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July 11, 2025

Via Electronic Filing

Matthew L. Homsher, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v.
Philadelphia Gas Works – Docket No. C-2024-3052277

Dear Secretary Homsher:

Enclosed for electronic filing please find Philadelphia Gas Works' ("PGW") Motion to Dismiss the Objections of the Bureau of Investigation and Enforcement and to Compel Complete Replies to PGW's Interrogatories, Set II, Nos. 13 and 14 in the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Bryce R. Beard

BRB/lww

cc: Hon. Christopher P. Pell w/enc. (cpell@pa.gov)
Colby B. Widdowson, Esq. (cwiddowson@pa.gov)
Michael L. Swindler, Esq. (mswindler@pa.gov)
Graciela Christlieb, Esq., PGW

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of PGW's Motion to Dismiss Objections of I&E and to Compel Complete Replies to PGW Interrogatories, Set II, Nos. 13 and 14, upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only

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Dated: July 11, 2025

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Bryce R. Beard, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2024-3052277
	:	
Philadelphia Gas Works,	:	
Respondent.	:	

**PHILADELPHIA GAS WORKS’ MOTION TO DISMISS
THE OBJECTIONS OF THE BUREAU OF INVESTIGATION AND
ENFORCEMENT AND TO COMPEL COMPLETE REPLIES TO PGW
INTERROGATORIES, SET II, NOS. 13 AND 14.**

Pursuant to 52 Pa. Code §§ 5.321, 5.342, and 5.349, Philadelphia Gas Works (“PGW”) hereby respectfully requests that Administrative Law Judge Pell (“ALJ” or “Presiding Officer”) dismiss the objections to discovery by complainant Bureau of Investigation and Enforcement (“BI&E”) of the Pennsylvania Public Utility Commission (“PUC” or “Commission”), and compel BI&E to provide full and complete answers to PGW Set II Interrogatories Nos. 13 and 14. PGW served the Set II interrogatories on BI&E June 12, 2025, and BI&E served Objections to Interrogatories Nos. 13 and 14 (Appendix A) on June 23, 2025 and subsequently provide partial answers to Nos. 13 and 14 on July 9, 2025.¹

I. SUMMARY OF POSITION

BI&E objects to disclosing its investigative report into the gas explosion occurring November 30, 2021 at 815 Jackson Street, Philadelphia, Pennsylvania (“Investigative Report”)

¹ By agreement of the Parties, BI&E was granted an extension to provide answers to Set II until July 9, 2025. Likewise, it was agreed that PGW Motion to Compel responses to Set II (if any) would be due July 11, 2025, making this Motion to Compel timely by agreement of the parties.

based upon misinterpretations of confidentiality law. If this important underlying factual document is withheld, it would be highly prejudicial to PGW's ability to cross examine BI&E's witness and present its defense. PGW seeks to compel the release of this document, and it would be acceptable to PGW if it is marked "confidential" for the record under the protective order, if necessary.

PGW has the right to probe BI&E's expert witness' understanding of the facts relied upon in testimony with the actual Investigative Report when the witness herself had no first hand interactions involving the incident. BI&E's complaint seeks monetary fines and expensive remedial action against PGW. Denial of access to the Investigative Report violates PGW's due process rights and would constitute reversible error on appeal.

The Investigative Report is highly "relevant to the subject matter" of the complaint and the proper subject of discovery. The Investigative Report is referenced in the pre-filed BI&E direct testimony and the witness, Ms. Terri Cooper Smith, clearly has relied upon its content to present facts about the circumstances of the incident and draw conclusions where she had no interaction with the initial incident or inspection of PGW's facilities. BI&E has no special privileges when it comes to discovery and is a party like any other.

The basis of BI&E's objection is a two-fold invocation of the attorney/client and deliberative process privileges. These purported justifications fail for numerous reasons.

As a threshold matter, both require that protection can only be considered where the basis of the claim is clearly stated. BI&E's June 23, 2025 objections are insufficiently detailed to sustain them, as they contain no factual information regarding the reason that this Investigative Report should be confidential or explaining the risks of disclosure. The sole fact set forth is a general assertion that the Investigative Report was "sent via email" to an attorney (the date of

which is not even disclosed). There is no claim that the Investigative Report itself contains legal advice. Further, there is no sworn verification supplied to support even that meager fact.

In other words, BI&E invokes the privileges without the disclosure of any of the underlying facts that would support confidentiality and privilege. To the contrary, confidentiality is not a free pass to trod on due process rights. It is insufficient to simply parrot the words of the doctrine. In order for Your Honor to even consider applying the privileges, the facts supporting applicability of those privileges are BI&E's burden to show.

On the merits, were Your Honor to consider them, both claims of confidentiality and privilege fail. As to the attorney-client claim, BI&E's objection and subsequent partial interrogatory response simply state that the Investigative Report was "sent via email" and "for legal review." Sending a document to an attorney does not cloak it in attorney-client privilege. Indeed, PGW is *not* seeking any email or other correspondence between BI&E's lawyers and the investigators. Nor is PGW seeking to discover advice rendered or any legal advice sought. Rather, PGW seeks the factual materials relied upon by Ms. Cooper Smith for her direct testimony in this case.

The claim that the Investigative Report was after-the-fact provided to an attorney does not cloak it in the privilege. Pennsylvania appellate law makes clear that underlying *facts* contained in a document allegedly protected by attorney-client privilege are always discoverable. "[A] fact does not enter into a non-discoverable sphere solely by virtue of its having been communicated to counsel."² The Commonwealth Court has held that the attorney-client privilege solely protects *confidential communications* between attorney and client, not

² *Custom Designs & Mfg. Co. v. Sherwin-Williams Co.*, 39 A.3d 372, 378 (Pa. Super. 2012).

underlying facts.³

The notion that the Investigative Report is protected under deliberative process privilege is similarly misguided. For this claim, there are no facts presented. It is not sufficient for an objection to parrot the words of the doctrine. The objection must contain sufficient detail for the trial judge, in this case Your Honor, to weigh the desire for confidentiality with the need for the disclosure. In this case, BI&E has not provided any evidence that the Investigative Report is subject to the deliberative process privilege.

Moreover, the materials sought are not “pre-decisional.” Even had BI&E forthrightly supplied facts in support, the doctrine does not apply to BI&E inasmuch as BI&E is *not* a deliberative body. BI&E are not advisory staff; they are prosecutors and absolutely prohibited from conferring with the Commission’s advisory staff. As the Public Utility Code and the Commission’s rules of discovery specify, BI&E is entitled to no greater protection from discovery than any other party.

Nor can the privilege be used to thwart the discovery of facts. As with the attorney-client privilege, the deliberative process privilege does *not* apply to factual information. Case law is rife with incidences where discovery of investigative reports was compelled. The cases cited by BI&E either stand for a completely different—often adverse—proposition, or are inapplicable.

It is imperative to PGW’s defense that the BI&E investigative Report setting forth the facts underlying its prosecution of PGW be released.

³ *Bagwell v. Pa. Dept. of Educ.*, 103 A.3d 409, 415 (Pa. Commw. Ct. 2014) (citing *Upjohn Co. v. US*, 449 U.S. 383 (1981))

II. PROCEDURAL BACKGROUND

This proceeding was initiated on November 25, 2024, when BI&E filed the above-captioned Formal Complaint against PGW. The Formal Complaint, among other things, seeks a finding that PGW violated 49 CFR Part 192, the Public Utility Code, the Commission's regulations, and PGW's internal procedures regarding the natural gas explosion that occurred at 815 Jackson Street, Philadelphia, Pennsylvania on November 30, 2021. PGW filed its answer responding to the Formal Complaint on January 29, 2025, denying each of the allegations contained in the Formal Complaint.

In compliance with the procedural schedule adopted by Your Honor, BI&E prefiled its direct case consisting of a single piece of testimony comprising 26 pages and 13 numbered exhibits on June 2, 2025. PGW's rebuttal testimony is due to be filed on August 15, 2025.

On June 12, 2025, PGW served Set II interrogatories and requests for documents on BI&E to be answered by those officers, employees, or agents of BI&E as may be cognizant of the requested information and who are authorized to answer on behalf of BI&E. On June 23, 2025, BI&E filed objections to PGW's Set II interrogatories. PGW's Set II Nos. 13 and 14, as well as BI&E's objections thereto, are included as **Appendix A**. Due to the holiday and availability of counsel, PGW and BI&E agreed to extend the due date for responses to Set II until July 9, 2025, and likewise agreed to extend the due date for the Motion to Compel until July 11, 2025. On July 9, 2025, BI&E answered the unobjected-to discovery. A copy of BI&E's response to PGW Set II No. 14 (discussing the Investigative Report) is included as **Appendix B**. This motion is timely filed by agreement of PGW and BI&E.

This motion seeks to dismiss the objections to Set II Interrogatories Nos. 13 and 14 by complainant BI&E and to compel BI&E to provide full and complete answers to PGW's discovery.

III. BI&E's DIRECT CASE

BI&E has presented a single piece of direct testimony in support of its Complaint and its burden of proof as the Complainant: BI&E Statement No. 1, Direct Testimony of Terri Cooper Smith, Supervisor, Fixed Utility Valuation Engineer on behalf BI&E ("BI&E St. 1").

BI&E St. 1 contains numerous detailed, factual statements, allegations, and conclusions regarding the incident on Jackson Street, including the PGW facilities in the area, PGW's street markings on site, PGW's investigation of the incident, conditions at the site, the movement of equipment, the excavation of the cast iron main, surrounding subsidence, photos of the site, evidence of recent water and sewer lateral excavations and similar factual statements and evidence. From this information, as presented, the witness then draws conclusions regarding the cause of the explosion.

The underlying basis of the factual representations set forth in BI&E St. 1 and the witness' knowledge regarding them are clearly "relevant to the subject matter" and the proper subject of discovery.

Moreover, BI&E's witness Ms. Cooper Smith does not claim any first-hand participation in BI&E's investigation involving the November 30, 2021 incident at 815 Jackson Street. Indeed, Ms. Cooper Smith testifies that her only familiarity with the November 30, 2021 incident was a single contact from PGW notifying her, as a Gas Safety supervisor, on the date that the incident occurred. As described in BI&E St. 1:

Q: Are you familiar with the natural gas explosion which occurred on November 30, 2021 at 815 Jackson Street in Philadelphia, PA and that is the subject of this proceeding?

A: Yes, I am.

Q: Please explain how or why you are familiar with the November 30, 2021 explosion.

A: On November 30, 2021, at approximately 8:31pm, I was notified by PGW of a gas explosion occurring at 815 Jackson Street, Philadelphia, PA.

BI&E St. No. 1 at 7.

Rather than relying on any first-hand account, Ms. Cooper Smith explains that the “Pipeline Safety” division of BI&E undertook an investigation without mentioning her direct participation in any capacity:

Q: Did Pipeline Safety conduct its own investigation into the November 30, 2021 gas explosion?

A: Yes, the responsibilities of Pipeline Safety include investigations of gas explosions on jurisdictional facilities.

BI&E St. No. 1 at 8. The witness further states that:

Q: Did Pipeline Safety complete its investigation of the November 30, 2021 explosion?

A: Yes.

BI&E St. No. 1 at 20.

Thus, the investigation undertaken by other BI&E personnel to which the witness refers is a highly relevant line of inquiry for discovery by PGW.

IV. DISCOVERY OF BI&E WITNESS AND OBJECTIONS

Pursuant to 52 Pa. Code § 5.342(g), a copy of PGW’s Set II Nos. 13 and 14 interrogatories and BI&E’s objections are included as **Appendix A**.

V. **FAILURE TO FULLY DISCLOSE THE NATURE OF THE OBJECTED TO REPORT**

None of the facts involving alleged privileges for the Investigative Report have been described in any detail as is required under Commission rules, PGW's instructions accompanying the Set II discovery, and the rules applicable to both the attorney-client privilege and deliberative process claims. This failure to provide adequate information deprives PGW, the Commission, and Your Honor of the opportunity to adequately investigate and evaluate the claims of confidentiality/privilege. Given that BI&E has the burden to demonstrate the basis of its claims as a threshold matter even before the objection can even be considered, the objections should be denied and BI&E compelled to answer on this ground alone.

The instructions accompanying PGW's Set II interrogatories specifically address any claim of privilege and what information the party must provide when privilege is claimed to give PGW—as well as Your Honor and the Commission, if necessary—an understanding as to the veracity of such privilege claims. Specifically, PGW's unobjected-to instructions relevant here provide as follows:

4. If you claim any form of privilege or other protection from disclosure as a ground for withholding information responsive to an interrogatory or request or any part thereof, contained in a document, set forth with respect to the document:
 - (i) the date and number of pages;
 - (ii) the identity of the author(s) or preparer(s);
 - (iii) the identity of the addressee, if any;
 - (iv) the title;
 - (v) the type of tangible thing (e.g. letter, memorandum, telegram, chart, report, recording disc);
 - (vi) the subject matter (without revealing the information as to which privilege or protection from non-disclosure is claimed);
 - (vii) the identity of each person who has received the document or to whom knowledge of the contents of the document was communicated;

- (viii) the identity of the present custodian(s);
- (ix) the nature of your claim of non-discoverability (e.g. attorney-client privilege); and
- (x) each and every fact on which you rest your claim of privilege or other protection from disclosure, stated with sufficient specificity to permit PGW to make a full determination as to whether your claim is valid.

No such information describing the objected-to Investigative Report was provided as part of the objection.⁴

The BI&E objections contain no detail about the nature of the document, such as date of completion, the identity of the authors, the persons with whom the document was shared, the number of pages, or any of the other information necessary to support or form a complete and valid objection, such that PGW or Your Honor can understand the basis of the claim. In doing so, BI&E has preserved exclusively unto itself any real understanding of the Investigative Report, including its purpose, its length, its completion date, or its dissemination, so as to meaningfully contest the claims of confidentiality and privilege.

More is required under well-settled Pennsylvania discovery rules, where our Appellate Courts have held:

The party asserting privilege bears the burden of producing facts establishing proper invocation of the privilege. *Yocabet v. UPMC Presbyterian*, 119 A.3d 1012, 1019 (Pa. Super. 2015). “Once the invoking party has made the appropriate proffer, then the burden shifts to the party seeking disclosure to set forth facts showing that disclosure should be compelled either because the privilege has been waived or because an exception to the privilege applies.” *Id.*

“Accordingly, if the party asserting the privilege does not produce sufficient facts to show that the privilege was properly invoked, then the burden never shifts to the other party, and the communication is not protected under attorney-client privilege.” *Custom Designs & Mfg. Co. v. Sherwin-Williams Co.*, 39 A.3d 372, 376 (Pa. Super.

⁴ Objections shall “[i]nclude a description of the facts and circumstances purporting to justify the objection.” 52 Pa. Code § 5.342.

2012) (citation and alteration omitted); *see also Red Vision Sys., Inc. v. Nat'l Real Estate Info. Serv., L.P.*, 108 A.3d 54, 62 (Pa. Super. 2015).⁵

The Commonwealth Court has similarly observed that:

[A] privilege log provides an acceptable format in which to identify [allegedly privileged] documents, the applicable privilege, and the reason for the privilege claimed.” *Fisher v. Nationwide Mut. Ins. Co.*, 258 A.3d 451, 461 n.8 (Pa. Super. 2021). In *Fisher*, the court ruled that a privilege log adequate for that purpose must “provide enough useful information ... to enable the trial court to rule on the relevance of the items listed or explain why the privileges raised were applicable.” *Id.* at 462. The party claiming attorney-client privilege in *Fisher* had presented a privilege log that “simply list[ed] numbers of documents, the subject of the document, and the privilege basis, all in cursory fashion.” *Id.* In the absence of “useful” information, the claiming party “failed to meet its burden to assert facts establishing . . . an attorney-client privilege . . . with respect to any of the documents at issue.” *Id.*⁶

BI&E’s June 23, 2025 objections contain no useful information supporting its claim of privilege. They are insufficiently detailed to sustain them and do not set forth with specificity any facts besides general assertions that the Investigative Report was “sent to an attorney” at a later date. Further, there is no sworn verification supplied to support even the meager facts asserted in the objections.

The validity of BI&E’s objections should be ruled upon as written and submitted. Any subsequent attempt by BI&E to bolster with further “facts” in reply to this Motion should be rejected as prejudicial and in violation of PGW’s due process rights where BI&E had the burden to disclose all facts in support of their objections to PGW.

⁵ *Carlino E. Brandywine, L.P. v. Brandywine Vill. Assocs.*, 260 A.3d 179, 197 (Pa. Super. 2021) (emphasis added and in original).

⁶ *See Mwambu v. Monroeville Volunteer Fire Co. No. 4*, 276 A.3d 1217 (Pa. Commw. Ct. 2022) (reported in table).

VI. BI&E'S OBJECTIONS SHOULD BE OVERRULED

A. Standard for Review

The Commission's regulations set forth the standard of review for discovery:

Any party to a proceeding may serve written interrogatories upon any other party for purposes of discovering relevant, unprivileged information.⁷

The Commission's rules and regulations allow wide latitude to parties engaged in discovery. Section 5.321(c) of the Commission's Rules of Administrative Practice and Procedure specifically provide that "a participant may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."⁸ Discovery is permitted regardless of whether the information sought "relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant."⁹ Information may be discoverable, even if it would be inadmissible at a hearing.¹⁰ "It is not grounds for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."¹¹

Specific as to expert witnesses (such as Ms. Cooper Smith), the regulations expressly allow discovery of the Investigative Report:

Consistent with Pa.R.C.P. 4003.5 (relating to discovery of expert testimony trial preparation material), discovery of facts known and opinions held by an expert, otherwise discoverable under §5.321 (relating to scope), including that acquired or developed in anticipation of litigation or for hearing.¹²

⁷ 66 Pa. C.S. § 333(d).

⁸ 52 Pa. Code § 5.321(c).

⁹ *Id.*

¹⁰ *Application of Nabil Nasr and Wael Hafez*, Docket No. A-2012-2295813, 2012 Pa. PUC LEXIS 1849 (Order issued Nov. 28, 2012) at 12.

¹¹ *Id.*

¹² 52 Pa. Code § 5.324(a).

Nor does BI&E have special status under the Commission's discovery rules, which specifically state:

Commission staff. This subchapter applies equally to Commission staff serving in a prosecutory or party capacity in proceedings before the Commission, with no exceptions other than as specifically set forth in this chapter.¹³

Based on the standards set forth above, BI&E's Objections to PGW's Interrogatories should be overruled as a matter of due process and BI&E should be compelled to fully and completely answer the questions propounded in PGW-BI&E Set II Nos. 13 and 14 as part of the routine discovery process in this matter.

B. PGW's Due Process Rights are Abridged by BI&E's Refusal to Disclose the Factual Report Relied Upon in Preparation of Testimony

The privileges claimed by BI&E are in derogation of PGW's due process rights. In lodging the objection to provide documents and material relied upon by Ms. Cooper Smith, BI&E concedes that the witness has read the Investigative Report and is relying on it for her testimony, even likely repeating some (but potentially not all) of the factual statements made and conclusions reached therein. Indeed, as shown in **Appendix B**, No. 14(b), Ms. Cooper Smith "relied upon [the Investigative Report] in preparing her testimony."

The allegations made in the Complaint and in the testimony are serious. They allege (unfairly in PGW's view) numerous violations of regulations and procedures and, as remedy, a large monetary fine and series of burdensome remedial measures. PGW is entitled to defend itself.

¹³ 52 Pa. Code § 5.321(e); 66 Pa. C.S § 333(d) ("When participating in a commission proceeding, the Office of Trial Staff shall be subject to the same rules of discovery applicable to any other party to the case."). BI&E, of course, is the successor bureau to the old Trial Staff.

There is no question that pursuant to the bedrock law of due process, PGW is entitled to probe the veracity of, and be provided with, all factual bases, allegations, documents, or otherwise that BI&E's witness relied upon or that are in her possession. The Courts are clear that "the Commission, as an administrative body, is bound by the due process provisions of constitutional law and by the principles of common fairness." *Hess v. Pa. Pub. Util. Comm'n*, 107 A.3d 246, 266 (Pa. Commw. Ct. 2014); *Bridgewater Borough v. Pa. Pub. Util. Comm'n*, 124 A.2d 165 (Pa. Super. 1956); *McCormick v. Pa. Pub. Util. Comm'n*, 30 A.2d 327 (Pa. Super. 1943). "Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, *to inspect documents*, and to offer evidence in explanation or rebuttal."¹⁴

BI&E's objections and refusal to produce relevant factual evidence that they claim privilege for by virtue of simply "provid[ing] via email to" an attorney violates PGW's due process rights by:

- 1) Depriving PGW of the meaningful opportunity to defend itself. The Investigative Report may include exculpatory information that BI&E may be selectively withholding. This document contains the foundation for BI&E's only witness' conclusions and observations, where the witness admittedly has no firsthand knowledge of the facts on the night of the incident.
- 2) Depriving PGW of the right to confront witnesses and test their degree of understanding (and the material relied upon by an expert witness to draw conclusions). In this situation, Ms. Cooper Smith's testimony admits limited first-

¹⁴ *Hess*, 107 A.3d at 266 (emphasis added); *Davidson v. Unemployment Compensation Bd. of Review*, 151 A.2d 870 (Pa. Super. 1959); *In re Shenandoah Suburban Bus Lines, Inc.*, 46 A.2d 26 (Pa. Super. 1946).

hand knowledge and therefore, Ms. Cooper Smith is relying significantly on hearsay documents (the Investigative Report) as the basis for her testimony. While the *Walker/Chapman* rule provides that simple hearsay evidence may support an agency's finding of fact, so long as the hearsay is admitted into the record without objection and is corroborated by competent evidence in the record, that does not permit hearsay materials relied upon by Ms. Cooper Smith to be withheld in discovery, which would mean supporting her testimony via hearsay (the contents of the Investigative Report) within hearsay (i.e., Ms. Cooper Smith second-hand restating contents of the Investigative Report to which she has no first-hand knowledge).¹⁵

While not binding, analogs between BI&E's refusal to produce the Investigative Report (containing the facts observed now forming the basis of Ms. Cooper Smith's testimony) and the refusal to disclose a police report in a criminal investigation (which also contains the facts observed regarding an incident relied upon by the prosecution) weigh in favor of PGW's due process rights. In the latter instance, due process requires the production of all police reports relied upon by criminal prosecutors in pressing charges, regardless of admissibility.¹⁶ The same principle should apply here, and BI&E should not be permitted to withhold key factual

¹⁵ See *Walker v. Unemployment Compensation Bd. of Review*, 367 A.2d 366, 370 (Pa. Commw. Ct. 1976) (*Walker*) (citations omitted); see also *Chapman v. Unemployment Compensation Bd. of Review*, 20 A.3d 603, 610 n.8 (Pa. Commw. Ct. 2011) ("*Chapman*").

¹⁶ See, e.g., *Commonwealth v. Johnson*, 174 A.3d 1050, 1055 (2017) ("It is well-settled that the Commonwealth violates a defendant's right to due process when it withholds evidence that is both favorable to the defense and material to the defendant's guilt or punishment. *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. 'When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule.' *Giglio v. US*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). The Commonwealth does not dispute that the withheld evidence is 'favorable to the accused, either because it is exculpatory, or because it is impeaching.' *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed. 2d 286 (1999). Nor does the Commonwealth deny that it 'suppressed' the police reports, 'either willfully or inadvertently.' *Id.* at 282, 119 S.Ct. 1936.").

information that forms the basis of their complaint merely because it was “provided via email” to an attorney.

Therefore, BI&E should be compelled to produce the Investigative Report that was relied upon by Ms. Cooper Smith in forming her direct testimony where she admittedly had little-to-no firsthand experience with the incident itself.

C. The Attorney-Client Privilege Does Not Apply to the Investigative Report

PGW avers¹⁷ that BI&E cannot meet its burden to show that the factual Investigative Report is or remains protected by attorney-client privilege. As BI&E’s objections state, the factual Investigative Report was simply “provided via email” to an attorney, with the only unverified qualifier provided being that the Investigative Report was sent “for the purpose of seeking professional legal advice regarding the incident.” That same Investigative Report was the source of the information underlying BI&E’s direct testimony.

In fact, BI&E’s July 9, 2025 response to Set II No. 14 makes clear that the Investigative Report was prepared by Safety Inspectors and finalized on March 14, 2025, then reviewed by Ms. Cooper Smith. Only after this factual Investigative Report was created was it sent merely for “legal review.” The full and complete explanation, as verified by BI&E, shows that nowhere in the process of creating the Investigative Report did any attorney-client privilege attach:

a. I&E’s investigation began on the day of the event with an incident inspection by Pipeline Safety Inspectors Scott Orr and Vladimir Shteyn. The initial incident inspection formed the basis of the Investigative Report. The Investigative Report was continually amended during the investigation process. The Investigative Report created by Scott Orr was finalized on March 14, 2024. The investigation and drafting of the Investigative Report were done under the supervision of Ms. Cooper Smith. Ms. Cooper Smith

¹⁷ This is, notwithstanding, that PGW is prejudiced in addressing with specificity BI&E’s claim of attorney-client privilege where no privilege log or other specific, verified information was provided in support of the privilege claim.

reviewed, edited, and approved the Investigative Report through the drafting process, *prior to sending the report for legal review*.

See **Appendix B** (emphasis added).

As discussed below, as a preliminary matter, the Investigative Report is not an attorney/client document—it is a factual document created by Pipeline Safety Inspectors that BI&E is now attempting to transform after the fact to shield it from production merely because it was emailed to an attorney “for legal review.” That position is contrary to the law and cannot be endorsed. Further, even if this document were protected (it is not), BI&E has waived any attorney-client privilege by wielding its alleged privilege to conceal the Investigative Report—thus using the privilege as both a “shield” and a “sword,” which is not allowed under the law. Second, even if the privilege was not waived, the law is clear that BI&E must produce the Investigative Report to disclose the facts it contains, as facts are never protected by attorney-client privilege.

1. Principles of Attorney-Client Privilege

Attorney-client privilege has long been recognized in the law.¹⁸ In Pennsylvania, the attorney-client privilege is codified under statute, 42 Pa. C.S. § 5928. Under Pennsylvania statutory and decisional law, attorney-client privilege protects from disclosure only those communications made by a client to his or her attorney which are confidential and made in connection with the providing of legal services or advice.¹⁹ Government entities may claim the

¹⁸ *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263–64 (Pa. Super. 2007), *aff’d by an equally divided court*, 605 Pa. 468 (2010) (“*Nationwide*”) (“The attorney-client privilege has deep historical roots and indeed is the oldest of the privileges for confidential communications in common law. See *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). It is designed to foster confidence between attorney and client, leading to a trusting, open dialogue. *Slusaw v. Hoffman*, 861 A.2d 269, 273 (Pa. Super. 2004); *Estate of Wood*, *supra* at 571. The privilege derives from the recognition that full and frank communication between attorney and client is necessary for sound legal advocacy and advice, which serve the broader public interests of ‘observance of law and administration of justice.’ *Upjohn Co.*, *supra* at 389, 101 S. Ct. 677”).

¹⁹ *Id.* at 1264.

attorney-client privilege for communications between their attorney and their agents or employees who are authorized to act on behalf of the entities.²⁰

However, protection under attorney-client privilege is subject to limits, exceptions, and waiver, and the privilege may be forfeited if its exercise will only frustrate the interests of justice.²¹ One such waiver for purposes of justice is what courts recognize as “subject matter waiver.”²² Subject matter waiver of attorney-client privilege is based on considerations of fairness, which preclude a party from disclosing only those privileged materials that support its position, while simultaneously concealing as privileged those materials that are unfavorable to its position.²³ As the court in *Nationwide* held:

A litigant attempting to use attorney-client privilege as an offensive weapon by selective disclosure of favorable privileged communications has misused the privilege; waiver of the privilege for all communications on the same subject has been deemed the appropriate response to such misuse.²⁴

Indeed, the *Nationwide* Court went on to reiterate that “attorney-client privilege is a shield used to protect [privileged] communications, not a sword wielded to gain advantage in litigation.”²⁵

2. BI&E has the Burden of Proof to Support its Claim for Attorney-Client Privilege

Whether attorney-client privilege protects the Investigative Report prepared by BI&E investigators is a question of law, here to be decided by Your Honor and the Commission. As the *Nationwide* Court recognized: “‘no claimant of a testimonial privilege can be the final arbiter of his own claim’ applies to a party invoking attorney-client privilege as surely as it

²⁰ *Twp. of Neshannock v. Kirila Contractors, Inc.*, 181 A.3d 467 (Pa. Commw. Ct. 2018); *Gould v. City of Aliquippa*, 750 A.2d 934 (Pa. Commw. Ct. 2000).

²¹ *Brennan v. Brennan*, 422 A.2d 510, 515 (1980).

²² *Nationwide*, 924 A.2d at 1265.

²³ *Id.* at 1265 (citing *Katz v. AT&T Corp.*, 191 F.R.D. 433, 439 (E.D. Pa. 2000)).

²⁴ *Id.*

²⁵ *Id.* (citing *Murray v. Gemplus Int’l, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003)).

applies to those who invoke other evidentiary privileges.”²⁶

In this instance, BI&E has the burden to support its claim for attorney-client privilege but fails to do so.²⁷ When a court analyzes disputes over disclosure of communications which attorney-client privilege has been asserted, a two-part test is applied:

The first part of the inquiry is whether attorney-client privilege does indeed apply to a particular communication. If the court holds that the privilege does apply, then the court must engage in the second part of the inquiry: whether an exception or waiver applies, thereby overcoming the privilege and permitting disclosure. *See Investigating Grand Jury of Philadelphia County*, 527 Pa. at 440, 593 A.2d at 406; *Brennan*, 422 A.2d at 517.²⁸

Here, BI&E’s objection and its response to Set II No. 14 make clear—BI&E is attempting to shield the Investigative Report from production on the mere fact it was later sent to an attorney for legal review. This patently fails the applicable test under Pennsylvania law. To be clear, the Investigative report was not a communication between client and attorney; instead, it was a fact document with no attorney involvement in the creation, drafting, or editing thereof. BI&E’s claim that attorney-client privilege attaches to any document that its inspectors simply “send via email” to an attorney must fail under bedrock legal principles.

²⁶ *Id.* (citing *Commonwealth v. Hess*, 411 A.2d 830, 833 (1979)) (applying precept to spousal privilege).

²⁷ *Id.* at 1267 (“The Commonwealth Court has articulated the same principles as to the shifting burdens of proof in an attorney-client privilege inquiry”); see *Joyner v. S.E. Pa. Transp. Auth.*, 736 A.2d 35, 38 n. 3 (Pa. Commw. 1999) (concluding that the Pennsylvania Supreme Court’s holding in *Commonwealth v. Maguigan*, 511 A.2d 1327, 1334 (1986), establishes that “the party asserting [attorney-client] privilege has the initial burden to prove that it is properly invoked” and only then does the burden shift to “the other party to prove why the applicable privilege would not be violated by the disclosure, e.g., the privilege was waived, an exception to the privilege exists and is applicable, etc.”); *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 31 (Pa. Commw. Ct. 2001) (stating that “[t]he party asserting [attorney-client] privilege has the initial burden to prove that it is properly invoked, and the party seeking to overcome the privilege has the burden to prove an applicable exception to the privilege”).

²⁸ *Nationwide*, 924 A.2d at 1265–66.

3. Even if, *arguendo*, emailing a document to an attorney invokes Attorney-Client Privilege, any Attorney Client Privilege Involving the Investigative Report has been Subject Matter-Waived Under Principles of Fundamental Fairness

Even if attorney-client privilege attaches to documents merely sent by email to an attorney (it does not), BI&E's witness Ms. Cooper Smith submitted direct testimony including allegations against PGW based *not* on her own first-hand observations, but on the factual contents of the Investigative Report prepared by other persons in the Pipeline Safety division, specifically Pipeline Safety Inspectors Scott Orr and Vladimir Shteyn. See **Appendix B**. Ms. Cooper Smith's verified use of the Investigative Report in testimony waived any attorney-client privilege that may have applied because the witness: (1) relied on the Investigative Report; and (2) partially disclosed the material with the aim, in whole or in part, of furthering the party's case with regard to the subject matter of the disclosed "communications" (i.e. finding violations and imposing penalties on PGW).

Courts have held that attorney-client privilege cannot act as a shield and a sword by selectively disclosing only certain favorable information during pending litigation. *Commonwealth v. Spanier*, 132 A.3d 481, 496 (Pa. Super. 2016). This is precisely what BI&E appears to have done with respect to the Investigative Report.

BI&E has selectively disclosed information contained in its factual Investigative Report that it alleges is now protected by attorney-client privilege—to wit, the pipeline safety inspector's in-person contemporaneous notes and the Investigative Report to which Ms. Cooper Smith *did not author but upon which she now relies*. BI&E, by claiming privilege as to the factual Investigative Report, has used the privilege *as a sword* to pierce PGW with alleged violations, costly requested relief, and civil penalties, while at the same time employing alleged attorney-client privilege *as a shield* to disallow PGW to view the documents containing the

actual first-hand facts upon which BI&E has relied. This fundamentally prejudices PGW in preparing a suitable defense and right to cross-examine a witness presented who has no first-hand experience, but rather is relying on the Investigative Report for her position.

The cure for BI&E's subject matter waiver is for PGW to be provided the Investigative Report in its entirety. *Nationwide*, 924 A.2d at 1265. Indeed, the Investigative Report may well hold exculpatory materials withheld by BI&E—but PGW and Your Honor cannot know that fact until the complete factual Investigative Report is produced.

4. Even if Attorney-Client Privilege Would Apply to Portions of the Investigative Report, that does not Automatically Designate the Entire Report in Evidentiary Privilege

PGW is *not* seeking any email or other correspondence between BI&E's lawyers and investigator. PGW is not seeking to discover the email by which the Investigative Report was transmitted to the legal section or any subsequent conversations with counsel about it. PGW is not seeking to discover advice rendered or to identify any legal advice sought. Rather, PGW seeks the *factual* materials verifiably and expressly relied upon by Ms. Cooper Smith for her direct testimony in this case. The Investigative Report was drafted and then provided to counsel, so it is not clear how the Investigative Report potentially contains legal advice considering it was provided to the BI&E's attorneys after it was prepared.

Pennsylvania appellate law makes clear that underlying *facts* contained in a document allegedly protected by attorney-client privilege are always discoverable. “[A] fact does not enter into a non-discoverable sphere solely by virtue of its having been communicated to counsel.”²⁹ Indeed, the Commonwealth Court has held that the attorney-client privilege solely protects

²⁹ *Custom Designs & Mfg. Co.*, 39 A.3d at 378.

confidential communications between attorney and client, *not underlying facts*.³⁰

The underlying *facts within the documents* relied upon by Ms. Cooper Smith are not protected by attorney-client privilege simply because, at some point, they were forwarded via email to BI&E’s prosecutory attorneys at some undisclosed time in the past. As our Supreme Court has held, courts should permit utilization of an evidentiary privilege “only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominate principle of utilizing all rational means for ascertaining the truth.”³¹ Therefore, while PGW believes that the factual Investigative Report must be disclosed in its entirety under the principle of subject matter waiver as discussed above, the law further requires BI&E to produce the Investigative Report in its original form to present the facts PGW is entitled to review.

D. The Confidential Deliberation Doctrine Does Not Apply

The doctrine shielding “documents containing deliberations of law or policymaking, reflecting opinions, recommendations or advice” is totally inapplicable here. The Commonwealth Court summarized the deliberative process privilege as permitting “the government to withhold documents containing ‘confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.’”³² The stated purpose of this privilege is to allow the free exchange of ideas and information within government agencies.³³

In determining whether the deliberative process privilege applies, the Commonwealth Court employs a three-prong analysis.³⁴ The court must determine whether the communications:

³⁰ *Bagwell*, 103 A.3d at 415 (citing *Upjohn*, 449 U.S. 383).

³¹ *Commonwealth v. Stewart*, 690 A.2d 195, 197 (1997).

³² *Ario v. Deloitte & Touche LLP*, 934 A.2d 1290 (Pa. Commw. Ct. 2007) (“*Ario*”) (citing *Commonwealth v. Vartan*, 733 A.2d 1258, 1263 (1999) (“*Vartan*”) (plurality opinion)).

³³ *Vartan*, 733 A.2d at 1263.

³⁴ *Ario*, 934 A.2d at 1293.

(1) were made before the deliberative process was completed; (2) whether the communications were deliberative in character; and (3) whether the communications were a direct part of the deliberative process in that the communications make recommendations or express opinions on legal or policy matters.³⁵ Regarding the first and second prongs, the party asserting the privilege must show that the information is both “pre-decisional” and “deliberative.”³⁶ Information is pre-decisional if it “reflects matters leading to a final decision of an agency,” and the information is deliberative if it “reflects the process the agency used to reach the decision.”³⁷

There are several problems with BI&E’s assertion of a blanket exclusion of an Investigatory Report relied upon by its witness as a basis of testimony to preclude otherwise discoverable material, including that: (1) BI&E provided no privilege log and has presented only the barest bones of a claim while providing no details whatsoever as to how the document was created or used—it has simply parroted the doctrine without explaining why the Investigative Report is not discoverable or the harms that would occur were it to be disclosed; (2) BI&E is not a deliberative body; (3) the materials sought are not “pre-decisional”; and (4) this matter is raised in the context of litigation where BI&E is the moving party and its witness admittedly relied upon the document for the factual assertions made in testimony.

³⁵ *Id.* (citing *Vartan*, 733 A.2d at 1264).

³⁶ *Id.*

³⁷ *Id.*

1. BI&E Has Failed its Burden of Proof that the Deliberative Process Privilege Applies to the Investigative Report.

The government bears the burden to prove that the deliberative process privilege is applicable.³⁸ To meet its burden, the government must present more than a bare conclusion or statement that the documents sought are privileged; otherwise, the government agency, not the court, would have the power to determine the availability of the privilege.³⁹

It is not sufficient for an objection to parrot the words of the doctrine. The objection must contain sufficient detail for the trial judge, in this case Your Honor, to weigh the need for confidentiality with the need for the disclosure of the information. The Commonwealth Court has held that “to demonstrate that the withheld documents are deliberative in character, an agency must ‘submit evidence of specific facts showing how the information relates to deliberation of a particular decision.’”⁴⁰ Further, “[a]ffidavits that are conclusory or merely parrot the exemption do not suffice.”⁴¹ As the Commonwealth Court explained in *Office of the Governor v. Scolforo*:

It is not enough to include in the [a]ffidavit a list of subjects to which internal deliberations may have related. The [a]ffidavit must be specific enough to permit the OOR or this Court to ascertain how disclosure of the entries would reflect the internal deliberations on those subjects. Because this [a]ffidavit is not detailed, but rather conclusory, it is not sufficient, standing alone, to prove that the [records] are exempt from disclosure The only evidence the Department submitted here to support its denial was the Verification. The Verification does not directly address any of the three elements required to establish the predecisional deliberative exception.⁴²

BI&E’s objections sets forth none of these things—it simply states the conclusion.

³⁸ *Joe*, 782 A.2d at 33.

³⁹ *Id.* (citing *Redland Soccer Club, Inc. v. Dept. of the Army*, 55 F.3d 827 (3d Cir. 1995)).

⁴⁰ *Pa. Dep’t of Educ. v. Bagwell*, 114 A.3d 1113, 1123–24 (Pa. Commw. Ct. 2015).

⁴¹ *Id.*

⁴² *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1104 (Pa. Commw. Ct. 2013) (en banc).

2. I&E is Not a Deliberative Body

BI&E is expressly prohibited from playing a decision-making, adjudicatory role in Commission matters.⁴³ The BI&E investigators and prosecutors, as their titles imply, decide only whether to bring an action, a complaint in this instance, to submit before Commission—*who is the deliberative body*—for resolution. The act of deciding whether to bring a complaint is *not* a determination of law or policy. BI&E does not deliberate law or policy making themselves. BI&E are not advisory staff; they are prosecutors, prohibited by *Lyness* from conferring with advisory staff.⁴⁴ BI&E are advocates and, as the Public Utility Code and the Commission’s rules of discovery specify, are entitled to no greater protection from discovery than any other party, as discussed previously.

Discovery on BI&E is entirely different from discovery served upon the Commission itself. The Public Utility Code establishes a separate procedure for discovery upon the Commissioners and their advisory staff:

[T]he commission shall designate an appropriate official, *other than the Director of Trial Staff or any other employee of the Office of Trial Staff*, on whom other parties to the proceeding may serve written interrogatories directed to the commission. That official shall arrange for agency personnel with knowledge of the facts to answer and sign the interrogatories on behalf of the commission. Interrogatories directed to the commission shall be allowed only upon an order of the commission based upon a specific finding that the interrogating party is seeking significant, unprivileged information not discoverable by alternative means.⁴⁵

The Commission’s prosecutorial office cannot apply the rules that apply to the Commission decision making authority to its investigatory reports.

⁴³ See 66 Pa. C.S. § 308.2(b) (“A commission employee engaged in a prosecutory function may not, in that matter or a factually related matter, provide advice or assistance to a commission employee performing an advisory function as to that matter”).

⁴⁴ *Lyness v. State Bd. of Med.*, 605 A.2d 1204 (1992)

⁴⁵ 66 Pa. C.S. § 333(d) (emphasis added).

3. The Materials Sought are Not “Pre-decisional”

Simply stated, investigative materials, including those of an administrative agency, are not protected from disclosure under the deliberative process doctrine. Courts frequently compel agencies to provide investigative materials as part of civil litigation proceedings, overruling the deliberative process objection. This same rule applies across all agencies. For instance, the State’s Bureau of Professional and Occupational Affairs was required to release, in the context of litigation, its investigative files relating to a dentist licensed by the Bureau.⁴⁶ The Common Pleas Court entered an order dismissing the motion to quash the subpoena and directing that the Bureau produce the investigative file relating to the dentist, Dr. Schwartz. The Supreme Court’s decision emphasized the narrowness of the deliberative process doctrine in general and specifically found that there is no support for a broad claim of confidentiality:

The Bureau acknowledges that the General Assembly has not seen fit to enact a specific confidentiality provision or protection for the Bureau’s investigative files. Furthermore, the Bureau concedes that no judicial precedent exists to support its claim of confidentiality. Nevertheless, the Bureau requests this Court recognize a privilege that would prevent disclosure of investigative files because its interest in ensuring the confidentiality of documents outweighs the *Bens*’ need to obtain discovery of any relevant materials in the Bureau’s possession. The Bureau’s concern that its investigations may be affected by the potential for disclosure of its files in the course of discovery proceedings does not lead inevitably, however, to the conclusion that the files are in fact privileged.

The Bureau does not cite any authority establishing that an executive privilege has been recognized in this Commonwealth for information obtained in the course of an investigation of private complaints made against a professional licensee; nor do we find the Bureau’s argument for recognition of a common law privilege compelling in this case.⁴⁷

⁴⁶ *Ben v. Schwartz*, 729 A.2d 547, 549 (1999) (“On November 29, 1995, a notice of deposition and subpoena were issued to the Bureau compelling production of the Bureau’s investigative file pertaining to Dr. Schwartz at a deposition scheduled for December 20, 1995”).

⁴⁷ *Id.* at 553.

Nor does the deliberative process doctrine preclude the deposition of Bureau workers about an agency investigation into the business practices of a funeral home.⁴⁸ In summary, there is no legal authority for BI&E’s claim for deliberative process privilege to shield information obtained over the course of their investigation.

In another case, the Philadelphia prison system was forced to release fact studies in response to litigation involving a wrongful death action brought by the survivors of inmate Joe, who died shortly after being released from custody in a Philadelphia correctional center.⁴⁹ The Plaintiffs filed a motion to compel production of documents by the prison system relating to care of Joe specifically, and the inmate population in general, at the prison. Upon a partial grant of the discovery requested, an appeal ensued, where the Supreme Court rejected the deliberative process claim:

Defendants argue that the deliberative process privilege applies because the documents requested were reviewed by the City as part of the City’s ongoing, deliberative review of inmate health, or were generated in the course of the City’s evaluation of Prison Health’s performance, or were generated in order to analyze how the City, through Prison Health, could better discharge its obligation to provide health care for inmates

We reject Defendant’s broad interpretation of the deliberative process privilege. Under Defendants’ interpretation, the privilege would shield any document which evaluates the performance of a contractor. The deliberative process privilege specifically contemplates that a “deliberative process” occur

In the case before us, Defendants have not identified a “deliberative process.” Instead, they merely allege an ongoing review of Prison Health’s performance. Accordingly, they failed to meet their burden to establish that the deliberative process privilege applies to the requested documents.⁵⁰

⁴⁸ *Rae v. Pa. Funeral Dir. Ass’n*, 925 A.2d 197, 199 (Pa. Commw. Ct. 2007), *vacated on different grounds*, 977 A.2d 1121 (2009).

⁴⁹ *Joe*, 782 A.2d at 28.

⁵⁰ *Id.* at 33–34.

Thus, it is clear that investigative reports are not protected under the deliberative process doctrine. Like the *Joe* case, BI&E's objections contemplate no deliberative process whatsoever and thus, the privilege does not apply to the Investigative Report.

4. This Matter is Raised in the Context of Litigation where BI&E is the Party with the Burden of Proof

A claim of confidentiality, where it conflicts with the due process rights of a party in litigation, has generally been held to be unsustainable. The laws of this Commonwealth do not favor evidentiary privileges.⁵¹ As the Commonwealth Court has noted:

Exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." Thus, courts should accept testimonial privileges "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Id.* (quoting *Commonwealth v. Stewart*, 547 Pa. 277, 282–283, 690 A.2d 195, 197 (1997)) (citations omitted). Nor does the "deliberative process "privilege" provide the kind of global protection of information as proposed by the Liquidator [Secretary of Insurance].⁵²

Where, as here, factual material is sought, the Courts have consistently ruled against a claim of privilege. For example, in *League of Women Voters vs. Commonwealth of Pennsylvania*, the Commonwealth Court wrote:

As with the executive privilege, after the initial requirements are met, the court must engage in a balancing of factors to determine whether the privilege should be applied. *Koken v. One Beacon Ins. Co.*, 911 A.2d 1021, 1027 (Pa. Cmwlth. 2006).

Importantly, the deliberative process privilege does *not* apply to factual information, "so long as the factual information is severable from the advice or underlying confidential deliberations of law or policymaking." *Deloitte & Touche*, 934 A.2d at 1293. "Purely factual information, even if used by decision-makers in their

⁵¹ *Id.* at 31.

⁵² *Koken v. One Beacon Ins. Co.*, 911 A.2d 1021, 1027 (Pa. Commw. Ct. 2006).

deliberations, is usually not protected” by the deliberative process privilege. *One Beacon*, 911 A.2d at 1027. Moreover, courts must narrowly construe the deliberative process privilege. *Id.*⁵³

The egregiousness of BI&E’s refusal to provide the investigative report is particularly underscored here where a witness, who lacks first-hand knowledge of the facts, relies upon the Investigative Report to submit testimony. There is no basis for not sharing that document with the respondent in the proceeding in which the testimony is filed.

5. The Cases Cited By BI&E are Inapposite

The cases cited by BI&E provide little to no insight into the deliberative process doctrine and instead, stand for the propositions asserted here by PGW—namely the narrowness of the exemption.

In *Redland Soccer*,⁵⁴ the Third Circuit Court of Appeals *reversed* the trial court’s refusal to compel production of one hundred and thirty-nine documents from the United States Army and remanded the matter back with the following admonition:

The initial burden of showing privilege applies is on the government. *See Schreiber v. Society for Savings Bancorp.*, 11 F.3d 217, 221 (D.C. Cir. 1993). To meet it, the government must present more than a bare conclusion or statement that the documents sought are privileged. *Id.* Otherwise, the agency, not the court, would have the power to determine the availability of the privilege. *Id.*

In considering the United States’ assertion of privilege, the district court should keep in mind the fact that Federal Rule of Civil Procedure authorizes broad discovery . . . but the deliberative process privilege, like other executive privileges, should be narrowly construed.⁵⁵

⁵³ *League of Women Voters*, 177 A.3d at 1017–18; *see also One Beacon Ins. Co.*, 911 A.2d 1021; *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973).

⁵⁴ *Redland Soccer Club, Inc.*, 55 F.3d at 853.

⁵⁵ *Id.* at 854, 856 (citations omitted).

The same is true of the *Grand Jury* case cited by BI&E, where the Third Circuit *also remanded* the case back to the trial court:

“[I]n most situations, factual summaries prepared for informational purposes” will not be protected even if they are part of an investigative record. *Paisley v. C.I.A.*, 712 F.2d 686, 699 (D.C. Cir. 1983) (citing cases). Even if documents contain advisory opinions, factual material which is severable is not protected. *See Mink*, 410 U.S. at 88–91, 93 S. Ct. at 836–38. Furthermore, the party seeking disclosure may overcome the claim of privilege by showing a sufficient need for the material in the context of the facts or the nature of the case ... These limitations reflect the careful tailoring of the privilege to achieve its purpose of protecting confidentiality without unduly inhibiting the truth-finding process of litigation.

In this case, the U.S. Attorney has repeatedly disclaimed interest in confidential deliberations and has stated that he seeks only hard evidence. Most if not all of the documents sought in this case are notes, summaries and transcripts of interviews that are unlikely to contain deliberative communications.⁵⁶

The two Commission cases involving the actual application of the doctrine before the Commission cited by BI&E’s objection are inapposite. These cases involve the submission of reports to the Commission itself that were employed to render Commission decisions and, hence, not applicable here.

In *West Penn*, the Commission issued a rate case “suspension” order that directed certain topics be addressed by the parties based upon advice provided by the Bureau of Audits and the Law Bureau to the Commission.⁵⁷ “Our order made no final determination on any issue and merely concluded that the various considerations involved were complex and merited further

⁵⁶ *In re Grand Jury*, 821 F.2d 946, 959 (3d Cir. 1987).

⁵⁷ *Pa. Pub. Util. Comm’n v. W. Penn Power Co.*, 73 Pa. P.U.C. 122, Docket No. R-901609, (Order entered July 20, 1990).

development.”⁵⁸ The Commission described the privilege as involving the process of *its own* deliberations:

In that sense, the deliberative process privilege protects, staff reports from public disclosure just as a law clerk's draft opinion to a judge is protected from disclosure The deliberative process privilege therefore protects the staff's willingness to provide the Commission with frank opinions and recommendations in writing, and prevents the premature disclosure of proposed policies or decisions before they have been considered and finally adopted in public meeting.⁵⁹

The key is that both Audits and Law were acting in an advisory capacity. Importantly, the document sought here is a factual Investigative Report created by Pipeline Safety Inspectors Scott Orr and Vladimir Shteyn in the Safety Division that, by law, cannot be communicated to the Commission and certainly are not advisory to the Commission. The Investigative Report sought by PGW here is not at all analogous to “a law clerk’s draft opinion to a judge.”

The second case cited in the objections, *DiDonato*, is old law and applied only under subsequently discredited Commission procedures that predate *Lyness* by two years. In *DiDonato*, the Commission ruled that a prosecutorial staff report of an investigation into an explosion in the facilities of Philadelphia Electric Company submitted to the Commission was “prepared for internal Commission use to determine if official action should be taken against a jurisdictional utility with respect to the explosion.”⁶⁰ The Commission stated that the staff report is “protected by the deliberative process privilege, i.e., documents prepared by staff to advise the Commission,” and that the report “was developed for the purpose of advising the Commission on the incident”—disclosure of which would discourage staff members to give frank opinions and recommendations to the Commission in writing if subject to public disclosure.

⁵⁸ *Id.* at 2.

⁵⁹ *Id.*

⁶⁰ *Re John M. DiDonato*, Docket No. P-900480 (Order entered Dec. 19, 1990).

However, this ruling predates *Lyness* by two years. Under those pre-*Lyness* procedures, the prosecutorial arm of the Commission would advise the Commissioners on the threshold question of whether to bring a complaint action. Upon Commission approval, the Trial Staff would then bring the complaint. The Pennsylvania Supreme Court found this process offensive.⁶¹

In response, the Commission established Trial Staff (and now BI&E) as an independent entity that makes its own prosecutorial decisions and is “walled off” from the Commission as decision maker.⁶² Therefore, there was no report provided to the Commission advising it to undertake the current complaint against PGW. The Investigative Report sought by PGW is a document solely internal to BI&E. Thus, the advisory step to which the deliberative process privilege attached in *DiDonato* no longer exists and the Investigative Report is not protected.

E. Right to Know and 66 Pa. C.S. § 335(d)

Although the Set II interrogatories are governed by the Commission’s discovery rules, BI&E has also injected the argument that “Pipeline Safety’s investigative report would not be disclosed or discoverable under the Right to Know Law [“RTKL”].” Although a bit of a red herring and not at all germane to the procedures and law governing discovery among parties to a litigated case, PGW agrees that, on its face, the RTKL would likely preclude disclosure inasmuch as it would constitute “investigative materials, notes, correspondence and reports.”⁶³

⁶¹ *Lyness*, 605 A.2d at 1211 (“The accused is forced to face the same body which heard allegations and formed prosecutorial judgments concerning probable cause (some of it perhaps inadmissible as formal evidence), now dressed in the robe of impartial jurist. Such a schizophrenic face of justice, poses subtle dangers which threaten complete objectivity and is not permissible under the due process guaranty of the Pennsylvania Constitution, as interpreted by this Court for over three decades.”).

⁶² *Implementation of Act 129 of 2008; Organization of Bureaus and Offices; Doc. No. M-2008-2071852*, Final Procedural Order, 41 Pa.B. 4732 (“3. Attorneys and technical staff within BI&E have standing and authority to participate in all Commission proceedings and to initiation enforcement actions and prosecutions in the public interest.”).

⁶³ 65 P.S. § 67.708(17)(ii); see, e.g., *Pa. Pub. Util. Comm’n v. Andrew Seder/The Times Leader*, 139 A.3d 165 (Pa. 2016) (“*Seder*”).

More germane to the inquiry here is Section 335(d) of the Public Utility Code, which establishes a separate obligation of disclosure:

[W]henever the commission conducts an investigation of an act or practice of a public utility and makes a decision, enters into a settlement with a public utility or takes any other official action, as defined in the Sunshine Act, with respect to its investigation, it shall make part of the public record and release publicly any documents relied upon by the commission in reaching its determination, whether prepared by consultants or commission employees other than documents protected by legal privilege.⁶⁴

The Commonwealth Court recently reviewed this provision in *Energy Transfer v. Rebecca Moss & Spotlight PA* (“*Moss*”) and described the Section 335(d) triggers as follows:

This provision creates a two-part test to determine whether a record must be disclosed. First, there must be an investigation by the Commission. Second, the Commission must make a “decision,” enter into a “settlement” with a public utility, or take “any other official action, as defined in the Sunshine Act, with respect to that investigation.” *Id.* “Official action” is defined as: “(1) Recommendations made by an agency pursuant to statute, ordinance or executive order[;] (2) The establishment of policy by an agency[;] (3) The decisions on agency business made by an agency[; or] (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.” 65 Pa. C.S. § 703.⁶⁵

In applying these provisions, the Courts have held that:

- It is not until after the PUC’s investigative materials are presented as part of a formal complaint, presented at a formal hearing, or presented as part of a settlement agreement that the materials are made public. *Pa. Pub. Util. Comm’n v. Gilbert*, 40 A.3d 755 (Pa. Commw. Ct. 2012).
- The mere filing of a complaint would not constitute a “decision” within the meaning of Section 335(d) of the Public Utility Code because it is not final. At best, it is an inchoate decision because the Bureau can withdraw or amend its complaint. Section 335(d) requires a decision, settlement, or other official action, as defined in the Sunshine Act, before documents may be made available to the public. Stated otherwise, there must be a formal resolution to the complaint by the Commission, whether by settlement, consent decree or by adjudication after a full hearing on the merits, before the disclosure

⁶⁴ 66 Pa. C.S. § 335(d).

⁶⁵ 288 A.3d 957 (Pa. Commw. Ct. 2023).

requirement in Section 335(d) of the Public Utility Code is triggered. *See Moss*, 288 A.3d 957.

Hence, in *Seder*, the whistle blower letter, which was one basis of the BI&E decision to prosecute, was ordered released with the author's identifying information redacted.

It would be the height of a Kafka novel and extremely prejudicial to deny PGW, *during the actual litigation*, the right to obtain those documents and then assert that they can be only obtained *after the litigation is complete*. PGW submits that only the rules of discovery apply here and allow discovery of the Investigative Report, without resort to either the RTKL or Subsection 335(d).

VII. CONCLUSION

WHEREFORE, pursuant to 52 Pa. Code §§ 5.321, 5.342, and 5.349 and for all the reasons set forth above, PGW respectfully requests that the Presiding Officer: (a) overrule the objections to discovery by BI&E; (b) compel BI&E to provide full and complete answers to PGW Interrogatories Set II Nos. 13 and 14 within seven days; and (c) grant any other relief deemed appropriate under the circumstances.

Respectfully Submitted,

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Dated: July 11, 2025

Appendix A

**BI&E's June 23, 2025
Objections, Set II Nos. 13-14**

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement	:	
	:	
v.	:	Docket No. C-2024-3052277
	:	
Philadelphia Gas Works	:	

**OBJECTIONS OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
TO THE
INTERROGATORIES OF PHILADELPHIA GAS WORKS- SET II**

Pursuant to 52 Pa. Code § 5.342, the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”), by and through its prosecuting attorneys, files the within Objections to the Interrogatories of Philadelphia Gas Works - Set II directed to I&E, and in support thereof, avers as follows:

OBJECTIONS

13. Fully and completely identify and provided copies of any and all documents reviewed by Ms. Cooper Smith in preparation of testimony. Provide full and complete copies thereof.

OBJECTION:

I&E objects to the request to produce “provided copies of any and all documents reviewed by Ms. Cooper Smith in preparation of testimony” as it relates to investigative reports. I&E is not objecting to the remainder of the interrogatory and intends to provide a timely response.

Pipeline Safety Inspectors from the I&E Safety Division prepared a report of the November 30, 2021 incident and provided it *via* email to the Director and Chief Prosecutor of I&E, and Michael L. Swindler, Esq., Deputy Chief Prosecutor of I&E Enforcement for the purpose of seeking professional legal advice regarding the incident. The investigation report is protected from disclosure pursuant to the attorney-client privilege and deliberative process privilege.

The attorney-client privilege prohibits compelling a client to disclose confidential communications. 42 Pa.C.S. § 5928. The privilege requires the existence of a relationship in which an attorney is acting in his or her professional capacity as a lawyer, notably when there has been a professional consultation with an attorney who acts or advises as such. *Okum v. Commonwealth of Pa.*, 465 A.2d 1324, 1325 (Pa. Cmwlth. 1983) (citing *In re Fogg’s Estate*, 94

A. 453 (Pa. 1915)); *Okum*, 465 A.2d at 1325 (citing *Alexander v. Queen*, 97 A. 1063 (Pa. 1916)). Here, the privilege extends to the investigation report, which was prepared by I&E Pipeline Safety Inspectors for legal prosecutory personnel in I&E, for the purpose of seeking professional legal advice regarding this incident. The report was not disseminated to the public or any other non-attorney personnel at the Commission. Consequently, disclosure of the report is protected by the attorney-client privilege.

The deliberative process privilege permits the government to withhold documents containing “confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.” *Redland Soccer Club, Inc. v. Department of the Army of the United States*, 55 F.3d 827, 853 (3d Cir. 1995), citing *In re Grand Jury*, 821 F.2d 946, 959 (3d Cir. 1987). The purpose for the privilege is to allow the free exchange of ideas and information within government agencies. See, e.g., *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Schell v. United States Dept. of Health and Human Services*, 843 F.2d 933 (6th Cir. 1988); *Times Mirror Co. v. Superior Court of Sacramento County*, 53 Cal. 3d 1325 (Cal. 1991). The Commission has adopted the deliberative process privilege. *Pa. PUC v. West Penn Power Company*, Docket No. R-901609, (Order entered July 20, 1990). The Commission has determined that a request to obtain records from the former Gas Safety Division of the Bureau of Safety and Compliance sought information protected by the deliberative process privilege. *Re John M. DiDonato*, Docket No. P-900480 (Order entered December 19, 1990). Such investigative records included a staff report that was prepared for internal Commission use to determine whether official action should be taken against a jurisdictional utility with respect to a natural gas explosion. *Id.* Consequently, disclosure of Pipeline Safety’s investigative report is also protected by the deliberative process privilege.

Moreover, Pipeline Safety’s investigative report would not be disclosed or discoverable under the Right to Know Law. 65 P.S. § 67.708(b)(17)(ii). Specifically, the Right to Know Law excludes the non-criminal record of any agency which includes investigative materials, notes, correspondence, and reports. 65 P.S. § 67.708(b)(17)(ii).

14. Confirm or Deny: I&E's investigation process for the November 30, 2021 incident includes a report(s) addressing the results of its investigation by either Ms. Cooper Smith or by an individual under her supervision. If your response is "Confirmed":
- a. Identify the author and date of such investigative reports created by Ms. Cooper Smith or by an individual under her supervision during the investigation.
 - b. State whether Ms. Cooper Smith relied upon such report(s) in preparing her testimony.
 - c. If your answer to (b) above is affirmative, produce any and all such report(s).

OBJECTION:

I&E objects to "(c) If your answer to (b) above is affirmative, produce any and all such report(s)" for the same reasons that were previously articulated in I&E's Objection to Interrogatory 13 of Set II and I&E's Objections to PGW's Set I. The information sought, which includes Safety's investigative report, is protected by attorney-client privilege and the deliberative process privilege. I&E is not objecting to the remainder of this Interrogatory and intends to provide a timely response.

Appendix B

**BI&E's July 9, 2025
response, Set II No. 14**



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

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

July 9, 2025

Via Electronic Mail

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Re: Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement v.
Philadelphia Gas Works
Docket No. C-2024-3052277
I&E's Answer to Philadelphia Gas Works' Interrogatories – Set II

Dear Counsel:

Enclosed is the Bureau of Investigation and Enforcement's ("I&E") **Answer to the Interrogatories of Philadelphia Gas Works - Set II** in the above-referenced matter.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact the undersigned.

Sincerely,

Colby B. Widdowson
Prosecutor
Bureau of Investigation & Enforcement
PA Attorney ID No. 326185
(717) 787-2139
cwiddowson@pa.gov

CBW/
Enclosures

cc: Per Certificate of Service
Secretary Matthew Homsher (*Cover Letter and Certificate of Service Only - via e-file*)
Hon. Christopher Pell (*Cover Letter and Certificate of Service Only - via email - cpell@pa.gov*)
Michael L. Swindler, Deputy Chief Prosecutor (*via email - mwindler@pa.gov*)

14. Confirm or Deny: I&E’s investigation process for the November 30, 2021 incident includes a report(s) addressing the results of its investigation by either Ms. Cooper Smith or by an individual under her supervision. If your response is “Confirmed”:
- a. Identify the author and date of such investigative reports created by Ms. Cooper Smith or by an individual under her supervision during the investigation.
 - b. State whether Ms. Cooper Smith relied upon such report(s) in preparing her testimony.
 - c. If your answer to (b) above is affirmative, produce any and all such report(s).

ANSWER:

Confirmed.

- a. **I&E’s investigation began on the day of the event with an incident inspection by Pipeline Safety Inspectors Scott Orr and Vladimir Shteyn. The initial incident inspection formed the basis of the Investigative Report. The Investigative Report was continually amended during the investigation process. The Investigative Report created by Scott Orr was finalized on March 14, 2024. The investigation and drafting of the Investigative Report were done under the supervision of Ms. Cooper Smith. Ms. Cooper Smith reviewed, edited, and approved the Investigative Report through the drafting process, prior to sending the report for legal review.**
- b. **Yes.**
- c. **I&E formally objected to producing this document based upon attorney-client privilege and deliberative process privilege. *See Objections of the Bureau of Investigation and Enforcement to the Interrogatories of Philadelphia Gas Works- Set II, dated June 23, 2025.***

Answer provided by: Terri Cooper Smith, Supervisor, Fixed Utility Valuation Engineer

