

Middletown Township v. Cortes and Energy Transfer | Energy Transfer v. Cortes and Middletown Township

Right-to-Know Law – Exceptions to Disclosure.

Under Pennsylvania's Right-to-Know Law, records are presumed public records accessible for inspection and copying by anyone requesting them and must be made available unless the records fall within specific enumerated exceptions or are privileged. *Feldman v. Pennsylvania Commission on Crime and Delinquency*, 208 A.3d 167 (Pa. Cmwlth. 2019), see 65 P.S. § 67.101 et seq. The exceptions to disclosure of public records must be narrowly construed, and the burden of proving the record is exempt from public access rests on the local agency receiving the request by a preponderance of the evidence. *Central Dauphin School District v. Hawkins*, 199 A.3d 1005 (Pa. Cmwlth. 2018). An affidavit submitted to justify non-disclosure of requested documents pursuant to any exemption under the Right to Know Law must be detailed, nonconclusory and submitted in good faith. *United Healthcare of Pennsylvania, Inc. v. Pennsylvania Dept. of Human Services*, 187 A.3d 1046 (Pa.Cmwlth. 2018).

The trial court held:

Following a Court Order which Affirmed in Part and Reversed in Part the Final Determination issued by the Office of Open Records, Petitioners Middletown Township and Energy Transfer filed an appeal. The Court issued a Decision and Order on October 15, 2021 regarding Respondent Samuel Cortes' Right to Know Appeal. In the case at bar, no issue of attorney-client privilege or any other privilege was raised. All of Petitioners' contentions of error pertain to Respondent's request for release of information Item No. 1 which sought the following:

All communication by and between the Township (including but not limited to, all appointed and elected officials, e.g. Township Manager, Township Engineer, and Solicitor or conflict Solicitor, James Flandreau, Esquire, collectively the Township) and Sunoco Pipeline, L.P. (including but not limited to Duane, Morris, L.L.P. and all other persons and/or entities acting for or on behalf of it, Collectively "Sunoco") from January 1, 2019 through the present relating to the Mariner East 2 Pipeline or any work relating to the same.

Petitioner Township provided Respondent with certain records responsive to Request Item No. 1, but partially denied the Request asserting that certain records were confidential security information pursuant to the Public Utility Confidential Security Information Disclosure Act, and related to a Protected Order issued by the Public Utilities Commission. 35 P.S. §§ 2141.1-2141.8. Petitioners contend that the Court erred in concluding that the non-criminal investigations exception did not apply to preclude production of the information request in Respondent's Request Item No. 1. 65 P.C. § 708(b)(17). Petitioners also assert that the Court erred in failing to accept the averments contained in the Affidavit submitted by the Township's Right to Know Officer in support of the log.

The Court determined that the exemption log and supporting Affidavits submitted by Petitioner Township to substantiate its reliance on the non-criminal investigation exemption were insufficient because the records cited in the log failed to relate them to any such non-criminal investigations. Further, the Court found that the Affidavit submitted by Petitioner Township's Right-to-Know Officer which causes it to fail as a supporting basis for the Township's Exemption Log and assertion of non-criminal investigation exemption. The Court noted that an affidavit which simply tracks the language of the exception it presup-

poses is insufficient to demonstrate that the responsive records are exempt from disclosure. *Pennsylvania Dept. of Labor and Industry v. Darlington*, 234 A.3d 865 (Pa. Cmwh. 2020). The Court stated that it did not err in its treatment of the Affidavit in question.

Petitioners also argued that the Court erred by failing to consider the public policy implications of releasing the requested records. The Court stated that it did not fail to consider the public policy implications, rather, Petitioners ignored that it is the Court's duty to interpret and apply the provisions of the Right-To-Know Law and controlling Appellate Authority. The Court maintained that it is not merely to consider public policy implications of a release of records, but to balance those concerns and implications against the public's overrule right to access information involving government activities. The Court noted that the balance and tension between these interests is at the heart of the role designated by the Legislature for the Court to fulfill in making the Right-to-Know Law procedure function.

The Court found that the records sought in Respondent's Request Item No. 1 should be provided. Therefore, the Court concluded that Petitioners' contentions of error were without merit and that its Decision and Order were fully supported by the record as well as the applicable statutory and decisional authority.

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CV-2021-003772

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Opinion by the Honorable Barry C. Dozor, filed October 15, 2021

OPINION

Petitioners Middletown Township and Energy Transfer appeal from this Court's Decision and Order dated October 15, 2021 which Affirmed in Part and Reversed in Part the Final Determination issued by the Office of Open Records regarding Respondent Samuel Cortes' Right to Know Appeal.

The procedural history of this matter shows that on December 16, 2020, Respondent Cortes submitted a Right to Know Request to Petitioner Middletown Township pursuant to the Pennsylvania Right - To - Know Law, 65 P.S. §67.101 et seq. The request consisted of seven (7) categories of information. The Township granted items 2 through 6, denied category 7 of the request based upon the Township's determination that no responsive records existed, and partially granted item 1 subject to the withholding of certain records deemed exempt from disclosure under the Right - To - Know Law.

On February 8, 2021, Respondent Cortes appealed the Township's decision to the Office of Open Records challenging the Township's partial denial of item 1 of his Request and the outright denial of item 7. On March 18, 2021, the Office of Open Records issued a Final Determination that sustained Respondent's Appeal and directed release of records responsive to item 1 of Respondent Cortes' Request except for those records which reflect confidential settlement negotiations not subject to disclosure under the Right - To - Know Law and security records that are exempt from disclosure under the Law.

On April 19, 2021, Petitioner Township filed a Petition for Review of the Final Determination issued by the Office of Open Records. A Petition for Review also was filed on the same day by petitioner Energy Transfer, who had been notified by Petitioner Township that the Respondent's Right – To – Know request implicated records provided to it by Energy Transfer and its agents. By Order dated April 28, 2021, the Court consolidated the two Petitions for Review.

By Order dated June 8, 2021, the Court scheduled a hearing on the consolidated Petitions for Review on June 24, 2021. Thereafter, the Parties filed a Stipulation of Counsel and Proposed Order of Court which stipulated that in lieu of an evidentiary hearing, the case would be decided on briefs only and that the Parties further waived oral argument and the right to present evidence. The Parties further agreed that the Petition for Review would stand solely on the record established before the Office of Open Records. By Order dated July 1, 2021, the court approved the Parties' Stipulation and the Petitions for Review were considered by the Court accordingly.

By Decision and Order entered October 15, 2021, the Court partially Affirmed the Final Determination of the Office of Open Records as it related to Respondent's Request Item No. 1 and directed Petitioner Township to produce all records conforming to this Request. The Decision and Order Reversed the Final Determination of the Office of Open Records as it related to Respondent's Request Item No. 7 and directed that no production of documents was necessary pursuant to that Request. Lastly, the Court's Decision and Order also directed that no further production of documents was necessary by Petitioner Township in regard to Respondent's request for appraisal information on the basis that the Township represented that the appraisal information previously had been provided in response to prior Right – To – Know requests.

It is from this Decision and Order that Petitioners' Middletown Township and Energy Transfer now have filed notices of appeal to the Commonwealth Court of Pennsylvania.

Initially we note that the general objective of the Right – To – Know Law is to empower citizens by affording them access to information concerning the activities of their government. Accordingly, under the Right – To – Know Law, records are presumed to be public records accessible for inspection and copying by anyone requesting them and they must be made available to a requester unless they fall within specific enumerated exceptions or are privileged. **Feldman v. Pennsylvania Commission on Crime and Delinquency**, 208 A.3d 167 (Pa. Cmwlth., 2019). Under the Right – To – Know Law, the exceptions to disclosure of public records must be narrowly construed, and the burden of proving that a record is exempt from public access is placed upon the local agency receiving the request by a preponderance of the evidence. **Central Dauphin School District v. Hawkins**, 199 A.3d 1005 (Pa. Cmwlth., 2018). No issue of attorney – client or other privilege has been raised in this case.

All of Petitioners' contentions of error with the Court's Decision relate to our ruling regarding Respondent's request for release of information item number 1. That item sought the following:

All communication by and between the Township (including but not limited to, all appointed and elected officials, e.g.

Township Manager, Township Engineer, and Solicitor or conflict Solicitor, James Flandreau, Esquire, collectively the Township) and Sunoco Pipeline, L.P. (including but not limited to Duane, Morris, L.L.P. and all other persons and/or entities acting for or on behalf of it, Collectively "Sunoco") from January 1, 2019 through the present relating to the Mariner East 2 Pipeline or any work relating to the same.

As noted previously, Petitioner Township provided Respondent with certain records responsive to Request Item No. 1, but partially denied the Request asserting that certain records were confidential security information pursuant to the Public Utility Confidential Security Information Disclosure Protective Act, 35 P.S. §§2141.1 – 2141.8., and related to a Protective Order issued by the Public Utilities Commission. Petitioner Township also asserted that release of the additional records would jeopardize public safety, endanger the safety or physical security of a public utility, reflect internal predecision deliberations, relate to a noncriminal investigation and relate to leasing or disposing of real property.

In its Final Determination of Respondent's Appeal from Petitioner Township's Decision, the Office of Open Records concluded, inter alia, that Petitioners failed to establish that the records requested pursuant to Respondent's Item No. 1 related to a noncriminal investigation exempt from disclosure pursuant to 65 P.C. § 708 (b)(17). Petitioners asserted that the Office of Open Records erred in concluding that the records requested in Respondent's Request Item No. 1 were exempt from disclosure under the exemption for non-criminal investigations set forth in the Right – To – Know Law. Now Petitioners contend that the Court erred, for a variety of reasons in likewise concluding that the non-criminal investigations exemption did not apply to preclude production of the information requested in Respondent's Request Item No. 1.

In the Court's determination of this issue, we concluded that the exemption log and supporting Affidavits submitted by Petitioner Township to substantiate its reliance on the non-criminal investigation exemption were insufficient for the reasons that the records cited in the log failed to relate them to any such noncriminal investigations. Additionally, the Court rejected Petitioners' further argument that the decision to reject the non-criminal investigation exemption in this case was foreclosed by a decision made by the Office of Open Records in another matter, **Fuller v. Middletown Township** Office of Open Records Docket No. AP 2020-1286, wherein the Township was permitted to withhold requested records related to non-criminal investigations involving Petitioner Energy Transfer's public utility pipeline operations.

In their contentions of Error, Petitioners initially assert that the Court erred in finding that Petitioner Township's Exemption Log was insufficient to support the application of the non-criminal investigation exemption and further erred in failing to accept the averments contained in the Affidavit submitted by the Township's Right To Know Officer in support of the Log.

Addressing the issue of the Townships' Right To Know Officer's Affidavit first, an affidavit submitted to justify non-disclosure of requested documents pursuant to any exemption under the Right To Know Law must be detailed, nonconclusory and submitted in good faith. **United Healthcare of Pennsylvania, Inc. v.**

Pennsylvania Department of Human Services, 187 A.3d 1046 (Pa. Cmwlth. 2018). However, conclusory affidavits, standing alone, will not satisfy an agency's burden of proof under the Right To Know Law. The affidavit upon which the agency or entity relies, must be specific enough to permit a reviewing Court to ascertain whether the claimed exemption applies to the records requested. 1d.

It is precisely this lack of specificity and the conclusory nature of the Affidavit submitted by Petitioner Township's Right To Know Officer which causes it to fail as a supporting basis for the Township's Exemption Log and assertion of non-criminal investigation exemption. The statement "Certain records were withheld that were related to non-criminal investigations pursuant to Section 708 (b) (17) of the Right To Know Law, 65 P.S. § 708 (b) (17)" is totally non-specific and conclusory in nature and does little more than parrot the statutory exemption provision. An affidavit which merely tracks the language of the exception it presupposes is insufficient to demonstrate that the responsive records are exempt from disclosure. **Pennsylvania Department of Labor and Industry v. Darlington**, 234 A.3d 865 (Pa. Cmwlth. 2020). Accordingly, the Court did not err in its treatment of the Affidavit in question.

Likewise the Court did not err in concluding that the Petitioner Township's Privilege Log was insufficient to establish that the requested records were exempt from disclosure pursuant to the non-criminal investigation exemption. While in our Decision, we acknowledged that Petitioner – Township's exemption log was substantial and constituted a good – faith effort to qualify the documents for the non-criminal investigation exemption, the log failed to disclose specifics regarding the investigations allegedly conducted and how the records cited in the log related to such noncriminal investigations. When these deficiencies are viewed in the context of the conclusory, non – specific Affidavit submitted by Petitioner Township's Right To Know Officer, the Court's decision concluding that the Petitioner's claim of non-criminal exemption was not supported by the record was legally and factually correct.

Petitioners next contend that the Court erred by imposing an additional burden of proof upon them to show that the non-criminal investigation exemption applied in regard to the documents requested by Respondent in his Request Item No.1. The record shows that the Court did not impose any additional burdens of proof upon Petitioners but merely concluded that its exemption log and Affidavits failed to satisfy Petitioner Township's well-established burden of proving that a record is exempt from public access by a preponderance of the evidence. While Petitioner's contend that the Decision of the Court, and for that matter, the Office of Open Records, was against the strong public policy which forms the foundation of the non-criminal investigation exemption, Petitioners wholly ignore the equally strong general public policy consideration which requires the Right – To – Know Law to be liberally interpreted and for exemptions to be narrowly construed. This Court neither rewrote established case law nor legislated by adding statutory requirements which did not exist. Instead, we applied the standards set by existing caselaw to the facts presented by this case and concluded that although well intentioned, the Petitioner Township's efforts by way of its exemption log and Affidavits, taken as a whole, failed to satisfy its burden to establish the existence of the non-criminal exemption to the Right To Know Law. Accordingly, Petitioners' contention of error in this regard is without merit.

Petitioners next contend that the Court erred in distinguishing the Office of Open Records decision in **Fuller v. Middletown Township** from this case. To be clear, the Petitioner's position on appeal to this Court was that the Office of Open Records Final Determination in this matter was an improper departure from its prior holding in the **Fuller** case without an announcement by the Office of its intent to do so.

However, a review of the Office of Open Records Final Determination showed that the **Fuller** case was neither ignored nor contravened. Instead, **Fuller** was found not be controlling on the issues in this matter because of distinctions in the record of the present case specifically relating to the conclusory and nonspecific nature of Petitioner Township's exemption log and supporting Affidavits. The record in the instant case clearly establishes that these record distinctions exist and that Petitioners' contention of error as to the **Fuller** case amounts merely to another attempt to disagree with this Court's ultimate conclusion that the burden to establish the applicability of the non-criminal investigation exemption was not satisfied. Accordingly, Petitioners' Contention of error is without merit.

Petitioners next assert that the Court erred in applying and relying upon **Central Dauphin School District v. Hawkins**, 199 A.3d 1005 (Pa. Cmwith., 2018), in rendering its decision. Petitioners argue that **Central Dauphin** is distinguishable from the instant case because the record involved therein, a video, was not created for or used in an investigation. Petitioners contend, conversely, that "the Township created all of the records at issue only for the purpose of investigating public safety issues associated with the construction of the Mariner pipeline".

Initially, we note that the Court cited **Central Dauphin** for two limited legal propositions. First, that under the Right - To - Know Law, exceptions to disclosure of public records must be narrowly construed and the burden of proving that a record is exempt from public access is placed upon the local agency receiving the request by a preponderance of the evidence. Second, **Central Dauphin** was cited for the proposition that each claim that a record is exempt as relating to an investigation must be decided on its unique facts, and merely because a record has some connection to an investigation does not automatically exempt it under the Right - To - Know Law. Neither of these legal propositions is rendered inapplicable to the instant case merely because the factual situations herein has certain factual distinction with **Central Dauphin**. Accordingly, Petitioners' contention of error in this regard is without merit.

Lastly, Petitioners again contend that the Court erred by failing to consider the public policy implications of releasing the requested records. As stated previously, this Court did not fail to consider the public policy implications of requiring the release of records in response to Respondent's Request Item No. 1. However, what Petitioners ignore is that a Court's duty in interpreting and applying the provisions of the Right - To - Know Law and the controlling Appellate authority in regard thereto, is not merely to consider the public policy concerns and implications of a release of records, but to balance those concerns and implications against the public's overrule right to access information involving the activities of government. The balance and tension between these important and sometimes contending interests is at the heart of the role designated by the Legislature for the Court to fulfill in making the Right - To - Know Law procedure function.

In issuing our Decision, this Court carefully weighted the concerns involved in releasing the information in question against the general right of the public to have access to that information. Additionally, the Court carefully consideration whether or not the Petitioner Township had satisfied its burden of establishing the existence of the non-criminal investigation exemption in regard to the records in question. As a result of that combined process and analysis and for the reasons fully set forth in our Decision and this Opinion, we concluded that the records sought in Respondent's Request Item No. 1 should be provided. Accordingly, no issue of public policy was ignored, and Petitioners' final contention of error is without merit.

It is for the foregoing reasons that the Court issued its Decision and Order from which Petitioners Appeal, and it is submitted that our Decision and Order are supported fully by the record in this matter and the applicable statutory and decisional authority.

BY THE COURT:

J.