



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

Josh Shapiro
ATTORNEY GENERAL

November 20, 2020

15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1111

E-mail: rsmith@eastgoshen.org

Attn: R. Smith
East Goshen Township
1580 Paoli Pike
West Chester, PA 19380

**RE: Right to Know Request
2020-199**

Dear Mr. Smith:

This letter acknowledges receipt by the Office of Attorney General of your written request for records under the Pennsylvania Right-to-Know Law (65 P.S. § 67.101 *et seq.*) (“RTKL”). Your request was received by the Right to Know Office on October 14, 2020. On October 21, 2020, you were notified that a legal review was necessary to determine whether the records requested are subject to access under the RTKL and additional time was required to perform this review. As provided in the RTKL, the Office of Attorney General (“OAG”) required up to an additional 30 calendar days, or until November 20, 2020, in which to provide a final response to your request. The review has now been completed, and this letter serves as our final response to your request.

The “identified records” are those stated in your October 14, 2020 request, as modified by any subsequent communications. Specifically, your request indicates that you are seeking the following information:

Any and all documents including emails, letters, text messages, communication and pleadings regarding the August 22, 2020 letter from Tim Fitchett Esq. of Fair Shake, Environmental Legal Services to Seth Medelsohn, PUC, and Patrick Patterson, DEP, et al to which Attorney General General John Shapiro was cc'd regarding alleged subsidence reported by a whistleblower in connection with a drilling operation for the Mariner East II Pipeline.

A full and complete search pursuant to the requirements of the RTKL has been conducted and your request must be respectfully denied.

CANNOT CONFIRM OR DENY – Grand Jury

To the extent that your request seeks or may be construed to seek OAG records involving covert law enforcement investigations and/or Grand Jury materials, **the OAG can neither confirm, nor deny** the existence of such records without risk of compromising investigations and imperiling individuals or breaching Grand Jury secrecy laws. This response does neither. Should such records exist, they would be entirely exempt from public disclosure under the Investigating Grand Jury Act, the Criminal Investigative Exemption and the Criminal History Record Information Act, in addition to other RTKL provisions, as more fully explained below.

Grand Jury

To the extent you are seeking copies of “all documents...regarding alleged subsidence reported by a whistleblower in connection with a drilling operation for the Mariner East II Pipeline” submitted to the Grand Jury regarding this matter, should such records exist they would be exempt from disclosure under the Investigating Grand Jury Act, 42 Pa.C.S.A. §4541 *et seq.* The Grand Jury Act states: “[d]isclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the Commonwealth for use in the performance of their duties. The attorneys for the Commonwealth may, with the approval of the supervising judge, disclose matters occurring before the investigating grand jury including transcripts of testimony to local, State, other state or Federal law enforcement or investigating agencies to assist them in investigating crimes under their investigative jurisdiction. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court. All such persons shall be sworn to secrecy, and shall be in contempt of court if they reveal any information which they are sworn to keep secret.” 42 Pa.C.S.A. § 4549(b). Therefore, all matters occurring before the Grand Jury are not subject to public release.

Criminal Investigative Exemption

Additionally, if there are records related to alleged subsidence reported by a whistleblower in connection with a drilling operation for the Mariner East II Pipeline, those records would be protected from disclosure by the criminal investigative exemption. The RTKL exempts from disclosure “a record of an agency relating to or resulting in a criminal investigation, including complaints of potential criminal conduct other than a private criminal complaint; investigative materials, notes, correspondence, videos and reports...[a] record that includes information made confidential by law or court order...[a] record that, if disclosed, would...[r]eveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.” 65 P.S. § 67.708(b)(16)(i), (ii), (iv) and (vi)(A). *Barros v. Martin*, 92 A.3d 1243 (Pa. Cmwlth. 2014); *Coley v. Philadelphia District Attorney’s Office*, 77 A.3d 694 (Pa.

Cmwlth. 2013). If there are responsive records created during the course of an OAG investigation, disclosing those records would reveal the institution, progress or result of its investigation. Additionally, if records of this kind exist, they would also be protected from disclosure by other laws such as CHRIA, as more fully explained below.

CHRIA

Where applicable, certain investigative records are protected from release by CHRIA. Under CHRIA, “[i]nvestigative...[i]nformation shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency which requests the information in connection with its duties...”. 18 Pa.C.S.A. § 9106(c)(4). “Investigative information” is defined by CHRIA as “[i]nformation assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.” 18 Pa.C.S.A. § 9102. *Coley v. Philadelphia District Attorney’s Office*, 77 A.3d 694 (Pa. Cmwlth. 2013); *Mitchell v. Office of Open Records*, 997 A.2d 1262 (Pa. Cmwlth. 2010). Here, if there are records which document alleged subsidence reported by a whistleblower in connection with a drilling operation for the Mariner East II Pipeline, they would be related to a criminal incident and qualify for protection under CHRIA. As you, the requestor, are not a criminal justice agency, the OAG is without authority to release any such investigatory records to you.

PRIVILEGE

Certain of the responsive records, if they exist, would also be protected by privilege. Pursuant to the RTKL, a “record [that] is protected by a privilege” is not a “public record.” 65 P.S. § 67.305(a)(2). The RTKL defines “privilege” as “the 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.” *Id.* § 67.102.

Attorney-Work Product Doctrine

The attorney-work product doctrine protects certain documents from release. Records prepared or created that contain mental impressions, conclusions, legal theories and results of research created by an attorney in the course of his professional duties are protected from disclosure by the attorney-work product doctrine. See *Bagwell v. Pennsylvania Department of Education*, 103 A.3d 409, 415-416 (Pa. Cmwlth. 2014). If there are documents obtained or created regarding alleged subsidence reported by a whistleblower in connection with a drilling operation for the Mariner East II Pipeline those documents would reflect counsel’s opinions and research concerning the appropriate course of action to take regarding an investigation. The work-product doctrine offers broad protection to these mental impressions, opinions and conclusions, regardless of whether they were prepared in anticipation of litigation. *Bagwell* at 417. Therefore, if there are any records created by attorneys of the OAG during the course of an investigation that contain the attorneys’ mental impressions, conclusions, or legal theories they would be exempt from disclosure.

Predecisional Deliberations

Records utilized to make a decision, recommendation or to form an opinion on legal or policy matters are precluded from disclosure as “a record that reflects the internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, 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.” 65 P.S. §67.708(b)(10)(i)(A). *Kaplin v. Lower Merion Township*, 19 A.3d 1209 (Pa. Cmwlth. 2011), *petition for allowance of appeal denied*, 612 Pa. 693, 29 A.3d 798 (Pa. 2011). In this case, if there are records created by an employee of the OAG related to a contemplated or proposed course of action regarding any potential investigation into the Mariner East II Pipeline, those records would be precluded from disclosure under this provision of the RTKL.

Notes and Working papers

Finally, records that contain information that is strictly for personal use are precluded from disclosure as “notes and working papers prepared by or for a public official or agency employee used solely for that official’s or employee’s own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.” 65 P.S. § 67.708(b)(12). “Under this provision, a public official is not the only person required to prepare or see the particular record because the exception specifically includes within the definition of working papers ‘papers prepared by or for the public official.’” *City of Philadelphia v. Philadelphia Inquirer*, 52 A.3d 456, 461 (Pa. Cmwlth. 2012). Additionally, “[p]ersonal’ within this definition does not mean that it has to involve a public official’s personal affairs...it covers those documents necessary for that official that are ‘personal’ to that official in carrying out his public responsibilities.” *Id.* Therefore, if there are such records, those records have been precluded from disclosure by this RTKL provision.

CONCLUSION

Your request is respectfully denied per the above provisions under the RTKL. We trust that this response addresses the intent of your RTKL request.

RIGHT TO APPEAL

BY PROVIDING THIS RESPONSE, THE OFFICE OF ATTORNEY GENERAL HAS SATISFIED ITS OBLIGATION TO RESPOND TO YOUR REQUEST. SHOULD YOU WISH TO CHALLENGE THIS RESPONSE UNDER THE RTKL, YOU MUST FILE AN APPEAL WITH THE RIGHT TO KNOW APPEALS OFFICER OF THE PENNSYLVANIA OFFICE OF ATTORNEY GENERAL, WITHIN FIFTEEN (15) BUSINESS DAYS OF THE MAILING DATE OF THIS LETTER. YOUR APPEAL MUST INCLUDE A COPY OF YOUR ORIGINAL REQUEST AND THIS AGENCY’S RESPONSE, STATE THE GROUNDS UPON WHICH YOU CLAIM YOUR REQUEST SHOULD NOT HAVE BEEN DENIED AND

November 20, 2020

ADDRESS ALL REASONS STATED BY THIS AGENCY FOR ITS DENIAL OF YOUR REQUEST. FAILURE TO FOLLOW THESE INSTRUCTIONS MAY RESULT IN DISMISSAL OF YOUR APPEAL. YOUR APPEAL MUST BE SENT TO THE FOLLOWING:

RIGHT TO KNOW APPEALS OFFICER
OFFICE OF ATTORNEY GENERAL
CIVIL LITIGATION SECTION
15TH FLOOR STRAWBERRY SQUARE
HARRISBURG, PA 17120

Please note that this response is being sent from an unmonitored e-mail address. Do not reply to this e-mail.

Sincerely,

A handwritten signature in blue ink that reads "Sharon K. Maitland".

Sharon K. Maitland
Deputy Attorney General
Right to Know Officer

SKM:mae
2020-199