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## Sorry, Access Denied: Department of Environmental Protection v. Delaware Riverkeeper Network and the Relationship Between the Public's Right to Know and an Agency's Right to Conceal

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SORRY, ACCESS DENIED: *DEPARTMENT OF ENVIRONMENTAL PROTECTION V. DELAWARE RIVERKEEPER NETWORK* AND THE RELATIONSHIP BETWEEN THE PUBLIC'S RIGHT TO KNOW AND AN AGENCY'S RIGHT TO CONCEAL

I. INTRODUCTION

With increasing awareness about environmental issues, the concerned public is asking for change.<sup>1</sup> In order to create and implement reform that better regulates the emission of toxic chemicals and pollutants, there must be accountability attributed to entities causing damage to the environment.<sup>2</sup> Public disclosure laws have recently been used to address these environmental concerns.<sup>3</sup> Through the avenue provided by public disclosure laws, accountability for environmental concerns has increased.<sup>4</sup> Private and public entities are being held responsible for the detrimental effects to the environment via these public disclosure laws.<sup>5</sup> Exposure of the details of environmental and ecological issues “will ensure both public accountability and ecological accountability.”<sup>6</sup>

Several states have enacted varying versions of Right-to-Know law, requiring the public disclosure of records and documents.<sup>7</sup>

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1. Mary H. O'Brien, *Public Accountability: What's the Alternative?*, 13 J. ENVTL. L. & LITIG. 359, 359 (1998) (noting importance of ascertaining accountability for posed environmental dangers in order to preserve Earth for future generations).

2. *See id.* (discussing relationship between accountability and preservation of environment).

3. *See id.* at 363-64 (explaining importance of laws that hold entities accountable for damage they have done to environment). For a further discussion on how Pennsylvania has used its public disclosure law to address environmental concerns raised by environmental agencies, see *infra* notes 51-101 and accompanying text.

4. *See* O'Brien, *supra* note 1, at 364 (stating that access to information contained in public records concerning environmental issues through public disclosure laws produces results in terms of accountability and future action).

5. *Id.* at 361 (noting importance of entities being held accountable for public effects of their action).

6. *Id.* at 364 (explaining connection between accountability for environmental damage and future action to address environmental concerns).

7. *See* John L. Spilsbury, *The Hazardous Chemicals Right-to-Know Act: Letting the Public Know What's Next Door*, 64 N.C. L. REV. 1330, 1331 (1986) (listing North Carolina's public disclosure statute); *see also* Sophie Winkler, *Open Records Laws: A State by State Report*, NAT'L ASS'N OF COUNTIES (Dec. 2010), <http://www.naco.org/sites/default/files/documents/Open%20Records%20Laws%20A%20State%20by%20State%20Report.pdf> (listing details of each state's open records statute). For a further discussion of Pennsylvania's public disclosure law, the Right-to-Know Law, see *infra* notes 54-68 and accompanying text.

302 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

There are, however, exceptions reserved within a given state's Right-to-Know law that exempts specific documents from public access.<sup>8</sup> For example, the Hazardous Chemicals Right to Know Act is North Carolina's enactment of a public disclosure law in reference to information concerning the release of hazardous chemicals.<sup>9</sup> The Hazardous Chemicals Right to Know Act represents "[the] balance between the public's need for hazardous chemical information and [the agency's] right to protect confidential business information."<sup>10</sup> While recognizing that the public has a right to information concerning hazardous chemicals, the Hazardous Chemicals Right to Know Act exempts certain information from disclosure.<sup>11</sup> The state may consider the utility of information concerning hazardous chemicals as a factor when deciding whether the disclosure of records is required under the Right-to-Know law.<sup>12</sup> The Right-to-Know law "allows the public to become aware of the presence of hazardous chemicals used by [the agency] and to receive health and safety information regarding such chemicals."<sup>13</sup> Using this information, "the public presumably can take more adequate measures to protect itself from health and safety problems."<sup>14</sup> The utility of this information, however, relies on the idea that the information is recent and pertinent.<sup>15</sup> Thus, given the different stages of development that investigations and studies may be in, the usefulness of information cannot always be guaranteed.<sup>16</sup>

The key to public disclosure laws is that with the public disclosure of information pertaining to human and environmental

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8. For a discussion on the exceptions encompassed in Pennsylvania's Right-to-Know Law, see *infra* notes 58-64 and accompanying text.

9. Spilsbury, *supra* note 7, at 1331 (stating specific North Carolina statute that is public disclosure law). Although this Note examines Pennsylvania's public disclosure law, specifically the Right-to-Know Law, comparison to North Carolina's public disclosure law is helpful because the fundamental aspects and policies underlying public disclosure law remain the same, regardless of variations of the law from state to state. *See id.*

10. *Id.* (noting policy motivating North Carolina's public disclosure law).

11. *See id.* at 1335 (stating ways in which mandatory public disclosure under Hazardous Chemicals Right to Know Act is limited).

12. *See id.* at 1348 (discussing importance of analyzing usefulness of information made public).

13. *Id.* (stating benefits of public disclosure as required by Hazardous Chemicals Right to Know Act).

14. Spilsbury, *supra* note 7, at 1348 (explaining how public may use information obtained under North Carolina's public disclosure law).

15. *See id.* (noting importance of ensuring information that is publicly disclosed is accurate in order to guarantee that public takes appropriate measures addressing environmental concerns).

16. For a discussion on the dangers associated with releasing raw data to the public, see *infra* notes 135-177 and accompanying text.

health, the public can “improve the efficient functioning of the [environmental-protection] market.”<sup>17</sup> By having access to information, the public can lobby for the implementation of reform through regulation that better addresses health and safety concerns.<sup>18</sup> “[Right-to-Know] laws [ ] can improve health and safety[ ] by facilitating emergency planning, avoiding accidents, and helping the government determine areas in need of additional regulation.”<sup>19</sup> Additionally, “citizens can participate on a more equal footing with regulated entities in [the process of] permitting, land use, and other political decisions.”<sup>20</sup> Public disclosure laws hinge on the utility the information provides to the public, which makes the accuracy of disclosed information essential.<sup>21</sup> The agency against whom the request for information is being made needs to ensure that the information is reliable and accurate in order to avoid the public relying on misleading information.<sup>22</sup>

This Note examines the policy behind the exceptions enacted within Pennsylvania’s public disclosure law, the Right-to-Know Law.<sup>23</sup> Staying with previous precedent, in *Department of Environmental Protection v. Delaware Riverkeeper Network (Delaware Riverkeeper Network)*,<sup>24</sup> the Commonwealth Court of Pennsylvania held that the Department of Environmental Protection (DEP) was entitled to withhold information from a requestor under one of the exceptions reserved in the Right-to-Know Law.<sup>25</sup> This Note assesses the court’s statutory interpretation when determining whether the in-

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17. Clifford Rechtschaffen, *CPR Perspective: The Public Right to Know*, CENTER FOR PROGRESSIVE REFORM, <http://www.progressivereform.org/perspright.cfm> (last visited Oct. 13, 2015) (explaining why public has right to know and importance of asserting public’s right to know when addressing environmental concerns).

18. *See id.* (describing how public can use information obtained through public disclosure laws).

19. *Id.* (listing ways public can use information to reform existing legislation and create new legislation that adequately deals with environmental concerns).

20. *Id.* (noting how public can use public disclosure laws to not only reveal what entities are doing to environment but also use information to build better relationships with entities who contribute to environmental concerns).

21. For a discussion on the importance of releasing validated data to the public when the information ultimately concerns human health and life, see *infra* notes 154-177 and accompanying text.

22. For a discussion on how the agency holding the information being requested can ensure that the public is given access to reliable information, see *infra* notes 162-170 and accompanying text.

23. For a critical analysis of the policies underlying the court’s decision in *Dep’t of Env’tl. Prot. v. Del. Riverkeeper Network*, see *infra* notes 154-177 and accompanying text.

24. 113 A.3d 869, 879 (Pa. Commw. Ct. 2015).

25. For a narrative analysis of *Del. Riverkeeper Network*, see *infra* notes 102-153 and accompanying text.

304 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

formation requested falls within one of the Right-to-Know Law's exceptions.<sup>26</sup> Using prior decisions, the Commonwealth Court of Pennsylvania defined fundamental terms of the Right-to-Know Law.<sup>27</sup> Next, this Note highlights the emphasis the court placed on the raw quality of the data to which disclosure was requested.<sup>28</sup> The raw nature of the data played a significant role in the court's decision to exempt such information from public disclosure due to the fear of unwarranted public reaction.<sup>29</sup> Finally, this Note considers the scope of the court's holding, and the broader implication of protective measures that shield agencies from public disclosure laws.<sup>30</sup>

## II. FACTS

In *Delaware Riverkeeper Network*, the Commonwealth Court of Pennsylvania decided whether under the Right-to-Know Law, the Delaware Riverkeeper Network could gain access to the records from a study conducted by the DEP.<sup>31</sup> The Delaware Riverkeeper Network sought access to sample data in a study collected by the DEP that "evaluat[es] potential radiation exposure to workers, the public, and the environment resulting from certain materials generated by oil and gas exploration and production . . . activities in Pennsylvania."<sup>32</sup> The Delaware Riverkeeper Network argued that

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26. For an analysis of the court's reasoning in *Del. Riverkeeper Network*, see *infra* notes 102-153 and accompanying text.

27. For a narrative analysis of how the court defined terms used in the Right-to-Know Law, see *infra* notes 109-127 and accompanying text.

28. For a narrative analysis of the emphasis the court placed on the public policy concern that justified an exception from public disclosure, see *infra* notes 128-153 and accompanying text.

29. For a discussion on the public policy warranting the Department of Environmental Protection's partial denial of the Delaware Riverkeeper Network's information request, see *infra* notes 128-153 and accompanying text.

30. For an analysis on the potential impact of the court's holding in *Del. Riverkeeper Network*, see *infra* notes 178-196 and accompanying text.

31. Dep't of Env'tl. Prot. v. Del. Riverkeeper Network, 113 A.3d 869, 870-71 (Pa. Commw. Ct. 2015) (stating central issue of case).

32. *Id.* at 871 (detailing what Delaware Riverkeeper Network wanted access to). The Delaware Riverkeeper Network is "a nonprofit . . . membership organization" that "provides . . . environmental advocacy, volunteer monitoring programs, stream restoration projects[,] and public education." *Who We Are – About Delaware Riverkeeper Network (DRN)*, DEL. RIVERKEEPER NETWORK, <http://www.delawareriverkeeper.org/about/whoweare.asp> (last visited Sept. 3, 2015) (describing mission of organization). Moreover, the Delaware Riverkeeper Network litigates "when necessary to ensure enforcement of environmental safety laws." *Id.*

under public disclosure requirements of the Right-to-Know Law, the organization had a right to access DEP's data sample.<sup>33</sup>

The DEP conducted a study known as the Technologically-Enhanced Naturally-Occurring Radioactive Material Study (TENORM).<sup>34</sup> The DEP executed the TENORM study through the powers granted to the DEP under the Radiation Protection Act.<sup>35</sup> Under the Radiation Protection Act, the DEP has the power to “carry out a comprehensive program of monitoring levels of radioactivity in Pennsylvania’s environment,” and “participate in or conduct studies, investigations, . . . [and] research . . . relating to control, regulation, and monitoring of radiation sources.”<sup>36</sup> “[The] data produced by the . . . radiochemistry laboratory system software requires human review and analysis to ensure that there are not erroneous assumptions made by the software that could have an alternative scientific explanation.”<sup>37</sup> Additionally, the DEP “is engaged in deliberations regarding the . . . process necessary to ensure the accuracy and validity of the radiation data for the TENORM samples.”<sup>38</sup> Incorporated in this process is a “review of the techniques employed to collect samples and conduct field surveys, [a] review of procedures followed in performing analytical test methods, and [a] review of radiation analytical results generated to verify the validity of media-specific algorithms in analytical instrument software.”<sup>39</sup> Once these reviews are conducted, the data is used “to further calculate potential radiation exposure to the workers and public, and interpret the potential exposure against acceptable national and state radiation protection standards.”<sup>40</sup>

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33. *Del. Riverkeeper Network*, 113 A.3d at 871 (discussing Delaware Riverkeeper Network’s argument as why organization was entitled to DEP’s records).

34. *Id.* (describing origin of requested study data).

35. *Id.* at 873-74 (listing DEP’s duties and powers as agency under Radiation Protection Act).

36. *Id.* at 874 (quoting Radiation Protection Act, 35 PA. CONS. STAT. ANN. §§ 7110.301(c)(5), (c)(12) (West 1984)) (stating what roles Radiation Protection Act grants to DEP).

37. *Id.* at 878 (quoting DEP’s Br. App. A (Allard’s Am. Attestation 10)) (recognizing need for verification and further analysis by experts).

38. *Del. Riverkeeper Network*, 113 A.3d at 878 (quoting DEP’s Br. App. A (Allard’s Am. Attestation 12-13 ¶ 21)) (describing DEP’s role in ensuring release of accurate data to public).

39. *Id.* (quoting DEP’s Br. App. A (Allard’s Am. Attestation 12-13 ¶ 21)) (explaining proposed review process).

40. *Id.* (quoting DEP’s Br. App. A (Allard’s Am. Attestation 12-13 ¶ 35)) (discussing process of review that produces substantiated and verified results)

306 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

The Delaware Riverkeeper Network sought to have access to certain information collected during this study.<sup>41</sup> The reason why the Delaware Riverkeeper Network wanted the information and results of the DEP's TENORM study is not noted in the case.<sup>42</sup> The DEP granted the Delaware Riverkeeper Network's request in part and denied the organization's request in part, reasoning that the information withheld was exempt from disclosure under Right-to-Know Law.<sup>43</sup> Specifically, the DEP argued that the underlying sample data was "exempt from disclosure under Section 708(b) of the [Right-to-Know Law] . . . because the data constitutes noncriminal investigate records and internal predecisional deliberations."<sup>44</sup> Moreover, the DEP argued that the sample data was considered internal agency records that may possibly be the basis for future legis-

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41. *Id.* at 871 (noting exact information Delaware Riverkeeper Network requested from DEP). The Delaware Riverkeeper Network requested the following information from "records dated from 2013 to present relating to [DEP]'s TENORM [S]tudy:"

All sample data including data acquired at specialized Marcellus Shale treatment operations and on-site water treatment and recycling units, the exact location of all sample sites (including the address, GPS coordinates, and facility name if applicable), information regarding the type of beneficial use sites that have been and will be sampled, and the production data and dates for the well pads that have been and will be sampled. The study's expected completion date is also requested along with information regarding the peer review process including information regarding the selection and composition of the peer review panel and any opportunities for public input. Additionally, the 1994 [Naturally-occurring radioactive material (NORM)] Study 'Characterization and Disposal Options for Oil Field Waste in Pennsylvania' is requested.

*Id.* (alteration in original).

42. *Id.* (stating that Delaware Riverkeeper Network simply requested information from DEP without explaining for what purpose sought-after information would be used). According to the Deputy Director of the Delaware Riverkeeper Network, Tracy Carluccio, "[t]he public has a great capacity for understanding facts and information, deep concern about the levels of radioactivity associated with shale gas development in the state since people are being exposed every day, and huge interest in what DEP is finding." *Delaware Riverkeeper Network Wins Pennsylvania Open Records Challenge – Organization Prevails in Appeal of PADEP's Refusal to Disclose Radiation Study Files*, DEL. RIVERKEEPER NETWORK (July 16, 2014), <http://www.delawareriverkeeper.org/resources/PressReleases/PR%20RTK%20NORM%20success%207.14.pdf> (explaining why information from TENORM study is important to both organization and public). This may be the reason why the organization requested the premature release of unverified data from the TENORM study from the DEP. *See id.*

43. *Del. Riverkeeper Network*, 113 A.3d at 871 (discussing DEP's response to Delaware Riverkeeper Network's request under Right-to-Know Law).

44. *Id.* at 872 (outlining why DEP withheld certain information from study in response to Delaware Riverkeeper Network's request). Additionally, the DEP argued that the "[f]ield work performed as part of this study during 2013 included 184 site visits at 114 locations and the analysis of 1,000 samples. Given the scope and nature of this the sample data collected to date is voluminous[.]" *Id.* (alteration in original) (internal quotation marks omitted) (quoting Resp't R. at 25a).

lation enacted by the DEP.<sup>45</sup> After receiving the DEP's response to its request, the Delaware Riverkeeper Network appealed the DEP's denial to the Office of Open Records, arguing that the information was improperly withheld.<sup>46</sup> The Office of Open Records held that the DEP was required to disclose all data the Delaware Riverkeeper Network requested from the TENORM study.<sup>47</sup> The Commonwealth Court of Pennsylvania looked at previous precedent to determine what information could be withheld and what information required disclosure to the public upon request under the Right-to-Know Law.<sup>48</sup> The court reviewed the DEP's reasoning behind its strong interest in withholding certain sample data from the public's knowledge before such data was authenticated and analyzed.<sup>49</sup> Consequently, the court held that the Delaware Riverkeeper Network was not entitled to access the records of the TENORM study conducted by the DEP.<sup>50</sup>

### III. BACKGROUND

The Commonwealth Court of Pennsylvania relied on both statutory interpretation of terms in the Right-to-Know Law, and public

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45. *Id.* at 874 (explaining DEP's argument as to why it wants to exclude sample data from Delaware Riverkeeper Network's request).

DEP maintains that the TENORM Study was a systematic and searching inquiry or detailed examination because it involved extensive scientific testing, data collection and analysis for the purpose of determining whether future DEP action, such as new or amended legislation, regulations, policies or technical guidance, is necessary to protect human health and the environment.

*Id.*

46. *Id.* (reviewing case's history).

47. *Id.* (discussing procedural posture of case). Upon the determination of the Office of Open Records (OOR) that the information was not exempted under the Right-to-Know Law, the DEP appealed OOR's decision to the Commonwealth Court of Pennsylvania. *See id.*

48. *Del. Riverkeeper Network*, 113 A.3d at 873-79 (noting what court has previously allowed as exemptions under Right-to-Know Law under certain definitions of "record," "investigation," "public record," and "study").

49. *Id.* at 878-79 (reviewing DEP's argument that information would eventually be released to public once data was analyzed and reviewed by experts as valid and sufficient in granting DEP's request to withhold data from Delaware Riverkeeper Network). For a further discussion on the court's public policy concerns, see *infra* notes 128-153 and accompanying text.

50. *Del. Riverkeeper Network*, 113 A.3d at 879 (holding data was exempt from disclosure under Right-to-Know Law). The DEP collected the data under a mandate of the Radiation Protection Act, which meant that the "[data] was the result of 'a systematic or searching inquiry, a detailed examination, or an official probe' in the course of DEP's official duties and, thus, constitutes a noncriminal investigation." *Id.* (quoting *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 523 (Pa. Commw. Ct. 2011)).



308 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

policy concerns in its decision in *Delaware Riverkeeper Network*.<sup>51</sup> Section A discusses the Right-to-Know Law.<sup>52</sup> Section B discusses the body of case law surrounding the Right-to-Know Law.<sup>53</sup>

#### A. Right-to-Know Law

The basis of the Delaware Riverkeeper Network's request is the Right-to-Know Law.<sup>54</sup> It is under this Pennsylvania statute that the organization, along with other members of the public, can request information from state agencies.<sup>55</sup> The Right-to-Know Law was "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions."<sup>56</sup> Additionally, the Right-to-Know Law makes information regarding the "use of public funds" accessible to the public.<sup>57</sup> Although the Right-to-Know Law favors disclosure over withholding information, the Act recognizes exceptions to disclosure.<sup>58</sup> Under Section 67.305(a) of the Right-to-Know Law, "a record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record."<sup>59</sup> Additionally, "a Commonwealth agency shall provide public records in accordance with [the Right-to-Know Law]."<sup>60</sup> This presumption, however, does not apply when "the record is exempt under section 708 [of the Right-to-Know Law]."<sup>61</sup>

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51. For a critical analysis of the court's reasoning, see *infra* notes 154-177 and accompanying text.

52. For a discussion of the Right-to-Know Law, see *infra* notes 54-68 and accompanying text.

53. For a discussion of Right-to-Know Law jurisprudence, see *infra* notes 69-101 and accompanying text.

54. See *Del. Riverkeeper Network*, 113 A.3d at 871 (noting how Delaware Riverkeeper Network sought to obtain information from DEP).

55. See *id.* at 872 (explaining utility of Right-to-Know Law). "Section 301(a) of the [Right-to-Know Law] requires that '[a] Commonwealth agency shall provide public records in accordance with [the law][ ]'." *Id.* (alteration in original) (quoting Right-to-Know Law, 65 PA. CONS. STAT. ANN. § 67.301(a) (West 2009)).

56. *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010) (noting impetus behind enacting Right-to-Know Law and why certain exceptions exist under Right-to-Know Law).

57. *Current Status, Inc. v. Hykel*, 778 A.2d 781, 784 (Pa. Commw. Ct. 2001) (citations omitted) (discussing intent behind Right-to-Know Law and how citizens may inspect how and when state is using public funds).

58. See *Del. Riverkeeper Network*, 113 A.3d at 872 (noting various exceptions under Right-to-Know Law, such as records of noncriminal investigation).

59. 65 PA. CONS. STAT. ANN. § 67.305(a) (West 2009) (noting presumption of disclosure).

60. § 67.301(a) (noting requirements of Commonwealth agencies under Right-to-Know Law).

61. § 67.305(a)(1) (listing exceptions to rule of presumption).

Section 708 of the Right-to-Know Law specifically lists information and records that are exempt from disclosure and are therefore “exempt from access by a requester under this act.”<sup>62</sup> Because of the presumption of disclosure of a public record, under Section 67.708(a) of the Right-to-Know Law, “the burden of proving that a record of a Commonwealth agency . . . is exempt from public access shall be on the Commonwealth agency . . . receiving a request by a preponderance of the evidence.”<sup>63</sup> Generally, “although the general provisions of the [Right-to-Know Law] must be liberally construed to effect its objects, the exemptions from disclosure under Section 708(b) . . . must be narrowly construed.”<sup>64</sup> Enacted in 2009, the Right-to-Know Law was not the only law to protect disclosure of records.<sup>65</sup> Prior to the Right-to-Know Law, Pennsylvania’s public disclosure law was called the Prior Law; the Prior Law was enacted in 1957 and effective until 2009, and exempted certain records from public disclosure.<sup>66</sup>

“Under the Prior Law, raw data compiled during agency information-gathering was held not to be a public record subject to disclosure, since it is unanalyzed and may or may not ultimately influence the agency’s decision or future action.”<sup>67</sup> The Commonwealth Court of Pennsylvania has evaluated the relationship between disclosure laws, such as the Right-to-Know Law, and its predecessor, the Prior Law, and agency records several times over the past three decades.<sup>68</sup>

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62. § 67.708(b) (stating procedures Commonwealth agencies must go through upon receiving request for information).

63. § 67.708(a) (highlighting importance of disclosure under Right-to-Know Law).

64. *Del. Riverkeeper Network*, 113 A.3d at 873 (quoting *Hous. Auth. of Pittsburgh v. Van Osdol*, 40 A.3d 209, 215 (Pa. Commw. Ct. 2012)) (noting difficult burden DEP bears in proving that information Delaware Riverkeeper Network requested is exempt under Right-to-Know Law).

65. *See id.* at 874 (discussing predecessor of Right-to-Know Law).

66. *Id.* (noting cases decided under Prior Law). The Prior Law was formerly enacted in 1957 in sections 66.1 through 66.9 of the Pennsylvania Statutes. 65 PA. CONS. STAT. ANN. §§ 66.1-9 (West 1957). The Right-to-Know Law, however, repealed the Prior Law in 2009. 65 PA. CONS. STAT. ANN. § 67.3102(2)(ii) (West 2009).

67. *Del. Riverkeeper Network*, 113 A.3d at 875 (explaining why raw data that was yet-to-be analyzed was exempted from disclosure under Prior Law).

68. *See Safety, Agric., Villages & Env’t (S.A.V.E.), Inc. v. Del. Valley Reg’l Planning Comm’n*, 819 A.2d 1235 (Pa. Commw. Ct. 2003) (discussing disclosure of environmental effects of proposed highway improvement project); *Aronson v. Pa. Dep’t of Labor & Indus.*, 693 A.2d 262 (Pa. Commw. Ct. 1997) (explaining effects of disclosure of prevailing wage survey conducted by Department of Labor and Industry); *Aamodt v. Commonwealth, Dep’t of Health*, 502 A.2d 776 (Pa. Commw.

310 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

## B. Right-to-Know Law Jurisprudence

In *Aronson v. Pennsylvania Department of Labor and Industry*,<sup>69</sup> decided in 1997, the Commonwealth Court of Pennsylvania considered whether the responses to a prevailing wage survey of construction employers required disclosure under the Right-to-Know Law.<sup>70</sup> The unanalyzed character of raw data played an important role in the Commonwealth Court's decision regarding the disclosure of responses to a prevailing wage survey in *Aronson*.<sup>71</sup> The data in question came from a wage survey that "requested that construction employers voluntarily report data about the wages they paid on certain types of projects . . . to assist the Deputy Secretary for Safety and Standards for the Department [of Labor and Industry] to accurately determine prevailing wages."<sup>72</sup> The Department of Labor and Industry argued that the responses to the wage survey were "not yet analyzed" and "[were] only potentially and speculatively implicated."<sup>73</sup> The Commonwealth Court of Pennsylvania agreed with the Department of Labor and Industry's argument, qualifying the raw data obtained through the wage survey as a non-public record because the data was unverified.<sup>74</sup> The responses to the wage survey "ha[d] not yet [been] analyzed . . . to set prevailing wages," a decision that would eventually "fix[ ] the rights or duties of a person."<sup>75</sup>

In *Aamodt v. Commonwealth, Department of Health*,<sup>76</sup> the Commonwealth Court of Pennsylvania continued to follow the standard

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Ct. 1986) (noting that raw data of study on effects of nuclear generating station accident on pregnancy outcomes was not subject to disclosure).

69. 693 A.2d 262 (Pa. Commw. Ct. 1997).

70. *Id.* at 263 (explaining issue court was faced with).

71. *Id.* at 265 (emphasizing how Secretary of Department of Labor and Industry has yet to analyze and to determine prevailing wage rates). The Secretary of Department of Labor and Industry is obligated to analyze the data and after analyzing, determine prevailing wage rates. *Id.* This characteristic deems the raw data as a non-public record that is not subject to disclosure. *Id.*

72. *Id.* (noting what data from survey concerned).

73. *Id.* at 265 (noting it is too premature to release results of wage survey without proper determination of wage rates and decision "fixing personal or property rights").

74. *Aronson*, 693 A.2d at 264 (explaining that because responses and data from wage survey will later be compiled and used to determine wage rates prior to survey being distributed to public, raw data collected was not a public record subject to disclosure).

75. *Id.* at 265 (discussing how data obtained from wage survey will be used to set prevailing wages, which are affixed to person's rights). The Commonwealth Court of Pennsylvania further noted that "[a] decision fixing the rights or duties of a person is just not the same as gathering information, notations, and evaluations that may or may not be utilized at some future time to fix rights or duties." *Id.*

76. 94 Pa. Commw. 54 (Pa. Commw. Ct. 1986).

of considering whether the information being sought is unverified.<sup>77</sup> Importantly, the court similarly used the premature characteristic of raw data in its decision to deny a request for information under the Right-to-Know Law.<sup>78</sup> Following a nuclear accident at the Three Mile Island Nuclear Generating Station in 1979, “the Department [of Health] instituted a study on the effects of the [ ] accident on pregnancy outcomes in the vicinity of [the accident location]. . . . for the period of 1976 through 1984.”<sup>79</sup> The plaintiff in *Aamodt* requested the results of the study, which was comprised of raw data, under the Right-to-Know Law.<sup>80</sup> The Department of Health granted the plaintiff’s request for information in part and denied the request in part.<sup>81</sup> The Department of Health specifically “offer[ed] to provide the [requester] with a statistical abstract of that data once its final report was issued.”<sup>82</sup> The court concluded that access to the raw data sought by the requestor constituted “the original surveys which the Department [of Health] had solicited from the volunteers who engaged in the [ ] pregnancy study.”<sup>83</sup> Noting that

the raw data which the Department [of Health] used in producing its study is neither a minute, order or decision affecting personal or property rights nor is it an account, voucher or contract dealing with the receipt or disbursement of funds within the statutory definition of a “public record” subject to disclosure,

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77. *Id.* at 56 (deciding that Department of Health’s refusal to release information requested was appropriate).

78. *Id.* at 59 (holding that investigation products and field investigation notes are exempt from disclosure under Right-to-Know Law). These products and notes are not considered public records under prior precedent of the Commonwealth Court of Pennsylvania. *Id.*

79. *Id.* at 56 (explaining why study of accident’s effects was implemented).

80. *Id.* (outlining plaintiff’s argument as to what he wanted to gain access to specifically).

81. *Aamodt*, 94 Pa. Commw. at 56 (explaining procedural posture of case).

82. *Id.* (highlighting that Department of Health did not fully deny plaintiff’s request for information). Despite the Department of Health’s offer to provide data once it was analyzed and an official report was issued, the plaintiff sued the Department of Health for its refusal to provide him with the raw data of the study on the effects of the nuclear generating station accident on pregnancy outcomes. *Id.*

83. *Id.* (stating that plaintiff never specified what he meant when he stated that he was requesting ‘raw data’).

312 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

the court exempted such raw data from being released to the public.<sup>84</sup> Particularly, the court relied on the Right-to-Know Law exception that exempts public records “of papers the publication of which would disclose the institution, progress[,] or result of an investigation undertaken by an agency in the performance of its official duties.”<sup>85</sup> The court in *Aadmodt* thus held that the raw data the plaintiff sought was “outside of the [Right-to-Know Law]’s definition of public record.”<sup>86</sup>

The premature nature of raw data is not the only characteristic that the Commonwealth Court of Pennsylvania has considered when members of the public request information and the agencies deny the request.<sup>87</sup> In *Safety, Agriculture, Villages and Environment (S.A.V.E.), Inc. v. Delaware Valley Regional Planning Commission*,<sup>88</sup> the Pennsylvania Commonwealth Court also reviewed whether the agency from which the information is requested is “an agency” under the Right-to-Know Act.<sup>89</sup> The court found that the Delaware Valley Regional Planning Commission (Commission) was not an agency as defined by the Right-to-Know Law, and thus, the Commission was not required to disclose its records to the public upon re-

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84. *Id.* at 58 (internal quotation marks omitted) (explaining how all these factors make raw data non-public record that is subject to disclosure under Right-to-Know Law).

85. *Id.* (citing *Wiley v. Woods*, 393 Pa. 341, 347-48 (Pa. 1958)) (explaining why Department of Health staff member’s notes on survey in connection with rezoning plan were not public records subject to disclosure in *Wiley*, which thus does not entitle plaintiff in this case to data of effects of nuclear generating station accident on pregnancy outcomes). Furthermore, the court concluded that the participants in the study would have their identity and confidentiality compromised if the raw data from the study was disclosed to the public. *Id.* at 58-59.

86. *Aadmodt*, 94 Pa. Commw. at 58 (internal quotation marks omitted) (concluding that because raw data is not a public record, it is not subject to mandated disclosure under Right-to-Know Act).

87. *See id.* at 58-59 (noting importance of maintaining confidentiality through nondisclosure when raw data is obtained from human subjects in a study).

88. 819 A.2d 1235 (Pa. Commw. Ct. 2003).

89. *See id.* at 1241 (Pa. Commw. Ct. 2003) (discussing scope of the term ‘agency’ under Right-to-Know Law in order to determine if disclosure is required from entity that is being asked procure documents). According to the Right-to-Know Law, an agency is:

Any department, board or commission of the executive branch of the Commonwealth, any political subdivision of the Commonwealth, the Pennsylvania Turnpike Commission, or any State or municipal authority or similar organization created by or pursuant to a statute which declares in substance that such organization performs or has its purpose the performance of an essential governmental function.

*Id.* (emphasis omitted) (citing Right-to-Know Law, 65 PA. CONS. STAT. ANN. § 66.1(1) (West 2009)).

quest.<sup>90</sup> The requester in *Delaware Valley Regional Planning Commission* was an advocacy group “concerned with the impact of the proposed highway improvement project along the ten-mile stretch of the Pennsylvania State Highway . . . on the environment and agriculture.”<sup>91</sup> The group requested the disclosure of multiple documents regarding the Pennsylvania State Highway improvement project, including “all underlying data and assumptions used as input into the models[,] the data for the land use study for the [highway] corridor[,] . . . [and] accident data and reports for the [highway].”<sup>92</sup> Similar to the requests in *Delaware Riverkeeper Network*, *Aronson*, and *Aamodt*, the request in *Delaware Valley Regional Planning Commission* was denied.<sup>93</sup> The court agreed with the Commission’s decision to deny the plaintiff’s request for information because the Commission did not constitute an agency as defined by the Right-to-Know Law and, consequently, the Commission’s documents were not subject to disclosure.<sup>94</sup> The Commission “acts only in an advisory capacity and does not have authority to make ultimate decisions on any proposed projects.”<sup>95</sup> Additionally, “while the Commission provides important planning services to the Commonwealth and the participating counties, those services are neither constitutionally mandated nor necessary for the survival of the Commonwealth.”<sup>96</sup>

Notably, the court acknowledged the raw and premature quality of the data collected during the proposed highway improvement study.<sup>97</sup> After the collected data is compiled and analyzed, “the fact that the requested documents gathered by the Commission may be later used by the state agencies and possibly have some impact on the [state agencies’] ultimate decisions regarding the proposed

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90. *Id.* at 1243 (holding that Delaware Valley Regional Planning Commission rightfully and appropriately denied organization’s request of internal documents).

91. *Id.* at 1239 (noting who requester is, which may illuminate possible interest in obtaining project documents from Delaware Valley Regional Planning Commission).

92. *Id.* at 1237 (detailing specific request of documents made by Safety, Agriculture, Villages and Environment, Inc.)

93. *Del. Valley Reg’l Planning Comm’n*, 819 A.2d at 1237 (recounting procedural facts of case).

94. *Id.* at 1242 (addressing capacity of Delaware Valley Regional Planning Commission as agency under Right-to-Know Law).

95. *Id.* (explaining why Delaware Valley Regional Planning Commission’s proposed highway improvement project documents are not subject to disclosure under Right-to-Know Law).

96. *Id.* (reasoning that not every organization that performs some governmental function is ‘an agency’ under Right-to-Know Law).

97. *Id.* (noting how this characteristic plays role in making such data not public record that should be disclosed).

314 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

[highway project] is insufficient to establish that those documents” are required to be disclosed.<sup>98</sup> As evidenced by the court’s holdings in *Delaware Riverkeeper Network*, *Aronson*, and *Delaware Regional Valley Planning Commission*, the incentive to release raw data decreases when the results of the study that may later provide the basis for a published final report would be accessible by the public within a certain period.<sup>99</sup> The data being raw and premature illuminates the court’s prevalent concern with the potential misuse of unanalyzed data that is devoid of expert opinions and evaluation.<sup>100</sup> The Commonwealth Court of Pennsylvania has used this characteristic, among other factors, in limiting the public disclosure of information obtained by a study or project relating to environmental concerns.<sup>101</sup>

#### IV. NARRATIVE ANALYSIS

The issue before the Commonwealth Court of Pennsylvania in *Delaware Riverkeeper Network* was whether the DEP could properly withhold the Delaware Riverkeeper Network’s request for information from the TENORM study under Pennsylvania’s Right-to-Know Law.<sup>102</sup> The Commonwealth Court of Pennsylvania needed to determine specifically whether the sample data was exempt from public disclosure under Section 708(b)(17) of the Right-to-Know Law as records of a noncriminal investigation.<sup>103</sup> In its analysis, the court reviewed the Right-to-Know Law’s definitions of a “record,” a “public record,” an “investigation,” and an “inquiry” in order to de-

98. *Del. Valley Reg’l Planning Comm’n*, 819 A.2d at 1242 (stating that potential value results of study may hold does not warrant disclosure of such results in early phases, prior to expert analysis).

99. *Id.* (describing how disclosure in form of an official agency decision of information stemming from study’s data makes information into public record).

100. *See Del. Riverkeeper Network*, 113 A.3d at 879 (highlighting that results of TENORM study will be included in DEP’s final report); *Del. Valley Reg’l Planning Comm’n*, 819 A.2d at 1242 (noting possibility of official decision of state agency using results of study); *Aronson*, 693 A.2d at 265 (describing process in which results from study will be used to determine wage rates).

101. *See Del. Riverkeeper Network*, 113 A.3d at 879 (holding TENORM study results did not have to be released to public).

The premature release of DEP’s TENORM unvalidated [sic] and preliminary data to the public prior to the . . . completion of . . . internal deliberations, with respect to the quality of data and the potential effects to human health and the environment, will result in erroneous and/or misleading characterization of the levels and effects of . . . TENORM associated with [oil and gas] exploration and production.  
*Id.* at 879 (quoting DEP’s Br. App. A (Allard’s Am. Attestation 12-13 ¶ 40)).

102. *Del. Riverkeeper Network*, 113 A.3d at 871 (outlining issue before Commonwealth Court of Pennsylvania).

103. *Id.* (noting specific exemption under Right-to-Know Law).

termine whether TENORM's sample data was exempt from public disclosure.<sup>104</sup> Remaining consistent with previous case law regarding exemptions warranting the nondisclosure of otherwise public documents, the Commonwealth Court of Pennsylvania found that the results from the TENORM study were exempt due to the raw quality of the TENORM's sample data.<sup>105</sup>

The court "narrowly constru[ed] [the] application of Section 708(b)(17) of the [Right-to-Know Law] to the requested sampling data."<sup>106</sup> By narrowly construing the application of one of the exemptions granting nondisclosure of public records, the court maintained its commitment to affording a presumption of disclosure to requests under the Right-to-Know Law.<sup>107</sup> Ultimately, "the DEP met its burden of proving by a preponderance of the evidence that the data [was] exempt from disclosure and, therefore, [ ] not a public record."<sup>108</sup>

#### A. Exemption under Right-to-Know Law: Records of a Noncriminal Investigation

The Commonwealth Court of Pennsylvania considered the sample data from the TENORM study as a record of a noncriminal investigation.<sup>109</sup> If the sample data is a record of a noncriminal investigation, as the court concluded, then it is not considered a public record that warrants disclosure upon request under the Right-to-Know Law.<sup>110</sup> The purpose of the Right-to-Know Law is to open government action to public scrutiny and criticism.<sup>111</sup> The

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104. *Id.* at 873 (looking at Right-to-Know Law precedent and definitions to determine whether sample data was exempt from public disclosure).

105. *Id.* at 879 (noting holding of case). The court in *Del. Riverkeeper Network* looked at multiple cases under the Right-to-Know Law and the Prior Law. *Id.* For a discussion on previous precedent under Right-to-Know Law and the Prior Law, see *supra* notes 69-101 and accompanying text.

106. *Del. Riverkeeper Network*, 113 A.3d at 879 (highlighting scope of application of exemptions under Right-to-Know Law in this case).

107. *Id.* at 872-73 (underscoring importance of Right-to-Know Law and liberal construction of it in order "to promote [public] access to official government information").

108. *Id.* at 873 (noting burden of proof required under Right-to-Know Law).

109. *Id.* (discussing exemption sample data that was part of Right-to-Know Law).

110. *Id.* (listing record of noncriminal investigation as exemption from public access).

111. *Del. Riverkeeper Network*, 113 A.3d at 872 (citing *Office of Governor v. Raffle*, 65 A.3d 1105, 1107 n.1 (Pa. Commw. Ct. 2013)) (explaining policy behind Right-to-Know Law).



316 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

law has therefore been afforded a presumption of disclosure.<sup>112</sup> When enforcing the required disclosure under the Right-to-Know Law, “[the] preliminary, threshold issue that must be decided before reaching the question of whether any exceptions under Section 708 of the [Right-to-Know Law] apply” is “[w]hether [the] sought after information constitutes a ‘public record’.”<sup>113</sup> After the party from whom the information is being requested determines this threshold matter, the information is considered under the exceptions available under the Right-to-Know Law.<sup>114</sup>

In *Delaware Riverkeeper Network*, the Commonwealth Court of Pennsylvania first determined whether the sample data from the DEP’s TENORM study was a record.<sup>115</sup> The court reasoned that this threshold matter was an essential step before considering whether the sample data was a public record subject to disclosure under the Right-to-Know Law.<sup>116</sup> The court found that “[t]here [was] no dispute in this case that the sampling data [the Delaware Riverkeeper Network] requested from [the] DEP was created, received and/or retained in connection with [the] DEP’s TENORM [s]tudy activity and, therefore, constitutes records.”<sup>117</sup> Upon determining that the sample data was a record, the court considered whether the sample data was exempt from disclosure as a record of a noncriminal investigation under Section 708(b)(17) of the Right-to-Know Law.<sup>118</sup> Section 708(b)(17)

exempts from public access . . . [a] record of an agency relating to a noncriminal investigation including . . . (ii) [i]nvestigative materials, notes, correspondence and reports[,] . . . (vi) [a] record that, if disclosed, would do any

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112. *Id.* at 872-73 (emphasizing liberal interpretation of disclosure under Right-to-Know Law).

113. *Id.* at 872 (listing first step in determining what disclosure is required under Right-to-Know Law).

114. *Id.* (noting that exemptions under Right-to-Know Law must be interpreted narrowly). Furthermore, in conformity with the presumption of disclosure required under the Right-to-Know Law, the exemptions from disclosure are applied conservatively: “although the general provisions of the [Right-to-Know Law] must be liberally construed to effect its objects, the exemptions from disclosure under Section 708(b) of the [law] must be narrowly construed.” *Id.* at 873 (citing *Hous. Auth. of Pittsburgh v. Van Osdol*, 40 A.3d 209, 215 (Pa. Commw. Ct. 2012)).

115. *Id.* (stating that sample data constitutes records).

116. *Del. Riverkeeper Network*, 113 A.3d at 873 (citing *Office of Governor v. Bari*, 20 A.3d 634, 640 (Pa. Commw. Ct. 2011)) (determining that in order for information to be public record, it must be recorded).

117. *Id.* (noting issue not present in this case).

118. *Id.* (discussing exemption under Section 708(b)(17) of Right-to-Know Law in order to see if application of exemption is appropriate in this case).

of the following: (A) [r]eveal the institution, progress or result of an agency investigation . . . .<sup>119</sup>

In conformity with prior precedent, the Commonwealth Court of Pennsylvania defined the term “investigation” as “a systematic or searching inquiry, a detailed examination, or an official probe.”<sup>120</sup> It added that “in order for an agency to conduct any type of investigation, the investigation would necessarily be a part of the agency’s official duties.”<sup>121</sup> As a result, the court identified the following two important tests to determine whether the sample data was exempt from disclosure under Section 708(b)(17) of the Right-to-Know Law: (1) whether the sample data from the TENORM study was a part of an investigation, as defined by the court; and (2) whether the investigation was a part of the agency’s official duties.<sup>122</sup> Applying the court’s definition of investigation to the sample data resulting from the DEP’s TENORM study, the Commonwealth Court found that the sample data was exempt from public disclosure as a record of noncriminal investigation under the Right-to-Know Law.<sup>123</sup>

The DEP conducted the TENORM study in compliance with the mandate of the Radiation Protection Act.<sup>124</sup> The Commonwealth Court reasoned that the Radiation Protection Act’s mandate makes the sample data collected during the TENORM study the result of “a systematic or searching inquiry, a detailed examination,

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119. 65 PA. CONS. STAT. ANN. § 67.708(b)(17) (West 2009) (listing what is exempt from public disclosure).

120. *Del. Riverkeeper Network*, 113 A.3d at 873 (emphasis omitted) (quoting *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 523 (Pa. Commw. Ct. 2011)) (defining term ‘investigation’ within application of Right-to-Know Law).

121. *Id.* (emphasis omitted) (quoting *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 523 (Pa. Commw. Ct. 2011)) (describing required context of investigation in order to be exempt from disclosure).

122. *Id.* (discussing what records of investigation would fall into exemption under Right-to-Know Law and what records would not).

123. *Id.* at 879 (discussing holding of case).

124. *Id.* at 873-74 (noting mandate under Radiation Protection Act requiring DEP to carry out TENORM study). Specifically, Section 301(c) of the Radiation Protection Act states:

[The] DEP shall have the power and its duties shall be to: . . . (2) [d]evelop and conduct comprehensive programs for the registration, licensing, control, management, regulation and inspection of radiation sources and radiation source users[,] . . . (5) [c]arry out a comprehensive program of monitoring levels of radioactivity in Pennsylvania’s environment . . . (12) [e]ncourage, participate in or conduct studies, investigations, training, research, remedial actions and demonstrations relation to control, regulation and monitoring of radiation sources.

*Id.* at 874 (emphasis omitted) (citing 35 PA. CONS. STAT. ANN. § 7110.301(c) (West 1984)).

318 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

or an official probe.”<sup>125</sup> The court further noted that the DEP had undertaken the TENORM investigation in the course of its official duties under the Radiation Protection Act.<sup>126</sup> By narrowly construing the authority exempting an agency’s record of noncriminal investigation from public disclosure, the court could place the sample data, which resulted from the DEP’s ongoing TENORM study, within that exception.<sup>127</sup>

#### B. Raw Quality of Sample Data

In order to determine whether the sample from the DEP’s TENORM study qualified as a record of noncriminal investigation under Section 708(b)(17) of the Right-to-Know Law, and therefore was exempt from public access, the court looked at past Pennsylvania jurisprudence regarding whether investigative records of an agency fell under the records of a noncriminal investigation exemption.<sup>128</sup> In addition to interpreting the terms used in the Right-to-Know Law and its exemptions, the Commonwealth Court of Pennsylvania considered public policy concerns relating to the potential release of raw and unsubstantiated data to the public.<sup>129</sup> The court ultimately decided that public policy favored the exemption of the sample data from public access.<sup>130</sup>

The DEP argued that the TENORM study not only was a part of a noncriminal investigation, but also that “it involved extensive scientific testing, data collection and analysis for the purpose of determining whether future DEP action, such as new or amended legislation, regulations, policies or technical guidance, is necessary to protect human health and the environment.”<sup>131</sup> For these two rea-

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125. *Del. Riverkeeper Network*, 113 A.3d at 873 (emphasis omitted) (quoting *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 523 (Pa. Commw. Ct. 2011)) (internal quotation marks omitted) (applying Radiation Protection Act’s mandate to sample data collected under DEP’s TENORM study).

126. *Id.* (emphasis omitted) (quoting *Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 523 (Pa. Commw. Ct. 2011)) (internal quotation marks omitted) (noting that investigation was undertaken in appropriate context and warrants exemption from public disclosure).

127. *Id.* at 879 (noting holding of case).

128. *Id.* at 874-76 (discussing prior decisions of Commonwealth Court of Pennsylvania). For a discussion on previous precedent under Right-to-Know Law and the Prior Law, see *supra* notes 69-101 and accompanying text.

129. *Del. Riverkeeper Network*, 113 A.3d at 877-78 (determining whether public policy concerns outweighed presumption of disclosure under Right-to-Know Law).

130. *Id.* at 879 (acknowledging that enough public policy concerns exist to warrant exemption of sample data from public disclosure).

131. *Id.* at 874 (explaining DEP’s public policy argument, in addition to DEP’s argument that sample data fell into statutory exemption under Right-to-Know Law).

sons, under the DEP's argument, the sample data from the TENORM study should be exempted from public disclosure.<sup>132</sup>

The Commonwealth Court of Pennsylvania has previously considered public policy concerns when determining whether it should grant access to agency records.<sup>133</sup> Relying on its decisions in *Delaware Valley Regional Planning Commission*, *Aronson*, and *Aamodt*, the court held that "raw data compiled during agency information-gathering was held not to be a public record subject to disclosure . . . [because] it is unanalyzed and may or may not ultimately influence the agency's decision or future action."<sup>134</sup>

The public policy concerns the Commonwealth Court considered included whether requiring the agency to disclose results of a particular investigation could lead to a compromise in the protection of witnesses who were participating in the investigation.<sup>135</sup> This potential compromise, in turn, could result in individuals "being less likely to cooperate and provide relevant information out of fear of retaliation or public embarrassment."<sup>136</sup> Furthermore, "if individuals are less likely to cooperate in the [ ] investigation [ ] process, then the [ ] investigation [ ] will no longer be an effective means of" monitoring radiation exposure to individuals in certain areas of Pennsylvania.<sup>137</sup> Attempting to dispute this public policy concern, the Delaware Riverkeeper Network argued that the "protection of witnesses is not a concern in the instant case because the information gathered through [the] DEP's TENORM [s]tudy is purely factual and is gathered from inanimate objects via radiological and other instruments."<sup>138</sup> The Commonwealth Court of Penn-

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132. *Id.* (noting DEP's overall argument for denying Delaware Riverkeeper Network's information request).

133. For a discussion of cases where the Commonwealth Court of Pennsylvania considered public policy concerns under the Right-to-Know Law, see *supra* notes 69-101 and accompanying text.

134. *Del. Riverkeeper Network*, 113 A.3d at 875 (describing potential dangers associated with premature release of raw data).

135. *See id.* (describing concern of agency when releasing investigative records).

136. *Id.* at 877 (quoting *Pa. Util. Comm'n v. Gilbert*, 40 A.3d 755, 761 (Pa. Commw. Ct. 2012)) (describing why agency may be hesitant when releasing investigative records to public).

137. *Id.* (quoting *Pa. Util. Comm'n v. Gilbert*, 40 A.3d 755, 761 (Pa. Commw. Ct. 2012)) (noting ramification of not protecting individuals who partake in investigation).

138. *Del. Riverkeeper Network*, 113 A.3d at 877-78 (citing Delaware Riverkeeper Network Br. 25) (explaining Delaware Riverkeeper Network's response to agency's concern regarding release of investigative records).

320 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

sylvania responded, however, by finding “this Court’s precedent instructive” in regard to this public policy concern.<sup>139</sup>

The court similarly looked at whether maintaining the transparency of the sample data under the presumption of disclosure under the Right-to-Know Law would serve the law’s purpose, such as discouraging potential abuse of power through open and public criticism.<sup>140</sup> The Commonwealth Court of Pennsylvania placed significant value on the raw quality of the data.<sup>141</sup> For example, the person responsible for “directing the [DEP’s] implementation of a statewide radiation protection program” explained the importance of releasing already verified and substantiated data.<sup>142</sup> Professionals trained in analyzing the type of data generated from the TENORM study assess the data and develop appropriate advice regarding the risks associated with exposure to radioactivity and future measures that can be taken.<sup>143</sup> The raw sample data would remain unverified and unsubstantiated without these methods of review, and would therefore not reveal the real implications of radiation exposure to individuals located in certain areas of Pennsylvania.<sup>144</sup>

Further, the Commonwealth Court of Pennsylvania reasoned that the release of unanalyzed raw data would prove to be detrimental to the DEP’s future legislative action.<sup>145</sup> “Depending on TENORM’s impact to human health or the environment, the [s]tudy will determine future DEP action regarding its handling.”<sup>146</sup> Using the substantiated and verified results of the study, the DEP may rec-

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139. *Id.* at 878 (acknowledging importance and legitimacy of agency’s concern, regardless of nature of investigation).

140. *Id.* (citing DEP’s Br. App. A (Allard’s Am. Attestation)) (considering other policy concerns).

141. *Id.* (citing DEP’s Br. App. A (Allard’s Am. Attestation)) (highlighting experts have yet to verify data).

142. *Id.* (quoting DEP’s Br. App. A (Allard’s Am. Attestation 1.6)) (using this individual’s explanation as basis for court’s decision).

143. *Del. Riverkeeper Network*, 113 A.3d at 878 (citing DEP’s Br. App. A (Allard’s Am. Attestation)) (discussing process data from TENORM study goes through before release to public). For a further discussion on the review process of the data collected from the TENORM study, see *supra* notes 34-40 and accompanying text.

144. *See Del. Riverkeeper Network*, 113 A.3d at 878 (citing DEP’s Br. App. A (Allard’s Am. Attestation)) (noting disclosure of raw data may possibly result in misleading information).

145. *See id.* (deciding public policy concern warranted DEP’s denial of Delaware Riverkeeper Network’s information request).

146. *Id.* at 879 (quoting DEP’s Br. App. A (Allard’s Am. Attestation 12-13 ¶ 39)) (highlighting how results of TENORM study implicate larger plans for DEP).

ommend “new or amended legislation, . . . regulations, . . . technical guidance, or . . . DEP policies.”<sup>147</sup> Consequently,

[t]he premature release of [the] DEP’s TENORM invalidated and preliminary data to the public prior to the . . . completion of [the DEP’s] internal deliberations, with respect to the quality of data and the potential effects of human health and the environment, will result in erroneous and/or misleading characterization of the levels and effects of . . . [technologically-enhanced naturally-occurring radioactive material] associated with [oil and gas] exploration and production currently under investigation because such data does not reflect the final decision of [the] DEP.<sup>148</sup>

Thus, the release of unverified raw data, which is what the Delaware Riverkeeper Network requested from the DEP, could potentially become the source of unsubstantiated allegations and accusations.<sup>149</sup>

The Commonwealth Court of Pennsylvania further emphasized that after the internal deliberations and review process, the DEP would release materials to the public detailing the data found during the TENORM study.<sup>150</sup> According to the person responsible for overseeing the DEP’s implementation of the Radiation Protection Act, “[t]he [detailed] report, which is expected to be issued by the end of the year, is [the] DEP’s final decisional record.”<sup>151</sup> Given that the public would be able to access the data after the expert analysis of the raw data collected during the TENORM study, the court found the release of raw data to be unnecessary.<sup>152</sup> The court thus concluded by stating both public policy concerns and the exemptions under Section 708(b)(17) of the Right-to-

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147. *Id.* (quoting DEP’s Br. App. A (Allard’s Am. Attestation 12-13 ¶ 39)) (listing future DEP action that TENORM study may have significant effects on).

148. *Id.* at 879 (quoting DEP’s Br. App. A (Allard’s Am. Attestation 12-13 ¶ 40)) (describing real concerns DEP has with releasing unverified data to public via Delaware Riverkeeper Network’s information request under Right-to-Know Law).

149. *See Del. Riverkeeper Network*, 113 A.3d at 879 (noting disclosure of unverified data may result in public incorrectly characterizing effects of radiation in certain parts of Pennsylvania).

150. *Id.* at 878 (quoting DEP’s Br. App. A (Allard’s Am. Attestation)) (describing what DEP plans to do with raw data from TENORM study).

151. *See id.* (quoting DEP’s Br. App. A (Allard’s Am. Attestation 12-13 ¶ 37)) (relying partly on assurance of accessible published report in court’s decision).

152. *Id.* at 879 (reviewing holding of case).

322 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

Know Law warrant the denial of the Delaware Riverkeeper Network's request for the raw data of the DEP's TENORM study.<sup>153</sup>

## V. CRITICAL ANALYSIS

In agreeing with a consistent line of the Commonwealth Court of Pennsylvania case law, the *Delaware Riverkeeper Network* court reasonably decided that the DEP properly denied the Delaware Riverkeeper Network's information request under the Right-to-Know Law and could withhold the sample data from its TENORM study.<sup>154</sup> The court's decision was based on considerations of important public policy concerns, as well as statutory interpretation in order to determine whether the sample data was exempt from public disclosure.<sup>155</sup>

In rejecting the Delaware Riverkeeper Network's argument that there is no concern over the protection and cooperation of participants in the TENORM study if the raw data is released, the court properly relied on existing Right-to-Know Law jurisprudence that contemplated relevant policy concerns.<sup>156</sup> Despite the information for the TENORM study being "purely factual and [ ] gathered from inanimate objects," the court remained internally consistent by considering this as a public policy concern.<sup>157</sup> Although the information collected during the TENORM study is not entirely collected from individuals, the possibility of disclosing the identity of surveyors and field workers warrants the court's public policy concern regarding protection of individuals engaged in the TENORM study.<sup>158</sup> In order to adequately protect these individu-

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153. *Id.* (concluding DEP rightfully denied Delaware Riverkeeper Network's information request).

154. *Del. Riverkeeper Network*, 113 A.3d at 879 (noting exemption sample data fell under Right-to-Know Law). For a discussion of cases the court considered in *Del. Riverkeeper Network* to determine whether the DEP appropriately withheld the sample data from its response to the Delaware Riverkeeper Network's information request, see *supra* notes 69-101 and accompanying text.

155. For a discussion of the test the Court employed when determining whether the sample data from the TENORM study was exempt from public access, see *supra* notes 102-153 and accompanying text.

156. For a discussion of public policy concerns the court considered in *Del. Riverkeeper Network*, see *supra* notes 128-153 and accompanying text.

157. *Del. Riverkeeper Network*, 113 A.3d at 878 (quoting Delaware Riverkeeper Network's Br. 25) (emphasizing agency's legitimate concern over releasing raw data). For a further discussion of cases where the Commonwealth Court of Pennsylvania considered public policy concerns under the Right-to-Know Law, see *supra* notes 69-101 and accompanying text.

158. For a discussion of the agency's concern that releasing investigative records would compromise both the identity of the participants and the integrity of the investigation, see *supra* notes 128-153 and accompanying text.

als, regardless of the frequency of their participation in the study, the DEP must analyze the raw data containing personal information such as name and location, and omit it from the final published report.<sup>159</sup> This, as the Commonwealth Court of Pennsylvania concluded, would ensure that the individuals who participated in the study are protected from public critique.<sup>160</sup> Additionally, ensuring the protection of their identity would facilitate cooperation in obtaining wholesome results during the TENORM study.<sup>161</sup>

Similarly, the court in *Delaware Riverkeeper Network* highlighted the fact that the results of the TENORM study would eventually be published and released to the public in the form of an official report.<sup>162</sup> With respect to the Radiation Protection Act's mandate, the DEP is required to "prepare a report on environmental radiation levels, as determined by the monitoring program, on at least an annual basis."<sup>163</sup> Under the Radiation Protection Act,

[t]he report shall . . . contain a description and analysis of any emergency responses or other actions taken by [the DEP] . . . and any other information about environmental radiation or radiation emergencies which [the DEP] deems to be of sufficient importance to call to the attention of . . . the citizens of the Commonwealth [of Pennsylvania].<sup>164</sup>

Because the results of the study would be published in an official report and the public would be given access to that report, the disclosure of unsubstantiated and unverified data is unwarranted.<sup>165</sup> Releasing raw data to the public, when the data has yet-to-be verified by experts in order to extract its substantive value,

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159. For a discussion of appropriately verifying raw data before its public disclosure, see *supra* notes 150-153 and accompanying text.

160. For a discussion addressing this public policy concern, see *supra* notes 135-139 and accompanying text.

161. For a discussion of the importance of maintaining the identity of the participants in the investigation in order to ensure their participation, see *supra* notes 135-139 and accompanying text.

162. *Del. Riverkeeper Network*, 113 A.3d at 878 (quoting DEP's Br. App. A (Allard's Am. Attestation)) (indicating final report would be made available to public at end of this year).

163. *Id.* at 874 (citing 35 PA. CONS. STAT. ANN. § 7110.301(c) (West 1984)) (describing DEP's role under Radiation Protection Act's mandate).

164. *Id.* (citing 35 PA. CONS. STAT. ANN. § 7110.301(c) (West 1984)) (explaining details report must contain, including actions DEP will pursue in response to results of TENORM study).

165. For a discussion on why the publishing of the report would alleviate public policy concerns, see *supra* notes 150-153 & 162-170 and accompanying text.



324 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

may provoke premature responses and action from the public.<sup>166</sup> For example, if the sample data listed toxic radiation exposure levels incorrectly due to a fault in the algorithm used in the study, and that data, before being verified and substantiated by experts, was released, there may be a public outcry and a dramatic response to such alarming, yet deceiving, news.<sup>167</sup> Additionally, organizations that aim to protect the environment through litigation, such as the Delaware Riverkeeper Network, may use unverified and raw data to jump to conclusions about the DEP's role in protecting human health and the environment.<sup>168</sup> This may lead to frivolous litigation prefaced on unsubstantiated data.<sup>169</sup> By concluding that the raw quality of the data from the TENORM study warranted its exemption under the Right-to-Know Law, the court appropriately considered the possibility of unwarranted future litigation and the overcrowding of court dockets.<sup>170</sup>

Furthermore, the *Delaware Riverkeeper Network* court additionally relied both on the Right-to-Know Law precedent and the Prior Law precedent.<sup>171</sup> The significance of relying on Prior Law precedent, in addition to the precedent of the contested law, highlights the importance of public policy concerns underlying both statutes.<sup>172</sup> The Prior Law was repealed and replaced by the Right-to-Know Law.<sup>173</sup> Its replacement, however, does not undermine the public policy concerns considered under the Prior Law, and instead highlights that the same public policy concerns are present under the

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166. For a discussion of the risks associated with releasing raw and unverified data, see *supra* notes 128-177 and accompanying text.

167. For a discussion of public policy concerns regarding releasing an agency's investigative records, see *supra* notes 128-153 and accompanying text.

168. For a discussion of how public disclosure of raw data may lead to the incorrect characterization of radiation exposure levels, see *supra* notes 162-170 and accompanying text.

169. For a discussion of the relationship between the release of raw data and mischaracterization of the results of the TENORM study, see *supra* notes 162-170 and accompanying text.

170. See *Del. Riverkeeper Network*, 113 A.3d at 879 (describing holding of case). For a further discussion on the public policy concerns the court in *Del. Riverkeeper Network* considered, see *supra* notes 128-153 and accompanying text.

171. For a discussion of previous precedent under Right-to-Know Law and the Prior Law, see *supra* notes 69-101 and accompanying text.

172. For a discussion of the public policy concerns underlying the Right-to-Know Law and the Prior Law, see *supra* notes 54-61 and accompanying text.

173. See 65 PA. CONS. STAT. ANN. §§ 66.1-66.9 (West 1957) (codifying Prior Law). The Right-to-Know Law, however, repealed the Prior Law in 2009. 65 PA. CONS. STAT. ANN. § 67.3702(2)(ii) (West 2009).

current law.<sup>174</sup> In using Prior Law precedent, the court acknowledged that concerns over unwarranted claims based on unverified and raw data exist both under the Prior Law and under the Right-to-Know Law.<sup>175</sup> The court's concern is valid given that the study evaluates the serious risk of radiation exposure to not only the environment, but also human health.<sup>176</sup> Given the seriousness of this subject matter, the release of raw data that has yet-to-be verified and analyzed may enflame the public and be the source of frivolous litigation.<sup>177</sup>

## VI. IMPACT

The Commonwealth Court of Pennsylvania adhered to its previous precedent concerning public disclosure law, in conformity with cases decided under the previous public disclosure statute, the Prior Law, and under the current public disclosure statute, the Right-to-Know Law.<sup>178</sup> The court noted that although other courts have interpreted the terms of public disclosure law in either a narrower or broader scope, the court would adhere to prior precedent and would follow the definitions it had previously put forth.<sup>179</sup> The court's explicitness and motivation to keep with prior precedent sets the parameters of the court's argument and suggests future implications of this decision.<sup>180</sup> By applying the Right-to-Know Law and balancing policy concerns that are specific to the set of facts in *Delaware Riverkeeper Network*, the Commonwealth Court of Pennsylvania implicitly acknowledged that other courts may decide similar cases differently, thereby leaving the door open for other courts to view its analysis and decision as narrow and particular.<sup>181</sup> This

174. For a discussion of the court's emphasis on public policy considerations regardless of whether the sought-after information fits within the statutory exemption under the Right-to-Know Law, see *supra* notes 128-153 and accompanying text.

175. For a discussion of the Prior Law precedent of the Commonwealth Court of Pennsylvania, see *supra* notes 65-68 and accompanying text.

176. *Del. Riverkeeper Network*, 113 A.3d at 871 (describing objective of TE-NORM study).

177. For a discussion of the ramifications of releasing unverified and raw data, see *supra* notes 154-177 and accompanying text.

178. For a discussion of the relevant background information regarding Pennsylvania's public disclosure law jurisprudence, see *supra* notes 51-101 and accompanying text.

179. *Del. Riverkeeper Network*, 113 A.3d at 872-78 (using only cases decided by Commonwealth Court of Pennsylvania, as opposed to using decisions of other Pennsylvania courts that have interpreted Right-to-Know Law).

180. *Id.* at 879 (holding that DEP rightfully withheld sample data from TE-NORM study from Delaware Riverkeeper Network's request).

181. *Id.* at 872-78 (relying on Commonwealth Court of Pennsylvania decisions, which limit court's decision and binding authority of precedent).

326 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

may implicate an inconsistency of future decisions regarding other environmental agencies requesting information from a federal agency and responsive future action by the DEP.<sup>182</sup> Other courts may require a federal agency to disclose information to an environmental agency requesting access to documents concerning an ongoing investigation by citing the court's statutory analysis in *Delaware Riverkeeper Network* as a narrow and specific approach in defining the terms of the Right-to-Know Law.<sup>183</sup>

What broadens the scope of the court's decision in *Delaware Riverkeeper Network* is the court's emphasis on the raw-like quality of the data collected under the TENORM study.<sup>184</sup> The Commonwealth Court of Pennsylvania underscored the implications of releasing raw data to the public before the data has gone through any verification and analysis process by experts.<sup>185</sup> The fear of misuse of information and unwarranted reaction to misleading information is a fear that courts beside the *Delaware Riverkeeper Network*'s court will undoubtedly have to face.<sup>186</sup>

Following the decision in *Delaware Riverkeeper Network*, future litigants who seek the disclosure of information may need to demonstrate that the disclosure of information from a federal or state agency will not stir unwarranted public reaction to premature information that has yet-to-be validated.<sup>187</sup> The question as to how future litigants can assuage this public policy concern remains unanswered.<sup>188</sup> The court in *Delaware Riverkeeper Network*, however, provides some guidance.<sup>189</sup> If the information being sought after

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182. For a critical analysis of the use of the cases in which the court relies on in *Del. Riverkeeper Network*, see *supra* notes 154-177 and accompanying text.

183. For a narrative analysis of the court's statutory interpretation of the exceptions under the Right-to-Know Law, see *supra* notes 102-153 and accompanying text.

184. For a critical analysis of the public policy concern motivating the court's holding in *Del. Riverkeeper Network*, see *supra* notes 154-177 and accompanying text.

185. For a discussion of the risks involved with releasing raw data to the public, see *supra* notes 128-177 and accompanying text.

186. For a critical analysis of the policy concern of releasing data that may be the source of unfounded litigation, see *supra* notes 154-177 and accompanying text.

187. For a discussion on the misleading characterization of levels of radiation that may result if the raw data of the TENORM study was released, see *supra* notes 162-170 and accompanying text.

188. For a critical analysis of the court's solution to the DEP's withholding of information from the Delaware Riverkeeper Network, see *supra* notes 154-177 and accompanying text.

189. See *Del. Riverkeeper Network*, 113 A.3d at 878 (quoting DEP's Br. App. A (Allard's Am. Attestation)) (noting that final report would be made available to public at end of 2015).

will be analyzed by experts and eventually be made available to the public via an accessible medium, then a court facing this issue may not require the disclosure of unconfirmed data that has the potential to cause unwarranted public reaction.<sup>190</sup>

Additionally, the decision in *Delaware Riverkeeper Network* may provide an additional avenue for future courts to deny any information request under public disclosure law: the court may cite to the public policy concerns associated with the premature release of raw data.<sup>191</sup> Because the court in *Delaware Riverkeeper Network* allowed the DEP to withhold sample data collected under the mandate of the Radiation Protection Act, the Commonwealth Court of Pennsylvania may in the future allow the DEP to withhold any data that is collected under the premise of a state act.<sup>192</sup> Even more broadly, when a federal or state agency is in the process of collecting data that needs be analyzed in order to determine future legislation or when such data may reveal the agency's deliberations on a project, the information collected may be exempt from public disclosure due to a matter of public policy.<sup>193</sup> In determining whether the disclosure of such information is required, courts have to engage in a balancing test.<sup>194</sup> On one side, there is the argument that when a study is dealing with something as serious as radiation, which poses serious and dangerous risks to human health and life, the public has a right to know about any data collected, regardless of whether the data has been verified.<sup>195</sup> On the other hand, similar to the DEP's argument in *Delaware Riverkeeper Network*, when such raw data is complex and requires the help of experts, the release of this information would prove to be detrimental, as opposed to beneficial,

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190. For a discussion on the significance that the results of the TENORM study will be published following expert analysis, see *supra* notes 150-153 & 162-170 and accompanying text.

191. For a critical discussion of the court's holding, see *supra* notes 154-177 and accompanying text.

192. *Del. Riverkeeper Network*, 113 A.3d at 878 (holding that DEP was justified in partially denying Delaware Riverkeeper Network's information request).

193. For a narrative analysis of the public policy analysis the court uses in its holding, see *supra* notes 102-153 and accompanying text.

194. For a discussion on the statutory interpretation and public policy concerns that influence the court's decision in *Del. Riverkeeper Network*, see *supra* notes 102-153 and accompanying text.

195. See Jan Murphy, *Which Release is Worse – Radiation or Information on Radiation? DEP Told to Hand Over Data on Well Sites*, PENN LIVE (July 16, 2014 1:27 PM), [http://www.pennlive.com/midstate/index.ssf/2014/07/which\\_release\\_is\\_worse\\_radiati.html](http://www.pennlive.com/midstate/index.ssf/2014/07/which_release_is_worse_radiati.html) (explaining what those seeking access to information may argue).

328 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVII: p. 301

to implementing a solution to a possibly life-threatening problem.<sup>196</sup>

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196. *See id.* (discussing dangers associated with releasing premature data).

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