

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA
NO. 473 CD 2026

TECFUSIONS, INC.,
Petitioner/Appellant,

v.

PENNSYLVANIA DEPARTMENT OF COMMUNITY AND ECONOMIC
DEVELOPMENT, KATIE MALONE AND TECHNICAL.LY,
Respondents/Appellees.

Appeal from the March 10, 2026 Final Determination of the Pennsylvania Office
of Open Records (Docket No. AP 2026-0174)

**BRIEF OF RESPONDENTS/APPELLEES KATIE MALONE AND
TECHNICAL.LY**

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COUNTERSTATEMENT OF THE SCOPE
AND STANDARD OF REVIEW

This Court may exercise plenary review of the findings of the OOR, applying a *de novo* standard of review. *Bowling v. Off. of Open Recs.*, 75 A.3d 453, 459 (Pa. 2013). However, there is “nothing in the [Right to Know Law] that would prevent a Chapter 13 court from simply adopting the findings of fact and conclusions of law of an appeals officer when appropriate, thus, in the proper case, effectively achieving the result sought by the OOR.” *Id.* at 473. Critically, “courts reviewing OOR[] decisions[] must construe” exceptions to disclosure “strictly, lest they subvert the [Right to Know Law’s] purpose.” *ACLU of Pa. v. Pa. State Police*, 232 A.3d 654, 656–57 (Pa. 2020).

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Should this Court affirm the decision of the Office of Open Records and find Technical.ly entitled to the public records ordered released by that agency given that neither the Department nor TECfusions submitted sufficient evidence to meet their burden of proving their claimed exemptions?

Suggested answer: Yes.

COUNTERSTATEMENT OF THE CASE

On November 11, 2025, Katie Malone, a reporter with Technical.ly (together, “Techical.ly”), submitted a request (the “Request”) to the Pennsylvania Department of Community and Economic Development¹ (the “Department” or “DCED”) pursuant to the Pennsylvania Right to Know Law, 65 P.S. §§ 67.101 *et seq.* (the “RKTL”). R. 7a. The Request stated:

I am requesting all records, including emails and text messages, sent to or from Secretary Rick Siger between January 1, 2025, and November 11, 2025, that contain or reference the phrase “data center” or “data centers.” This request includes:

- The full text of each message.
- The date and time each message was sent or received.
- The names and email addresses or phone numbers of all senders and recipients.

If any responsive records are stored in archived systems, on personal devices, or in accounts managed by outside parties on behalf of Secretary Siger, please include those records as well.

¹ Appellant’s Statement of the Case correctly identifies the Department as the Department of Community and Economic Development; however, both the covers to Appellant’s brief and reproduced record list “Department of Community and Economic Engagement.”

R. 7a.

On January 7, 2026, the Department sent Technical.ly a letter, explaining that it was partially granting the Request and providing some responsive records.

R. 2a–3a. The letter further explained that DCED was partially denying the Request to redact personal identification information and internal, predecisional deliberations, and to exclude confidential proprietary information and notes and working papers prepared by or for a public official. R. 3a. One of the withheld documents was a 22-page PowerPoint (the “Presentation”) that, according to the Department, was supplied to DCED by TECfusions to propose a sustainable economic development strategy for Pennsylvania and a consulting relationship between TECfusions and the Commonwealth. R. 111a. The Department withheld this Presentation on the grounds that it included “forward-looking plans and projections and confidential proprietary information,” falling within the scope of the statutory confidential proprietary information exemption. R. 111a–112a.

On January 14, 2026, Technical.ly appealed the denial to the Office of Open Records (“OOR”), including the withholding of the Presentation. R. 1a. The Department responded to the appeal on January 27, 2026, maintaining its withholding of the Presentation based on the confidential proprietary information exemption. R. 82a.

On February 5, 2026, the OOR directed the Department to issue notice of the appeal to TECfusions in order to allow the company to have a full and fair opportunity to be heard in the appeal process. R. 126a. On February 5, 2026, the Department confirmed that it had already issued notice to TECfusions in the manner suggested. R. 128a.

TECfusions subsequently submitted a request to participate in the appeal to defend its proprietary interest and trade secrets in the Presentation, noting that its request was filed after the fifteen business day deadline set by the OOR, but arguing that TECfusions should still be permitted to participate given its direct interest and lack of prejudice to the other parties. R. 132a–133a. In the request, TECfusions listed three types of evidence that the company could provide in support of the proprietary nature of the Presentation: (1) an “affidavit from an authorized company representative,” (2) “evidence of confidentiality measures,” and (3) “documentation of competitive harm.” R. 134a. TECfusions also offered to submit legal analysis if needed. *Id.*

On February 10, 2026, the OOR granted TECfusions’ request to participate, extended the schedule for the issuance of its final decision, and set a deadline of February 17, 2026 at 11:59 p.m. for any submissions from TECfusions. R. 137a. Despite its assertion about its ability to provide “highly probative” information to the OOR, TECfusions did not submit anything to the OOR prior to this deadline,

and the OOR proceeded to issue its Final Determination on March 10, 2026, noting that the OOR had not received any supplemental submissions to date. R. 134a, 139a, 142a.

With respect to the Presentation, the OOR’s Final Determination concluded that the Presentation must be disclosed because neither DCED nor TECfusions had met their burdens to establish that the document is exempt from access due to being trade secrets and/or confidential proprietary information. R. 146a–149a. The OOR noted that “[TECfusions], after requesting to participate in this matter and subsequently obtaining DIP status, has not submitted any substantial evidence to support its position.” R. 148a. Specifically, TECfusions “failed to provide any specific evidence demonstrating actual competition in the relevant market, a likelihood of substantial competitive injury if the information were released or demonstrating that the PowerPoint presentation contains trade secrets of [TECfusions].” R. 149a. Lacking the necessary evidence to support an exemption, the OOR determined that the Presentation was not exempt and must be disclosed. *Id.*

TECfusions subsequently filed a Petition for Review before this Court, challenging the OOR’s Final Determination as to the Presentation. After TECfusion’s Petition for Review was filed, DCED on April 28, 2026 submitted a notice of nonparticipation to this Court.

SUMMARY OF THE ARGUMENT

The OOR's final determination was correct because neither the Department nor TECfusions presented sufficient evidence to support the claimed exemptions. TECfusions was provided a full and fair opportunity to be heard before the OOR, with the OOR even extending the schedule for the appeal in order to provide TECfusions more time to submit supporting materials, and TECfusions failed to submit *anything* in support of its claimed exemptions. This failure is critical, and fatal, to TECfusions' ability to establish that the Presentation is exempt from disclosure.

In this appeal, TECfusions argues that the Presentation is exempt from disclosure due to containing confidential proprietary information and trade secrets. These specific statutory exemptions require TECfusions to prove a variety of facts by a preponderance of the evidence, including the competitive value of the information and the potential harm if the Presentation were publicly revealed. *See* 65 P.S. § 67.708(a)(1); *Off. of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). The OOR correctly concluded that the record did not contain sufficient evidence of these necessary facts to support the exemptions because TECfusions did not supply such evidence when it had the chance.

Rather than explain why the OOR erred given the record before it, TECfusions has tried to create a new factual record for purposes of this appeal—

including an undated declaration from its Associate General Counsel that was never submitted to the OOR. R152a–157a. TECfusions includes this new declaration as the last document in its Reproduced Record and then bases virtually all of its legal arguments on the facts in this new declaration. Pennsylvania courts routinely reject this type of post hoc supplementation of a factual record in RKTL appeals when the party had a full and fair opportunity to present its relevant evidence in earlier proceedings, as TECfusions undisputedly did here. *See, e.g., Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 129–130 (Pa. Commw. Ct. 2019), *aff’d in part, vacated in part sub nom.*, 255 A.3d 385 (Pa. 2021) (“Lack of evidence, when the parties and participants had a full opportunity to submit evidence to the fact-finder, is not a valid reason for supplementing the record.”) TECfusions’ improper attempt to stealthily supplement the record must be denied, and the new declaration should not be considered for purposes of this appeal.

Without the new declaration, TECfusions’ arguments in favor of the exemptions fall apart for lack of factual support. TECfusions has not pointed to a single fact *in the record of this case* that supports applying its claimed exemptions. For this reason, this Court should affirm the OOR and order the release of the Presentation.

Alternatively, if the Court is inclined to consider the new declaration, even that new evidence does not justify a complete withholding of the 22-page

Presentation. Rather, the Court should conduct *in camera review* of the Presentation to determine whether any content falling within the claimed exemptions can be redacted and remaining non-exempt content disclosed—as the RKTL requires. *See* 65 Pa. Stat. Ann. § 67.706 (“The agency may not deny access to the record if the information which is not subject to access is able to be redacted.”)

ARGUMENT

- I. The OOR correctly determined that Technical.ly is entitled to the requested records.**
 - A. This Court should not consider new evidence not presented to the OOR.**

The issue in this appeal, and the focus of TECfusions’ Brief, is whether the Presentation must be withheld under the trade secret and/or confidential proprietary information exemptions. Accordingly, TECfusions’ Brief includes factual information about its business and the content of the Presentation and then proceeds to rely on these facts to argue that the Presentation meets the requirements for these exemptions to disclosure. Virtually all of the facts in the Brief that TECfusions uses to justify application of its claimed exemptions are supported solely by the undated declaration from TECfusions’ Associate General Counsel, Oscar Gonzalez (the “Gonzalez Declaration”). *See* Br. at 6–11 (citing extensively to the Gonzalez Declaration included in Appellants’ Reproduced

Record at R. 152a–157a). However, *the Gonzalez Declaration was not presented to the OOR below and has been filed for the very first time in connection with this appeal.* See R126a–137a (portion of OOR Certified Record after TECfusions included as a direct interest participant). TECfusions’ attempt to silently insert this new piece of evidence into the record on appeal is wholly improper and should be rejected by this Court.

Pursuant to 65 P.S. § 67.1303(b), the record on appeal before this Court “shall consist of the request, the agency's response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer.” *Id.* TECfusions is not entitled to supplement the record or present new evidence without leave of this Court. See generally *Commonwealth v. Preston*, 904 A.2d 1, 6–7 (Pa. Super. Ct. 2006) (“The law of Pennsylvania is well settled that matters which are not of record cannot be considered on appeal...[A]ny document which is not part of the officially certified record is deemed nonexistent.”); see also Order², *Picker v. Pa. Liquor Control Bd.*, No. 553 C.D. 2024 (Pa. Commw. Ct. Oct. 21, 2024) (striking new documents presented as exhibits to a brief in an appeal from a decision by the OOR that were not presented before the OOR).

² A copy of this Order is attached hereto as Exhibit A.

TECfusions was granted leave to participate in the OOR proceedings and had ample opportunity to provide whatever factual information it deemed important to justify these exemptions. *See* R. 141a (OOR acknowledges that TECfusions received notice of the OOR proceedings from the Department on January 21, 2026, and the OOR granted TECfusions’ request for “Direct Interest Participant” status in the proceedings and informed TECfusions of its deadline to submit relevant evidence); *see also* R. 128a (letter from the Department, affirming that it notified TECfusions about the OOR proceedings), 131a–136a (TECfusions’ request to participate in the OOR proceedings), 137a–138a (correspondence from OOR to TECfusions, granting TECfusions’ request to participate in the appeal and imposing a deadline for its submission). Nonetheless, TECfusions chose not to provide *any materials* to the OOR, including this type of declaration. *See* 142a (OOR Final Determination, noting that the OOR did not receive any supplemental submissions), 148a (“However, [TECfusions] after requesting to participate in this matter and subsequently obtaining DIP status, has not submitted any substantial evidence to support its position.”).

Even if TECfusions had requested leave of this Court to supplement the record, TECfusions must still explain why it did not submit this evidence earlier during the OOR proceedings; otherwise, it is attempting to gain an improper “second bite of the apple.” *Pa. Tpk. Comm’n v. Murphy*, 25 A.3d 1294, 1297–98

(Pa. Commw. 2011) (denying state agency’s application to supplement the record with additional declarations not introduced before the OOR). As Pennsylvania’s highest court has explained, “allow[ing] a party to initially withhold evidence, but then introduce new evidence at later stages of the proceedings, would significantly delay the disclosure of often time-sensitive information, as well as frustrate the underlying policy of the RTKL”—a statute aimed at “openness and providing expedient access to information.” *McKelvey v. Pa. Dep’t of Health*, 255 A.3d 385, 409 (Pa. 2021).

In *McKelvey*, multiple journalists requested copies of medical marijuana business permit applications under the RTKL. *Id.* at 388–89. The Department of Health provided only copies that had been redacted by the applicants, and the journalists appealed to the OOR. *Id.* at 389–90. The Department of Health and all of the relevant applicants were granted leave to participate before the OOR, but some applicants failed to provide competent evidence to prove the applicability of the claimed exemptions, and the OOR granted the journalists access to most of the information contained in the applications. *Id.* at 391–92. Upon review by the Commonwealth Court, the Department of Health sought to supplement the record, and the court denied this request. *Id.* at 392–93. The Pennsylvania Supreme Court affirmed this decision, noting that “the Department received numerous opportunities to submit evidence and argument before the OOR, and chose not to

take advantage of those opportunities.” *Id.* at 404. One of the applicants also sought a remand for additional fact-finding, and the Pennsylvania Supreme Court denied this request for the same reason, emphasizing that “the OOR allowed for ample notice, time, and opportunity for [the applicant] to develop its record in support of its claim of exemptions” and “[the applicant] offered no reason for neglecting to submit its own evidence.” *Id.* at 409.

This is just like the situation in *McKelvey*, where the party requesting to supplement the record had “full opportunity to participate in the proceedings and to provide evidence and argument to the OOR,” and “offered no reason for neglecting to submit its own evidence.” *Id.* at 409. Here, TECfusions has not even attempted to explain why supplementing the record is justified in this case. Neither the Brief nor the Gonzalez Declaration itself offers any reason why this evidence was not presented to the OOR. As the lower court in *McKelvey* aptly explained: “Lack of evidence, when the parties and participants had a full opportunity to submit evidence to the fact-finder, is not a valid reason for supplementing the record.” *Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 129–130 (Pa. Commw. Ct. 2019), *aff’d in part, vacated in part sub nom.*, 255 A.3d 385 (Pa. 2021). There is no basis to supplement the record with new evidence under these circumstances, and the Court should strike or otherwise decline to consider the Gonzalez Declaration for purposes of ruling on the merits of this appeal.

B. Based on the evidence actually presented to the OOR, TECfusions has not met its burden to justify the claimed exemptions to disclosure.

TECfusions acknowledges that it bears the burden of proving that the Presentation is exempt by a preponderance of the evidence. *See* Br. at 14 (citing 65 P.S. § 67.708(a)(1)). Once this case is properly limited to the evidentiary record actually presented to the OOR, the inevitable conclusion is that TECfusions has not—and cannot—meet this burden.

Here, TECfusions has claimed that the Presentation is exempt as confidential proprietary information and trade secrets. Both of these exemptions require TECfusions to meet both elements of a two-part test. *See Bari*, 20 A.3d at 634. Confidential proprietary information must be commercial or financial information received by an agency (1) that is “privileged or confidential” and (2) “the disclosure of which would cause substantial harm to the competitive position of the [entity] that submitted the information.” 65 P.S. § 67.102. A trade secret must be “[i]nformation, 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 readably ascertainable by proper means by other persons 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.” *Id.*

To qualify for these exemptions, TECfusions must provide—and this Court must be able to review—information related to the competitive value of the content in the Presentation and the potential harm if this content were publicly revealed. *See, e.g., Com. Dep’t of Pub. Welfare v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), *rev’d in part*, 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.”) (internal citations omitted); *Parsons v. Pa. Higher Educ. Assistance Agency*, 910 A.2d 177, 185 (Pa. Commw. Ct. 2006) (To constitute a “trade secret,” the information must be an “actual secret of peculiar importance to the business and constitute competitive value to the owner.”).

As the OOR correctly recognized, these exemptions require information from TECfusions that TECfusions failed to provide, despite ample opportunity to do so. *See* R. 149a (“...TECfusions, although obtaining DIP status, failed to provide any specific evidence demonstrating actual competition in the relevant market, a likelihood of substantial competitive injury if the information were released, or demonstrating that the PowerPoint presentation contains trade secrets of [TECfusions].”). This fatal deficiency is made obvious by the fact that virtually

all of TECfusions’ arguments in this appeal in support of the exemptions are supported solely by the facts in the new and improper Gonzalez Declaration. *See* Br. at 14–22. When the Gonzalez Declaration is properly removed from consideration, TECfusions’ arguments fail for lack of factual support.

On this record, without evidence of any of the factual prerequisites for establishing these exemptions, TECfusions has failed to meet its burden to establish that the exemptions apply. *See Mission Pa., LLC v. McKelvey*, 212 A.3d 119, 137–138 (Pa. Commw. Ct. 2019), *appeal denied by* 223 A.3d 675 (Pa. 2020) (redactions were not supported by the evidence where the third party did not prove the confidential nature of, or describe, the content of its redactions); *Wickard v. Pa. Dep’t of Gen. Servs.*, OOR Dkt. AP 2025-1553, 2025 PA O.O.R.D. LEXIS 2304 (certain third parties did not participate on appeal and therefore failed to provide evidence that responsive proposals contain CPI/trade secrets exempt under Section 708(b)(11)). Accordingly, the OOR Final Decision should be affirmed and the Presentation should be disclosed.

II. Even if this Court determines that an exemption to disclosure applies, the solution is applying targeted redactions, not withholding the entire record.

Pennsylvania’s courts have consistently emphasized that exemptions to disclosure under the RKTL must be construed *narrowly*. *See, e.g., ACLU of Pa.*, 232 A.3d at 656–57 (“courts reviewing OOR[] decisions[] must construe”

exceptions to disclosure “strictly, lest they subvert the [Right to Know Law’s] purpose.”); *Off. of Dist. Att’y of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017) (in determining whether the government has carried its burden, the RTKL’s exceptions “must be narrowly construed.”).

Here, even if the new Gonzalez Declaration is considered by this Court, it does not demonstrate that the *entire* Presentation falls *entirely* within one or both of the claimed exemptions. Indeed, it is hard to imagine that a 22-page PowerPoint presentation is comprised exclusively of information that is so confidential and sensitive as to qualify for one or both of these narrow exemptions. While the Gonzalez Declaration states that various categories of sensitive information are “contained” in the Presentation, it does not state, much less establish by a preponderance of the evidence, that every piece of content in the Presentation is equally sensitive. *E.g.*, R. 153a–156a ¶¶ 10, 12, 14, 21. The Gonzalez Declaration and the Brief are notably silent on the issue of whether any content falling within one or both of the exemptions could be redacted and the remaining content disclosed.

To be sure, the RKTL explicitly requires exempted material to be redacted from records that are otherwise subject to disclosure, and does not permit an agency to withhold an entire record simply because some parts of it are exempted:

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information

which is not subject to access, the agency's response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. ***The agency may not deny access to the record if the information which is not subject to access is able to be redacted.***

65 Pa. Stat. Ann. § 67.706 (emphasis added). Complete nondisclosure is unlawful when it is possible to apply targeted redactions to the specific content that actually falls within one or both of the exemptions and disclose the remaining content. *See generally Times Publ'g Co., Inc. v. Michel*, 633 A.2d 1233, 1239 (Pa. Commw. Ct. 1993), *pet. denied*, 645 A.2d 1321 (Pa. 1994) (explaining under the old Act that information in a document that is not protected from disclosure is still accessible even if the same document also contains protected information).

Accordingly, Technical.ly respectfully requests that, if the Court determines that some part of the Presentation may fall within one or both of the claimed exemptions, the Court conduct further fact finding and/or *in camera* review to determine whether such information can be redacted prior to disclosure.

RELIEF

For the foregoing reasons, Appellees respectfully request that the Final Determination of the OOR be affirmed.

Dated: September 4, 2026

/s/ Paula Knudsen Burke

Paula Knudsen Burke

Pa. I.D.: 87607

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CERTIFICATE OF COMPLIANCE JUDICIAL PUBLIC ACCESS POLICY

1. I, Paula Knudsen Burke, hereby certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than nonconfidential information and documents.

Dated: September 4, 2026

/s/ Paula Knudsen Burke

Paula Knudsen Burke
*Attorney for Katie Malone and
Technical.ly*

CERTIFICATE OF SERVICE

I hereby certify that that on September 4, 2026 I electronically filed the foregoing BRIEF OF APPELLEES by using the E-FILING system. I further certify that a copy of the foregoing was served on the following:

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Paula Knudsen Burke
*Attorney for Katie Malone and
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Exhibit A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Benjamin R. Picker,	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Liquor Control Board	:	
(Office of Open Records),	:	
Respondent	:	No. 553 C.D. 2024

PER CURIAM

ORDER

NOW, October 21, 2024, upon review of Benjamin R. Picker’s (Petitioner) August 20, 2024 “Application to Strike [the Pennsylvania Liquor Control Board’s (Respondent)] Improper Supplementation of the Record Without Leave of Court” (Application), to which no answer has been filed, the Application is GRANTED.

Section 1303 of the Right-to-Know Law, Act of February 14, 2008, P.L. 6, 65 P.S. §67.1303, provides that the record on appeal before a Chapter 13 court “shall consist[] of the request, the agency’s response, the appeal filed under [S]ection 1101, the hearing transcript, if any, and the final written determination.” *Id.*

A review of the record confirms that the exhibits attached to Respondent’s appellate brief were not before the Office of Open Records. Accordingly, pages 50 through 93 (Exhibits B through H) of Respondent’s brief are STRICKEN, and any reference thereto in the appellate brief shall be disregarded by the Court.

Petitioner may file four copies of a reply brief, and serve one copy on Respondent, pursuant to this Court’s August 23, 2024 Order.

The Prothonotary shall attach a copy of this Order to all electronic and paper copies of the briefs.

Certified from the Record
OCT 21 2024
And Order Exit