



Safeguarding Confidential Security Information

**Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission**

Why Talk About This?

- ▶ Just might save you from a malpractice suit OR losing your government job OR being fired by your utility employer OR criminal charges!
- ▶ Common mistakes: failure to pay close attention to confidential and proprietary material when filing with an agency, especially confidential security information and critical infrastructure information
 - ▶ Properly label the material; properly file the material (Public and Confidential versions); review the filing for sensitive material; avoid improper handling of sensitive material.

TRAIN YOUR ATTORNEYS, TECHNICAL, AND SUPPORT STAFF!

READ THE APPLICABLE STATUTES OR REGULATIONS!

KNOW THE REQUIREMENTS AND POLICY SET BY YOUR ORGANIZATION!

Freedom of Information and Right to Know Laws

- ▶ All state agencies and municipalities are subject to the PA RTK Law - PA Courts and PA General Assembly exempt from the statute except salaries and expenses incurred.
- ▶ Definition of a “Record; Exemptions; Protected Privileges by statute or regulation.
- ▶ Common theme is to promote transparency of government operations, but 30 exemptions for personal information, ongoing investigations, security information, legislation to protect family information of public officials.
- ▶ Attorney Client Privilege, Attorney Work Product, Confidential Security Information, Critical Infrastructure Information, and Critical Energy Infrastructure - all protected by Model Rules of Professional Conduct and statutes with strict requirements - exempt from Federal FOIA and PA Right to Know Law

Open Records Laws, Ex Parte, and Co-mingling of Agency Functions

- ▶ Ethical Considerations:
- ▶ When receiving an RTK request for information - what is it asking for? Docketed or contested proceedings? An ongoing investigation?
- ▶ Look at who the request is directed at - and determines who in the Commission has this information?
- ▶ Does the request target Commissioners or other decision-makers?
- ▶ Ex parte prohibitions?
- ▶ Does the request target advisory, judicial, and/or prosecutorial staff?
- ▶ In Pennsylvania - Supreme Court ruling in *Lyness v. PA Board of Medicine (1992)*
- ▶ Send the request to staff on separate emails to avoid mingling of functions.
- ▶ Instructions to staff on how to gather responsive records is crucial.

Agency's Due Diligence to Search for Records

- ▶ The PA RTK Law places burden upon the agency to search diligently for any and all records - in the agency's possession - responsive to the request - clearly identify both disclosed and what and why exempt.
- ▶ Recent Court ruling in Pennsylvania admonishing state agency for failure to act with due diligence or in bad faith.
- ▶ PA Supreme Court Decision in *Uniontown Newspapers v. PA Department of Corrections, December 22, 2020*, ruled agency to not only release records, but also ordered agency to pay attorney's fees of opposing counsel. The Court placed stronger burden on agency's records officer to have first-hand knowledge of requested records.
- ▶ Cost of time and resources on part of agency to gather records, review, legal analysis, and ensure appellate proof response if affidavits required.

THIRD PARTY NOTIFICATION

- ▶ Section 707(b) of the PA RTK Law states that an agency must notify a Third Party who provided the requested information to the safekeeping of the agency.
- ▶ Third Party is given five business days to justify the information should be kept confidential or can be released to the requester.
- ▶ Third Party has rights during the appeal process before PA Office of Open Records and can argue on appeal its direct interest in keeping the information exempt from disclosure.
- ▶ Access to non-public documents - 52 Pa. Code Section 1.74 - Petition and Subpoena submitted to Secretary

Pennsylvania's Public Utility Confidential Security Information Disclosure Protection Act of 2006

- ▶ **Utility has the responsibility to clearly identify and label the Confidential Security Information (CSI)**
- ▶ **Cover Letter telling the Commission CSI is included, but cover letter should not be marked as CSI**
- ▶ **Utility should submit two versions: Public with redactions and Confidential version with the CSI**
- ▶ **RTK Law in PA protects records made confidential by law.**
- ▶ **Commission has responsibility to protect CSI once it is filed.**
- ▶ **Knowing or reckless release of CSI is criminal in Pennsylvania.**
- ▶ **Ethical duty to protect CSI found in historical files.**

Who Can Review CSI?

- ▶ WHAT RESTRICTIONS DOES THE LAW IMPOSE?
- ▶ In Pennsylvania - restricted access only through the Secretary according to statutory and regulatory conditions.
- ▶ PUC Staff must go through series of protocols to review CSI
- ▶ Outside Party - Commission can impose multiple conditions to review CSI such as criminal background checks
 - ▶ Commission must weigh a balancing test in PA - the sensitivity of the information vs. potential harm or risk if CSI is released
 - ▶ Knowing, deliberate, or negligent handling is punishable under the statute if CSI is released
- ▶ LANDMARK PA SUPREME COURT DECISION - December 22, 2021
- ▶ *PUC v. Friedman/ Energy Transfer v. OOR (Friedman II) - PA. Supreme Court, 1560 CD 2019/1576 CD 2019*

***Energy Transfer v. Eric Friedman /
Pennsylvania Public Utility Commission v. Eric Friedman***
265 A.3d 421

**Right-to-Know Law v. the Public Utility Confidential Security Information
Disclosure Protection Act**

- ▶ On February 4, 2019, Friedman filed a Right-to-Know (RTK) request for records containing or relating to calculations or estimates of blast radius (Energy Transfer or Sunoco Pipeline) or "buffer zone" regarding accidents or releases from HVL pipelines.
- ▶ Secretary Chiavetta denied Friedman's request, stating that the responsive records had been designated CSI and thus were protected from disclosure
- ▶ Friedman filed an appeal with the Office of Open Records (OOR), disputing the confidential nature of the records
- ▶ OOR concluded that there was no evidence that the responsive records had been properly designated as CSI - and therefore not entitled to protection from disclosure under the CSI Act. OOR wanted to perform an *in camera* review of the CSI.

Energy Transfer v. Eric Friedman / Pennsylvania Public Utility Commission v. Eric Friedman

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- ▶ PA Commonwealth Court reversed the OOR's decision in a unanimous opinion. *PA. Pub. Util. Comm'n v. Friedman, 244 A.3d 515 (Pa. Cmwlth. 2020)* ruling the OOR has no authority under RTK Law to perform in camera review of CSI documents. Friedman appealed to PA Supreme Court.
- ▶ On December 22, 2021, the Pennsylvania Supreme Court issued an opinion affirming the Commonwealth Court and reversing the OOR's order. Specifically, the Court held that the OOR did not have authority to reconsider the nature of CSI-designated records or the public accessibility of those records.
- ▶ The CSI Act prevails over the PA RTK Law!