

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephenson Group Natural Gas	:	
Company,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 934 C.D. 2011
	:	SUBMITTED: December 9, 2011
Pennsylvania Department of	:	
Environmental Protection,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER¹**

FILED: April 4, 2012

Petitioner, Stephenson Group Natural Gas Company (Stephenson), petitions for review of the final determination of the Office of Open Records (OOR) denying Stephenson’s appeal of the Department of Environmental Protection’s (“DEP”) partial denial of its request for documents under the Pennsylvania Right-to-Know Law (the “RTKL”).²

¹ This case was assigned to the opinion writer on or before January 6, 2012, when the opinion writer completed her term as President Judge.

² Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

On February 14, 2011, Stephenson submitted a right-to-know request to DEP seeking copies of:

All records . . . relating to each and every “Consent Assessment of Civil Penalty” issued by [DEP], Bureau of Oil and Gas Management, Southwest Regional Office, “BOGM, SWRO” and each and every related “Civil Penalty Calculation Worksheet” associated therewith as compiled in accordance with Document No. 550-4180-001, “Civil Penalty Assessments in the Oil and Gas Management Program” . . . from January 1, 2010 to February 9, 2011.

Reproduced Record (R.R.) at 3a-4a.

Ronald Schwartz of the Southwest Regional Office of the Bureau of Oil and Gas Management initially invoked a thirty-day extension, and ultimately responded on behalf of DEP, granting the request only in part by denying access to the Civil Penalty Calculation Worksheets (the worksheets). OOR denied Stephenson’s request regarding the worksheets on the grounds that they were exempt from disclosure under Section 708(b)(10)(i)(A) of the RTKL, 65 P.S. § 67.708(b)(10)(i)(A), as predecisional deliberations, and Section 708(b)(17)(vi), 65 P.S. § 67.708(b)(17)(vi), as records relating to a noncriminal investigation. DEP also asserted the attorney-client and work product privileges.

Stephenson appealed, asserting that, *inter alia*, DEP could not meet its burden under these exemptions and that the worksheets were disclosable under Section 708(b)(17)(vi)(A) as records showing imposition of a civil penalty. In support of its appeal, Stephenson submitted a copy of DEP’s Technical Guidance Document No. 550-4180-001 (Guidance Document). The Guidance Document provides both procedural guidance to DEP staff in calculating civil penalty

amounts for settlement purposes or in actions for violations, and advisory information to the regulated industry. A sample worksheet appended to the Guidance Document details the factors considered in penalty calculation, including: (1) danger to public safety or health; (2) damage to natural resources; (3) willfulness of the violator; (4) Commonwealth costs; (5) violator savings; (6) violator history; and (7) cooperation discount.

DEP supplemented the record with a letter from Edward Stokan, assistant counsel, and a notarized affidavit of Jack Crook, compliance chief in DEP's Bureau of Oil and Gas Management, Southwest Region ("Affidavit"). Crook stated that he reviewed the 146 pages of worksheets at issue in the appeal, and that each worksheet is a "preliminary step in DEP's deliberation over the nature of a respondent's violation of law and an appropriate civil penalty." Affidavit at ¶ 4; R.R. at 51a. He further averred that each consent assessment is based upon DEP's "internal, predecisional deliberations as reflected in the corresponding worksheet," and that the worksheet is part of the noncriminal investigation into the nature of a respondent's violations and assessment of appropriate penalties based upon consideration of various factors. *Id.* at ¶¶ 6, 7; R.R. at 51a. Crook also attested that the worksheets are not "the imposition of a civil penalty," but rather are a step in reaching the imposition of a civil penalty, as the ultimate imposition is the Consent Assessment of Civil Penalty."³ *Id.* at ¶ 8; R.R. at 52a. Finally, he asserted that disclosure of the worksheets would hinder DEP's ability to secure appropriate sanctions and encumber the internal discussion on whether to impose a penalty, and the amount thereof.

³ DEP produced the requested consent assessments of civil penalty to Stephenson.

OOR denied Stephenson's appeal concluding that the worksheets contain information related to a noncriminal investigation and are exempt from disclosure under Section 708(b)(17). OOR further concluded that the worksheets did not constitute records showing imposition of a civil penalty and, therefore, did not fall under Section 708(b)(17)(vi)(A), which requires disclosure of records showing imposition of a civil penalty. R.R. at 57a. OOR did not address DEP's two other grounds for denying the request. This appeal followed.

Stephenson asserts that OOR erred in concluding that the worksheets are protected from disclosure under the noncriminal investigation exemption.⁴ Specifically, Stephenson argues that pursuant to Section 708(b)(17)(vi)(A) the worksheets are disclosable as records that would reveal the imposition of a civil penalty or fine.⁵

There is no dispute that the documents Stephenson requested are records in the possession of DEP and, to the extent they are not exempt from disclosure under Section 708 of the RTKL, they are public records to which Stephenson is entitled access. Section 708(b)(17) provides, in relevant part, that the following records are exempt from disclosure:

⁴ In reviewing a final determination of the OOR, this Court "independently reviews the OOR's orders and may substitute its own findings of facts for [those] of the agency." *Bowling v. Office of Open Records*, 990 A.2d 813, 818 (Pa. Cmwlth. 2010), *appeal granted in part*, ___ Pa. ___, 15 A.3d 427 (2011).

⁵ Stephenson has not challenged OOR's conclusion that the worksheets are records that fall within the terms of Section 708(b)(17). Accordingly, we will not address DEP's argument that the worksheets are exempt from disclosure because (1) the worksheets are records that would reveal the institution, progress or result of DEP's noncriminal investigation; (2) the worksheets are investigative materials, notes, correspondence and reports; and (3) the disclosure of the worksheets would hinder the ability to obtain an administrative or civil sanction.

A record of an agency relating to a noncriminal investigation, including:

-
- (vi) A record that, if disclosed, would do any of the following:
 - (A) Reveal the institution, progress or result of an agency investigation, *except the imposition of a fine or civil penalty*, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court

65 P.S. § 67.708(b)(17) (emphasis added).

Stephenson argues that the noncriminal investigative exemption is not applicable because the worksheets are records reflecting the imposition of a fine or civil penalty and, therefore, are subject to disclosure under Section 708(b)(17)(vi)(A). Stephenson asserts that withholding the worksheets is contrary to the purpose of the RTKL as the only way for the public to properly scrutinize the actions of DEP in assessing civil penalties is to review how each penalty is calculated. Stephenson contends that the worksheets reflect the imposition of a civil penalty because DEP has already decided that it is going to assess a penalty and the worksheets are simply the calculation of the penalty. DEP counters that the worksheets do not reflect the imposition of a civil penalty because a penalty is not imposed until DEP issues the Consent Assessment of Civil Penalty. According to DEP, the worksheets do not impose a penalty or fine, but merely reflect that DEP has determined that some violation of law has occurred and that a penalty could be imposed. We agree that the worksheets do not reflect the actual imposition of a penalty.

The Guidance Document states that the worksheets are

used to calculate a penalty to be assessed unilaterally by the Department. If after achieving compliance, the violator and the Department can agree in a Consent Assessment of Civil Penalty (settlement), a lesser amount may be appropriate. This settlement amount would reflect the value of avoiding litigation, but not at the cost of continuing environmental harm. While a consent assessment should result in a significant fraction of the amount calculated for a unilateral penalty assessment, each consent assessment will be considered on its particulars. The Oil and Gas Management Program has not established a specific policy on what is a usual fraction or percentage for a penalty in a consent assessment compared to the penalty calculated for a unilateral assessment.

R.R. at 30a. The Crook Affidavit, which states that, “[t]he work sheets do not constitute the imposition of a civil penalty. Each work sheet proposes a civil penalty for DEP’s internal deliberation and thereby constitutes a preliminary step towards DEP’s ultimate imposition of a civil penalty,” also supports DEP’s contention that the worksheets are exempt. R.R. at 52a. We conclude that the worksheets reflect DEP’s investigation of violations and its consideration of various factors to assess the nature and severity of the violations. The penalty calculation on the worksheet is not necessarily the final or ultimate fine or civil penalty that DEP will impose. Accordingly, we conclude that OOR did not err in holding that the worksheets were exempt from disclosure.

Finally, Stephenson petitioned the Court to order *in camera* review of the requested documents.⁶ A hearing and/or *in camera* review of requested documents is appropriate in RTKL cases where necessary for a proper review of the issues raised on appeal. *Bowling v. Office of Open Records*, 990 A.2d 813 (Pa. Cmwlth. 2010), *appeal granted in part*, ___ Pa. ___, 15 A.3d 427 (2011). The record includes Stephenson's request, DEP's response, the Guidance Document, the Crook Affidavit, and the parties' other submissions to OOR. Having reviewed the record in its entirety, we conclude that these documents constituted a sufficient record for this Court to conduct a meaningful review rendering *in camera* review unnecessary.

For all of the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

⁶ On August 2, 2011, Stephenson filed an application for relief requesting *in camera* review. By order dated August 18, 2011, the decision regarding Stephenson's application was deferred to the merits panel.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephenson Group Natural Gas	:	
Company,	:	
	:	
Petitioner	:	
	:	
	:	
v.	:	No. 934 C.D. 2011
	:	
	:	
Pennsylvania Department of	:	
Environmental Protection,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 4th day of April, 2012, the order of the Office of Open Records is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge