

FINAL DETERMINATION

IN THE MATTER OF :

CITIZENS FOR PENNSYLVANIA'S

FUTURE, : Complainant :

:

v. : Docket No.: AP 2013-0402

(Consolidated)

PENNSYLVANIA DEPARTMENT OF

CONSERVATION AND :

NATURAL RESOURCES, : Respondent, :

:

and :

ANADA DIKO DEMDOL HIR COOD

ANADARKO PETROLEUM CORP., : ANADARKO E&P ENERGY :

SERVICES, CORP. AND :

ANADARKO E&P ONSHORE, L.L.C., : Direct Interest Participants :

INTRODUCTION

Citizens for Pennsylvania's Future (the "Requester") submitted two requests ("Requests") to the Pennsylvania Department of Conservation and Natural Resources ("Department" or "DCNR") pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, ("RTKL"), seeking certain natural gas plans/maps submitted to the Department by Anadarko Petroleum Corporation ("Anadarko"). The Department denied the Requests,

claiming, among other reasons, that responsive records contain trade secrets or confidential proprietary information. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part** and the Department is required to take further action as directed herein.

FACTUAL BACKGROUND

On January 10, 2013, the Requester filed the Requests. The first Request¹ seeks:

1. Proposed and final plans for development of oil and gas resources under or within the Loyalsock State Forest submitted by Anadarko to DCNR from January 1, 2011 to the present.

The second Request² seeks:

- 1. All proposed development maps referred to in the letter from Ellen M. Ferretti to Anadarko dated July 18, 2012.
- 2. All proposed or final development maps depicting the Loyalsock State Forest, or any part thereof, submitted by Anadarko to DCNR after July 18, 2012.

On January 17, 2013, the Department invoked a thirty (30) day extension of time to respond to the Requests pursuant to 65 P.S. § 67.902. On February 15, 2013, the Department denied the Requests, stating that "no final decision has been made by DCNR to proceed with the lease, acquisition or disposal of real property or interest in real property or the purchase of public supply or construction project with Anadarko for the Loyalsock [State Forest]." The Department continued by stating that the requested records are exempt as reflecting internal, predecisional deliberations(65 P.S. § 67.708(b)(10)) and protected by the executive and deliberative process privileges. In addition, the Department also denied the Requests to the extent they sought 1) the

¹ DCNR assigned this Request a tracking #13-1007.

² DCNR assigned this Request a tracking #13-1010.

contents of real estate appraisals, engineering or feasibility estimates, environmental reviews audits or evaluations made for or by an agency pursuant to 65 P.S. § 67.708(b)(22)(A) and (C); or 2) trade secrets or confidential proprietary information pursuant to 65 P.S. § 67.708(b)(11).

On March 11, 2013, the Requester appealed both of the Department's denials to the OOR, challenging the denials and stating grounds for disclosure.³ The two appeals were subsequently consolidated into the above-referenced docket number. The Requester asserts that the requested records are public and not exempt under Section 708, nor protected by any privileges. The Requester also asked the OOR to conduct an *in camera* review of the requested records.

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 March 21, 2013, the Department provided legal argument in support of its position for denying the Requests and stated there is a single document at issue in both appeals entitled, "Anadarko Petroleum Corporation, Loyalsock State Forest, Plan of Development, March 28, 2012 [("Plan")]." The Department submitted the sworn affidavit of Teddy W. Borawski, Jr., Program Manager for the Department, attesting to the fact that after staff members for the Department conducted a search for the records requested in both of the Requests, only the Plan is responsive to the Requests.

On March 21, 2013, Anadarko Petroleum Corporation, Anadarko Energy Services Corporation and Anadarko E&P Company, L.P. n/k/a Anadarko E&P Onshore, L.L.P. ("Anadarko") submitted a request to participate in the appeals as a party with a direct interest and filed its legal argument that the records are exempt and noting that it would

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³ The appeals were docketed as OOR Dkt. AP 2013-0402 and 2013-0403.

not be adverse to an *in camera* inspection. On April 12, 2013, the OOR granted the participation of all Anadarko companies as having a direct interest in the appeals.⁴

On March 27, 2013, after the record closed, the Requester requested the OOR to allow it to provide further legal argument in light of the Department's and Anadarko's submissions on the substantive issues raised on appeal. It also requested a hearing and agreed to participate in an informal mediation by agreement of the parties.

On May 10, 2013, the parties signed an agreement to participate in an informal mediation. The OOR conducted mediation between the parties. On June 12, 2013, the Requester sent a letter to the OOR stating that, despite the mediation efforts, the parties' disputes cannot be resolved through mediation and requested the OOR to rule on any outstanding procedural issues and issue the final determination in the appeals. On June 13, 2013, the OOR sent a letter to the parties terminating the mediation and transferring the appeals to a different appeals officer for review and issuance of a Final Determination.

On June 20, 2013, the OOR granted the Requester's request to supplement its legal argument in this matter and ordered the Department to provide the withheld records responsive to the Requests for *in camera* inspection. The Requester filed its supplemental argument on June 27, 2013. On July 9, 2013, the Department provided the

The OOR granted the request of Anadarko E&P Onshore, L.L.C. to participate in the appeal as a party with a direct interest.

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⁴ On April 2, 2013, Anadarko provided additional evidence of whether Anadarko E&P Onshore, L.L.C. had a direct interest to participate in the appeals. Anadarko provided an affidavit of Margaret E. Roark, Manager of Corporate Governance and Assistant Secretary for Anadarko Petroleum Corporation, attesting that Anadarko E&P Company, L.P. was converted from a limited partnership to a limited liability company with the name Anadarko E&P Onshore, L.L.C. Anadarko also provided a certification from Jeffrey W. Bullock, the Secretary of the Department of State of Delaware, certifying the conversion of the company.

Plan to the OOR for *in camera* inspection.⁵ Additionally, the Requester agreed to extend the date for the OOR's issuance of the Final Determination until to September 13, 2013 pursuant to 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 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. OOR, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), aff'd No. 20 MAP 2011, 2013 Pa. LEXIS 1800 (Pa. Aug. 20, 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 or not hold a hearing is discretionary and non-appealable. *Id.*; Giurintano v. Dep't of Gen. Servs., 20 A.3d. 613, 617 (Pa. Commw. Ct. 2011). 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, the Requester requested a hearing, but the OOR has the necessary, requisite

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⁵ On July 5, 2013, the parties agreed to have the Department "provide the OOR with a copy of Anadarko's [Plan] with graphical signs (*i.e.*, text boxes with associated numbers that in turn refer to in an inspection index) that merely identify parts of the Plan that Anadarko claims as 'confidential proprietary information' or 'trade secrets', as long as the copy does not contain any annotations" On July 9, 2013, the Department submitted two copies of the Plan and the accompanying inspection index for *in camera* review by the OOR. One copy contained text boxes corresponding to the inspection index and the other contained no markings.

information and evidence before it to properly adjudicate the matter. Therefore, the request for a hearing is denied.

The Department 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). Similarly, the burden of proof in claiming a privilege from disclosure is on the party asserting that privilege. Levy v. Senate of Pa., 34 A.3d 243, 249 (Pa. Commw. Ct. 2011); DOT v. Drack, 42 A.3d 355, 364 (Pa. Commw. Ct. 2012) ("[T]he RTKL places an evidentiary burden upon agencies seeking to deny access to records even when a privilege is involved"); In re: Subpoena No. 22, 709 A.2d 385 (Pa. Super. Ct. 1998). 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. Certain information contained within the Plan is protected from disclosure as confidential proprietary information and trade secrets

Both the Department and Anadarko advance the argument that the Plan is exempt from disclosure under Section 708(b)(11) of the RTKL. Section 708(b)(11) exempts from disclosure "[a] record that constitutes or reveals a trade secret or confidential proprietary information." 65 P.S. § 67.708(b)(11). "Confidential proprietary information" is defined as:

Commercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the [entity] that submitted the information.

65 P.S. § 67.102. "Trade Secrets" are defined as:

Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

- (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S § 67.102. An agency must establish that both elements of these two-part tests are met in order for the exemption to apply. *See Sansoni v. Pennsylvania Housing Finance Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *see also Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011) (involving confidential proprietary information).

Anadarko states that it has taken measures to ensure that the Plan remains confidential and not disclosed to third parties. The sworn affidavit of Chris Sembritzky, General Manager of Operations for Anadarko Petroleum Company, attests that Anadarko has an online database of projects that restricts access to each project. Only the personnel

assigned to the Plan's project, have access to the Plan. Mr. Sembritzky further attests that Anadarko's disclosure to third parties is only upon the execution of a confidentiality agreement and that the Department was required to execute a "Trade Secret/Proprietary Information Notice." In addition, each page of the Plan is marked "confidential and proprietary." The *in camera* inspection confirms Mr. Sembritzky's attestations.⁶

The sworn affidavit of Daniel Devlin, the Department's Director of the Bureau of Forestry, attests that he and Department staff believed at the time of receipt of the Plan and continue to believe that the information in the Plan is the type of information commonly held as "confidential and proprietary" for companies like Anadarko doing natural gas exploration and drilling.

Anadarko also argues that the disclosure of this information would cause substantial harm to its competitive position. In particular, Anadarko states that disclosure of this information would be immense value to competitors by gaining insight into how Anadarko conducts its operations and strategic deployment of resources, which could be adopted and used by competitors in their own operations or in the future bidding process. The sworn statement of Mr. Sembritzky attests that "Anadarko owns an undivided 50% interest in mineral rights, including natural gas rights, under portions of Loyalsock State[,]" which Anadarko argues that any other owner could compete in mineral resources with Anadarko.

Based upon review of the record and OOR's *in camera* review, the OOR finds that certain information contained within the Record is exempt as "confidential"

the records reviewed in camera.

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⁶ Section IV(D)(11) of the OOR Interim Guidelines provides, among other things, that "Reference to specific records submitted for *in camera* inspection, or the contents of such records, in the final determination will be ... by reference to generic description or characterizations as set forth in the *in camera* inspection index." As such, the OOR's written analysis is constrained to a generic description of

proprietary information" and "trade secrets" under Section 708(b)(11). Specifically, the Department and Anadarko have established that information within the marked textboxes that correspond to the inspection index as "confidential proprietary information" is exempt under Section 708(b)(11). After considerable financial expenditures, Anadarko generated and compiled into the Plan its analyses, designs and determinations of how to go about conducting its business in the Loyalsock State Forest. As discussed above, Anadarko has taken great measures to ensure this information's confidentiality within its own company and with third parties.

Additionally, the information within the marked textboxes that correspond to the inspection index as "trade secrets" is exempt under Section 708(b)(11). The information on the Plan provided as a trade secret of Anadarko contains its own modeling and analysis of the property. This information was developed by Anadarko and derives independent economic value to industry competitors, including the other owners of the mineral rights under Loyalsock State Forest. Competitors of Anadarko could gain knowledge of Anadarko's modeling and analysis and use it for their own business venture at Loyalsock State Forest. It is clear that Anadarko and the Department have taken many steps to keep this information confidential and withheld from third parties.

Pursuant to 65 P.S. § 67.706, the Department may redact all information in the inspection index marked as confidential proprietary information or a trade secret under Section 708(b)(11) of the RTKL.

2. The Plan is not exempt from disclosure in its entirety under Section 708(b)(22) as the Plan was not "made for or by an Agency"

The Department and Anadarko claim that the Plan is exempt from disclosure in its entirety under Section 708(b)(22)(i)(A) and (C) of the RTKL. Section 708(b)(22) exempts from disclosure:

- (i) The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations **made for or by an agency** relative to the following:
 - (A) The leasing, acquiring or disposing of real property or an interest in real property.
 - (C) Construction projects.

65 P.S. 67.708(b)(22)(i)(A), (C) (emphasis added). The RTKL also provides that this exemption "shall not apply once the decision is made to proceed with the lease, acquisition or disposal of real property..." 65 P.S. 67.708(b)(22)(ii). The affidavits of Mr. Devlin and Mr. Sembritzky both attest that no final decision has been made on the Plan.

Based on an *in camera* review, the OOR finds that the Plan does contain engineering and feasibility estimates, environmental reviews and evaluations relative to the leasing of real property and construction projects. However, Section 708(b)(22)(i) requires these records to have been "made for or by an agency." Here, the Plan was not made by the Department, rather it was made by Anadarko. The issue then becomes whether the Plan was made *for* the Department.

In order to better examine this issue under the circumstances of this case, the OOR will look at the relationship between the Department and Anadarko. The sworn affidavit of Daniel Devlin attests that he Department previously reviewed Anadarko's Marcellus Shale development in the Loyalsock State Forest, in which the Department

disapproved the construction of five well pads in October of 2011. He further attests that after disapproving the construction of well pads in 2011, the Department requested more detailed information for Anadarko's proposed Marcellus Shale development; Anadarko submitted the Plan in response to the Department's request for more information.

The OOR finds that Anadarko, on its own volition, submitted a construction plan for five well pads at Loyalsock State Forest to conduct its gas drilling business. The Department disapproved that proposal because it needed more detailed information. The more detailed information is contained with the Plan at issue here and was submitted again for the Department's review.

Recently, the OOR issued a final order in *Lund v. Dep't of Conservation & Natural Resources* that granted an appeal of a Requester seeking a wetland delineation report and proposed snowmobile trail on Loyalsock State Forest. OOR Dkt. AP 2013-0854, 2013 PA O.O.R.D. LEXIS 488. The request sought an easement or right away involving state lands owned by the Department. The OOR held that the reports were submitted to the Department by a third party in support of the third party's own proposal to reroute a snowmobile trail. The Department did not directly request or contract to have the reports made for its own use. *See also Marshall v. Neshaminy School District*, OOR Dkt. AP 2010-0015, 2010 PA O.O.R.D. LEXIS 67; *Ali v. DCED*, OOR Dkt. AP 2009-0154, 2009 PA O.O.R.D. LEXIS 286 (holding that records prepared by third parties in support of their own proposal and interests are not made for an agency); *c.f. Hanhausen v. Dep't of Revenue*, OOR Dkt. AP 2013-0214, 2013 PA O.O.R.D. LEXIS 183 (stating that draft legislation prepared by a third party that resulted in various

versions being drafted and exchanged between the two parties for their own separate interests was found by the OOR to be prepared by the agency).

Here, the OOR finds that the Plan was not made *for* the Department. Instead, the record demonstrates that the Plan was made by Anadarko and submitted to the Department in support of Anadarko's gas drilling business. The Department is not in the business of gas drilling and is not creating gas drilling plans for its own use. In addition, there is no evidence that the Department contracted with Anadarko to produce the Plan for the Department's use. The Plan was made *by* Anadarko and *for* Anadarko's business. The fact the Plan was submitted to the Department does not automatically suggest that the Plan was made *for* the Department. The Plan was submitted because Anadarko cannot proceed with its business without first obtaining approvals from the Department. Accordingly, the Plan is not exempt from disclosure pursuant to Section 708(b)(22) of the RTKL.

3. The Plan is not exempt from disclosure in its entirety as an internal, predecisional deliberation pursuant to Section 708(b)(10), nor is the Plan protected from disclosure by the executive and deliberative privileges

The Department also contends that that the Plan reflects internal, predecisional deliberations of the Department and is exempt under Section 708(b)(10) of the RTKL. This section exempts from 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 of officials of another agency, including predecisional deliberations relating to budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). The OOR has consistently held that an agency must show three elements to substantiate this exception: (1) the deliberations reflected are "internal" to the agency; (2) the deliberations reflected are predecisional, i.e., before a decision or action; and (3) the contents are deliberative in character, i.e., pertaining to proposed action and/or policy making. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011); *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1101 n.8 (Pa. Commw. Ct. 2013).

In the present matter, the Department argues that the Plan reflects internal, predecisional deliberations by the Department. While the Department points to various correspondence between and Anadarko to support its argument, these items do nothing more than indicate that the Department and Anadarko will be meeting to review the Plan, once additional information is provided.

The OOR finds that the evidence fails to demonstrate that the Plan is internal to the Department. *See Schmitz v. Pa. Turnpike Comm'n*, OOR Dkt. AP 2009-0321, 2009 PA O.O.R.D. LEXIS 361. The record does no more than substantiate the fact that the Plan was prepared by Anadarko and submitted by Anadarko to the Department for review. Section 708(b)(10) is clear that the deliberations must be of "an agency, its members, employees or officials." *See Sansoni*, *supra* (applications submitted by third party to agency does not reflect deliberations by the agency); *Lund*, *supra* (a record submitted by a third party to the Department for review of the third party's proposal to reroute a snowmobile trail on state owned land was in support of the third party's own interest and therefore not internal to DCNR); *McLaughlin v. Wyoming Valley West Sch. Dist.*, OOR Dkt. AP 2013-0594, 2013 PA O.O.R.D. LEXIS 319 (proposal submitted by

contractor of a proposed sale of a copier does not reflect deliberations of the agency). The fact that the Department requires additional information for its review and ultimate decision, does not make the Plan internal to the agency. Based on the record and OOR's *in camera* review, the Plan is not internal to the Department, and therefore, not exempt from disclosure under Section 708(b)(10) of the RTKL.

The Department also argues that the executive and deliberative process privilege protect disclosure of the Plan. Section 708(b)(10)(i) of the RTKL has been recognized by the Commonwealth Court as codifying the deliberative process privilege. *Scolforo*, 65 A.3d at 1100. For the same reasons set forth above, the Plan is not protected by the deliberative process privilege. The Department also raises the executive privilege, but does not suggest an analysis separate from the deliberative process privilege. The Department cites *Rae v. Penn. Funeral Dirs. Ass'n.* for the proposition that "the executive privilege is coterminous with a deliberative process privilege." 925 A.2d 197, fn. 5 (Pa. Commw. Ct. 2007). Since the Department does not offer a separate analysis for the executive privilege, there is no additional evidence to review. For the same reasons, the executive privilege does not apply to shield the entire Plan from disclosure.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part** and the Department is required to provide the Plan with redactions of confidential proprietary information and trade secrets as identified in its inspection index 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: September 13, 2013

APPEALS OFFICER

JILL S. WOLFE, ESQ.

Sent to: Mark Baldwin, Esq. (via e-mail only);

Mark Szybist, Esq. (via e-mail only); Joshua Belcher, Esq. (via e-mail only); Connie Plonowski (via e-mail only)