

LAW OFFICES
PINNOLA & BOMSTEIN

MICHAEL S. BOMSTEIN
PETER J. PINNOLA

ELKINS PARK OFFICE
8039 OLD YORK ROAD
ELKINS PARK, PA 19027
(215) 635-3070
FAX (215) 635-3944

100 SOUTH BROAD STREET, SUITE 2126
PHILADELPHIA, PA 19110
(215) 592-8383
FAX (215) 574-0699
EMAIL mbomstein@gmail.com

MT. AIRY OFFICE
7727 GERMANTOWN AVENUE, SUITE 100
PHILADELPHIA, PA 19119
(215) 248-5800

REPLY TO:
Center City

April 30, 2019

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

Re: Flynn, et al. v. Sunoco Pipeline L.P., Docket Nos. C-2018-3006116 and
P-2018-3006117

**FLYNN RESPONDENTS' ADDITIONAL MEMORANDUM IN
SUPPORT OF MOTION TO COMPEL DISCOVERY**

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is Complainants' Additional
Memorandum in Support of Motion to Compel Discovery.

If you have any questions regarding this filing, please contact the undersigned.

Very truly yours,


MICHAEL S. BOMSTEIN, ESQ.

MSB:mik

cc: Judge Barnes (Via email and First Class Mail)
Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Meghan Flynn, et al.	:	
	:	C-2018-3006116
v.	:	P-2018-3006117
	:	
Sunoco Pipeline, L.P.	:	

**FLYNN RESPONDENTS' ADDITIONAL MEMORANDUM IN
SUPPORT OF MOTION TO COMPEL DISCOVERY**

The parties now have briefed their respective positions regarding Sunoco's discovery responses. Since the last filing, however, a new sinkhole has developed in Middletown, Delaware County. On April 24, 2019, Sunoco reported a 12' by 12' by 12' "subsidence" event immediately adjacent to heavily trafficked U.S. Route 1 and only yards from the State Police Barracks. A photograph from the Delco Times is attached hereto as Ex. "A."

Two Mariner pipelines were operating at the site of the sinkhole at the time of the event: the 8 inch Mariner East 1 and the 12 inch pipeline that has become part of the workaround pipeline. Both pipelines are the subject of the Formal Complaint in this proceeding.

Investigation of this incident is supposedly ongoing. The information obtained may implicate the issues raised in the Formal Complaint and makes the granting of Complainants' discovery motion all the more important.

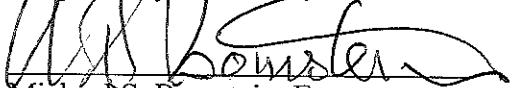
Also since the last filing, the Commission submitted its response to the Right-to-Know request of Delaware County resident Eric Friedman in OOR Appeal Docket #AP 2019-0502. In the Commission's response it made reference to Sunoco's possession of three separate Hazard Assessment Reports: One for ME1, one for ME2, and one for the workaround pipeline.

In explaining why the reports should not be made public, the Commission and its affiant, Paul Metro, refer in seven separate instances to the potential for “mass destruction” to the public living near these facilities in the event of a terrorist attack.

The existence of the three hazard assessments now has been disclosed for the first time. Sunoco’s recognition of the potential for mass destruction is significant.

This information is crucial to proof of Complainants’ contention that Sunoco at all relevant times has been aware the HVL pipelines have the potential to injure and/or damage large numbers of citizens in high consequence areas. Prior to this time, Sunoco has denied this contention. The reports, therefore, must be turned over to Complainants’ counsel and representatives and it becomes all the more important for the ALJ to grant their discovery motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael S. Bomstein", written over a horizontal line.

Michael S. Bomstein, Esq.

Pinnola & Bomstein

PA ID No. 21328

Email: mbomstein@gmail.com

Suite 2126 Land Title Building

100 South Broad Street

Philadelphia, PA 19110

Tel.: (215) 592-8383

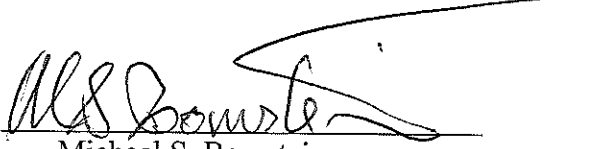
Attorney for Complainants

Dated: April 30, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the persons listed below, in accordance with the requirements of § 1.54 (relating to service by a party). This document has been filed electronically on the Commission's electronic filing system and served on the following via electronic and first-class mail:

SEE ATTACHED LIST


Michael S. Bomstein

Dated: April 30, 2019

(PARTIES LIST UPDATED MARCH 28, 2019)

NEIL S WITKES ESQUIRE
ROBERT D FOX ESQUIRE
DIANA A SILVA ESQUIRE
MANKO, GOLD, KATCHER & FOX LLP
401 CITY AVENUE
VALA CYNWYD PA 19004
NWITKES@MANKOGOLD.COM
REPRESENTING SUNOCO PIPELINE LP

THOMAS J SNISCAK, ESQUIRE
HAWKE MCKEON AND SNISCAK LLP
100 N TENTH STREET
HARRISBURG PA 17101
TJSNISCAK@HMSLEGAL.COM
REPRESENTING SUNOCO PIPELINE LP

RICH RAIDERS ESQUIRE
606 NORTH 5TH STREET
READING PA 19601
484.509.2715
RICH@RAIDERSLAW.COM
REPRESENTING INTERVENOR ANDOVER HOMEOWNERS' ASSOCIATION INC.

ANTHONY D KANAGY ESQUIRE
POST & SCHELL PC
17 N SECOND ST 12TH FL
HARRISBURG PA 17101-1601
717.612.6034
AKANAGY@POSTSCHELL.COM
REPRESENTING INTERVENOR RANGE RESOURCES APPALACHIA

ERIN MCDOWELL ESQUIRE
3000 TOWN CENTER BLVD
CANONSBURG PA 15317
EMCDOWELL@RANGERESOURCES.COM
REPRESENTING INTERVENOR RANGE RESOURCES APPALACHIA

LEAH ROTENBERG ESQUIRE
MAYS CONNARD & ROTENBERG LLP
1235 PENN AVE
SUITE 202
WYOMISSING PA 19610
610.400.0481
ROTENBERG@MCR-ATTORNEYS.COM
REPRESENTING INTERVENOR TWINS VALLEY SCHOOL DISTRICT

MARGARET A MORRIS ESQUIRE
REGER RIZZO & DARNALL
2929 ARCH STREET 13TH FLOOR
PHILADELPHIA PA 19104
215.495.6524

MMORRIS@REGERLAW.COM

*REPRESENTING INTERVENOR EAST GOSHEN TOWNSHIP AND INTERVENOR
CHESTER COUNTY*

VINCENT MATTHEW POMPO ESQUIRE
LAMB MCERLANE PC
24 EAST MARKET ST
PO BOX 565

WEST CHESTER PA 19381

VPOMPO@LAMBMCKERLANE.COM

REPRESENTING INTERVENOR WEST WHITELAND TOWNSHIP

MARK L FREED ESQUIRE
CURTIN & HEEFNER LLP
DOYLESTOWN COMMERCE CENTER
2005 S EASTON ROAD SUITE 100
DOYLESTOWN PA 18901

MLF@CURTINHEEFNER.COM

REPRESENTING INTERVENOR UWCHLAN TOWNSHIP

JAMES R FLANDREAU
PAUL FLANDREAU & BERGER LLP
320 WEST FRONT ST
MEDIA PA 19063

JFLANDREAU@PFBLLAW.COM

REPRESENTING INTERVENOR MIDDLETOWN TOWNSHIP

PATRICIA BISWANGER ESQUIRE
217 NORTH MONROE STREET
MEDIA PA 19063

PATBISWANGER@GMAIL.COM

REPRESENTING INTERVENOR COUNTY OF DELAWARE

MICHAEL MADDREN, ESQUIRE
OFFICE OF THE SOLICITOR
COUNTY OF DELAWARE
GOVERNMENT CENTER BUILDING
201 WEST FRONT STREET
MEDIA, PA 19063

MADDRENM@CO.DELAWARE.PA.US

REPRESENTING INTERVENOR COUNTY OF DELAWARE

ALEX JOHN BAUMLER ESQUIRE
LAMB MCERLANE PC
24 EAST MARKET ST
BOX 565

WEST CHESTER PA 19381

ABAUMLER@LAMBMCERLANE.COM

REPRESENTING INTERVENOR DOWNINGTOWN AREA SCHOOL DISTRICT, ET AL.

GUY DONATELLI ESQUIRE
LAMB MCERLANE PC
24 EAST MARKET ST
BOX 565

WEST CHESTER PA 19381

GDONATELLI@LAMBMCERLANE.COM

REPRESENTING INTERVENORS

*ROSE TREE MEDIA SCHOOL DISTRICT, DELAWARE COUNTY
& SEN. THOMAS H. KILLION*

JAMES DALTON
UNRUH TURNER BURKE & FREES
PO BOX 515

WEST CHESTER PA 19381

610.692.1371

JDALTON@UTBF.COM

REPRESENTING INTERVENOR WEST CHESTER AREA SCHOOL DISTRICT

JAMES BYRNE ESQUIRE
MCNICHOL BYRNE & MATLAWSKI PC
1223 N PROVIDENCE RD
MEDIA PA 19063

JJB Byrne@MBMLAWOFFICE.COM

REPRESENTING INTERVENOR THORNBURY TOWNSHIP

DAVID J. BROOMAN
RICHARD SOKORAI
MARK R. FISCHER
HIGH SWARTZ

40 EAST AIRY STREET
NORRISTOWN, PA 19404

DBROOMAN@HIGHSWARTZ.COM

REPRESENTING INTERVENOR WEST GOSHEN TOWNSHIP

JOSH MAXWELL
MAYOR OF DOWNINGTOWN
4 W. LANCASTER AVENUE
DOWNINGTOWN, PA 19335
JMAXWELL@DOWNINGTOWN.ORG
PRO SE INTERVENOR

THOMAS CASEY
1113 WINDSOR DR.
WEST CHESTER, PA 19380
TCASEYLEGAL@GMAIL.COM
PRO SE INTERVENOR

VIRGINIA MARCILLE-KERSLAKE
103 SHOEN ROAD
EXTON, PA 19341
VKERSLAKE@GMAIL.COM
PRO SE INTERVENOR

LAURA OBENSKI
14 SOUTH VILLAGE AVENUE
EXTON, PA 19341
LIOBENSKI@GMAIL.COM
PRO SE COMPLAINANT

MELISSA DIBERNARDINO
1602 OLD ORCHARD LANE
WEST CHESTER, PA 19380
LISSDIBERNARDION@GMAIL.COM
PRO SE COMPLAINANT

REBECCA BRITTON
211 ANDOVER DRIVE
EXTON, PA 19341
RBKITTONLEGAL@GMAIL.COM
PRO SE COMPLAINANT

Ex. "A"



A large sinkhole opened up in front of the Pennsylvania State police barracks in Middletown this week, believed to be linked to drilling for the Mariner East pipeline project.

PETE BANNAN - MEDIUMNEWS GROUP

Ex. "B"



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

April 15, 2019

OOOR Docket# AP 2019-0502

Kelly Isenberg, Esquire
Appeals Officer
Commonwealth of Pennsylvania
Office of Open Records
333 Market St., 16th Floor
Harrisburg PA 17101-2234

Via Email (kisenberg@pa.gov)

Re: Pa PUC Response – OOR Appeal Docket #AP 2019-0502

To the Honorable Appeals Officer Isenberg:

I. Procedural History

On Monday, February 4, 2019, Mr. Friedman (Requestor) submitted the following Right-to-Know Law (RTKL) (65 P.S. §§ 67.101 *et seq.*) request (Request) to the Pennsylvania Public Utility Commission (PUC or Commission):

Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

Q: You have an estimate of the blast radius that's associated with an accident on an HVL pipeline, yes?

A: We have reviewed the "buffer zone" calculation that's required by federal regulations.

Q: Do YOU have an estimate of what that distance looks like?

A: Pardon me, I couldn't hear the...

Q: Do you have an estimate of what that distance is?

A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXQOk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request 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, highly volatile liquids (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" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF)."

On Monday, March 11, 2019, the Commission denied Mr. Friedman's RTKL Request (PUC RTKL 2019-0007).

On Monday, April 1, 2019, the Requestor filed this Appeal (Appeal) to the Office of Open Records (OOR). The Appeal was defective because it did not include a copy of the Commission's Final Response. Requestor cured the defect on April 2, 2019.

On Tuesday, April 2, 2019, OOR notified the PUC of the Appeal, providing the PUC with seven business days to file a response to the Appeal, or until Thursday, April 11, 2019.

Due to the defective Appeal, the PUC requested an extension to file its response, and on Friday, April 5, 2019, OOR granted the PUC's request for three additional days to respond, or until Monday, April 15, 2019.

II. Argument

A. The Responsive Records

The PUC conducted a thorough search for all responsive records. Chiavetta Affidavit ¶ 2. The responsive records consist of three Reports: Hazard Assessment for ME1; Hazard Assessment for ME2 Pipeline; and Hazard Assessment for Re-route of ME2 near Chester & Delaware County, as well as Commission Inspection Reports of these pipelines in which there are references and reviews of these Hazard Assessments. Metro Affidavit ¶¶ 4, 5. The three Reports were all submitted by Sunoco marked as confidential. Metro Affidavit ¶ 4. These responsive records are part of active and ongoing Commission investigation of these pipelines. Metro Affidavit ¶¶ 2, 3. The Commission does not have any requested records other than records that are part of these Commission's investigations. Metro Affidavit ¶ 6; Chiavetta Affidavit ¶ 4.

B. RTKL Exemptions for Safety of the Public and Public Utility Facilities

The RTKL prohibits disclosure of records that “would be reasonably likely to jeopardize or threaten public safety” or “which creates a reasonable likelihood of endangering the safety or the physical security of a ... public utility, resource, infrastructure, [or] facility,” including “infrastructure records that expose or create a vulnerability through disclosure.” 65 P.S. § 67.708(b)(2) and (3). (Underlining added for emphasis.)

Mr. Metro, the Manager of the Office of the Safety Division, Pipeline Safety Section of the Commission, states that in his professional opinion, disclosure of the Report, designated as CSI, 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. Metro Affidavit ¶¶ 7, 8.

Specifically, Mr. Metro, in his professional opinion, reasonably believes that release of the Reports, designated as CSI, 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. The reports explicitly provides how such an assessment can be made (as well as the assessment for these particular pipelines); information which could clearly be used by a terrorist to plan an attack a pipeline (and particularly on the Sunoco pipelines, as it contains the specific operating parameters of the pipeline) to cause the greatest possible harm and mass destruction to the public living near such facilities. Metro Affidavit ¶ 9. In addition, Mr. Metro believes that release of the Reports would allow for awareness of the potential effectiveness of a sabotage act on a pipeline to harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety. Metro Affidavit ¶ 10. Finally, Mr. Metro notes that he arrived at his professional opinion in consultation with numerous other technical gas safety staff at the Commission, all of which agree with his professional assessment. Metro Affidavit ¶ 11.

Based on the foregoing, the requested records are exempt from disclosure as CSI pursuant to these exemptions of the RTKL. The Commission notes that the Requestor specifically limited his request: “This request does not seek information provided by Sunoco if that information has been designated as confidential security information.” Request.

C. Public Utility Confidential Security Information Disclosure Protection Act

The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (Also referred to as Act 156 of 2006) (35 P.S. §§ 2141.1 – 2141.8) prohibits disclosure of “Confidential Security Information” (CSI). 35 P.S. § 2141.5(a). CSI is “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 non-disclosure of which is necessary for the protection of life, safety, public property or public utility facilities.” 35 P.S. § 2141.2. (Underlining added for emphasis.)

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 . . . 35 P.S. § 2141.3(a).

Section 2141.3(c)(4) of PUCSIDPA provides:

(4) Agency review of the public utility's designation or request to examine records containing confidential security information shall be based on consistency with the definition of confidential security information contained in this act or when there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction.

35 P.S. § 2141.3(c)(4). (Underlining and italics added for emphasis.)

PUCSIDPA defines a number of key terms in these sections:

“Terrorist act.” Any act or acts constituting a violent offense intended to:

- (1) intimidate or coerce a civilian population;
- (2) influence the policy of a government by intimidation or coercion; or
- (3) affect the conduct of a government.

“Violent offense.” An offense under 18 Pa.C.S. Pt. II (relating to definition of specific offenses), including an attempt, conspiracy or solicitation to commit any such offense, which is punishable by imprisonment of more than one year and involves an act dangerous to human life or property.

“Dangerous to human life or property.” A violent act or an act which is intended to or likely to cause death, serious bodily injury or mass destruction.

“Mass destruction.” An act which is intended to or likely to destroy or cause serious damage to facilities, public or private buildings, places of public accommodation or public works under circumstances evincing depraved indifference to human life or property.

35 P.S. § 2141.2. (Definitions.) (Underlining added for emphasis.)

The PUC has issued regulations to effectuate PUCSIDPA at 52 Pa. Code §§ 102.1 – 102.4. Section 102.4(b) of the 52 Pa. Code provides:

§ 102.4. Challenge procedures to confidentiality designation. . . .

(b) Relevant factors to be considered for requests to review.

. . . If the Commission determines 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, the Commission will deny the request.

. . .

52 Pa. Code § 102.4. (Underlining added for emphasis.)

The PUC conducted a thorough search for all responsive records. Chiavetta affidavit ¶ 2. The responsive records consist of three Reports: Hazard Assessment for ME1; Hazard Assessment for ME2 Pipeline; and Hazard Assessment for Re-route of ME2 near Chester & Delaware County, as well as Commission Inspection Reports of these pipelines in which there are references and reviews of these Hazard Assessments. Metro Affidavit ¶¶ 4, 5. The three Reports were all submitted by Sunoco marked as confidential. Metro Affidavit ¶ 4. These responsive records are part of active and ongoing Commission investigation of these pipelines. Metro Affidavit ¶¶ 2, 3. The Commission does not have any requested records other than records that are part of these Commission's investigations. Metro Affidavit ¶ 6; Chiavetta Affidavit ¶ 4.

Based on the standards for nondisclosure set forth in PUCSIDPA, the Reports and Inspection Reports are exempt from disclosure. The Report and Inspection Reports are "Confidential Security Information" within the meaning of The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (35 P.S. §§ 2141.1 – 2141.8). Mr. Metro, the Manager of the Office of the Safety Division, Pipeline Safety Section of the Commission, states that in his professional opinion, disclosure of the Reports and the Inspection Reports 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. Metro Affidavit ¶ 7. He based his opinion on consistency with the definition of Confidential Security Information contained in PUCSIDPA 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. Metro Affidavit ¶ 8.

Specifically, Mr. Metro, in his professional opinion, reasonably believes that release of the Reports and Inspection Reports 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. The 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 clearly be used by a terrorist to plan an attack a pipeline (and particularly on the Sunoco pipelines, as it contains the specific operating parameters of the pipelines) to cause the greatest possible harm and mass destruction to the public living near such facilities. Metro Affidavit ¶ 9. In addition, Mr. Metro believes that release of the Reports and Inspection Reports would allow for awareness of the potential effectiveness of a sabotage act on a pipeline to harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety. Metro Affidavit ¶ 10. Finally, Mr. Metro notes that he arrived at my professional opinion that

the Report is Confidential Security Information in consultation with numerous other technical gas safety staff at the Commission, all of which agree with his professional assessment. Metro Affidavit ¶ 11.

Based on the foregoing, the requested records are exempt from disclosure as CSI pursuant to PUCSIDPA. Additionally, the RTKL only requires disclosure of “public records.” Since PUCSIDPA prohibits disclosure, the Reports, by definition are not a public records and cannot be disclosed. 65 P.S. § 67.102 and 301(a). The Commission notes that the Requestor specifically limited his request: “This request does not seek information provided by Sunoco if that information has been designated as confidential security information.” Request.

Note that “A public official or public employee who acquires a public utility record or portions thereof which contain confidential security information or any reproduction of a public utility record or portion thereof which contains confidential security information and who knowingly or recklessly releases, publishes or otherwise discloses a public utility record or portion thereof which contains confidential security information or any reproduction of a public utility record or portion thereof which contains confidential security information commits a misdemeanor of the second degree subject to prosecution by the Attorney General and shall, upon conviction, be sentenced to pay a fine of not more than \$5,000 plus costs of prosecution or to a term of imprisonment not to exceed one year, or both, and shall be removed from office or agency employment.” 35 P.S. § 2141.6. (Underlining added.)

D. Noncriminal Investigation Exemption

The noncriminal investigation exemption of the RTKL (65 P.S. § 67.708(b)(17)) exempts from disclosure “a record of an agency relating to a noncriminal investigation,” including “investigative materials, notes, correspondence and reports,” and records that would, if disclosed, “reveal the institution, progress or result of an agency investigation.” 65 P.S. § 67.708(b)(17) and (b)(17)(iv)(A). This exemption is quite broad by the language of the exemption, as it covers records relating to a noncriminal investigation, or that would reveal “the institution, progress, or result of” an agency investigation. Webster’s Third New International Dictionary (Unabridged) (1971) defines “relating” as “present participle of relate – to show or establish a logical or causal connection between,” and “reveal” as “to make (something secret or hidden) publicly known: to open up to view.” Use of these broad terms indicates the breadth of this exemption, as it exempts from disclosure records logically or casually connected with the investigation, or records that would make publicly known the institution of the investigation, the progress of the investigation, or the result of the investigation.¹

To successfully assert the noncriminal investigative records exemption, the agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. Pa. Dep’t of Health v. Office of Open Records, 4 A.3d 803, 810-11 (Pa.Cwlth. 2010). Further, the inquiry, examination or

¹ The noncriminal investigation exemption does have an exception to the exemption regarding disclosability of some possible outcomes of the investigation; however, the investigation is active and ongoing and therefore these exceptions are not applicable. Metro Affidavit ¶¶ 2, 3.

probe must be “conducted as part of an agency’s official duties.” *Id.* at 814.

The Commission’s statutory authority to investigate pipeline matters as part of the PUC’s official duties is provided by the Public Utility Code (66 Pa.C.S. §§ 101 *et. seq.*). The Public Utility Code provides: “Public Utility: (1) Any person or corporations now or hereafter owning or operating in the Commonwealth equipment or facilities for: (v) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substances, by pipeline or conduit, for the public for compensation.” 66 Pa.C.S. § 102. “The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth.” 66 Pa.C.S. § 501(b). “Every public utility . . . affected by or subject to any regulations or orders of the commission . . . shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof.” 66 Pa.C.S. § 501(c). Finally, “[w]henever the commission shall be of opinion that any person or corporation . . . is violating, or is about to violate, any provisions of this part . . . then in every such case the commission may institute injunction, mandamus or other appropriate legal proceedings, to restrain such violations of the provisions of this part, or of the regulations, or orders of the commission, and to enforce obedience thereto.” 66 Pa.C.S. § 502.

To effectuate this authority, the Commission created the Bureau of Investigation and Enforcement (BIE) in 2011 to perform the prosecutory functions of the Commission. *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Commission Order entered August 11, 2011). BIE is charged with, *inter alia*, representing the public interest “in enforcing compliance with the state and federal . . . gas safety laws and regulations.” *Id.* at 5; *See also* 66 Pa.C.S. § 308.2(a)(11) (Statutory section explicitly creating BIE). As shown by this broad statutory grant of powers, it is part of the Commission’s official duties to investigate pipeline matters such as Sunoco’s ME1, ME2, and ME2-Bypass pipelines.

The Commonwealth Court has recognized the PUC’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.Cmwlt. 2012).

The Commission conducted (and is still conducting) “a systematic or searching inquiry, a detailed examination, or an official probe” of Sunoco’s ME1, ME2, and ME2-Bypass pipelines. *Metro Affidavit* ¶¶ 2,3. (Please take Judicial Notice that Sunoco Pipeline, L.P. is a jurisdictional “public utility,” having received a Certificate of Public Convenience at A-140111, that is engaged in, *inter alia*, the intrastate transportation of hazardous liquids.) Paul Metro, Manager of the Office of the Safety Division, Pipeline Safety Section of the Commission, oversees the investigation of these matters. *Metro Affidavit* ¶¶ 1, 2, 3. These investigations began on or about April 1, 2017, and has been active and ongoing since that time. *Metro Affidavit* ¶¶ 2, 3. On December 13, 2018, Mr. Metro directed the Commission’s Bureau of Investigation and Enforcement (BIE) to file a Formal Complaint at C-2018-3006534 against

Sunoco Pipeline L.P. a/k/a Energy Transfer Partners regarding ME1. This proceeding is active and ongoing. Metro Affidavit ¶ 2.

As shown above, the Commission is carrying out official investigations conducted as part of its official duties. The Commission does not have any requested records other than records that are part of these Commission's investigations. Chiavetta Affidavit ¶ 4; Metro Affidavit ¶ 6. Consequently, the noncriminal investigation exemption of the RTKL exempts from disclosure all of the Commission's records within the scope of the Request.

E. Additional Reason Why the Requested Records are Exempt from Disclosure

For the reasons stated above, the Commission asserts that PUCSIDPA and the CSI and noncriminal investigation exemption of the RTKL exempts from disclosure all of the Commission's records that are responsive to the Request. However, in order to preserve the Commission's rights, the Commission will assert all applicable reasons why the requested records cannot be disclosed.

1. Deliberative Process Privilege

In Commonwealth Acting ex rel. Unified Judicial Sys. v. Vartan, 733 A.2d 1258 (Pa. 1999), the Pennsylvania Supreme Court held that the deliberative process privilege "covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" The RTKL defines privilege to include "[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." 65 P.S. § 67.102. (Underlining added.)

Similarly, "[t]he internal, predecisional deliberations of an agency, its members, employees or officials . . . including predecisional deliberations relating to a . . . contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations" are exempt from disclosure under the RTKL. 65 P.S. § 67.708(b)(10)(i)(A). Some of the requested records reflect deliberations by BIE staff regarding the contemplated strategies for the investigations as well as the decision to file a formal complaint, and therefore are not disclosable pursuant to this common law legal privilege and this exemption of the RTKL. Also, pursuant to Section 102 of the RTKL, such records subject to a legal privilege are not "public records" and are therefore not subject to the RTKL's requirement to provide public records. 65 P.S. § 67.102 and 301(a).

III. Conclusion

The Commission timely answered the Request, and properly denied the Request because all requested records are exempt from disclosure pursuant to PUCSIDPA, and the CSI and noncriminal investigation exemptions of the Right-to-Know Law. The Commission respectfully requests that the Office of Open Records find that the Commission complied with the Right-to-Know Law and properly denied the Request, and mark the matter closed.

If the Supporting Affidavits are deemed insufficient, the PUC demands, consistent with minimum due process standards given the extremely limited seven-day response time, *in camera* review of all the responsive records. In addition, the PUC reserves the right to supplement this response to support the assertion of the additional reasons for nondisclosure if the OOR rejects application of PUCSIDPA and the Right-to-Know Law's CSI and noncriminal investigation exemptions.

Respectfully submitted,



Steven K. Bainbridge
Assistant Counsel
Pa. Atty. I.D. 91018

Enclosures

Chiavetta Affidavit with attachments
Metro Affidavit

Service (Via Email Only)

Mr. Eric Friedman
2 Fallbrook Ln
Glen Mills PA 19342
Eric.law.friedman@gmail.com

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

Eric Friedman

v.

Pennsylvania Public Utility Commission

:
:
:

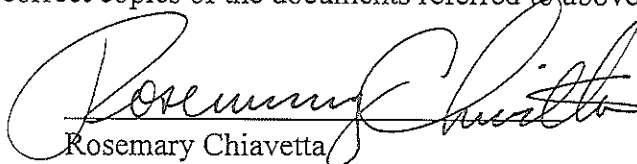
OOR AP 2019-0502

AFFIDAVIT OF
ROSEMARY CHIAVETTA, SECRETARY
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Before me, the undersigned notary public, this day, April 15, 2019, personally appeared Rosemary Chiavetta, Secretary of the Pennsylvania Public Utility Commission, to me known, who being duly sworn according to law, deposes the following:

I, **Rosemary Chiavetta**, say that I am authorized to make this affidavit on behalf of the Pennsylvania Public Utility Commission (Commission or PUC), being an employee of the Commission as Secretary, and having the duty as records custodian for the Commission of maintaining all records for the Commission, and having knowledge of the facts relevant to the present matter, the facts set forth are true and correct to the best of my knowledge, information and belief, and I expect to be able to prove the same at any hearing hereof, attest as follows:

- 1) In my capacity as Open Records Officer (ORO) of the Commission, on Monday, February 4, 2019, I received Mr. Friedman's Right-to-Know Law (RTKL) request by email, which was docketed as PUC RTK 2019-0007. The Request is attached hereto.
- 2) Following a thorough search for all responsive records, on March 11, 2019, I sent the Commission's Response to the Requestor. The Commission's Response is attached hereto.
- 3) The Commission's Bureau of Investigation and Enforcement (BIE) has initiated various investigations against Sunoco Pipeline L.P. a/k/a Energy Transfer Partners. These investigations are active and ongoing.
- 4) The Commission does not have any responsive records other than those that are part of these Commission investigations.
- 5) The attached documents are true and correct copies of the documents referred to above.

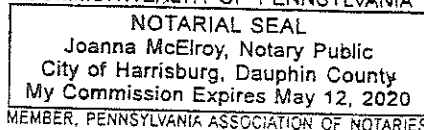


Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission

Subscribed and sworn to before me this
April 15, 2019.

Notary Public

COMMONWEALTH OF PENNSYLVANIA



From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Monday, February 04, 2019 1:57 PM
To: Chiavetta, Rosemary
Subject: [External] Request for records under Pennsylvania's Right-to-Know statute

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

Q: You have an estimate of the blast radius that's associated with an accident on an HVL pipeline, yes?

A: We have reviewed the "buffer zone" calculation that's required by federal regulations.

Q: Do YOU have an estimate of what that distance looks like?

A: Pardon me, I couldn't hear the...

Q: Do you have an estimate of what that distance is?

A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXQOk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request 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, highly volatile liquids (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" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF).

Thank you,

Eric Friedman
2 Fallbrook Lane
Glen Mills PA 19342



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
400 NORTH STREET, HARRISBURG, PENNSYLVANIA 17120

IN REPLY PLEASE
REFER TO OUR FILE

PUC RTK 2019-0007

March 11, 2019

Eric Friedman
2 Fallbrook Lane
Glen Mills, PA 19342

Final response sent via Email only:
Eric.law.friedman@gmail.com

Dear Mr. Friedman:

By this letter, the Pennsylvania Public Utility Commission (Commission or PUC) responds to your Right to Know request filed pursuant to the provisions of Pennsylvania's Right to Know Law (RTKL), 65 P.S. §§ 67.101 et seq., *as amended*. In your request received Monday, February 4, 2019, you stated:

"Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

Q: You have an estimate of the blast radius that's associated with an accident on an HVL pipeline, yes?

A: We have reviewed the "buffer zone" calculation that's required by federal regulations.

Q: Do YOU have an estimate of what that distance looks like?

A: Pardon me, I couldn't hear the...

Q: Do you have an estimate of what that distance is?

A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXQOk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request 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, highly volatile liquids (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" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF)."

Your request is denied.

The documents responsive to your request have been designated as confidential security information (CSI), and therefore, as your request indicated, you are not seeking such documents. To the extent that your request does seek such documents, the Commission must deny your request, since the documents are designated CSI. Additionally, the documents are part of a noncriminal investigation and therefore are exempt from disclosure under the RTKL.

The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (35 P.S. §§ 2141.1 – 2141.8) prohibits disclosure of "Confidential Security Information" (CSI). 35 P.S. § 2141.2 (Definitions). CSI is "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 non-disclosure of which is necessary for the protection of life, safety, public property or public utility facilities." 35 P.S. § 2141.2. The documents requested were designated as CSI and are not disclosable.

In addition, the RTKL provides for exemptions for CSI. The RTKL prohibits disclosure of records that "would be reasonably likely to jeopardize or threaten public safety" or "which creates a reasonable likelihood of endangering the safety or the physical security of a ... public utility, resource, infrastructure, [or] facility," including "infrastructure records that expose or create a vulnerability through disclosure." 65 P.S. § 67.708(b)(2) and (3). Therefore, the documents requested are not disclosable under the RTKL.

Finally, the documents are exempt from disclosure pursuant to the noncriminal investigation provision of the RTKL (65 P.S. § 67.708(b)(17)), which exempts from disclosure "records of an agency relating to a noncriminal investigation," including "investigative materials, notes, correspondence and reports," and records that would "reveal the institution, progress or result of an agency investigation." 65 P.S. § 67.708(b)(17).

For all of the reasons stated, the records requested are exempt from disclosure.

This response constitutes the final response of the Commission to your RTK Law Request.

NOTICE OF RIGHT TO APPEAL

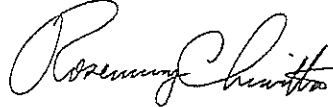
If you believe the PUC has wrongfully denied any part of your request, you may appeal within 15 business days from the date of this letter to:

Office of Open Records
16th Floor
333 Market Street
Harrisburg, PA 17126-0333

If you choose to file an appeal, you must do so within 15 business days of the mailing date of the agency's response. 65 P.S. § 67.1101. Please note that a copy of your original Right-to-Know request and this denial letter must be included when filing an appeal. The law also requires that you state the reasons why the record is a public record and address the reasons the Agency denied your request. Visit the Office of Open Records website at <http://openrecords.pa.gov> for further information on filing an appeal.

Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Sincerely,

A handwritten signature in cursive script, appearing to read "Rosemary Chiavetta".

Rosemary Chiavetta
Secretary and Right to Know Officer
Pa Public Utility Commission

cc: Steven Bainbridge, PUC Assistant Counsel
Right to Know File PUC RTK 2019-0007

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

Eric Friedman

v.

Pennsylvania Public Utility Commission

:
:
:

OOR AP 2019-0502

AFFIDAVIT OF
PAUL J. METRO, MANAGER
OFFICE OF THE SAFETY DIVISION, PIPELINE SAFETY SECTION
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Before me, the undersigned notary public, this day, April 15, 2019, personally appeared Paul J. Metro, Manager of the Safety Division, Pipeline Safety Section of the Pennsylvania Public Utility Commission, to me known, who being duly sworn according to law, deposes the following:

I, **Paul J. Metro**, say that I am authorized to make this affidavit on behalf of the Pennsylvania Public Utility Commission (Commission or PUC), being an employee of the Commission as Manager of the Safety Division, Pipeline Safety Section, and having the responsibility for investigating, analyzing, and responding to pipeline safety issues in Pennsylvania, and having knowledge of the facts relevant to the present matter, the facts set forth are true and correct to the best of my knowledge, information and belief, and I expect to be able to prove the same at any hearing hereof, attest as follows:

- 1) In my capacity as Manager of the Safety Division, Pipeline Safety Section of the Commission, I oversee Commission investigations of gas and hazardous volatile liquid pipelines.
- 2) On or about April 1, 2017, the Commission commenced an official investigation of the "Mariner East 1" (ME1) pipeline under my oversight. The investigation is active and has been ongoing since that time. On December 13, 2018, the Commission's Bureau of Investigation and Enforcement (BIE) filed a Formal Complaint C-2018-3006534 against Sunoco Pipeline L.P. a/k/a Energy Transfer Partners (Sunoco) to continue this investigation. This proceeding is active and ongoing.
- 3) The Commission also has these additional investigations of Sunoco pipelines: March 2018 Investigation of ME1 ("Lisa Drive" Investigation of ME1); Investigation of "Mariner East 2" (ME2); and July 2018 Investigation of "Mariner East 2 – Bypass" (ME2-bypass). All of these investigations are active and ongoing.
- 4) The Commission records that "relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced," (also described as "containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to)

information that was produced for PUC by an external source or that was developed internally”) (that is, the requested records), consist of the following, all filed with the Commission by Sunoco Pipeline L.P. a/k/a Energy Transfer Partners (and marked as Confidential by Sunoco). These records are part of the active and ongoing investigations of these pipelines. These records were produced to the Commission by Sunoco and are marked as confidential.

Hazard Assessment for ME1

Date: 12-17-2013

Pages: 56

Hazard Assessment for proposed ME2 Pipeline

Date 3-27-2017

Pages: 67

Hazard Assessment for Re-route of ME2 near Chester & Delaware County

Date: 10-5-2018

Pages: 33

5) In addition to the three reports indicated in paragraph four, the Commission has requested records in the form of Inspection Reports created by Commission Safety Staff in which there are references and reviews of these Hazard Assessments. These Inspection Reports are part of the active and ongoing investigations indicated above.

6) The Commission does not have any requested records other than records that are part of these Commission’s investigations.

7) The requested records are “Confidential Security Information” within the meaning of The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (35 P.S. §§ 2141.1 – 2141.8). 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.

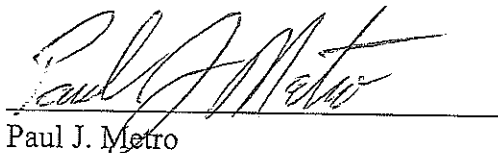
8) I based my opinion on the definition of “confidential security information” contained in PUCSIDPA and on that there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction.

9) 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 provides how such an assessment can be made (as well as the assessment for this particular pipeline); information which could clearly be used by a terrorist to plan an attack a pipeline (and particularly on these Sunoco pipelines, as they contains the specific operating parameters of the pipelines) to cause the greatest possible harm and mass destruction to the public living near such facilities.

10) 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

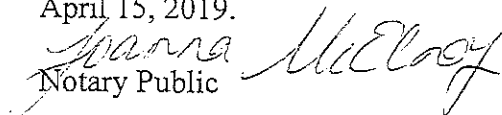
harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety.

11) I arrived at my professional opinion that the requested records are Confidential Security Information in consultation with numerous other technical gas safety staff at the Commission, all of which agree with my professional assessment.



Paul J. Metro
Manager of the Safety Division
Pipeline Safety Section
Pennsylvania Public Utility Commission

Subscribed and sworn to before me this
April 15, 2019.



Notary Public

