfer Partners (“ETP”) regarding the pending appeal. On April 11, 2019, ETP, owners of the Sunoco Pipeline, L.P. (“SPLP”), the operator of the HVL pipelines that are the subject of the Request, requested to participate in this appeal pursuant to 65 P.S. § 67.1101(c). Also, on April 11, 2019, ETP/SPLP submitted a position statement arguing that the requested records are CSI, and among other things, that the records relate to a noncriminal investigation, 65 P.S. § 708(b)(17)(ii). ETP/SPLP’s submission included the sworn declaration, made under the penalty of perjury, of Joseph Perez, ETP/SPLP’s Senior Vice President for Project Engineering and Construction. ETP/SPLP’s request to participate is granted and, as a result, the argument and evidence submitted by ETP/SPLP has been made part of the record.

On April 12, 2019, the Requester submitted a position statement objecting to ETP/SPLP’s request to participate, disputing that the requested information is confidential and asserting that based on a Protective Order issued by the Pennsylvania Commonwealth Court, attorneys for ETP/SPLP are not permitted to contact him. The Requester attached copies of documents he asserts are examples of “models of HVL blast radii” found in the public domain and a May 16, 2017 Commonwealth Court Order he believes prohibits ETP/SPLP from contacting him.

On April 15, 2019,<sup>3</sup> 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). 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, Pipeline Safety Section.

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<sup>3</sup> The OOR granted the Commission’s request to keep the record open until April 15, 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”).

On April 15 and April 21, 2019,<sup>4</sup> the Requester submitted position statements disputing the accuracy of the factual assertions in the Commission’s position statement and challenging the credibility of Ms. Chiavetta’s and Mr. Metro’s affidavits. The Requester also disputes the confidential nature of the records and the secure nature of the pipeline infrastructure. The Requester requested that the OOR conduct an *in camera* review of the responsive records.

On April 23 and 24, 2019, ETP/SPLP and the Commission objected to the Requester’s request for *in camera* review.

On May 28, 2019, the Commission submitted a supplemental position statement in response to the OOR’s request for clarification regarding the application of Section 335 of the Public Utility Code (“Code”), 66 Pa.C.S. § 335, to the responsive records.

On May 31, 2019, the Requester submitted a reply to the Commission’s supplemental position statement.

On June 3, 2019, in response to the OOR’s request for additional evidence, the Commission submitted, under seal, redacted transmittal letters, which were purportedly provided by ETP/SPLP in connection with a pipeline incident investigation pursuant to Section 2141.3 of the Act and 52 Pa. Code § 102.3(b). The Requester was not provided with a copy of the redacted transmittal letters. While the OOR did not order the Commission to provide the records for *in camera* review, the unopened submission was secured in the same manner used to secure records submitted for *in camera* review.<sup>5</sup> As explained below, the transmittal letters were not reviewed by the OOR or considered as evidence in this appeal.

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<sup>4</sup> The Requester’s April 21, 2019 submission was received after the record closed; however, to develop the record, the submission was considered. *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”).

<sup>5</sup> *See* Section V(E)(11) of the OOR Procedural Guidelines. Further, the records have been retained because the Requester submitted a separate RTKL request for the records submitted by the Commission in connection with the instant appeal. *See Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018) (an

## LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the Requester requested *in camera* review; 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

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agency has the duty to take reasonable steps to prevent the automatic destruction of records pursuant to a retention schedule when the agency knows the records to be responsive to a RTKL request).

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)).

**1. The Commission did not prove that the records are confidential security information**

The Commission and ETP/SPLP argue that because the responsive records consist of 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, through Mr. Metro’s affidavit, identifies the following records as responsive to the Request:

Hazard Assessment for ME1  
Date: 12-17-2013  
Pages: 56

Hazard Assessment for proposed ME2 Pipeline  
Date: 3-27-217  
Pages: 67

Hazard Assessment for Re-route of ME2 near Chester & Delaware County  
Date: 10-5-2018  
Pages: 33.

In addition, the Commission states that the responsive records include Commission Inspection Reports of the subject pipelines in which the three Hazard Assessment reports were referenced and reviewed.

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 Pa.C.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 the three identified Hazard Assessment reports “were produced to the Commission by [SPLP] and are marked as confidential.” More specifically, Mr. Metro attests that that the records filed with the Commission were “marked as Confidential by Sunoco[.]” and that “the requested records are [CSI] within the meaning of the [Act].” On behalf of ETP/SPLP, Mr. Perez attests that he has “knowledge of records submitted to the ... Commission and possibly implicated in the [Request]....” Mr. Perez further attests that “to the extent the [r]equested [r]ecords exist, ET and SPLP treat this material as confidential security information in accordance with the provisions and procedures of the [Act]...and the [Commission’s] regulations implementing the Act....”

Regarding the material contained in the records, Mr. Metro attests the following:

The requested records are [CSI] within the meaning of the [Act]. In my professional opinion, disclosure of the requested records would compromise security against sabotage or criminal or terrorist acts, and non-disclosure is necessary for the protection of life, safety, public property or public utility facilities.

I base my opinion on the definition of [CSI] contained in the [Act] and on that there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction.

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).

To develop the record in this matter, the OOR directed the Commission to submit copies of the transmittal letters which, if ETP/SPLP had followed the mandatory procedure under the Act and its regulations, would have been included with the records produced to the Commission. Instead of submitting the transmittal letters that are expressly deemed public records under 53 Pa. Code § 102.3, the Commission hand-delivered redacted transmittal letters in a sealed envelope to the OOR. The OOR instructed the Commission that, in order to have the transmittal letters admitted as evidence of record, the Commission must provide a copy to the Requester. The Commission asserted that the letters had been properly redacted and that the OOR should review the records *in camera*, and it declined to provide the Requester with a copy of the letters. Accordingly, the sealed, redacted transmittal letters were not admitted into evidence. *See* 65 P.S. § 67.1102(b)(2) (the RTKL authorizes appeals officer to “admit testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute”).

Here, the Commission and ETP/SPLP argue that the requested records consist of CSI and that the Requester expressly excluded “information provided by Sunoco if that information has been designated as [CSI]” from the Request; therefore, they argue the Act prohibits the disclosure of the records and the records are not responsive to the Request. Mr. Metro and Mr. Perez attest that the records provided to the Commission are CSI; however, Section 2141.3 of the Act requires agencies to develop protocols for the submission and public challenge of information sought to be classified as “confidential security information,” and such protocols are found in the Commission’s regulations at 52 Pa. Code §§ 102.1 – 102.4. The only evidence provided by the Commission and ETP/SPLP regarding the designation of the responsive records as CSI consists of conclusory statements from Mr. Metro, who states that ETP/SPLP marked the records as confidential, that the

requested records are “[CSI] within the meaning of the [Act],” and that he arrived at his professional opinion that the records are CSI “in consultation with numerous other technical gas safety staff,” and from Mr. Perez, who states “[t]o the extent that the [r]equested [r]ecords exist, ET[P] and Sunoco treat this material as [CSI] in accordance with the provisions and procedures specified by the [Act] and [regulations].” Under the RTKL a sworn attestation may serve as sufficient evidentiary support; however, “a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*); *see also Bagwell*, 155 A.3d at 1130 (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”) (citations omitted); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d at 659 (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*); *West Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) (“The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions”) (citing *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)).

While it is not incumbent upon the OOR to request additional evidence when developing the record, *Highmark, Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017), the OOR attempted to develop the record by requesting copies of the transmittal letters. In response to the OOR’s request, the Commission provided copies of the redacted transmittal letters asserting that the redacted material consists of CSI and the letters relate to a noncriminal investigation; however, 52 Pa. Code §102.3(b)(1) clearly states that a transmittal letter “may not contain any confidential

security information.” The Commission further asserts that, despite the express language in 52 Pa. Code & 102.3(b)(1), “the designation is not binding on any particular transmittal letter, and the Commission is authorized to waive its own regulations,” but fails to cite its authority to waive its own regulations that it was required to develop in order to implement “filing protocols and procedures for public utilities to follow when submitting records, *including protocols and procedures for submitting records containing [CSI],*” under the Act. *See* 35 P.S. § 2141.3(b) (emphasis added). Because the Commission declined to provide a copy of the transmittal letters to the Requester, no evidence has been admitted into the record to demonstrate that the ETP/SPLP and the Commission have complied with the mandated procedures to designate the responsive records as CSI. In addition, as the Commission has failed to prove why it is not required to comply with the protocols, as ETP/SPLP’s and the Commission’s compliance with “[p]rocedures for submitting ... and protecting confidential security information” set forth in § 2141.3 is a condition precedent for nondisclosure. ETP/SPLP and the Commission are, therefore, not entitled to the statutory protection of the Act. *See 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)).

**2. The Commission has demonstrated that certain records are exempt under Section 708(b)(3) of the RTKL**

The Commission and ETP/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. 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....” *California Borough v. Rothery*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018) (internal citations omitted); *see also Mission Pa., LLC v. McKelvey*, \_\_\_ A.3d \_\_\_, 2019 Pa. Commw. LEXIS 528 (Pa. Commw. Ct. June 4, 2019).

Mr. Metro, who is the Commission’s Manager of the Safety Division, Pipeline Safety Section, oversees Commission investigations of gas and HVL pipelines. In support of the Commission’s position, Mr. Metro attests it is his opinion, based on the definition of CSI in the

Act, that “there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction.” Mr. Metro further attests the following:

In my professional opinion, release of the requested records would compromise security against sabotage or criminal or terroristic 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 Reports and Inspection Reports explicitly provide[] how such an assessment can be made (as well as the assessment for this particular pipeline); information which could be clearly be used by a terrorist to plan an attack [on] a pipeline (and particularly on these Sunoco pipelines, as they contain[] the specific operating parameters of the pipelines) to cause the greatest possible harm and mass destruction to the public living near the facilities.

In my professional opinion, release of the requested records would allow for awareness of the potential effectiveness of a sabotage act on a pipeline (and in particular on these pipelines) to harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety.

I arrived at my professional opinion that the requested records are [CSI] in consultation with numerous other technical gas safety staff at the Commission, all of which agree with my professional assessment.

Additionally, regarding the nature of the CSI that ETP/SPLP purportedly provided to the Commission, Mr. Perez attests the following:

While certain observations concerning the characteristics of ET’s HVL pipelines – such as their general path or the location of the above-ground valves – can be seen at the surface level, the [r]equested [r]ecords seek far more detailed information than anything that could be obtained through surface-level observation. The release of this information would create a much more significant risk to the security and integrity of the Pipelines than anything that could be obtained through surface-level observation. Specifically, providing an individual or group of individuals with the detailed calculations sought here would give someone with malicious intent knowledge necessary to breach, damage or destroy the pipelines.

Based upon my review of the [r]equested [r]ecords in possession of ET as submitted to [the Commission’s Bureau of Investigation and Enforcement], I believe that the [r]equested [r]ecords are of sufficient detail that, if disclosed, could be used to facilitate damage or disruption of ET’s HVL pipelines.

Here, the Request expressly seeks “calculations or estimates of *blast radius* (Sunoco’s term) or “buffer zone” ([Commission’s] term) *regarding accidents or releases* from HVL

pipelines.” It is undisputed that portions of the identified responsive records, the Hazard Assessment Reports, were produced by ETP/SPLP and submitted to the Commission’s Bureau of Investigation and Enforcement (“BIE”) in connection with four ongoing Commission pipeline investigations – ME1, ME1-Lisa Drive, ME2 and ME2-Bypass – from which one may reasonably infer the existence of safety concerns with the public utility structures. Considering these facts along with the sworn attestations of Mr. Metro, the individual supervising the investigations, and Mr. Perez, the corporate representative who provided the reports, leads to a determination that the disclosure of how to calculate the extent of damage that may occur due to an accident at or release from one the pipelines would facilitate the formulation of a plan by a person with malicious intent to cause such an event.

The Requester argues that the safety hazards alleged by the Commission lie with the infrastructure itself, not the knowledge of any particular aspect of the pipelines. The Requester further argues that blast radii modeling formulas are available in the public domain and that certain pipeline valves are already visible on the land surface in populated areas. The Requester has also provided electronic links to and a copy of blast radii models to support his argument that the responsive records should not be withheld because the information is already in the public domain. However, a review of the sample models and references to blast radii models shows that they have been conducted by various private and community entities and as attested to by Mr. Perez, they do not include the detailed calculations that are specific to these particular pipelines. In the absence of any evidence that the Commission has acted in bad faith, “the averments in [the sworn statements] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. 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)). Accordingly, the Commission has demonstrated that the disclosure of

the three responsive Hazard Assessment Reports produced by ETP/SPLP and the security related content would endanger the safety and security of the pipelines and that the Hazard Assessment Reports were properly withheld under Section 708(b)(3) of the RTKL. *See* 65 P.S. § 708(a); *Mission Pa., LLC*, 2019 Pa. Commw. LEXIS 528, \*22-26 (finding the affidavit made by an individual who had extensive industry knowledge and experience sufficient to detail the security related concerns in support of redactions made pursuant Section 708(b)(3) of the RTKL).

**3. The Commission has demonstrated that some records relate to a noncriminal investigation**

The Commission and ETP/SPLP also argue that the records are part of four noncriminal investigations the Commission commenced, respectively, in April 2017, March 2018 and July 2018. 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).

Mr. Metro, Manager of the Office of Pipeline Safety, Gas Safety, attests that he oversees the investigation of ME1 on April 1, 2017, of ME1 on “Lisa Drive” and ME2 in March 2018, and of ME2-Bypass in July 2018. He attests that the investigations are active and have been ongoing. Mr. Metro further attests that, in addition to the Hazard Assessment Reports, “the Commission has requested records in the form of Inspection Reports created by Commission Safety Staff in which there are references and reviews of [the] Hazard Assessments. These Inspection Reports are part of the active and ongoing [Commission] investigations.” Mr. Perez corroborates that ETP/SPLP submitted the requested records to the Commission’s BIE. Ms. Chiavetta attests that the investigations are active and ongoing and that the Commission does not have any responsive records other than those that are part of the Commission’s investigation of the pipeline incident. In the absence of any evidence that the Commission has acted in bad faith, “the averments in [the affidavits] should be accepted as true.” *McGowan*, 103 A.3d at 82-83. Therefore, because the Commission may conduct noncriminal investigations and is doing so in this instance, the Commission’s Safety Staff Inspection Reports are related to the Commission’s ongoing noncriminal investigation of ME1, ME2 and ME2-Bypass pipelines and are exempt from disclosure under Section 708(b)(17) of the RTKL.

Although we have determined that the Hazard Assessment Reports are exempt from disclosure under the RTKL, as indicated above, Mr. Metro attests that the Inspection Reports are part of the ME1, ME2 and ME2-Bypass investigations and they reference and review the Hazard Assessment Reports.

While not raised by the Requester, Section 3101.1 of the RTKL provides that the provisions of the RTKL do not apply if they are in conflict with any other federal or state law. *See* 65 P.S. § 3101.1. Section 335(d) of the Public Utility Code, provides, in pertinent part:

whenever the commission conducts an investigation of an act or practice of a public utility and makes a decision, enters into a settlement with a public utility or takes any other official action, as defined in the Sunshine Act, with respect to its investigation, it shall make part of the public record and release publicly any documents relied upon by the commission in reaching its determination, whether prepared by consultants or commission employees, other than documents protected by legal privilege...

66 Pa.C.S. § 335(d). Applying Section 335(d) of the Code, the Pennsylvania Supreme Court has held that, in certain circumstances, investigatory materials may be publicly available under the Code. *See Pa. Pub. Utility Comm'n v. Seder*, 139 A.3d 165 (Pa. 2016). In *Seder*, the Supreme Court held that Section 335(d) of the Code required disclosure of a tip letter and an investigative file associated with a settlement agreement. There, the settlement agreement was entered into by a utility corporation and the Commission's BIE after an investigation was conducted by BIE regarding a violation of the Public Utility Code.

Here, it is undisputed that the Commission commenced four investigations related to the pipelines addressed in the records identified as responsive to the Request. It is also undisputed that ETP/SPLP is a public utility as the Commission, in its position statement, requests the OOR to take judicial notice of the fact that it received a "Certificate of Public Convenience at A-140111" deeming it a "jurisdictional public utility" and the Commonwealth Court has concluded that ETP/SPLP operates as a public utility. *See In re Condemnation by Sunoco Pipeline, L.P.*, 143 A.3d 1000, 1016-20 (Pa. Commw. Ct. 2016). Further, Mr. Metro attests that the Commission's BIE filed a Formal Complaint in the ME1 investigation, which has been docketed to C-2018-3006534.<sup>6</sup>

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<sup>6</sup> *See* <http://www.puc.state.pa.us/pcdocs/1598230.pdf> (last accessed June 20, 2019).

Accordingly, we must determine whether the investigative records underlying the Formal Complaint filed in connection with ME1 should be disclosed under Section 335(d) of the Code.

In response to the OOR's request for the Commission's position on the application of Section 335(d) of the Code to this matter, the Commission submitted a position statement arguing the ME1 investigation is still open and that the Commission has not made a decision, settlement or other official action in that matter to trigger the disclosure requirements under Section 335(d). However, in the case of *Gilbert*, the Commonwealth Court considered the application of Section 335(d) to records of, among other things, gas pipeline violation and incident reports, along with communications received by the Commission required by the Pipeline Safety Improvement Act of 2002, which the Court determined would include investigative materials gathered by safety inspectors. In *Gilbert*, the Court concluded that noncriminal investigation exemption found at Section 708(b)(17) of the RTKL prohibited disclosure of the requested records because “[i]t is not until after the PUC's investigative materials are presented as part of a formal complaint, presented at a formal hearing, or presented as part of a settlement agreement that the materials are made public” and that none of the triggering events of Section 335(d) of the Code had occurred. 40 A.3d 755, 760; *see also Dep't of Env'tl. Prot. v. Del. Riverkeeper Network*, 113 A.3d 869, 876-877 (Pa. Commw. Ct. 2015) (quoting *Gilbert*).

Here, in the investigatory matter involving ME1, the Commission made the “decision” to file a Formal Complaint and, pursuant to Section 335(d) of the Code, the “the documents relied upon by the commission in reaching its determination [to file a Formal Complaint as a result of the investigation of an incident at ME1], whether prepared by consultants or commission employees” should be made public. 66 P.S. § 335(d). As stated by the Supreme Court in *Seder*:

... the clear and unambiguous language of Subsection 335(d) demonstrates that the General Assembly intended the PUC to make part of the public record and release

publicly the documents sought by Appellants. This interpretation of the statute is consistent with the overall intent of the Legislature in enacting Subsection 335(d). More specifically, Subsection 335(d) is a public disclosure law that evinces the General Assembly's desire to effectuate transparency, above and beyond that which is required by the RTKL, in the government's dealings with public utilities.

*Seder*, 139 A.3d 165 at 174. Therefore, as in *Seder*, the Commission made a "decision" and the records related to the investigation of ME1 that formed the basis of the BIE's decision to file a Formal Complaint in connection with the pipeline safety incident must be disclosed under Section 335(d) of the Code.

However, Section 335(d) further states, in pertinent part:

provided, however, that if a document contains...information which, if disclosed to the public, could be used for criminal or terroristic purposes, the identifying information may be expurgated from the copy of the document made part of the public record.

66 Pa.C.S. § 335(d). As we have already determined that the Hazard Assessment Reports are exempt from disclosure under Section 708(b)(3) of the RTKL because the records are of the type which, if they were disclosed, could endanger the safety or physical security of a public utility, any references to or information from the ME1 Hazard Assessment report may be "expurgated from the document made part of the public record" pursuant to Section 335(d).<sup>7</sup>

## CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Commission is required to provide the redacted ME1 investigative records, as provided by this Final Determination, to the Requester 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

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<sup>7</sup> In its position statement, the Commission also asserted that some of the records reflect deliberations by BIE regarding the contemplated strategies and, therefore, are exempt pursuant to 65 P.S. § 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). In addition, because we have determined that the records are exempt pursuant to 65 P.S. §§ 708(b)(3) and (b)(17), we need not address the Commission's argument based on 65 P.S. § 708(b)(2).

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.<sup>8</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: June 26, 2019**

*/s/ Kelly C. Isenberg*

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<sup>8</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).