



DCNR records from October 2010, until the date of his request that related to Governor Tom Corbett's budget proposal to raise \$75 million dollars through non-surface impact drilling on Commonwealth-owned land; 1a-reports, studies, memoranda, and correspondence relating to leasing additional Commonwealth land for oil or natural gas development; 1b-records showing Commonwealth land for which surface or mineral rights are under consideration for leasing for additional oil or natural gas development; 1c-records showing the mineral rights owned by the Commonwealth in state parks; 1d-records showing calculations made as to the revenue which may be generated by leasing additional Commonwealth lands for natural gas or oil development including, but not limited to, all correspondence between the Governor's Office of the Office of the Budget and DCNR that referenced the \$75 million dollar revenue estimate; and 1e-records, including but not limited to, proposals, inquiries, or other communication made to DCNR from those that expressed interest in leasing Commonwealth lands for oil and gas development.<sup>3</sup>

### **B. The DCNR Response.**

By letter dated March 12, 2014, Connie Plonowski (Plonowski), the Open Records Officer for DCNR, invoked a thirty-day extension of the time to respond to Representative Vitali's request pursuant to Section 902 of the Law, 65

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**(continued...)**

appeal to the OOR. The OOR used the DCNR's classification system in its Final Decision. For clarity, this Court will do so as well.

<sup>3</sup> Representative Vitali also requested all records from October 2010, forward that related to the environmental impacts of drilling on already leased Commonwealth land and/or DCNR's ongoing monitoring program.

P.S. §67.902. By letter dated April 11, 2014, Plonowski granted the request with respect to item 1c and partially granted the request of records that related to the environmental impacts of drilling on already leased Commonwealth land and/or DCNR's ongoing monitoring program.

With respect to the remainder of Representative Vitali's request, Plonowski stated:

Furthermore, in an attempt to provide you with the information that DCNR reasonably believes you are seeking, DCNR has interpreted your RTKL [Law] request to mean the following:

*DCNR records from October 2010 to March 5, 2014, provided by DCNR to the Office of Budget in 2013, with respect to raising the specific amount of \$75 million for the Commonwealth through non-surface impact drilling on Commonwealth-owned land.*

We regret to inform you that DCNR was unable to locate information or records in DCNR's possession, custody or control provided to the Office of Budget that specifically indicated \$75 million through non-surface impact drilling on Commonwealth-owned land.

....

Third, with regard to your request for items identified as 1, 1a, 1b, 1d, and 1e, this portion of your RTKL [Law] request has been deemed overly broad and not sufficiently specific, and therefore is denied at this time. The RTKL [Law] requires that a request for records be made with 'sufficient specificity to enable the agency to ascertain which records' are being requested. . . .

....

The items identified as 1, 1a, 1b, 1d, and 1e are overly expansive because they seek 'all DCNR records' from October 2010 to March 5, 2014, the RTKL [Law] request date, 'relating to leasing additional commonwealth land for oil or natural gas development.' You do not limit the

request to a specific type of record other than the general categories of ‘reports, studies, memorandums [sic], and correspondence relating to leasing additional commonwealth land for oil or natural gas development.’ The request is not sufficiently specific because it does not provide clear direction to those who would search for such materials. There are a multitude of potential records that may or may not be interpreted as part of the request. The lack of a defined group of potential record holders, in conjunction with a broad range of types of records, makes it impossible for DCNR at this time to reasonably determine what items are being sought.

Fourth, with respect to your request in Part One, many of the possible records for the items identified as 1, 1a, 1b, 1d, and 1e of the request, should they currently exist at DCNR, may be exempt under one or more of the RTKL [Law] exceptions, including but not limited to, §708(b)(10), internal predecisional deliberations, attorney client or attorney work product, and §708(b)(11). Records originating with oil and gas drilling companies typically include sections with ‘trade secrets’ and/or ‘confidential proprietary information.’ Portions of the material may be exempt from disclosure as such. . . . DCNR reserves the right to review and assert all exemptions if any portion of the request is later deemed sufficiently specific. . . . (Citations omitted.) (Emphasis in original.)

Letter from Connie Plonowski, Agency Open Records Officer, Department of Conservation and Natural Resources, April 11, 2014, at 3-4; Reproduced Record (R.R.) at 26-27.

The DCNR interpreted the request regarding all records relating to the environmental impacts of drilling on already leased Commonwealth land and/or DCNR’s monitoring program to be overly expansive and insufficiently specific.

### **C. Appeal to the OOR.**

On April 22, 2014, Representative Vitali appealed the denial of items 1, 1a, 1b, 1d, and 1e to the OOR. Representative Vitali asserted that the DCNR improperly denied portions of his request based on the reasoning that his request lacked specificity and that the DCNR edited a portion of his request. Representative Vitali argues that the DCNR's unauthorized editing of his request resulted in an unjustified denial of portions of his request based on the failure of the DCNR to locate requested information or records.

### **D. The DCNR Response to the Appeal.**

The DCNR submitted a position statement to OOR from its Office of Chief Counsel. In the position statement, the DCNR argued that it properly denied the portion of the request for items identified as 1, 1a, 1b, 1d, and 1e as the request lacked sufficient specificity and was overly broad in scope. The DCNR also argued that it did not change the scope of the request by rephrasing item 1.

### **E. Notice to Third Parties.**

By email dated May 8, 2014, Benjamin Lorah, attorney for the OOR, requested that the DCNR provide a copy of the notice that the DCNR provided to any third parties to inform them of the appeal:

The OOR's docketing notification provided in the above captioned matter directed the Department [DCNR] to provide notification to third parties in the event the requested records 'contain confidential, proprietary or trademarked records of a person or business entity; or are held by a contractor or vendor [.]' We request that the Department [DCNR] submit a copy of the notice

provided to any third parties informing them of this appeal.

Email from Benjamin Lorah, May 8, 2014, at 1; R.R. at 119.

By letter dated May 15, 2014, Mark C. Baldwin, assistant counsel for the DCNR, informed OOR that the DCNR did not notify any third parties regarding the appeal because it was unable to determine which records were responsive to Representative Vitali's request because the request was overly broad.

Letter from Mark C. Baldwin, May 15, 2014, at 1; R.R. at 116.

#### **F. The OOR's Final Determination.**

In a final determination issued May 22, 2014, the OOR granted the appeal:

Here, the Request, viewed as a whole is sufficiently specific to enable the Department [DCNR] to respond. The structure of Item 1 of the Request clearly identifies the universe of records sought in the first paragraph and, through subsections (a)-(b) and (d)-(e), provides additional clarification by setting forth the types of records encompassed in the Item, e.g., 'reports, studies, memorandums [sic], and correspondence relating to leasing additional commonwealth land for oil or natural gas development.' Further, while the Department [DCNR] claims that it cannot identify the employees that may possess responsive records, the subject matter of the Request – a specific budget proposal involving extraction of gas and oil from Commonwealth lands – is sufficiently narrow for the Department to identify which of its employees may possess responsive records. In *Carey v. Department of Corrections* [61 A.3d 367 (Pa. Cmwlth. 2013)], the court found a request for unspecified records . . . related to a specific agency project . . . and a limiting time-frame to be sufficiently specific. . . . Here, the Request identifies a specific subject matter, 'the Governor's budget proposal to raise \$75 million through

non-surface impact drilling on commonwealth-owned land’ and a limiting time-frame, October 2010 to the present.

The Department [DCNR] also claims that Item 1 of the Request is insufficiently specific because it uses the phrase ‘all . . . records.’ Notably, the Request seeks ‘[a]ll DCNR records’ and includes subsections further limiting the pool of responsive records. . . . Although the Request here seeks ‘all DCNR records,’ given the other parameters provided in the Request, including the types of records sought, and the Commonwealth Court’s holding in Carey, Items 1a-b and 1d-e of the Request are sufficiently specific.

. . . .  
The Requester [Representative Vitali] claims that the Department [DCNR] interpreted Item 1 of the Request in an overly restrictive manner that effectively denied access to the records he sought. . . .

While an agency may interpret the meaning of a request for records, that interpretation must be reasonable. . . . The RTKL [Law] is remedial legislation that must be interpreted to maximize access. . . . Here, the Department’s [DCNR] interpretation of Item 1 of the request was not reasonable, as it narrowed the scope of the Request in such a way as to completely change the nature of the Request by interpreting this Item as seeking only records provided by the Department [DCNR] to the Office of the Budget. The Department [DCNR] cites to the OOR’s Final Determination in *Couloumbis v. Dep’t of General Services* [OOR Dkt. AP 20111-0964] as support for taking search terms from the face of a request, including the names of agency employees who would possess responsive records, to identify responsive records. . . . However, in *Couloumbis*, the agency’s search parameters did not constitute a narrowing or rewording of the underlying request and the requester did not challenge the agency’s search parameters. . . . In contrast, here, the Requester [Representative Vitali] contests the Department’s [DCNR] interpretation of his Request and the Department’s [DCNR] interpretation of Item 1 imposes a requirement that responsive records

would only [consist of] records provided by the Department [DCNR] to the Office of the Budget related to the \$75 million proposal. As a result, unlike the agency in *Couloumbis*, the Department [DCNR] did not merely identify the employees that may possess responsive records and include those names as parameters for the search and its interpretation was not reasonable for purposes of identifying records responsive to the Request.

....  
The Department [DCNR] asserts that the requested records are exempt from disclosure under 65 P.S. § 67.708(b)(10) and (11). On appeal, however, the Department [DCNR] failed to provide any evidentiary support or explanation concerning any of these exemptions. Accordingly, the Department [DCNR] has not met its burden of proof to withhold responsive records. . . . (Citations omitted.)

Final Determination of OOR, May 22, 2014, at 6-9; R.R. at 126-129. The OOR directed the DCNR to provide all responsive records within thirty days.

On June 6, 2014, the DCNR petitioned for reconsideration and to supplement the record. The OOR denied the petition on June 23, 2014.

## **II. Issues Presented.**

DCNR contends<sup>4</sup> that the OOR erred when it determined that Items 1, 1a, 1b, 1d, and 1e of the Request were sufficiently specific, when it required DCNR to provide all responsive records within thirty days without providing the

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<sup>4</sup> As to factual disputes, this Court may exercise functions of a fact-finder, and has the discretion to rely upon the record created below or to create its own. Bowling v. Office of Open Records, 75 A.3d 453 (Pa. 2013). As to a question of law under the Law, this Court's scope of review is plenary. Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011).



DCNR with the opportunity to discern and raise all objections to any additional records requested, and when it found the request was sufficiently specific though it did not consider an affidavit attached to the petition for reconsideration to determine whether the items were exempt under Section 708(b)(10)(i)(A) of the Law, 65 P.S. §67.708(b)(10)(i)(A), because the records reflected the DCNR's predecisional deliberations relating to a budget recommendation. The DCNR also contends that the OOR erred because it did not afford third parties with a potentially direct interest in a record subject to the request to assert an exemption pursuant to Section 708(b)(11) of the Law, 65 P.S. §67.708(b)(11).<sup>5</sup>

#### **A. Specificity.**

Initially, the DCNR contends that the OOR erred when it found that items 1, 1a, 1b, 1d, and 1e of Representative Vitali's request were sufficiently specific for the DCNR to respond.

Here, the DCNR argues that Representative Vitali's request identified an overly broad universe of potential records because records concerning the Governor's budget proposal to raise \$75 million through non-surface impact drilling on Commonwealth-owned land pertained in part to the Governor's Office of the Budget which is a separate state agency responsible for the preparation of the Governor's 2014 budget. The DCNR also reasserts that the Request lacked specificity and was overly broad in scope because the request sought all DCNR records from October 2010, to March 5, 2014, the date of the request, relating to

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<sup>5</sup> Section 708(b)(11) of the Law, 65 P.S. §67.708(b)(11), exempts a record that constitutes or reveals a trade secret or confidential proprietary information.

leasing additional Commonwealth land for oil and natural gas development. Further, the DCNR argues that Representative Vitali failed to identify specific individuals or departments within the DCNR as record holders.

Section 703 of the Law, 65 P.S. §67.703, provides: “A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested.” When determining the specificity of a request, the item or phrase must be construed in the context of the request. In order to determine whether a request is sufficiently specific courts review the extent to which the request sets forth (1) the agency business or activity for which records are sought; (2) the timeframe for which records are requested; and (3) the type or scope of the records sought. Askew v. Pennsylvania Office of the Governor, 65 A.3d 989 (Pa. Cmwlth. 2013).

The OOR found that the request was sufficiently specific because it clearly identified the records sought, such as reports, studies, memoranda, and correspondence relating to the leasing of additional Commonwealth land. The OOR also determined that while the DCNR claimed that it could not identify its employees who might possess responsive records, the subject matter of the request was sufficiently narrow for the DCNR to identify which of its employees might possess the records.

The OOR relied on Carey v. Pennsylvania Department of Corrections, 61 A.3d 367 (Pa. Cmwlth. 2013). In Carey, Douglas Carey (Carey) requested records from the Department of Corrections (DOC) related to the transfer from

Pennsylvania State Correctional Institutions to a correctional institution in Michigan from 2008 until the date of the request. Carey requested that DOC provide all communications and statements made by DOC or to DOC regarding such transfers, all documents/communications which might indicate the individuals or agencies that had authorized the transfers, all documents and/or communications of DOC, including but not limited to, the State Correctional Institution at Albion, the Secretary for the Department of Corrections, the Governor of the State of Pennsylvania, the Michigan Department of Corrections, and any other government official regarding the transfer of Pennsylvania inmates to the State of Michigan, all documents which released Carey from DOC and recommitted him to the State of Michigan, and all documents which were provided to inmates who were transferred, before, during and after their transfers. Carey, 61 A.3d at 370-371.

DOC denied the request in its entirety and asserted the request lacked specificity as required in Section 703 of the Law, 65 P.S. §67.703. Carey appealed to the OOR. The OOR found that the request was specific enough but denied access to the records pursuant to the public safety exception of Section 708(b)(2) of the Law, 65 P.S. §67.708(b)(2). Carey petitioned for review with this Court and asserted that none of the records qualified for exemption because any exempt information could be redacted. Because he believed he had no duty to refute the grounds DOC asserted as merely possible exemptions, Carey asserted that specificity was the only proper defense. Carey, 61 A.3d at 371.

This Court affirmed in part and held in abeyance in part pending the receipt of certain information. Carey, 61 A.3d at 380. With respect to the question of specificity, this Court held:

All of the records are specified by subject matter and date. Thus, all records pertain to transfers to or from Pennsylvania correctional institutions and to or from Michigan correctional institutions from 2008 to the date of the Request, May 2012.

DOC primarily focuses its lack of specificity argument on the burden placed on DOC in responding to the Request. DOC explains it maintains records related to ‘[t]ransfer [. . .] scattered across the Commonwealth in the files of dozens or perhaps hundreds of [DOC] employees at 24 correctional institutions as well as in the institutional files of approximately 1,000 inmates’ . . . .

. . . .

Part 1 of the Request seeks all communications by DOC to others regarding the transfer of inmates from Pennsylvania to Michigan, and reverse, over a finite period of time. Part 1 describes the specific types of communications sought, ‘including emails, texts, phone messages, fax[es].’ . . . . Part 3 seeks all records and communications of government individuals or entities regarding the transfer of Pennsylvania inmates to Michigan generally. Part 4 seeks information related to Requester’s [Carey] transfer and recommitment. Part 5 seeks all records that were provided to the transferred inmates, before, during, and after their transfer. Each of these parts specifies a subject matter, a finite timeframe and seeks a discrete group of documents, either by type, as communications, or by recipient, as in records provided to inmates in Part 5. The Request is sufficiently specific to enable DOC to assess which records are sought.

The only part of the Request where specificity is less clear is Part 2 in which Requester seeks ‘all documents/communications which may indicate’ the identities of those who authorized the transfers. The

word ‘may’ renders that part of the Request vague; nevertheless, the specific subject matter and timeframe, coupled with the fact that the Transfer is well-known to DOC, suffice to apprise DOC of the records sought. Thus, we affirm OOR’s determination as to specificity of the Request. (Citations omitted.)

Carey, 61 A.3d at 372-373.

Here, as in Carey, Representative Vitali’s request was limited in its timeframe and related to very specific subject matter. This Court agrees with the OOR that Representative Vitali’s request was sufficiently specific. With respect to whether the request was insufficient because it did not enable the DCNR to identify the employees who might possess the records, the OOR stated that the subject matter of the request – a specific budget proposal involving the extraction of gas and oil from Commonwealth lands - was sufficiently specific for the DCNR to identify which employees might possess responsive records. This Court agrees with the OOR.

### **B. Time for Objections.**

The DCNR next contends that the OOR erred when, after it found that the items were sufficiently specific, it required the DCNR to provide all responsive records within thirty days without providing the DCNR with the opportunity to discern and raise all objections to the additional records. The DCNR argues that it made a good faith effort to search for the requested items, but the request was very confusing.

Section 1101(b)(1) of the Law, 65 P.S. §67.1101(b)(1), provides that an OOR appeals officer shall make a final determination within thirty days of the

receipt of the appeal unless the requester agrees otherwise. However, the DCNR requested additional time to respond once its assertion that the request was not specific was denied by the OOR. In an amicus brief, the OOR asserts that there is no statutory authority for an extension if an agency's contention that a records request lacks specificity is rejected. Further, when the OOR scheduled the submission of relevant evidence or legal support within seven business days, the DCNR did not object to the schedule as an abuse of discretion. Because the DCNR did not raise this issue before the OOR, it was waived. See Pennsylvania Bankers Association v. Pennsylvania Department of Banking, 962 A.2d 609 (Pa. 2008). Assuming arguendo that the issue is not waived, this Court agrees with the OOR's analysis that there is no statutory support for the outcome the DCNR seeks.

### **C. Reconsideration.**

Next, the DCNR contends that the OOR erred when it determined that the request was sufficiently specific because it failed to consider the affidavit attached to the DCNR's petition for reconsideration<sup>6</sup> and/or to supplement the record for the OOR to determine whether the information requested was exempt pursuant to Section 708(b)(10)(i)(A) of the Law, 65 P.S. §67.708(b)(10)(i)(A).<sup>7</sup>

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<sup>6</sup> The DCNR did not file a separate petition for review from the denial of reconsideration.

<sup>7</sup> Section 708 of the Law, 65 P.S. §67.708, provides:

**(b) Exceptions.**—Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

....

(10)(i) A record that reflects:

(A) the internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional

**(Footnote continued on next page...)**

For each of the requested items, the DCNR asserts that it explained in its petition for reconsideration why the requested records were exempt. In Fort Cherry School District v. Coppola, 37 A.3d 1259, 1262 (Pa. Cmwlth. 2012), this Court stated that the OOR should not accept evidence submitted after a determination is issued.

Here, naturally, the petition for reconsideration was submitted to the OOR after the OOR issued its final determination. The OOR properly did not consider the evidence submitted in conjunction with the petition for reconsideration. To the extent that the OOR follows the General Rules of Administrative Practice and Procedure, this Court notes that 1 Pa.Code §35.241 does not contemplate the adjudicatory body accepting new evidence on reconsideration.

#### **D. Third Parties.**

Finally, the DCNR contends that the OOR erred because it did not permit third parties with a potentially direct interest in a record subject to an appeal to provide information that the record was exempt as a trade secret or was confidential proprietary information pursuant to Section 708(b)(11) of the Law, 65 P.S. §67.708(b)(11).

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**(continued...)**

deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

Section 707(b) of the Law, 65 P.S. §67.707(b), provides:

**Requests for trade secrets.**—An agency shall notify a third party of a request for a record if the third party provided the record and included a written statement signed by a representative of the third party that the record contains a trade secret or confidential proprietary information. Notification shall be provided within five business days of receipt of the request for the record. The agency shall deny the request for the record or release the record within the provision of notice to the third party and shall notify the third party of the decision.

Section 1101(c)(1) of the Law, 65 P.S. §67.1101(c)(1), provides:

A person other than the agency or requester with a direct interest in the record subject to an appeal under this section may within 15 days following the receipt of actual knowledge of the appeal but no later than the date the appeals officer issues an order, file a written request to provide information or to appear before the appeals officer or to file information in support of the requester's or agency's position.

The DCNR argues that the companies that engage in natural gas exploration and drilling and that submitted documents to the DCNR had a direct interest in documents which were the subject of the requests at 1a and 1e. The DCNR argues that the OOR “short-circuited” the procedure established under the Law which assures that third parties with trade secrets and confidential proprietary information the right to fully participate in the appeal/right to due process.

The problem with the DCNR's argument is that it did not comply with the Law. When it received the request from Representative Vitali and then when



Representative Vitali appealed to the OOR, the DCNR did not notify any oil and gas producers that the requested records might contain confidential proprietary information. Although Section 707(b) of the Law, 65 P.S. §67.707(b), requires an agency to provide notice to third parties within five days of the receipt of the request, the DCNR did not. The DCNR requested a thirty day extension to respond. Nothing in the record indicates that DCNR notified any third parties of the request during the extension period.

When Representative Vitali appealed to the OOR, the OOR specifically directed the DCNR to notify any third parties if the records contained confidential, proprietary, or trademarked records. The DCNR did not notify any oil and gas companies even though the OOR appeals officer requested it to “submit a copy of the notice provided to any third parties informing them of this appeal.” Email from Benjamin Lorah, May 8, 2014, at 1; R.R. at 119. Again, the DCNR informed OOR that doing so was unnecessary because Representative Vitali’s request lacked specificity.

When the DCNR decided to petition for review with this Court, it sent a Notice to Participate along with its petition for review to eighteen oil and gas companies. Anadarko Petroleum Corporation, Anadarko E&P Company LP, and Anadarko Energy Services Corporation (collectively, Anadarko) petitioned to intervene. This Court granted the petition. Anadarko’s position is that certain documents that it provided to the DCNR are exempt as trade secrets and proprietary information. As a result, Anadarko asserts that this Court should remand the case to the OOR to develop a factual record sufficient to decide

whether Anadarko's records are exempt. Anadarko asserts that an agency, such as DCNR, did not have the authority to waive Anadarko's interest in keeping certain information confidential. Pennsylvania Gaming Control Board v. Office of Open Records, 48 A.3d 503 (Pa. Cmwlth. 2012).

The DCNR argues that the OOR erred when it did not permit the oil and gas companies to participate based on information contained in its petition for reconsideration. This Court has already determined that the OOR properly did not consider evidence in the petition for reconsideration.

In its amicus brief, the OOR agrees with Anadarko that it is fundamentally unfair for Anadarko to be penalized for the DCNR's inaction and asks that this Court consider either permitting Anadarko to submit evidence in support of its exemption or remanding the case to the OOR to further develop the evidentiary record. Representative Vitali opposes a remand.

At various points in its brief, the DCNR asks this Court to assume the role of factfinder and conduct an evidentiary hearing. This Court declines to do so. As this Court stated in Department of Labor and Industry v. Heltzel, 90 A.3d 823 (Pa. Cmwlth. 2014), "[o]ur fact-finding role is best reserved for unique occasions, such as where the record is exhaustive, efficiency is maximized, and OOR initially considered the exceptions asserted."

However, this Court agrees with the OOR that it would be unfair to penalize Anadarko for the DCNR's failure to comply with the Law. This Court

remands this case to the OOR to give Anadarko the opportunity to present evidence that some of the requested records are exempt as trade secrets or confidential proprietary information.

Accordingly, this Court affirms in part and vacates and remands in part. This Court affirms every portion of the OOR's decision except this Court vacates that portion of the OOR's decision to the extent it requires the DCNR to disclose Anadarko's records. This Court remands to the OOR to afford Anadarko the opportunity to present evidence concerning the exemption of records under Section 708(b)(11) of the Law, 65 P.S. §67.708(b)(11).

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BERNARD L. MCGINLEY, Judge

