



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
DANIEL GILBERT AND <i>THE WALL</i>	:	
<i>STREET JOURNAL,</i>	:	
Complainant	:	
	:	Docket No.: AP 2011-0740
v.	:	
	:	
PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION,	:	
Respondent	:	

INTRODUCTION

Daniel Gilbert, a reporter for *The Wall Street Journal*, (the “Requester”) submitted a request (the “Request”) to the Pennsylvania Public Utility Commission (“Commission”) seeking records related to underground natural gas pipelines pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”). The Commission denied the Request, stating that the records are protected from release by the Public Utility Code, 66 Pa.C.S. §§ 101 *et seq.* (“PUC”), the noncriminal investigative exemption and the exemption for internal, predecisional deliberations. The Requester appealed to the Office of Open Records (“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted** and the Commission is required to take further action as directed.

FACTUAL BACKGROUND

On March 31, 2011, the Request was filed, stating

I am requesting electronic copies of the following records, limited to underground natural-gas pipelines, beginning Jan. 1, 2000 and continuing through the present:

- 1.) All records related to probable violations identified by the [PUC] including but not limited to:
 - a.) A description of the probable violation, including applicable Pennsylvania Code sections, when and where it was identified, the company or individual faulted;
 - b.) All enforcement actions taken by the [PUC], including financial penalties, whether the actions were appealed, and the resolution of the actions;
 - c.) All associated descriptions and narratives concerning probable violations;
 - d.) A list of all types of records related to pipeline safety that operators are required to keep and that the [PUC] inspects.
- 2.) All records related to pipeline incidents reported to the [PUC] by pipeline operators, including but not limited to:
 - a.) The name of the pipeline operator, date and location of incident;
 - b.) Whether there was an explosion;
 - c.) The number of fatalities and injuries, if any;
 - d.) The property damage in dollars, if any;
 - e.) The cause of the incident as determined by the [PUC], and any description and narrative;
 - f.) Of caused by a third party excavator, the name of the excavator, whether individual or firm;
 - g.) Pipe specifications associated with the incident, as applicable: diameter, manufacturer, year of manufacture, materials and type (i.e. cast iron, polyvinyl chloride, etc.), type of seam, type of weld, thickness of pipe wall;
 - h.) Pressure at the point and time of the incident, normal operating pressure at the point and time of the incident;

- i.) Corrosion, as applicable, what type (i.e. pitting, general corrosion).
- 3.) Copies of communications from pipeline owners and operators regarding public awareness programs, including communications that advise state officials of pipeline locations, and any other communications received by the Commission as required by the Pipeline Safety Improvement Act of 2002.
- 4.) Copies of all requests under the RTKL received by the Commission between Jan. 1, 2011 and the present.

The Request also asked the Commission to waive “all fees associated with producing these records.” On April 6, 2011, the Commission invoked a thirty-day extension to respond pursuant to 65 P.S. § 67.902(b). On May 9, 2011, the Commission granted Item 4 of the Request, but denied the remainder of the Request. With respect to Items 1(a), 1(b), 1(d), 2(a), 2(b), 2(d), 2(e), 2(g), 2(h), 2(i) and 3, the Commission cited exemptions for noncriminal investigative records (65 P.S. § 708(b)(17)) and internal, predecisional deliberations (65 P.S. § 67.708(b)(10)). With respect to Item 1(b), the Commission stated that it does not organize its records “in a manner which identified the order as one pertaining to gas safety enforcement,” and directed the Requester to its website and its public access kiosk to identify which particular “‘M’ dockets” are sought. The Commission denied Item 2(c), stating that such records are exempt under 66 Pa.C.S. § 1508. The Commission also denied Item 2(f), stating that it “does not maintain jurisdiction or records related to third party excavators” and directing the Requester to the Pennsylvania Department of Labor and Industry.

On May 27, 2011, the Requester appealed to the OOR, challenging the denial with respect to 65 P.S. § 67.708(b)(10) and 65 P.S. § 67.708(b)(17) only and stating

grounds for disclosure.¹ The OOR invited both parties to supplement the record. On June 9, 2011, the Commission provided a position statement, along with a variety of exhibits. In its materials, the Commission indicated that Item 1(d) is moot and Item 3 is partially moot due to the Commission's provision of records and requested a hearing "[i]n the event the Appeals Officer determines that the Commission's burden of proof in this matter is not satisfied..."

On June 10, 2011, the Requester also provided a position statement, along with an exhibit containing "aggregated figures regarding compliance actions taken, penalties assessed, and penalty funds collected by the [Commission]." After the record closed, the Commission provided an additional position statement stating, among other things, that the "appeal should be dismissed for failure to establish that the statutory appeal period has been met," along with an additional affidavit from its Chief of the Gas Safety Division. Because these materials were received after the record closed, they were not considered.² Pursuant to 65 P.S. § 67.1102(b)(3) and in accordance with the OOR's June 1, 2011 correspondence, the OOR asked the Requester to provide a copy of the Commission's April 6, 2011 extension notice "in order to ensure a timely appeal and a complete record." On June 15, 2011, the Requester provided a copy of the Commission's extension notice.³

On June 21, 2011, upon review of the materials presented, the OOR denied the Commission's request for a hearing.

¹ Because the Requester did not challenge the other grounds asserted by the Commission with respect to other parts of the Request, this appeal only concerns Items 1(a), 1(b), 1(d), 2(a), 2(b), 2(d), 2(e), 2(g), 2(h), 2(i) and 3 of the Request. *See Department of Corrections v. OOR*, 18 A.3d 429 (Pa. Commw. Ct. 2011).

² To the extent that the Commission's late-submitted materials challenge the requester's purported failure to establish the timeliness of the appeal, the OOR notes that Section III(B)(1) of the OOR Interim Guidelines do not require the submission of agency correspondence invoking an extension of time.

³ Both the Commission and the Requester submitted additional statements related to this supplementation. As these additional assertions were received after the record closed, they were not considered.

LEGAL ANALYSIS

The RTKL 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. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010). 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.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* 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.* Here, neither party requested a hearing and the OOR has the necessary, requisite 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. 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 clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the

evidence has been defined as “evidence which as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW DICTIONARY 1064 (8th ed.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

1. The Commission established that Item 1(d) of the Request is moot

Item 1(d) of the Request sought “All records related to probable violations identified by the [PUC] including but not limited to: ... d.) A list of all types of records related to pipeline safety that operators are required to keep and that the [PUC] inspects.” On appeal, the Commission alleges that it has satisfied Item 1(d) by directing the Requester to an attachment that the Requester already possesses. Because the Requester possesses the requested list, the appeal is moot as to Item 1(d).

2. The Commission did not establish that the requested records are protected by the noncriminal investigative exemption

The RTKL provides that certain records that relate “to a noncriminal investigation” may be withheld as exempt from public access. *See* 65 P.S. § 67.708(b)(17). 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 Department of Health v. OOR*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). An agency must also provide some evidentiary support that requested records are related to such an investigation. *Id.*; 65 P.S. § 67.708(b)(17). Based on the underlying purpose of the RTKL, “exemptions from disclosure must be narrowly construed.” *Bowling*, 990 A.2d at 824.

In the present case, the parties agree that the Commission “is responsible for enforcing federal and state pipeline regulations within Pennsylvania” and that it may impose civil penalties against pipeline operators. On appeal, the Commission provided

evidentiary support in the form of two notarized affidavits: one from the Chief of the Commission's Gas Safety Division ("Chief Affidavit") and the other from a Gas Safety Inspector of the Commission's Gas Safety Division ("Inspector Affidavit").⁴ The Chief Affidavit states, among other things, that

11) As part of the requirement for [United States Department of Transportation Pipeline and Hazardous Materials Safety Administration] funding, I am responsible for hiring inspection/investigative personnel or Gas Safety Inspectors, whose sole duty it is to conduct inspection/investigations of gas utilities for compliance with applicable state and Federal gas safety regulations.

12) Gas Safety Inspectors conduct non-criminal investigations of gas utilities entire operations to evaluate compliance with applicable state and Federal regulations.

13) Investigative duties include[] a thorough compliance review of the operator's plans, procedures, programs, records, physical plant, and work in progress.

14) The voluntary cooperation of the gas utility in providing the Gas Safety Inspector full and open access to the operator's premises and records is essential to the effective operation of gas safety enforcement inspections.

15) Upon completion of investigations, Gas Safety Inspectors forward to me their investigative findings together with the Inspector's recommendation for compliance action.

16) Compliance actions consist of a range of available enforcement options which span from informal to formal actions.

17) Based upon present findings, and in view of past compliance actions for a given utility, I will exercise discretion to determine the appropriate level of compliance action.

18) Compliance actions consist of an action or series of actions taken to enforce applicable state and federal pipeline regulations. These actions may take the form of a warning letter, an administratively imposed monetary sanction or order directing compliance with the regulations, an order directing corrective action under hazardous conditions, or a similar formal action letter.

19) A "probable violation letter" or "non-compliance letter" is a letter sent to a gas utility to notify them of investigative findings of "non-compliance" with applicable state and federal gas safety regulations, and requiring corrective action by the utility within a set period of time.

⁴ The Commission also provided a third affidavit from its Deputy Press Secretary related to the Commission's interactions with the Requester. This affidavit did not address either the exemptions for noncriminal investigative records or internal, predecisional deliberations.

20) Gas utilities will either voluntarily comply with the request for corrective action or face further compliance action.

The Inspector Affidavit contains similar language.

The Commission's materials establish that the Commission is involved in a variety of investigatory functions, but fail to reveal any information as to whether the particular records requested fall within the exemption under 65 P.S. § 67.708(b)(17). This circumstance is similar to that of *DOT v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010). In that case, the Commonwealth Court, after reviewing an affidavit presented by an agency on appeal to the OOR, stated

Essentially, the Affidavit avers that sight distance measurements and traffic studies are used in preparation of safety studies. However, the Affidavit does not aver that the *specific* sight distance measurements and traffic studies requested *in this case* are information that has been used in formulating a safety study or will necessarily be used in formulating a safety study. Therefore, the Department failed to carry its burden of showing that the requested documents in this case fall within the privilege conferred by Section 3754 of the Vehicle Code and would, thus, be exempt from the definition of public record pursuant to Section 305(a)(2) of the RTKL.

Id. at 335 (emphasis in original). In finding that the agency in that case failed to present evidence that the specific records sought are not subject to public access, the Court granted access to such records. Here, while the Commission presented general evidence of investigatory functions, the Commission failed to link the specific records requested to any investigatory activity or specific which subsection(s) under which the requested records are allegedly exempt. In conformity with the Commonwealth Court's reasoning in *DOT*, the OOR finds that the Commission failed to establish that the requested records are exempt under 65 P.S. § 67.708(b)(17).

2. The Commission did not establish that the requested records are exempt under 65 P.S. § 67.708(b)(10)

The RTKL provides that records reflecting the “internal, predecisional deliberations” of an agency may be withheld from public access. *See* 65 P.S. § 67.708(b)(10)(i)(A). In order for this exemption to apply, three elements must be satisfied: 1) the deliberations reflected are “internal” to the agency; 2) the deliberations reflected are predecisional, i.e., before a decision on an action; and 3) the contents are deliberative in character, i.e., pertaining to proposed action. *See Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *Sansoni v. PHFA*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *Kyle v. DCED*, OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310.

In the present case, the Commission argues in its unsworn position statement that it has satisfied all three elements of this exemption. The OOR has noted, however, that a “conclusory statement ... that [requested] records reflect internal predecisional deliberations of an agency does not establish this exception given the lack of substantiated facts.” *Marshall v. Neshaminy School District*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67; *see also Lynch v. Locust Twp.*, OOR Dkt. AP 2010-0420, 2010 PA O.O.R.D. LEXIS 394; *Laigle v. City of New Castle*, OOR Dkt. AP 2010-0287, 2010 PA O.O.R.D. LEXIS 260.

In the present case, the materials presented by the Commission do not provide any evidentiary detail as to how any record is “internal,” “predecisional” and/or deliberative in character. As a result, the OOR finds that the Commission failed to meet its burden of establishing that the exemption under 65 P.S. § 67.708(b)(10) applies to any responsive

records. See 65 P.S. § 67.305; see, e.g., *Marshall*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and the Commission is required to provide all responsive records to Items 1(a), 1(b), 1(d), 2(a), 2(b), 2(d), 2(e), 2(g), 2(h), 2(i) and 3 of the Request to the Requester within thirty (30) days. This Final Determination is binding on all parties. Within thirty (30) 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 according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: June 27, 2011



APPEALS OFFICER
J. CHADWICK SCHNEE, ESQ.

Sent to: Craig Linder, Esq.; Elizabeth Lion Januzzi, Esq.