



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

IN REPLY PLEASE
REFER TO OUR FILE

January 15, 2020

VIA FIRST CLASS MAIL OR eSERVICE

TO ALL PARTIES OF RECORD:

RE: Tanya J. McCloskey, Acting Consumer Advocate
v.
Hidden Valley Utility Services, L.P - Wastewater
Docket Number C-2014-2447169

Tanya J. McCloskey, Acting Consumer Advocate
v.
Hidden Valley Utility Services - Water
Docket Number C-2014-2447138

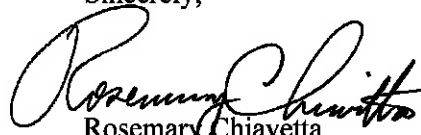
On May 15, 2019, the Commonwealth Court of Pennsylvania remanded the above cases to the Pennsylvania Public Utility Commission in its decision at *Hidden Valley v. PA. Public Utility Commission*, No. 187 C.D. 2019 (*Pa Cwmlth. May 15, 2019*).

On October 30, 2019, Jonathan Nase of Cozen O'Connor (Requester), representing Hidden Valley Utility Services – Water and Wastewater (HVUS) filed a Right to Know (RTK) request under the Pennsylvania Right to Know Law with the Secretary of the Pennsylvania Public Utility Commission. The Commission responded on December 6, 2019, attached both the RTK request and the Commission's response to the above dockets, and served all parties of record to cure any possible ex parte communications prohibited by Section 334(c) of the Public Utility Code.

On December 30, 2019, the Requester filed a timely appeal to the Commission's RTK response with the Pennsylvania Office of Open Records (OOR). The Commission responded to the appeal on January 13, 2020.

Therefore, please be advised that I am serving this Secretarial Letter, along with a copy of the Requester's appeal, and the Commission's appeal response to 1) all Parties of Record to the above dockets; 2) Appeals Officer Erin Burlew of the OOR; and, 3) attaching these documents to the record of the above dockets.

Sincerely,


Rosemary Chiavetta
Secretary of the Commission

Enclosures

CC: All Parties of Record to Dockets C-2014-2447169 and C-2014-2447138
Chief Administrative Law Judge Charles Rainey, Jr.
OOR Appeals Officer Erin Burlew



January 10, 2020

VIA HAND DELIVERY

Jonathan P. Nase
Direct Phone 717-773-4191
Direct Fax 215-372-2340
jnase@cozen.com

Appeals Officer Erin Burlew, Esq.
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

RECEIVED

JAN 10 2020

OFFICE OF OPEN RECORDS

Re: Appeal of Jonathan Nase, Docket #AP 2019-2852

Evidence and Legal Argument of Jonathan Nase

Dear Appeals Officer Burlew:

In accordance with the Official Notice of Appeal in this matter, enclosed please find the Evidence and Legal Argument of Jonathan Nase ("Requester"), together with the Attestation of Jonathan Nase. A copy of this filing has been served on the Public Utility Commission as indicated on the enclosed certificate of service.

Should you have any questions, please contact me. Thank you.

Sincerely,

COZEN O'CONNOR


By: Jonathan P. Nase

JPN
Attachments

cc: Per Certificate of Service
James Kettler, President, Hidden Valley Utility Services, L.P.

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

RECEIVED

JAN 17 2021

OFFICE OF OPEN RECORDS

Jonathan Nase,
Petitioner

v.

Pennsylvania Public Utility Commission,
Respondent

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Docket No. AP 2019-2652

**Requester's Evidence and Legal Argument in
Support of His Position**

Introduction

This appeal concerns a request for public records in the possession of the Pennsylvania Public Utility Commission ("PUC") relating to a small, troubled water and sewer company: Hidden Valley Utility Services, L.P. ("HVUS"). Jonathan Nase (the "Requester") has served as counsel to HVUS in several recent proceedings before the PUC.

In a recent complaint proceeding, *Tanya J. McCloskey, Acting Consumer Advocate v. Hidden Valley Utility Services, L.P. – Water and Wastewater*, Docket Nos. C-2014-2447138 and C-02014-2447169 ("*McCloskey*") (appended to the appeal as Attachment D), the PUC found that HVUS was not providing reasonable and adequate water and sewer service. HVUS was ordered to undertake corrective action, including but not limited to designing, contracting for, obtaining permits for, and building either (i) a new water treatment plant or (ii) a pipeline connecting the HVUS' system to another water source, all within one year from the date of the PUC's Order. Not surprisingly, HVUS failed to meet that deadline.

I expect the PUC will soon initiate a penalty proceeding against HVUS for failing to comply with the PUC's Order in *McCloskey*. In addition, the PUC will shortly commence an investigation into whether the PUC should force HVUS to sell its water and sewer systems to another utility pursuant to 66 Pa. C.S. § 529 (power of commission to order acquisition of small water and sewer utilities).

The Requester filed a Right to Know Law ("RTKL") request with the PUC to obtain documents necessary for HVUS to defend itself in these upcoming proceedings – documents that generally would not be available to HVUS through discovery in PUC proceedings. The PUC granted the RTKL request, in part, and denied it, in part.

For purposes of brevity, the Requester incorporates by reference the reasons for his appeal, appended to his appeal at Attachment B. For the convenience of the Appeals Officer, this document is attached hereto as Exhibit 1. In summary, although the PUC turned over a large number of documents, the PUC withheld an unknown number of documents. The Requester respectfully submits that the PUC failed to carry its burden of proving that any of these documents are exempt from disclosure. The PUC did not provide an exemption log, an affidavit, or any other evidence to establish the necessary elements of its claim that certain exemptions apply to those documents. Additionally, the PUC withheld all of those documents in their entirety, rather than redacting portions and disclosing the remainder of the pertinent documents. In short, the PUC's response failed to meet the requirements of the RTKL. *Mission Pa. LLC v. McKelvey*, 212 A.3d 119 (Pa. Cmwlth. Ct. 2019) (the failure to disclose many pages of a public record does not comport with the narrow construction of RTKL exemptions and the minimal redaction mandate).

Burden of Proof

The RTKL provides that a record in the possession of a Commonwealth agency (such as the PUC) is presumed to be a public record, but this presumption does not apply if the record is exempt from disclosure pursuant to Section 708 of the RTKL. 65 P.S. § 67.305(a)(1). The PUC has not claimed that any requested document is not a “record” within the meaning of the RTKL. 65 P.S. § 102. Instead, the PUC claims that some of the requested records are exempt from disclosure pursuant to Section 708.

The PUC bears the burden of proving that any given record is exempt from public disclosure. 65 P.S. § 67.708(a)(1). As explained in **Exhibit 1**, the PUC has failed to carry its burden. The PUC has not identified the documents that are allegedly exempt from disclosure, nor has it provided any factual support whatsoever for its claim that those documents are exempt from disclosure. Moreover, the PUC has failed to provide any factual support for its claim that every allegedly exempt document may be withheld in its entirety, rather than being disclosed with appropriate redactions. Consequently, the Appeals Officer should order the disclosure of those documents. In the alternative, the Appeals Officer should order the PUC to provide a privilege log, together with copies of the withheld documents, so the Appeals Officer can conduct an *in camera* review of the withheld documents to determine whether any exemption applies to those documents, in part or in whole.

Facts

The Requester’s Appeal included a copy of the RTKL request and the PUC’s response thereto. Since the PUC has yet to provide any factual support for its partial denial of the RTKL request, the Requester is unable to provide evidence to rebut that claim. Nevertheless, it is

significant to note that the RTKL request sought, *inter alia*, “All e-mails or other documents to or from a Commissioner, or any member of a Commissioner’s staff, mentioning Hidden Valley Utility Services, L.P. during the period 2013-present.” See Attachment C to the Appeal.

Although the PUC disclosed many documents in response to the request, few if any documents are to/from a Commissioner or a member of a Commissioner’s staff. While the Requester has no doubt that some of the requested documents, or portions of those documents, are exempt from disclosure, it is difficult to believe that every word of every such record is exempt from disclosure. This is particularly true with regard to comments regarding the upcoming proceedings – since those proceedings have yet to be commenced, any discussion of those proceedings surely would not fall within the pre-decisional deliberation exemption.

Legal Argument

The purpose of the RTKL is to promote government accountability. *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Cmwlth. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013). The PUC’s response to the instant RTKL request promoted government accountability by addressing concerns that the PUC may have violated HVUS’s due process rights by commingling the functions of prosecutor and adjudicator in violation of the Commonwealth Court of Pennsylvania’s decision in *Lyness v. State Board of Medicine*, 605 A.2d 1204 (1992). See PUC’s RTKL response p. 2 n.1.

The PUC’s response, however, did not promote government accountability in that the PUC failed to turn over virtually any document to/from a Commissioner or Commissioner’s Assistant. These documents, for example, would demonstrate whether one or more Commissioners, or Commissioner’s Assistants, has prejudged the upcoming proceedings. If any Commissioner, or

Commissioner's Assistant, has prejudged those proceedings, their participation in the upcoming adjudications would violate HVUS' due process rights. The instant request for public records is the only avenue of discovery available to HVUS and its counsel to obtain evidence regarding this important point. The Appeals Officer should ensure that the PUC is held accountable by carefully scrutinizing each and every claim that a document is exempt from disclosure, in part or in whole.

Conclusion

For all of the reasons set forth above and in Exhibit 1, the Requester respectfully requests that the Appeals Officer find that the PUC has failed to carry its burden of proof, and therefore should order the PUC to disclose all public records responsive to the Requester's RTKL request. In the alternative, the Requester respectfully requests that the Appeals Officer order the PUC to provide a privilege log, together with copies of the withheld documents, so the Appeals Officer can conduct an *in camera* review of the withheld documents to determine whether any exemption applies to those documents, in part or in whole.

Respectfully submitted,

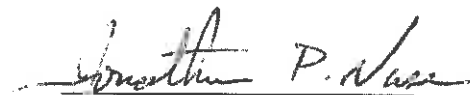

Jonathan P. Nase

Exhibit 1

Attachment B – Reasons for Appeal

I. Introduction

1. The requester in this case requested specific records (“Requests”) from the Pennsylvania Public Utility Commission (“Commission”) relating to Hidden Valley Utility Services, L.P. (“Hidden Valley”), a public utility subject to Commission jurisdiction. A copy of the Request is included as Attachment C.

2. Hidden Valley was a party to several matters before the Commission during the period 2014-2019, and will shortly be subject to additional Commission proceedings. Those proceedings included:

(a) *Tanya J. McCloskey, Acting Consumer Advocate v. Hidden Valley Utility Services, L.P. – Water and Wastewater*, Docket Nos. C-2014-2447138 and C-2014-2447169 (Initial Decision issued September 9, 2016; Opinion and Order entered January 18, 2018; Opinion and Order on Petition for Clarification, Reconsideration and Amendment entered May 3, 2018; Opinion and Order on Petition for Amendment entered January 17, 2019). Attachment D is a copy of the Commission’s Order entered May 3, 2018 in this proceeding. That Order provides, *inter alia*, that the Commission will begin certain proceedings in the future (e.g., a penalty proceeding and a proceeding to order the sale of the company pursuant to Section 529 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 529) if Hidden Valley does not comply with the Commission’s Order by the deadlines set forth in that Order. See ¶¶ 20 and 21. The penalty proceeding and the Section 529 proceeding are expected to begin in the near future.

(b) *Pennsylvania Public Utility Commission v. Hidden Valley Utility Services, L.P. – Water and Wastewater*, Docket Nos. R-2018-3001306 *et al.* (Recommended Decision issued January 25, 2019; Opinion and Order entered March 14, 2019; Opinion and Order on Motion to Extend the Time Period for Completing an Independent Financial Audit entered August 29, 2019).

(c) *Hidden Valley Utility Services, L.P. v. Pennsylvania Public Utility Commission*, 187 C.D. 2019 (appeal quashed by Order entered May 15, 2019).

3. In response to the Requests, the Commission’s Right to Know Law Officer (“RTKL Officer”), after an extension (a copy of which is included as Attachment E), granted three of the five Requests in full, and denied two of the five Requests in part. A copy of the Commission’s responses to the Requests is included as Attachment F (the Commission turned over a large number of documents, which are included on an attached CD).

4. This appeal concerns the partial denial of Requests 1 and 3. The RTKL Officer, *inter alia*, refused to provide certain documents, claiming that they fall under certain exemptions and privileges contained in the RTKL, including the attorney-client privilege, the attorney work product doctrine, the deliberative process privilege, the pre-decisional deliberation exemption and the notes and working papers exemption. The RTKL Officer did not provide a privilege log for the documents that allegedly fall within the RTKL’s exemptions and privileges.

II. Reasons for Appeal

5. Conclusory Denials are Insufficient. The Commission did not meet its burden of proving by a preponderance of the evidence that the records requested are exempt from disclosure under the RTKL. 65 P.S. § 67.708(a). The Commission merely concluded summarily that certain requested records are not subject to disclosure, without providing any other analysis. Mere conclusory statements like the ones the Commission provided in response to the requests are insufficient to meet the Commission's burden of proof. *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records.”).

6. The Blanket Assertion of the Attorney-Client Privilege is Improper. The Commission denied requests on the basis that the requested documents are protected by the attorney-client privilege. The attorney-client privilege requires “(1) that the asserted holder of the privilege is or sought to become a client; (2) that the person to whom the communication was made is a member of the bar of a court, or his or her subordinate; (3) that the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, for the purpose of securing an opinion of law, legal services, or assistance in a legal matter; and (4) that the claimed privilege has not been waived by the client.” See *Chambersburg Area School District v. Dorsey*, 97 A.3d 1281, 1289 (Pa. Cmwlth. 2014). The Commission did not meet its burden of proving that this exemption applies to any of the requested public records.

a. As the OOR concluded in *Davis v. Payne Commission*, Docket No. AP 2011-0754 (OOR Final Determination Issued June 27, 2011), the Commission here did not describe the documents that contain such communications or the content of the communications in order to substantiate that each and every record withheld from disclosure was made for the purpose of securing or providing legal advice.

b. Similarly, the Commission employs staff members who serve in various capacities, even if they are lawyers, and do not necessarily provide legal advice, opinions, services, or assistance; therefore, the attorney-client privilege does not attach to their communications.

c. Moreover, the Commission did not address whether the privilege has been waived for any responsive records through disclosure to a third party, including (without limitation) whether any communications by and among the Commissioners and all their respective assistants, along with any documentation resulting therefrom, results in a waiver of any privilege and therefore are not subject to protection. See *Chambersburg*. In other words, communications among the assistants of each of the Commissioners are not privileged; communications among Commissioners are not privileged; and communications among an assistant(s) of one Commissioner with a different Commissioner are not privileged.

7. The Blanket Assertion of the Work Product Doctrine is Improper. The Commission's claim that the records requested are immune from disclosure based on the work-

product doctrine similarly is wrong. That doctrine generally serves to protect the mental impressions, conclusions and opinions of attorneys prepared in anticipation of litigation. *See Nat'l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Cmwlth. 2001). As with the claim of attorney-client privilege, the Commission did not describe the documents that contain such information or the content of the records in order to substantiate that each and every record withheld from disclosure contains mental impressions, conclusions, and opinions of a licensed Pennsylvania attorney in anticipation of any litigation.

8. The Blanket Assertion of the Pre-Decisional Deliberation Exemption is Improper. The Commission partially denied Request Nos. 1 and 3, *inter alia*, on the basis that they seek records relating to internal pre-decisional deliberations. An agency must show three elements to meet its burden under this exception: (1) the deliberations reflected must be "internal" to the agency; (2) the deliberations reflected must be predecisional, *i.e.*, before a decision on an action; and (3) the contents must be 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. Cmwlth. 2011). The Commission has offered no information on how the records requested meet this test. Moreover, as stated above, Hidden Valley will soon be subject to a penalty proceeding and a Section 529 proceeding. Since those proceedings did not even commence prior to the Requester's filing of the Request, any deliberations pertaining to those proceedings would not fall within the pre-decisional deliberation exemption.

9. The Blanket Assertion of the Notes and Working Papers Exemption is Improper. Section 708(b)(12) of the RTKL exempts from disclosure "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." The Commission asserts that this exemption applies to certain documents responsive to Request 3, which requests "any e-mails or other documents to or from any employee in the Bureau of Technical Utility Services mentioning Hidden Valley Utility Services, L.P., during the period 2013-present." Without additional information, it is hard to fathom how a document "to or from" an employee is exempt from disclosure because it was prepared by that employee solely for that employee's personal use.

10. The Assertion of both the Deliberative Process Privilege and the Pre-Decisional Deliberation Exemption is Improper. The Commission contends that certain documents are exempt from disclosure pursuant to the deliberative process privilege and/or the pre-decisional deliberation exemption. However, the Commonwealth Court has held that the pre-decisional deliberation exemption codifies the deliberative process privilege. *Scolforo, supra*, at 1101. If the pre-decisional deliberation exemption does not apply, neither does the deliberative process privilege.

11. Redactions/Partial Disclosure and Privilege Log. With respect to all claims of privilege, the Commission violated the RTKL by withholding the records in whole rather than disclosing them in part with appropriate redactions. 65 P.S. § 67.706; *cf. Mission Pa., LLC v. McKelvey*, 212 A.3d 119 (Pa. Cmwlth. Ct. 2019) (the failure to disclose many pages of a public record does not comport with the narrow construction of RTKL exemptions and the minimal redaction mandate). At a bare minimum, the Commission should have produced a log identifying each record or part of record that contains privileged information and the applicable privilege.

12. Reservation of Rights. Requester hereby reserves the right to amend and offer additional support and grounds for the appeal.

III. Conclusion

WHEREFORE, the Appeals Officer should grant this appeal and order the Commission to disclose all records requested (with appropriate redactions, if necessary). In addition, the Appeals Officer should provide the Requester with an opportunity to provide additional briefing and support for the appeal, and the Appeals Officer should conduct an *in camera* review of the documents alleged to be exempt from disclosure.

Respectfully submitted,

Cozen O'Connor



Jonathan F. Nase (PA ID 44003)

17 N. Second St., Suite 1410

Harrisburg, PA 17101

jnase@cozen.com

Tel: (717) 773-4191

Fax: (215) 372-2340

Date: December 30, 2019

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

Jonathan Nase,	:	
Petitioner	:	
	:	
v.	:	Docket No. AP 2019-2652
	:	
Pennsylvania Public Utility Commission,	:	
Respondent	:	

Attestation of Jonathan P. Nase

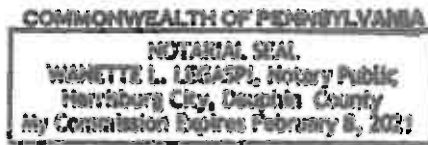
I, JONATHAN P. NASE, hereby declare, pursuant to 18 Pa. C.S. § 4904, that the following statements are true and correct:

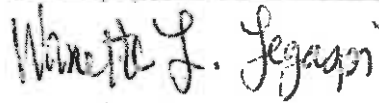
1. I am an attorney with the law firm of Cozen O'Connor. I have represented Hidden Valley Utility Services, L.P., in several recent proceedings before the Pennsylvania Public Utility Commission.
2. I am the Requester in the above-referenced proceeding.
3. Attached hereto is a true and correct copy of correspondence filed by the Office of Consumer Advocate, a party in *Tanya J. McCloskey, Acting Consumer Advocate v. Hidden Valley Utility Services, L.P. – Water and Wastewater*, Docket Nos. C-2014-2447138 and C-02014-2447169.
4. Based on the attached letter, I expect that the PUC will soon initiate a penalty proceeding against Hidden Valley Utility Services, L.P. (“HVUS”), as well as an investigation into

whether the PUC should force HVUS to sell its water and sewer systems to another utility pursuant to 66 Pa. C.S. § 529 (power of commission to order acquisition of small water and sewer utilities).

Respectfully,


Jonathan P. Nase




1/10/2020


COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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FAX (717) 783-7152
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November 20, 2019

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

RE: Tanya J. McCloskey, Acting Consumer Advocate
v.
Hidden Valley Utility Services, L.P. - Wastewater
Docket No. C-2014-2447169

Tanya J. McCloskey, Acting Consumer Advocate
v.
Hidden Valley Utility Services, L.P. - Water
Docket No. C-2014-2447138

Dear Secretary Chiavetta:

Pursuant to Ordering Paragraph 26 of the Commission's Opinion and Order entered May 3, 2018 (May 2018 Order) in the above-referenced dockets, the Office of Consumer Advocate (OCA) submits this letter notifying the Commission that Hidden Valley Utility Services, L.P. (HVUS) has failed to comply with certain deadlines specified in the May 2018 Order.

The May 2018 Order includes detailed timeframes for HVUS to bring its water and wastewater service into compliance with Commission regulations. Ordering Paragraph 26 provides that "in the event that [HVUS] fails to comply with any of the time deadlines directed in these Ordering Paragraphs, the Office of Consumer Advocate shall notify the Secretary of the Commission and the Director of the Commission's Bureau of Investigation and Enforcement within thirty days of the missed deadline." Per Ordering Paragraph 27, such a notice will trigger a separate proceeding pursuant 66 Pa. C.S. § 529.

HVUS submitted an engineer's report dated April 16, 2018 as required by Ordering Paragraphs 6, 7, 9, and 10 of the May 2018 Order. However, HVUS has now missed the deadlines in the May 2018 Order requiring that it comply with the recommendations of the engineer's report regarding

water service within one year of the date of the report. Ordering Paragraph 8. Further, the May 2018 Order also required HVUS to comply with the engineer's recommendations regarding wastewater service by January 31, 2019. Ordering Paragraph 11. By this letter, the OCA is notifying the Commission that HVUS has failed to comply with these deadlines.

Although it has been more than thirty days since HVUS missed these deadlines, the OCA did not previously submit a letter due to HVUS's pending appeal before Commonwealth Court at 187 C.D. 2019 challenging the compliance deadlines at issue here. The Commission initially issued an Opinion and Order in this proceeding on January 18, 2018. HVUS filed a Petition for Clarification on February 2, 2018, and the OCA filed an Answer to the Petition for Reconsideration on February 12, 2018. The Commission entered an Opinion and Order on the HVUS Petition for Clarification on May 3, 2018 (the May 2018 Order discussed herein). On October 18, 2018, HVUS submitted a Petition for an Amendment of the Opinion and Order issued on May 3, 2018. The OCA filed an Answer to the Petition for Amendment on October 29, 2018, and the Commission issued an Opinion and Order regarding the Petition on January 17, 2019. Subsequently, HVUS filed its Petition for Review with Commonwealth Court on February 19, 2019. On May 15, 2019, the Petition for Review was quashed and the record remanded to the Commission with direction that "a hearing will be held forthwith before the Commission regarding the sufficiency of both the engineer's report and the previously ordered one-year compliance deadline." Memorandum Opinion at 10-11. The OCA awaited further hearings as directed by Commonwealth Court, but now submits this letter out of an abundance of caution.

The OCA respectfully requests that further hearings be scheduled as required by the Orders discussed above, and a separate proceeding be initiated pursuant to 66 Pa. C.S. § 529 as required by the May 2018 Order.

Respectfully Submitted,

Christine Maloni Hoover
Senior Assistant Consumer Advocate
PA Attorney I.D. # 50026
E-mail: CHoover@paoca.org

Erin L. Gannon
Senior Assistant Consumer Advocate
PA Attorney I.D. # 83487
E-mail: EGannon@paoca.org

Enclosures:

cc: Richard Kanaskie, Director, Bureau of Investigation and Enforcement
Certificate of Service

*280774

CERTIFICATE OF SERVICE

Tanya J. McCloskey, Acting Consumer Advocate	:	
	:	
v.	:	Docket Nos. C-2014-2447138
	:	C-2014-2447169
Hidden Valley Utility Services, L.P. –	:	
Water and Wastewater	:	

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate’s Letter Requesting Scheduling of Further Hearings, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 20th day of November 2019.

SERVICE BY E-MAIL AND FIRST CLASS MAIL, POSTAGE PREPAID

Paige Macdonald-Matthes
Obermayer Rebmann
Maxwell & Hippel, LLP
200 Locust Street
Suite 400
Harrisburg, PA 17101

Jonathan P. Nase, Esquire
David P. Zambito, Esquire
Cozen O’Connor
17 North Second Street
Suite 1410
Harrisburg, PA 17101

SERVICE BY FIRST CLASS MAIL, POSTAGE PREPAID

James Kettler, President
Hidden Valley Utility Services, L.P.
811 Russell Avenue, Suite F
Gaithersburg, MD 20879

Robert J. Kollar
Kellie A. Kuhleman
1374 Langport Drive
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Counsel for Office of Consumer Advocate
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Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
Dated: November 20, 2019
*281019

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

Jonathan Nase,
Petitioner

v.

Pennsylvania Public Utility Commission,
Respondent

Docket No. AP 2019-2652

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Evidence and Legal Argument of Jonathan Nase**, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Via E-mail and First Class Mail

Renardo Hicks, Chief Counsel
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
Law Bureau, 3 West
400 North Street
Harrisburg, PA 17120

Rosemary Chiavetta
Agency Open Records Officer
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265


Jonathan P. Nase, Esquire

Date: January 10, 2020



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

January 13, 2020

OOR Docket # AP 2019-2652

Erin Burlew, Esquire
Appeals Officer
Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Via E-Mail (eburlew@pa.gov)

Re: Pa. PUC Response – OOR Appeal Docket No. # AP 2019-2652

Dear Appeals Officer Burlew:

The Pennsylvania Public Utility Commission files this Response in this matter.

I. Background

On October 30, 2019, Jonathan P. Nase, Esq., submitted via email the following request to the Pennsylvania Public Utility Commission (Commission) pursuant to

Pennsylvania's Right-to-Know Law (RTKL), 65 P.S. §§ 67.101 *et seq.*:

- “1. Any e-mails or other documents to or from a Commissioner, or any member of a Commissioner's staff, mentioning Hidden Valley Utility Services, L.P. during the period 2013-present.
2. Any e-mails or other documents between any employee of the Bureau of Investigation and Enforcement and an employee of any other Commission bureau, department or office, mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.
3. Any e-mails or other documents to or from any employee in the Bureau of Technical Utility Services mentioning Hidden Valley Utility Services, L.P, during the period 2013-present.

4. Any e-mails or other documents to or from any Commission employee and the Department of Environmental Protection mentioning Hidden Valley Utility Services, L.P., during the period 2013-present.

5. The power point presentation of Commissioner Norman J. Kennard at the National Association of Water Companies annual meeting held at the Keystone Building in 2019.”

Chiavetta Affidavit ¶ 2.

On November 5, 2019, the Commission provided an Interim Response to Nase extending the deadline for a Final Response to his request (PUC RTKL 2019-0069) to December 6, 2019. The Commission issued its Final Response on December 6, 2019. Chiavetta Affidavit ¶¶ 3, 5. Regarding Item Nos. 2, 4, and 5, the Commission granted Nase’s request in full and provided all responsive records. Chiavetta Affidavit ¶¶ 3, 5. The Commission granted in part Item No. 1 of Nase’s request and provided responsive emails. Chiavetta Affidavit ¶¶ 3, 5, 7. However, the Commission denied Nase’s request to the extent that responsive emails were exempt from disclosure under the attorney-client privilege, the attorney work product doctrine, the deliberative process privilege, 65 P.S. §§ 67.102, 67.305(a)(2), and the RTKL’s pre-decisional deliberation exemption, 65 P.S. § 67.708(b)(10). Chiavetta Affidavit ¶¶ 5-7. The Commission granted in part Item No. 3 of Nase’s request and provided responsive emails. Chiavetta Affidavit ¶¶ 3, 5, 9. However, the Commission denied Nase’s request to the extent that responsive emails were exempt from disclosure under the attorney-client privilege, the deliberative process privilege, 65 P.S. §§ 67.102, 67.305(a)(2), the predecisional

deliberation exemption, 65 P.S. § 67.708(b)(10), and the RTKL's notes and working papers exemption, 65 P.S. § 67.708(b)(12). Chiavetta Affidavit ¶¶ 5, 8-9.

Responsive records were provided to Nase on a USB drive. In addition, the Commission identified four docketed proceedings involving Hidden Valley Utility Services, L.P. (Hidden Valley), including two active complaint dockets, and instructed Nase on how to access associated documents on the Commission's website. Regarding the two complaint proceedings against Hidden Valley pending before the Commission's Office of Administrative Law Judge (OALJ), to the extent Nase's request may be deemed an *ex parte* communication, copies of Nase's request, the Commission's response, and the records accompanying the response were provided to the Office of Consumer Advocate, a party to the proceedings. Copies of the request and the response were also provided to the Commission's Bureau of Investigation and Enforcement (BIE), all parties of record, and the OALJ. Chiavetta Affidavit ¶¶ 4-5.

Nase filed this Appeal of the Commission's partial denial of Item Nos. 1 and 3 of his request to the Office of Open Records (OOR) on December 30, 2019. The Commission received official notification of the Appeal on December 31, 2019. At that time, the Commission was given until Friday, January 10, 2020 to file a response. On January 10, due to the unavailability of the Commission's affiant, the OOR granted the Commission an extension to the close of business on Monday, January 13, 2020.

II. Argument

The Commission conducted a thorough search for all responsive records. Chiavetta Affidavit ¶ 3. The responsive records consist of (1) emails and attached

documents to and from Commission employees mentioning Hidden Valley and (2) Commissioner Kennard's PowerPoint presentation from the 2019 annual meeting of the National Association of Water Companies. Some emails and documents were protected by privilege(s) and/or RTKL exemptions. Chiavetta Affidavit ¶¶ 3, 5, 7, 9. The Commission respectfully requests that the OOR deny Nase's Appeal because the Commission properly applied the asserted privileges and exemptions.

A. Nase Improperly Conflates The Requirements Of An RTKL Request Response With The Standard On Appeal

Under the RTKL, an agency's response denying a RTKL request is required to include a "description of the record requested" and the "specific reasons for denial, including a citation of supporting legal authority." 65 P.S. § 67.903. It is not until an appeal is filed with the OOR that the agency is required to meet its burden of proving that a record is exempt from public access by a preponderance of the evidence. 65 P.S. § 708(a)(1); *see Pa. State Police v. Kim*, 150 A.3d 155, 157 (Pa. Cmwlth. 2016) ("[t]he agency bears the burden of substantiating its denial on appeal to OOR.").

Here, however, Nase erroneously claims that the Commission did not meet its burden of proof because it did not include with its RTKL request response evidence (specifically, a "privilege log") or an analysis demonstrating that the records are exempt from disclosure under the RTKL. Nase improperly conflates the requirements of an agency's RTKL request response with the standard on appeal before the OOR.

Therefore, Nase's arguments that the Commission has not met its burden of proof are premature and should be rejected by the OOR.

Further, as demonstrated herein, the Commission has met its burden of proof before the OOR. The Commonwealth Court stated that “[a] preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a ‘more likely than not inquiry.’” *Carey v. Pa. Dep’t of Corrections*, 61 A.3d 367, 374 (Pa. Cmwlth. 2013). Before the OOR, an affidavit may serve as sufficient evidentiary support for a claimed privilege or exemption. *Sherry v. Radnor Twp. School District*, 20 A.3d 515, 520 (Pa. Cmwlth. 2011). The use of affidavits is reasonable “given the strict time limitations imposed on agencies and OOR to make a determination.” *Id.* Here, the Commission’s affidavit sufficiently demonstrates how the claimed privileges and exemptions apply to the records at issue. Absent competent evidence showing bad faith, the veracity of the Commission’s submissions explaining reasons for nondisclosure should not be questioned and the averments in the affidavits should be accepted as true. *See McGowan v. Pa. Dep’t of Environmental Protection*, 103 A.3d 374, 381-82 (Pa. Cmwlth. 2014).

B. A Privilege/Exemption Log And *In Camera* Review Are Unnecessary

With regard to privilege/exemption logs, the Commonwealth Court has recognized that “a satisfactory index could undermine the exemption, and in those cases, agencies may proffer generic determinations for nondisclosure.” *Bowling v. Office of Open Records*, 990 A.2d 813, 825 n. 13 (Pa. Cmwlth. 2010). In addition, agencies may “justify their exemptions on a . . . category-of-document basis.” *Id.* Where an agency sufficiently explains the basis for nondisclosure through an affidavit, a log or *in camera* review is not necessary. *UnitedHealthcare of Pa., Inc. v. Pa. Dep’t of Human Services*, 187 A.3d 1046, 1060 (Pa. Cmwlth. 2018) (*UnitedHealthcare*).

Nase claims that the Commission should have included a “privilege log” with its RTKL request response.¹ Nase fails to recognize that, as explained above, an agency is *not* required to provide a privilege/exemption log with its RTKL request response. 65 P.S. § 67.903 (a denial need only include a description of the records requested and the reasons for denial). Moreover, a log is not required before OOR when the agency justifies nondisclosure via affidavit. *Bowling* at 825 n. 13; *UnitedHealthcare* at 1060. The Commission’s affidavit sufficiently describes the records and demonstrates how the privileges and exemptions apply. No log is necessary here.²

Nase also seeks *in camera* review. As with privilege/exemption logs, *in camera* review is not required where the government agency otherwise provides a sufficient basis for meaningful review and independent assessment. *Commonwealth v. Center Twp.*, 95 A.3d 354, 367 (Pa. Cmwlth. 2014) (quoting *Schenck v. Twp. of Center*, 975 A.2d 591, 599 (Pa. 2009)). Because the Commission’s affidavit adequately identifies the records and justifies the privileges and exemptions, *in camera* review is unnecessary here. *See UnitedHealthcare* at 1060. Further, *in camera* review in this matter is not in the interest of administrative economy or preserving administrative resources. Therefore, the OOR should deny the request for *in camera* review.

¹ A “privilege log” applies when a privilege is asserted, whereas an “exemption log” applies when an exemption is asserted.” *UnitedHealthcare* at 1059 n. 13. In its Appeal, the Requester seeks a “privilege log,” rather than an “exemption log.”

² Given the limited timeframe for filing a response, the affidavit is sufficient to support its partial denial of Items No. 1 and 3 of the RTKL request. *See Sherry* at 520. If the OOR deems necessary, however, the Commission is amendable to providing a privilege/exemption log or proceeding with hearings.

C. The Commission Properly Asserted Privileges And Exemptions In Determining To Partially Deny Nase’s RTKL Request

Pursuant to the RTKL, a public record is an agency record that is not exempt under Section 708 of the RTKL, 65 P.S. § 67.708, or not protected by a privilege. 65 P.S. § 67.102. The presumption that agency records are public does *not* apply to exempt records and privileged records. 65 P.S. § 67.305. Under the RTKL, a privilege refers to “[t]he attorney-work product doctrine, the attorney-client privilege . . . or other privilege recognized by a court interpreting the laws of this Commonwealth.” 65 P.S. § 67.102. In partially denying the RTKL request, the Commission properly asserted the (1) attorney-client privilege, (2) attorney work product doctrine, (3) pre-decisional deliberation exemption, 65 P.S. § 65.708(b)(10), and the deliberative process privilege, and (4) the notes and working papers exemption, 65 P.S. § 65.708(b)(12). For the reasons set forth below, Nase’s arguments to the contrary are without merit.

1. Records Are Protected By The Attorney-Client Privilege

The attorney-client privilege protects communications between an attorney and a client that are confidential and made in connection with the provision of legal service or advice. *Cal. University of Pa. v. Schackner*, 168 A.3d 413, 421 (Pa. Cmwlth. 2017). In asserting the a attorney-client privilege, the agency must show that (1) the holder of the privilege is a client, (2) the person to whom the communication was made is an attorney, or his or her subordinate, (3) the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, to secure an opinion of law, and (4) the privilege has not been waived. *Id.* The privilege applies to client-to-attorney

communications to obtain legal advice and attorney-to-client communications to provide legal advice. *Id.* at 422. The attorney-client privilege may be waived by disclosing attorney-client communications to a third party. *Pa. Dep't of Education v. Bagwell*, 114 A.3d 1113, 1124 (Pa. Cmwlth. 2015). A requester challenging the attorney-client privilege based on waiver bears the burden of proving waiver. *Id.*

Regarding Item No. 1 of Nase's request—emails and documents to or from Commissioners and Commissioners' staff—some responsive records are protected by the attorney-client privilege. These records include (i) emails with attached documents between attorneys in the Commission's Law Bureau and Commissioners' staff providing legal advice regarding legislation; and (ii) emails with attached documents between Commissioners' staff attorneys and Commissioners containing legal advice, analysis, and recommendations regarding proposed Commission action with respect to water and wastewater complaint proceedings and other proceedings before the Commission.

Chiavetta Affidavit ¶¶ 6-7(a)-(b).

Likewise, regarding Item No. 3 of Nase's request—emails and documents to and from employees of the Commission's Bureau of Technical Utility Services (TUS)—some responsive records are exempt from disclosure pursuant to the attorney-client privilege. These records include (i) emails with attached documents between attorneys in the Commission's Law Bureau and TUS staff providing legal advice on legislation and (ii) emails between attorneys in the Law Bureau and TUS staff providing legal advice regarding procedures in a complaint proceeding. Chiavetta Affidavit ¶¶ 8-9(a), (d).

The emails and documents at issue were between Commission attorneys and Commissioners or TUS staff for the purpose of providing legal advice on the matters identified above. Further, the records were not shared with any third parties. Chiavetta Affidavit ¶ 10. As such, the Commission properly asserted the attorney-client privilege and determined that the emails and attached documents are exempt from disclosure.

2. Records Are Protected By The Attorney Work Product Doctrine

The attorney work product doctrine protects the mental impressions of an attorney and his or her conclusions, opinions, memoranda, notes or summaries, legal research or theories. *Bagwell v. Pa. Dep't of Education*, 103 A.3d 409, 415 (Pa. Cmwlth. 2014). The attorney work product doctrine also protects materials prepared by agents for an attorney, such as investigators. *Id.* at 416. While the attorney work product doctrine protects any materials prepared in “anticipation of litigation,” it also protects materials created by an attorney “in the course of his or her professional duties” generally. The Commonwealth Court has held that “[t]he anticipation of litigation part of the work-product doctrine is *not* an absolute requirement.” *Id.* (emphasis added).

Moreover, government counsel are entitled to exercise the privilege. *Id.* For example, the Commonwealth Court has stated that “memorandum containing legal analysis of a court decision prepared for other agency lawyers, without reference to specific litigation, is protected by the work-product doctrine.” *Id.* Additionally, the Pennsylvania Supreme Court has held that “to the extent material constitutes an agency’s work product, it is not subject to compulsory public disclosure pursuant to the RTKL.” *In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 225 (Pa. 2014).

Finally, with regard to waiver, the Pennsylvania Supreme Court has held that doctrine “is not waived by disclosure unless the alleged work product is disclosed to an adversary,” *Bousamra v. Excelsa Health*, 210 A.3d 967, 969 (Pa. 2019).³

Regarding Item No. 1 of Nase’s request, some responsive records are exempt from disclosure under the attorney work product doctrine. These records include emails with attached documents between Commissioners’ staff attorneys and Commissioners containing legal advice, analysis, and recommendations—prepared by Commissioners’ staff attorneys—on proposed Commission action in water and wastewater complaint proceedings and other proceedings before the Commission. Chiavetta Affidavit ¶ 7(b).

The emails and documents at issue contain the attorneys’ mental impressions, summaries of underlying events, and legal opinions and conclusions regarding matters before the Commission. These records were prepared by the attorneys in the course of their professional duties to the Commission. These records have not been disclosed to an adversary of the Commission. Chiavetta Affidavit ¶ 10. As such, the Commission properly asserted the attorney work product doctrine and determined that the records are exempt from disclosure.

3. Records Fall Under The Predecisional Deliberation Exemption And Are Protected By The Deliberative Process Privilege

The predecisional deliberation exemption of the RTKL applies to records that, *inter alia*, reflect the “internal, predecisional deliberations of an agency, its members,

³ A requester challenging the attorney work product privilege based on waiver bears the burden of proving waiver. *Bagwell*, 114 A.3d at 1124.

employees or officials . . . relating to a budget recommendation, legislative proposals, legislative amendment, contemplated or proposed course of action or any research, memos, or other documents used in predecisional deliberations.” 65 P.S. § 67.708(10)(i). The Commonwealth Court has held that the predecisional deliberation exemption codifies the deliberative process privilege. *McGowan* 103 A.3d at 383 (Pa. Cmwlth. 2014).

The Commonwealth Court has also held that “the predecisional deliberation privilege protects information where an agency demonstrates that the information merely *reflects*, or, in other words, ‘mirrors’ or ‘shows,’ that the agency engaged in the deliberative process; it does not require that an agency establish that the information itself *reveals* or ‘discloses’ deliberative communication.” *Id.* (emphasis in original). In addition, “there is nothing in . . . the RTKL that requires a predecisional deliberation by an agency to be one that results in an official adjudication or decision.” *Id.* at 385. Rather, the predecisional deliberation exemption “is much broader.” *Id.* For example, the exemption “covers recommendations, draft documents, proposals, suggestions, and other subjective documents” as well as “documents that would inaccurately reflect or prematurely disclose the views of the agency.” *Id.* at 384-85 (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

Regarding Item No. 1 of Nase’s request, some records are exempt from disclosure under the deliberative process privilege and the RTKL’s predecisional deliberations exemption. These records include (i) emails with attached documents between the Commission’s Law Bureau and Commissioners’ staff regarding new legislation; (ii) emails with attached documents between Commissioners staff attorneys and

Commissioners regarding proposed courses of action in water and wastewater complaint proceedings and other proceedings; and (iii) emails with attached documents to or from Commissioners and/or Commissioners' staff containing status updates on pending proceedings, addressing proposed courses of Commission action, and including preliminary drafts of official Commission documents. Chiavetta Affidavit ¶ 7(a)-(c).

In addition, regarding Item No. 3 of Nase's request, emails and documents to or from TUS staff are deliberative in nature and therefore exempt from disclosure. These emails and documents include (i) communications with the Law Bureau regarding legislation; (ii) communications containing activity summaries and calendar deadlines for Commission proceedings and internal compilations of water and wastewater data; and (iii) communications involving technical assistance provided by TUS, addressing proposed courses of Commission action, and including preliminary drafts of official Commission documents. Chiavetta Affidavit ¶ 9(a)-(b), (d).

The emails and documents at issue reveal deliberations and discussions among Commission staff and/or information to be used in deliberations regarding contemplated courses of action by the Commission and Commission staff. As such, the Commission properly asserted the deliberative process privilege and RTKL's predecisional deliberation exemption and determined that the records are exempt from disclosure.

Further, predecisional deliberations are part of the Commission's adjudicatory function. Pursuant to *Lyness v. State Board of Medicine*, 605 A.2d 1204 (Pa. 1992), all prosecutory and adjudicatory functions of the Commission must remain separate. In *Lyness*, the Pennsylvania Supreme Court held that there must be "walls of division"

between prosecutory and adjudicatory functions to eliminate the threat or appearance of bias. *Id.* at 1210. The comingling of functions is prohibited to preserve due process.

Hidden Valley, as represented by Nase, is currently the subject of ongoing, contested proceedings before the Commission at Docket Nos. C-2014-2447138 and C-2014-2447169 pursuant to the Commonwealth Court's May 15, 2019 Order and subsequent remand to the Commission. Chiavetta Affidavit ¶ 4; *Hidden Valley Utility Services, L.P. v. Pa. Public Utility Commission*, Docket No. 187 C.D. 2019 (Pa. Cmwlth. 2019). These proceedings involve Hidden Valley's compliance with unresolved water and wastewater quality of service issues dating back to 2005. Pursuant to the Commission's May 3, 2018 Order, BIE, the Commission's prosecutory arm, would be notified of Hidden Valley's failure to meet certain compliance deadlines. Failure to meet the compliance deadlines would result in an evidentiary hearing addressing, *inter alia*, the penalties to be imposed against Hidden Valley as well as a separate proceeding pursuant to Section 529 of the Public Utility Code, 66 Pa. C.S. § 529 (relating to directing a competent utility to operate or acquire a small sewer utility that has jeopardized public safety by failing to provide reasonable and adequate service). Chiavetta Affidavit ¶ 4.

Making predecisional, or adjudicatory, communications public also means making those communications available to BIE, the Commission's prosecutory arm. In effect, dispersing those communications to BIE is akin to adjudicatory personnel consulting with prosecutory personnel. This is exactly the type of interaction that *Lyness* seeks to prohibit. The Commission must maintain "walls of separation" to ensure that there is no bias in proceedings, like the penalty proceeding involving Hidden Valley and BIE.

Disclosing predecisional communications violates *Lyness* and jeopardizes the due process afforded to Hidden Valley in the proceedings before the Commission.⁴

4. Records Fall Under The Notes and Working Papers Exemption

The notes and working papers exemption of the RTKL applies to documents prepared for or by a public official or agency employee and used for that official's or employee's personal use. 65 P.S. § 67.708(b)(12). This exemption covers "those documents necessary for that official that are 'personal' to that official in carrying out his public responsibilities." *City of Philadelphia v. Philadelphia Inquirer*, 52 A.3d 456, 461 (Pa. Cmwlth. 2012). A record need not involve personal affairs. *Smith v. Pa. Dep't Environmental Protection*, 161 A.3d 1049, 1066 (Pa. Cmwlth. 2017). Rather, a record is exempt when it "relates to an official's public responsibilities but is personal." *Id.* at 1067. Further, documents prepared for officials' or employees' personal use that are not dispersed outside of the office fall under the notes and working papers exemption. *Glunk v. Pa. Dep't State*, 102 A.3d 605 (Pa. Cmwlth. 2014).

Regarding Item No. 3 of Nase's request, emails and documents containing information prepared and used by TUS staff are exempt from disclosure under the RTKL's notes and working papers exemption. These emails and documents include notes, memos, summaries, and internal compilations of water and wastewater data prepared by TUS staff to document meetings, calendar deadlines associated with

⁴ The Commission notes that the Commonwealth Court has held that RTKL requests concerning ongoing litigation may be problematic. See *City of Pittsburgh v. Silver*, 50 A.3d 296 (Pa. Cmwlth. 2012).

Commission proceedings, and other activity associated with pending water and wastewater matters. Chiavetta Affidavit ¶ 9(b).

The records at issue represent internal work papers prepared and used by employees of TUS to carry out their assigned duties. These documents were personally prepared by the employees to note and summarize information. As such, the Commission properly asserted the RTKL's notes and working papers exemption and determined that the records are exempt from disclosure.

D. Any *Ex Parte* Issues Must Be Cured

The Commission notes that making the remaining requested records available to Hidden Valley may violate the rule against *ex parte* communications. Dispersing records in which Commissioners, presiding officers, and employees of the Commission discuss the merits of issues internally to a party is, in effect, akin to consulting directly with the party. The rules against *ex parte* communications prohibit Commissioners, presiding officers, and employees from consulting with a party on the merits, unless there is notice and an opportunity for all parties to participate. 52 Pa. Code § 5.484; 66 Pa. C.S. § 334. Therefore, if the OOR orders the disclosure of records involving the merits of issues that may arise in the ongoing, contested proceedings before the Commission, those records should be made available to all parties in an effort to cure any *ex parte* issues.

III. Conclusion

The Commission properly granted Nase's RTKL request in part and denied the request in part. As to the partial denial, the records sought are protected by the privileges and exemptions asserted herein and, therefore, are not subject to disclosure under the RTKL. For the reasons set forth above, Nase's arguments are without merit. Further, Nase's misunderstanding of the requirements of the RTKL is not grounds for disclosure. The Commission respectfully requests that the OOR dismiss this Appeal.

Respectfully submitted,

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**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

Jonathan P. Nase

v.

Pennsylvania Public Utility Commission

OOOR AP Docket # 2019-2652

**AFFIDAVIT OF
ROSEMARY CHIAVETTA, SECRETARY
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Before me, the undersigned notary public, this day, January 13, 2020, personally appeared Rosemary Chiavetta, Secretary of the Pennsylvania Public Utility Commission, to me known, who being duly sworn according to law, deposes the following:

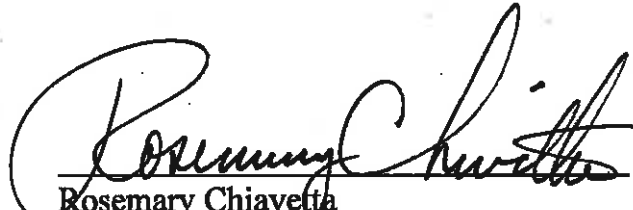
I, **Rosemary Chiavetta**, being duly sworn according to law, say that I am authorized to make this affidavit on behalf of the Pennsylvania Public Utility Commission (Commission), being an employee of the Commission as Secretary, and having the duty as records custodian for the Commission to maintain all records of 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) As Secretary for the Commission, my duties include being custodian of all Commission records. As part of my duties, my staff maintains the files of the Commission, including all records retained in public access files and internal access only files. I am custodian of all records, including internal and external communications, whether in hard copy or electronic format.
- 2) In my capacity as Open Records Officer of the Commission, on October 30, 2019, I received via email Jonathan P. Nase's Right-to-Know Law (RTKL) Request. Nase's Request was docketed as PUC RTK 2019-0069. A true and correct copy of the Request is attached hereto as "Appendix A."
- 3) Following a thorough search for responsive records, I received from Commission staff all responsive emails and documents. I personally reviewed all responsive records. On December 6, 2019, I sent the Commission's response to Nase's RTKL Request. A true and correct copy of the Commission's response letter granting Nase's Request in part and denying it in part is attached hereto as "Appendix B."

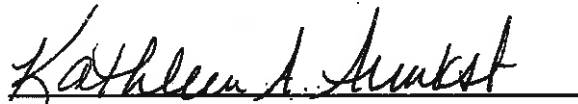
- 4) The Commission's only docketed proceedings involving Hidden Valley Utility Services, L.P. (Hidden Valley) are at Docket Nos. P-2014-2424858, R-2018-3001307, C-2014-2447169, and C-2014-2447138. The "C" Dockets are contested proceedings against Hidden Valley currently before the Commission in which Hidden Valley is represented by Nase, an attorney with Cozen O'Connor. These proceedings involve questions of Hidden Valley's compliance with deadlines for resolving water and wastewater quality of service problems. These matters were remanded to the Commission from the Commonwealth Court for further hearings regarding penalties for Hidden Valley and a proceeding under Section 529 of the Public Utility Code, 66 Pa. C.S. § 529.
- 5) The Commission provided numerous emails and documents to Nase in response to his RTKL Request. Other responsive emails and documents were not turned over because they are exempt from disclosure under privilege(s) and/or RTKL exemptions. Nase's appeal is limited to the partial denial of Item Nos. 1 and 3 of his Request.
- 6) Item No. 1 of Nase's RTKL Request is for "e-mails or other documents to or from a Commissioner, or any member of a Commissioner's staff, mentioning Hidden Valley Utility Services, L.P. from 2013-present."
- 7) Except for those records already provided to Nase in response to Item No. 1 of his RTKL Request, all responsive records in the Commission's possession are exempt from disclosure pursuant to the attorney-client privilege, the attorney work product doctrine, the deliberative process privilege, and/or the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10). Specifically, the records described below are exempt from disclosure for the following reasons:
 - (a) Emails with attached documents between attorneys in the Commission's Law Bureau and Commissioners' staff contain legal advice regarding legislation. These emails with attached documents are exempt from disclosure pursuant to the attorney-client privilege, the deliberative process privilege, and the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10).
 - (b) Emails with attached documents between Commissioners' staff attorneys and Commissioners contain legal advice, analysis, and recommendations regarding proposed Commission action in water and wastewater complaint proceedings and other proceedings. These emails with attached documents are exempt from disclosure pursuant to the attorney-client privilege, the attorney work product doctrine, the deliberative process privilege, and the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10).

- (c) Emails with attached documents to or from Commissioners and/or Commissioners' staff contain status updates on pending proceedings, address proposed courses of Commission action, and include preliminary drafts of official Commission documents. These emails with attached documents are exempt from disclosure pursuant to the deliberative process privilege and the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10).
- 8) Item No. 3 of Nase's RTKL Request is for "emails or other documents to or from any employee in the Bureau of Technical Utility Services (TUS) mentioning Hidden Valley Utility Services, L.P. during the period 2013-present."
- 9) Except for those records already provided to Nase in response to Item No. 3 of his RTKL Request, all responsive records in the Commission's possession are exempt from disclosure pursuant to the attorney-client privilege, deliberative process privilege, the RTKL's predecisional deliberations exemption, 65 P.S. 67.708(b)(10), and/or the RTKL's notes and working papers exemption, 65 P.S. § 67.708(b)(12). Specifically, the records described below are exempt from disclosure for the following reasons:
- (a) Emails with attached documents between attorneys in the Commission's Law Bureau and TUS staff contain legal advice regarding legislation. These emails with attached documents are exempt from disclosure pursuant to the attorney-client privilege, the deliberative process privilege, and the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10).
 - (b) Emails and documents to or from TUS staff contain notes, memos, activity summaries, calendar deadlines for Commission proceedings, and internal compilations of water and wastewater data prepared by TUS staff to document meetings and other activities associated with pending water and wastewater matters. These emails and documents are exempt from disclosure pursuant to the deliberative process privilege, the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10), and the RTKL's notes and working papers exemption, 65 P.S. § 67.708(b)(12).
 - (c) Emails between attorneys in the Commission's Law Bureau and TUS staff contain legal advice regarding procedures in a complaint proceeding. These emails are exempt from disclosure pursuant to the attorney-client privilege.
 - (d) Emails with attached documents to or from TUS staff involve technical assistance offered by TUS, address proposed courses of Commission action, and include preliminary drafts of official Commission documents. These emails with attached documents are exempt from disclosure pursuant to the deliberative process privilege and the RTKL's predecisional deliberations exemption, 65 P.S. § 67.708(b)(10).

10) None of the records that are exempt from disclosure pursuant to the attorney-client privilege have been disclosed to a third party.


Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission

Subscribed and sworn to before me this
13th day of January, 2020.


Kathleen A. Aunkst
Notary Public

