



Listen Live • On the Media



Last Chance

Make a year-end donation.

Donate

POLITICS & POLICY

ENERGY

ENVIRONMENT

PENNSYLVANIA

Reform of secrecy law for Pa. utilities faces long odds despite agreement that it's a problem

By Rebecca Moss of Spotlight PA · December 22, 2020



 Legal experts told Spotlight PA that the law is inherently archaic. (Michael Bryant/Philadelphia Inquirer)

This story originally appeared in [Spotlight PA](#).

[Spotlight PA](#) is an independent, non-partisan newsroom powered by The Philadelphia Inquirer in partnership with PennLive/The Patriot-News, TribLIVE/Pittsburgh Tribune-Review, and WITF Public Media. [Sign up for our free newsletters](#).

More than a decade ago, when the state Public Utility Commission was first considering how to adopt a new anti-terrorism law, critics spoke about the need for balance.

The effort was intended to prevent criminals from getting sensitive details about Pennsylvania's utility infrastructure that could be used to perpetrate mass crimes. The potential to contaminate drinking water systems and manipulate the electric grid were top of mind for state officials and lawmakers aiming to safeguard the state in the wake of the Sept. 11 attacks.

But secrecy could create unintended risks, critics argued in 2008. The commission should have a system to ensure that powerful utility companies do not exploit the law to keep large swaths of public information confidential without consequence.

Twelve years later, there is now bipartisan agreement that those concerns have come to pass. Some protections meant to ensure that the law was working as intended have fallen by the wayside. And a recent decision by Commonwealth Court could make the law stronger than ever — and make it even harder and more expensive for residents to challenge what gets kept a secret.

“Anytime a government agency or a regulated entity is given broad discretion to classify records as confidential, there has got to be a significant check on that power,” said Melissa Melewsy, a lawyer with the Pennsylvania NewsMedia Association, which submitted public comments arguing for greater government and corporate accountability related to the CSI Act in 2008. “And there really doesn't appear to be.”

Democratic Gov. Tom Wolf and lawmakers from both parties say the act — formally known as the Public Utility Confidentiality Security Information Disclosure Protection, or CSI, Act — is in need of reform. Legal experts told Spotlight PA that it is inherently archaic, implemented before the state overhauled its approach to public records and became the center of the fracking boom, leading to a proliferation of pipelines, most notably the Mariner East system.

Stretching through 17 south-central Pennsylvania counties, the roughly 350-mile system pumps natural gas liquids from Ohio, West Virginia, and Southwestern Pennsylvania to a storage and processing facility in Marcus Hook, Delaware County. School and county officials, as well as first responders and emergency planners, have said the law has at times prevented them from getting the safety information they need to draft detailed emergency plans should disaster strike.

For years, Sunoco and its parent company, Energy Transfer, have cited the CSI Act to prevent risk and safety information from being released to residents, many of whom remain in the dark about the danger the system poses and what to do if an accident occurs, a previous Spotlight PA investigation found.

The concerns surrounding Mariner East are not the first to run up against the CSI Act, which has been cited in the past to deny what many see as critical public safety information. When a natural gas pipeline explosion killed five people and damaged a city block in Allentown in the winter of 2011, U.S. Sen. Bob Casey said the state needed to provide more information about pipeline infrastructure to better protect the public. A spokesperson for the utility commission said the CSI Act was in conflict with his request.

Related Content

COURTS & LAW

StateImpact Pennsylvania

PUC doesn't have to disclose its estimates of Mariner East 'blast zone,' court rules

2 months ago

In 2015, Wolf convened a task force to study how the state could improve safety practices as pipeline infrastructure expanded statewide. Little has changed.

Instead, the CSI Act's power has only been interpreted more broadly with minimal oversight.

In October, Commonwealth Court Judge Andrew Crompton overturned a public records decision by the Office of Open Records that determined the Public Utility Commission, citing the CSI Act, inappropriately withheld certain information sought by Delaware County resident Eric Friedman.

But, ruling on an appeal filed by the utility commission and Energy Transfer, Crompton said the office had no authority to determine what records should be released under the act. He also ruled that authority rests solely within the commission or Commonwealth Court itself.

The court declined to rule on whether the content of the records sought by Friedman was appropriately marked as confidential. Instead, Crompton reversed the decision and remanded the request to the agency that first denied it.

The case has been appealed to the Pennsylvania Supreme Court, with support from state Senate Democrats. The parties argue that Commonwealth Court wrongly interpreted the role of the Office of Open Records, which was created in order to independently determine what records belong in the public domain.

“The [Office of Open Records] was created to be able to allow citizens to bring forward a case without counsel, which can be expensive,” said Shannon Sollenberger, a lawyer for Sens. Katie Muth (D., Montgomery) and Tim Kearney (D., Delaware), who filed an amicus brief in support of the appeal. “This is also an issue of access.”

If the decision is upheld, the lawyers argue, people who challenge the CSI Act will not be able to use the Office of Open Records as an arbiter, but will have to undergo the legal cost and complexity of retaining counsel and appealing these public records denials by the PUC directly to Commonwealth Court. There, they will often face off not only with the utility commission, but also deep-pocketed energy companies.

When the open records law was reformed in 2008, this was the type of burden it intended to correct. Lawyers said it was notable that the CSI Act was adopted before the revision of the Right-to-Know Law, and therefore is silent on the role of the records agency.

“Under the old Right-to-Know Law, the public’s only option was to go to court, and nobody did it, and the legislature recognized that was bad for government transparency,” said Melewsky, the lawyer for the state media association. (Spotlight PA is a member.) “Records must be available unless or until the agency can prove otherwise. That is really not what is going on here in the CSI Act.”

Eric Arneson, director of the Office of Open Records, said if the state Supreme Court does not take up the case, his office will use the Commonwealth Court decision in the Friedman case to inform future records decisions involving CSI information.

“Every case is different,” Arneson said, “but if another case came before us with facts that are similar enough that this case would apply, we have to take that into account. Absolutely.”

In the past, the office has made several findings that an agency too broadly applied the CSI Act. In a handful of cases, these decisions led the agency to turn over records to the public; other decisions in favor of the public, such as the Friedman case, were appealed by the agency and records have, in turn, spent years entangled in litigation.

Former Sen. Tom Killion (R., Delaware) called the Commonwealth Court’s ruling related to the CSI Act disappointing, saying it “highlights the need for the General Assembly to explicitly require information vital to public safety plans be shared with first responders and county emergency service agencies.”

“It’s unconscionable that those entrusted with protecting the public do not have the information necessary to effectively plan for a worst-case scenario,” Killion said.

MARINER EAST PIPELINE

More than 300 hospitals, schools, nursing homes, and other vulnerable buildings could be impacted by a potential leak of the Mariner East pipeline system. Sunoco has not disclosed the potential area of harm should an accident occur, but one study pegged it at 0.4 miles, while another found harm could extend 1.3 miles out. Click or tap to explore the pipeline.

Q:

0.4-mile zone
1.3-mile zone
<input type="radio"/> Vulnerable buildings

CHART: DANIEL SIMMONS RITCHIE / [Spotlight PA](#) • Source: Population estimates are based on a Spotlight PA analysis of 2017 data from the U.S. Census Bureau. Vulnerable building locations and estimates are based on 2020 data from the U.S. Department of

The utility commission stands by the importance of the CSI Act, with its executive director saying in 2019 that “it would not be prudent to lower the protections against public disclosure of CSI information.”

“We believe the repeal of the CSI Act will result in less protection against public disclosure of CSI and increased risk to the public from persons or entities seeking to harm the commonwealth’s infrastructure,” said the director, Seth Mendelsohn.

But former staff have said information submitted by utilities as confidential is reviewed by the commission only when it is challenged by the public. Yet many of the provisions created under the law to allow for this public challenge are not working as intended.

For example, transmittal or cover letters — meant to be a public record of when sensitive information has been concealed — have been withheld alongside CSI Act information, and those that are public are often vague and too poorly tracked to allow for meaningful public review. The utility commission has also said the amount of information marked confidential is so voluminous that it would be too burdensome to quantify the amount, as it would require staff there to count it by hand.

Kearney, the state senator from Delaware County, said part of the problem lies in the fact that pipeline operators are often huge for-profit energy companies, such as Sunoco, yet they have been given protections as if they are public utilities, such as local gas and electric companies.

That sets up a problem of elevating corporate secrets over public safety, he said.

“Just getting the emergency service people in the county up to speed with what was in the pipeline and how to deal with it was like pulling teeth,” Kearney said. “When we did get it was so redacted it was almost worthless.”

“There is a fundamental question about fairness,” he continued. “The way that our system is set up to work it is not working for a lot of people along the pipeline.”

Indeed, Pennsylvania’s landscape looked starkly different in the years leading up to the implementation of the CSI Act.

Oil and gas companies were just beginning to use a new and not yet controversial type of extraction. Fracking would not only unleash vast quantities of lucrative resources, but spur an unprecedented boom of pipeline infrastructure in order to transport the chemicals — odorless, colorless, highly volatile natural gas liquids — across the state.

The 2002 report that ultimately led to the creation of the CSI Act did not consider this type of pipeline infrastructure or the risks involved. The Public Utility Commission undertook a vulnerability assessment of the more than 7,000 utilities overseen in the state at the time, from electricity to waste to trucks and trains, but “due to time consideration,” the commission excluded liquified petroleum gas from its review.

Glen Thomas, chairman of the utility commission on Sept. 11, 2001, recalled the scramble to contact power plant owners and assess what information about the water supply or gas pipelines was easily accessible by the public.

“Information that we had at the commission was always comfortably publicly available information,” Thomas said. “Suddenly we had to relook at that and reconsider that. It was a challenge. Ultimately, it was a balancing act.”

The commission’s post-9/11 report recommended that to protect against terrorism, certain infrastructure information should be kept from public view “without compromising the principles of openness that ensure government accountability.”



Get the WHYY app!

Listen anytime, anywhere.



In a news release at the time, Thomas said it was imperative that companies, the commission, and other agencies share information and best practices to ensure the state was safe in the future.

Four years later, when the bill to create the CSI Act was introduced by Rep. Carole Rubley (R., Chester), it focused on protecting water, electric, and wastewater utilities, as well as natural gas heating. Pipelines were added to the definition of utilities in a later revised version of the bill.

“The original intent wasn’t that,” said former Rep. Tom Caltagirone (D., Berks), one of the co-sponsors of Rubley’s 2006 bill. “But with a situation like we had with 9/11, everybody was running

for the hills to protect everything that could be compromised and, lo and behold, the attorneys for these companies probably saw a loophole that they could drive a truck through.”

House legislation introduced last year by now Sen. Carolyn Comitta (D., Chester) and Rep. Chris Quinn (R., Delaware) would have abolished the CSI Act, relying solely on the Right-to-Know Law to protect security information, as it does for other agencies. Other bills have sought different reforms, or alternative forms of disclosure related to pipelines.

But little has happened.

A spokesperson for Wolf, Elizabeth Rementer, said the governor has “repeatedly called on the General Assembly for increased transparency related to pipeline safety and siting decisions.”

“While the specific language of the legislation would matter, the governor has appreciated Representative Comitta’s efforts to raise the profile of this issue, and would support more carefully tailored language in the act that promotes transparency while protecting truly sensitive information.”

A spokesperson for Casey said while confidentiality issues are generally legislated at the state level, the senator is monitoring the issue, “to determine if further action at the federal level is needed.”

“Prioritizing transparency and public safety related to pipeline projects is absolutely essential,” the spokesperson said.

In November, Wolf signed a bill sponsored by Quinn, the representative from Delaware County, requiring pipeline companies to provide emergency plans to local emergency managers upon request.

But the bill keeps the CSI Act intact, and requires non-disclosure agreements to be signed, which some emergency planners and school officials said is the same barrier that has made it difficult to use the information to inform public planning all along.

How effective can the bill be without changing the CSI Act?

“It is a great question,” Quinn said. “You have to look at legislation in general. We moved the ball in the right direction.”

“We are an energy state, and I understand people don’t want to quote-unquote kill the goose that laid the golden egg — even when I have written to the governor’s office asking for help on [pipeline] issues I got the cold shoulder,” Quinn said. “I don’t see us making any broad, drastic 180 on some of our current policies. But we can move things and improve things.”

Numerous lawmakers agreed there was an entrenched lack of political interest in discussing pipeline legislation, fueled by the influence of the oil and gas industry.

“What we don’t know does hurt us,” Muth, the senator from Montgomery County, said. “And many who lack that political courage, they don’t want to know.”

SPOTLIGHT PA

100% ESSENTIAL: [Spotlight PA](#) relies on funding from foundations and readers like you who are committed to accountability journalism that gets results. Become a member today at spotlightpa.org/donate.

Share this   

You may also like

POLITICS & POLICY

Spotlight PA

Mailed ballots, tight deadlines caused a crunch for Pa. elections officials. Now, comes the reckoning

2 weeks ago

POLITICS & POLICY

Spotlight PA

As coronavirus hits home, Pa. GOP shifts messaging but still rejects mandates

2 weeks ago

POLITICS & POLICY

Spotlight PA

Pa. counties reported no major issues with Dominion voting machines, a target of Trump and his campaign

4 weeks ago

WHYY thanks our sponsors — become a WHYY sponsor

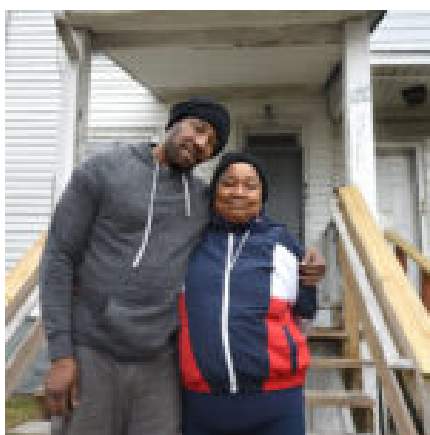
WHYY thanks our sponsors — become a WHYY sponsor

Top Stories



CORONAVIRUS PANDEMIC

Unemployment benefits expire for millions as Trump rages



CORONAVIRUS PANDEMIC

'Clean pajamas are not enough': Critiques of New Jersey jails mount amid pandemic



CORONAVIRUS PANDEMIC

Philly's Arts and Culture Task Force wants to ensure an equitable economic recovery

Want a digest of WHYY's programs, events & stories? Sign up for our weekly newsletter.

Enter your Email here

Subscribe

42%

Together we can reach 100% of WHYY's fiscal year goal

Donate →

Learn about WHYY Member benefits



Ways to Donate

WHYY connects you to your community and the world by delivering reliable information and worthwhile entertainment.

Contact Us

Philadelphia

215.351.1200

talkback@whyy.org

Delaware

302.516.7506

talkback@whyy.org

Our Programs

Billy Penn

Check, Please! Philly

Consider This

Delishtory

Eleanor Amplified

Flicks

Fresh Air

House Concert Series

Keystone Crossroads

Movers & Makers

On Stage at Curtis

PlanPhilly

The Pulse

Radio Times

Schooled

StateImpact

Things To Do

Voices in the Family

The Why

Women 100

You Oughta Know

Young Creators Studio

Inside WHYY

About

Employment

Sounding Board

Contact Us

Sponsorship

Directions

FCC Public Files

Follow Us



Sign up for a Newsletter →

© WHYY 2020 [Privacy Policy](#) [Terms of Use for WHYY.org](#)

WHYY is partnered with