pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
CORINNE BELL AND DELAWARE RIVERKEEPER NETWORK,	:	
Complainant	:	
	:	
v.	:	**Docket No.: AP 2014-0880**
	:	
PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
Respondent	:	

INTRODUCTION

Corinne Bell, on behalf of the Delaware Riverkeeper Network, (the "Requester") submitted a request ("Request") to the Pennsylvania Department of Environmental Protection ("Department") pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, ("RTKL"), seeking records relating to the Department's study of radiation levels involved in oil and gas development, known as a TENORM[1] study. The Department denied the Request in part as internal, predecisional deliberations and noncriminal investigative records. 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 Department is required to take further action as directed.

FACTUAL BACKGROUND

[1] Technologically Enhanced Naturally Occurring Radioactive Material ("TENORM").

On April 10, 2014, the Request was filed, seeking:

> The following records dated from 2013 to present relating to PADEP's TENORM study are requested:
>
> All sample data including data acquired at specialized Marcellus Shale treatment operations and on-site water treatment and recycling units, the exact location of all sample sites (including the address, GPS coordinates, and facility name if applicable), information regarding the type of beneficial use sites that have been and will be sampled, and the production data and dates for the well pads that have been and will be sampled. The study's expected completion date is also requested along with information regarding the peer review process including information regarding the selection and composition of the peer review panel and any opportunities for public input. Additionally, the 1994 Norm Study "Characterization and Disposal Options for Oil field Waste in Pennsylvania" is requested.

On April 16, 2014, the Department extended its response period for thirty days pursuant to 65 P.S. § 67.902. On May 14, 2014, the Department granted access to 294 pages of records describing the TENORM study and the status of the study, as well as the 1994 study. The Department denied the Request with respect to the TENORM study sample data as noncriminal investigative records (65 P.S. § 708(b)(17)) and internal, predecisional deliberations (65 P.S. § 708(b)(10))[2]. The Department explained that the TENORM study is a study initiated by the Department in 2013 to examine the levels of naturally occurring radiation in equipment, material and media used in the oil and gas development, including the environmental impacts and exposure to the public. The field work performed as part of this study contains 184 site visits at 114 locations analyzing 1,000 samples.

On June 2, 2014, the Requester appealed to the OOR, challenging the denial and stating why the records should be released. The Requester argues that the cited

[2] Although the Department also cited the "executive process privilege" as a reason for denying access, no separate analysis is required, as this privilege is codified by 65 P.S. 67.708(b)(10)(i). *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1100 (Pa. Commw. Ct. 2013).

exemptions of the RTKL do not apply because 1) the records contain purely factual information, 2) are not deliberative in nature, and 3) that the records reflect the gathering of information for a study, and are not part of a systematic or searching inquiry or an official probe.

The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c).

On June 19, 2014, the Department submitted its response to the appeal, along with an exemption log and affidavit from David Allard, Director of the Department's Bureau of Radiation Protection, in support. The log identifies the records responsive to the Request, which include 16 tests conducted by the Department containing 3,495 TENORM samples or surveys resulting in an estimated 57,308 pages of information responsive to the Request. The Department argues that these tests are exempt from public disclosure pursuant to the RTKL as internal, predecisional deliberations of the Department (65 P.S. § 67.708(b)(10)), noncriminal investigative records (65 P.S. § 67.708(b)(17)), threat to public safety ((65 P.S. § 67.708(b)(2)), threat to public security (65 P.S. § 67.708(b)(3) and a threat to personal safety if disclosed (65 P.S. § 67.708(b)(1)). The Department contends that these records contain unvalidated, preliminary sample data and information relating to sample location and identification generated during the Department's investigation that began in 2013 into the potential radiation exposure pathways to workers, the public and the environment from naturally occurring radioactive material generated by oil and gas exploration and activities. The Department represents that it will "provide its final decision, as well as the validated final

data generated during the TENORM study, in a detailed report that will be made available to the public."

On July 2, 2014, the Requester submitted a reply to the Department's submission, arguing that the release of the requested information does not threaten public safety, public security and personal security. The Requester agreed to an extension of time, allowing the OOR until July 11, 2014 to issue a final determination in this matter in accordance with 65 P.S. § 67.1101(b)(1).

LEGAL ANALYSIS

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

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request." 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to 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 Department is a Commonwealth subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL 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 "such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence." *Pa. State Troopers Ass'n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Dep't of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The Department has not established that the TENORM Study is related to a noncriminal investigation

The Department argues that the TENORM study, as identified in the exemption log, is a part of the Department's investigation into radioactive sources associated with oil and gas exploration in Pennsylvania. The Department contends that it has collected more than 3,500 samples and surveys as part of its investigation. Section 708(b)(17)

exempts from disclosure records of an agency "relating to noncriminal investigations," including "[i]nvestigative materials, notes, correspondence and reports" and a record that, if disclosed, would "[r]eveal the institution, progress or result of an agency investigation." 65 P.S. § 67.708(b)(17)(ii); 65 P.S. § 67.708(b)(17)(vi). 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. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, inquiry, examination, or probe must be "conducted as part of an agency's official duties." *Id.* at 814; *see also Johnson v. Pennsylvania Convention Center Authority*, 49 A.3d 920 (Pa. Commw. Ct. 2012).

The Commonwealth Court held that "[a]n official probe only applies to 'noncriminal investigations conducted by an agency acting within its legislatively granted fact-finding and investigative powers.'" *Department of Public Welfare v. Chawaga*, No. 1497 C.D. 2013, 2014 Pa. Commw. Unpub. LEXIS 168 at *5 (Pa. Commw. Ct. 2014) (quoting *Johnson*, *supra* at 925); *see also Collier v. Department of State*, OOR Dkt AP 2014-0361; 2014 PA O.O.R.D. LEXIS 398; *Bhaya v. Central Bucks School District*, OOR Dkt. AP 2014-0319; 2014 PA O.O.R.D. LEXIS 372.

The Department submitted Mr. Allard's affidavit, attesting that the Department "has the power and duty through the Radiation Protection Act to conduct studies and investigations relating to the control, regulation and monitoring of radiation sources... 35 P.S. §§ 7110.301(c)(12)-(13)." Section 7110.301 provides:

> (a) REGULATION IN GENERAL. -- The department is hereby designated as the agency of the Commonwealth for the purpose of registration, licensing, regulation and control of radiation, radiologic procedures, radiation sources and users of radiation sources ...

(c) POWERS AND DUTIES. – The department shall have the power and its duties shall be to:

...

(12) Encourage, participate in or conduct studies, investigations, trainings, research, remedial actions and demonstrations relating to control, regulation and monitoring of research sources.

(13) Collect and disseminate information related to nuclear power, the control of radiation sources, radiation protection, emergency response and the effects of radiation exposure.

...

(d) NOTIFICATION. – Whenever the department, in the course of its powers and duties as set forth in subsection (c), determines the levels of radiation exceed the normal range of radioactivity of a given area, the department shall immediately notify the Governor, the agency and the NRC and shall also report its findings to the public and it shall subsequently submit a detailed report on the occurrence to both the Governor and the NRC and shall make such report public.

35 P.S. §§ 7110.301(a), (c)(12-13), (d) (emphasis added).

Mr. Allard attests:

[The Department] and its contractors are conducting a probing inquiry that includes field screening and testing during the TENORM Study of potential sources, including drill cutting pits, flowback and produced water, temporary water storage vessels and recycle systems, drilling rigs and associated equipment, offices, trailers and trucks, production equipment, wastewater facilities, landfill leachate, and beneficial reuse areas (e.g., roadways treated with oil and gas produced water and brines). In addition to screening and testing, [the Department] has collected solid, aqueous and radon gas samples for off-site analysis.

The Radiation Protection Act distinguishes studies as separate from investigations. The Act vests the Department with the authority to conduct both "studies" and "investigations" and the Department has not provided evidence to support their position that the TENORM *Study* is an investigation pursuant to the RTKL. The very name identifies it as a study. The Act vests the Department with the authority to conduct

both an investigation and a study recognizing that there will be situations where a study is appropriate and not an investigation. An investigation is an inquiry that may or may not result in a sanction pursuant to the agency's authority of regulating that activity. A study is an academic or scientific analysis of a matter unrelated to the licensing or regulation of a specific activity. The Department's synonymous use of study and investigation in its submission does not change the fact that the Department was conducting a scientific analysis in a context that would not lead to the possibility of the imposition of sanctions under its regulatory authority, but rather to report its findings of radioactive material in Pennsylvania. Based on the information in the record, the Department was collecting information for a study, as it is termed the "TENORM Study," as opposed to an investigation.

Accordingly, the 3,495 samples and surveys that constitute data of the TENORM study, as identified in the log and withheld from disclosure, do not constitute information of a systematic or searching inquiry, or a detailed examination contemplated by the noncriminal investigative records exemption. *See* 65 P.S. § 67.708(b)(17).

2. The Department has not met its burden of proof that the records are protected from disclosure pursuant Section 708(b)(1)-(3) of the RTKL

On appeal, the Department argues that it withheld the study sample data of the TENORM study on the basis that disclosure would threaten personal security (65 P.S. § 67.708(b)(1)(ii)), public safety (65 P.S. § 67.708(b)(2)) and public security of infrastructure (65 P.S. § 67.708(b)(3)).

Section 708(b)(1)(ii) protects "a record, the disclosure of which ... would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual." 65 P.S. § 67.708(b)(1). Section 708(b)(2) of the

RTKL, exempts records "maintained by an agency in connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity[.]" 65 P.S. § 67.708(b)(2). In order to establish this exemption, an agency must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Department of Corrections*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013); *Adams v. Pennsylvania State Police*, 51 A.3d 322 (Pa. Commw. Ct. 2012). Finally, the Department argues that the requested records are exempt pursuant to Section 708(b)(3) of the RTKL. Section 708(b)(3) exempts from disclosure "[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, infrastructure, facility or information storage system." 65 P.S. § 67.708(b)(3).

Under the RTKL, a "reasonable likelihood" of harm is necessary to trigger the personal security, public safety and infrastructure security exemptions. Mere belief that the release of a record would cause harm is insufficient. *Zachariah v. Dep't of Corrections*, OOR Dkt. AP 2009-0481, 2009 PA O.O.R.D. LEXIS 216; *see also Lutz v. City of Philadelphia,* 6 A.3d 669, 676 (Pa. Commw. Ct. 2010) (holding that "[m]ore than mere conjecture is needed" to establish that this exemption applies).

On appeal, Mr. Allard attests:

> The release to the public of the preliminary unvalidated data, including sample locations, related to radioactive materials would be reasonably likely to result in a substantial and demonstrable risk of physical harm or harm to the personal security of an individual, or to the public at large, due to the health risks associated with exposure to radioactive materials should

> the security of those materials be compromised as a result of public knowledge as to their location and quantity.
>
> The public dissemination of information related to the specific location of NORM and/or TENORM poses security and medical risks for individuals or for the general public, should they access or be exposed to radioactive substances.
>
> If an individual with criminal intent obtained these records relating to the location and quantity of radioactive substances, either directly or through the republishing of these records obtained by someone else, the public's health and safety, as well as buildings and infrastructure, would be severely compromised due to risks associated with exposure to these radioactive materials.
>
> The premature release of the Department's TENORM unvalidated and preliminary data to the public prior to the Bureau's completion ... will result in erroneous and/or misleading characterizations of the levels and effects of NORM and/or TENORM associated with [Oil and Gas] exploration and production...

It is important to note that the TENORM study is the gathering of information on radioactive material that already exists from the oil and gas exploration and production activities. The Department contends that a reasonable likelihood of harm exists by releasing the information because of the risks associated with exposure to radioactive material. In essence, the Department's argument attempts to equate the risk of radioactive material itself to the *release of information* about radioactive material. The risks associated with exposure to radioactive material is not the same as any risk associated with releasing information about radioactive material.

Here, the Department fails to establish by a preponderance of the evidence, as required by law, how the release of this information about radioactive material would result in harm. The Department's evidentiary submission falls short of the law's requirement that it provide evidence that would establish that the release would be

reasonably likely to harm the personal security, public safety or the security of an infrastructure.

Further, Mr. Allard also attests, "when the Bureau ...determines the potential human health and environmental effects of NORM and/or TENORM generated during [oil and gas] exploration and production, the Bureau will provide its final findings and determinations, as well as the validated data generated during the TENORM Study, in a detailed report that will be made available to the public." As such, the Department cedes that the information is in fact public in that it plans to release the data once it has had the opportunity to "validate" the data, but argues that the premature release of the unvalidated data would result in erroneous and/or misleading characterizations. The law establishes a high bar that an agency must meet to withhold records under these exemptions, requiring an agency to demonstrate that the release would be reasonably likely to harm. The Department does not provide evidence that meets this test. It has not demonstrated how erroneous or misleading characterizations of data would result in harm to the personal security of an individual, public safety and infrastructure security.

3. The information requested is not protected as internal, predecisional deliberations under the RTKL

The Department argues that the withheld records are protected as internal, predecisional deliberations of the Department. *See* 65 P.S. § 67.708(b)(10). Section 708(b)(10) of the RTKL exempts from public disclosure 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 budget recommendation, ...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). To withhold a record under Section 708(b)(10)(i)(A), an agency must show: (1) the deliberations reflected are internal to the agency, including representatives, (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 a proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011); *Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010PA O.O.R.D. LEXIS 285; *PHFA v. Sansoni*, 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.

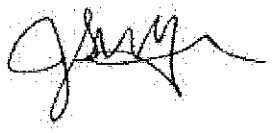
In the present matter, the Requester sought "sample data acquired … location of sample sites … information regarding the type of beneficial use sites…production data and dates …" The exemption log provided by the Department indicates that the responsive records are test methods and tests that have been conducted under the TENORM study. Under the Department's logic, these tests, that consist of data collected by the Department, are exempt from disclosure merely because the Department has not undergone "internal deliberations to verify the quality and assess the data's significance as to potential radiation exposure." However, the responsive records identified in the exemption log are not deliberative, rather are factual in character consisting sample data collected and sample location. Section 708(b)(10) requires a record to be deliberative in character; it must make recommendations or express opinion on legal or policy matters and is not be purely factual in nature. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011); *Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010PA O.O.R.D. LEXIS 285; *PHFA v. Sansoni*, 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. Based on the underlying purpose of the RTKL, however, "exemptions from disclosure must be narrowly construed. *Bowling, supra*; *see Gingrich v. Pa. Game Commission*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 ("The RTKL must be construed to maximize access to government records"). As such, the OOR finds that the Department has not met its burden of proving that the withheld records are exempt from disclosure pursuant to Section 708(b)(10) of the RTKL.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and the Department is required to provide all records responsive to the Request 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 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: July 11, 2014



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