

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David P. Gersch
(Admitted Pro Hac Vice)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743

Mary M. McKenzie
Attorney ID No. 47434
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103

*Counsel for Petitioners; Additional Counsel
Appear on Signature Page*

LEAGUE OF WOMEN VOTERS OF
PENNSYLVANIA, *et al.*,

Petitioners,

v.

COMMONWEALTH OF
PENNSYLVANIA, *et al.*,

Respondents.

Civ. No. 261 MD 2017

**PETITIONERS' ANSWER TO MOTION TO QUASH THE SUBPOENA
DIRECTED TO THE HONORABLE THOMAS W. CORBETT**

INTRODUCTION

The Court should deny Governor Corbett's Motion to Quash. Governor Corbett principally asserts an executive privilege and deliberative process privilege. But executive privilege "is not absolute." *Van Hine v. Dep't of State of Com.*, 856 A.2d 204, 208 (Pa. Commw. Ct. 2004) (quotation marks omitted). Pennsylvania applies a 10-factor test to determine whether it applies, *id.* These factors include (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program involvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the [requesting party's] suit is non-frivolous and brought in good faith; (6) whether the information sought is available through other discovery from other sources; and (7) the importance of the information sought to the [requesting party's] case. *Id.* at 209-10; *Haber v. Evans*, No. 03-CV-3376, 2004 WL 963995, at *3 (E.D. Pa. May 4, 2004). The remaining three factors involve criminal proceedings or disciplinary investigations and are inapplicable.

Governor Corbett does not address these factors. These factors support disclosure and do not support application of the privilege here, especially in light of the importance of the litigation and the absence of any risk that disclosure would thwart governmental processes.

As for deliberative process privilege, that is not a privilege that has been adopted by the Pennsylvania Supreme Court. What is more, that privilege is not absolute either. Governor Corbett does not produce a privilege log, but it is clear that not every document Petitioners request or deposition topic they identify would exclusively produce documents or information covered by deliberative process. The deliberative process does not cover factual information, for

example, even if it was used in making a decision. *Commonwealth v. Vartan*, 733 A.2d 1258, 1264 (Pa. 1997) (“information that is purely factual, even if decision-makers used it in their deliberations is usually not privileged”).

Lastly, to the extent Governor Corbett claims that some of the documents or information are protected from disclosure by the attorney-client privilege, Governor Corbett has not produced a privilege log or otherwise provided any description of documents or communications that are purportedly subject to attorney-client privilege. Governor Corbett should be required to provide a log of privileged documents just like any witness. To the extent Governor Corbett objects to deposition topics based on attorney-client privilege, his counsel may object to questions that seek privileged information.

In sum, the Motion to Quash the subpoena served on former Governor Corbett should be denied. Furthermore, Petitioners, by and through their undersigned counsel, submit the following Answer to the Motion to Quash the Subpoena directed to the Honorable Thomas W. Corbett (the “Subpoena”) and respond as follows:

ANSWER

1. Admitted in part; denied in part. Petitioners admit that they served all Respondents with a Notice of Intent to Serve a Subpoena to Produce Documents and Things for Discovery Pursuant to Rule 4009.21. Petitioners refer the Court to the Notice for its full and complete contents and deny anything inconsistent therewith.

2. Admitted. Petitioners direct the Court to its Order issued on November 22, 2017, wherein the Court ruled on pending objections to service of the Subpoena, and declined to strike the Subpoena. Order at 12-13. By way of further answer, service on

that Wednesday was not unexpected as Petitioners' counsel had been in contact with Governor Corbett's counsel and he had agreed to accept service.

3. Admitted in part; denied in part. Petitioners refer the Court to the Subpoena for its full and complete contents and deny anything inconsistent therewith. Regarding footnote 1, which is appended to paragraph 3 of the Motion, Petitioners are without knowledge or information sufficient to form a belief as to the truth of the averments set forth in footnote 1 and therefore they are denied. By way of further answer, Petitioners' counsel selected December 1st because Governor Corbett's counsel asked Petitioners' counsel to "issue the subpoena for a date as late next week or Monday, December 4 if possible." Moreover, Petitioners' counsel told Governor Corbett's counsel they are willing to discuss alternative dates.

4. Admitted in part; denied in part. Petitioners refer the Court to the Subpoena for its full and complete contents and deny anything inconsistent therewith.

5. Admitted in part; denied in part. Petitioners refer the Court to the Subpoena for its full and complete contents and deny anything inconsistent therewith.

6. Denied. Regarding footnote 2, which is appended to paragraph 6 of the motion, Petitioners admit in part and deny in part. Petitioners admit that Governor Corbett left office in January 2015. Petitioners are without knowledge or information sufficient to form a belief as to the current whereabouts of "all documents and related information in the possession of Governor Corbett in his capacity as Governor of Pennsylvania," and therefore deny this averment. Petitioners further respond that the documents requested by the Subpoena are not confined to those Governor Corbett possess "in his capacity as Governor of Pennsylvania."

7. Denied.

8. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

9. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

10. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

11. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

12. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

13. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

14. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

15. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response:

a. Governor Corbett is not an “executive” because he is no longer the Governor. Governor Corbett fails to cite a single case permitting someone who is no longer an executive to claim an executive privilege.

b. As for the cases Governor Corbett does cite, he neglects to explain them fully and to address all of the requirements for claiming executive privilege. For example, in both *Van Hine v. Department of State* and *Haber v. Evans*, the

courts applied a 10-factor test in order to balance the confidentiality of government information against the needs of the party requesting discovery. These factors include: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program involvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the [requesting party's] suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery from other sources; and (10) the importance of the information sought to the [requesting party's] case. *Van Hine*, 856 A.2d at 209-10; *Haber*, 2004 WL 963995, at *3.

c. Governor Corbett addresses none of these factors, despite the District Court's acknowledgement in *Haber* that it "must consider" them. *Haber*, 2004 WL 963995 at *2. Factors 1, 2, 3, 8, 9, and 10 weigh strongly in favor of disclosure, and factor 4 weighs in favor of disclosure (and the remaining factors are inapplicable). Factor 1 weighs in favor of disclosure because Governor Corbett is no longer the governor and disclosure cannot possibly thwart any

government processes. Factor 2 weighs in favor of disclosure because disclosure would have little or no impact on inadvertently-revealed third parties that were involved with making the 2011 Plan; indeed the General Assembly, Speaker Turzai, and Senator Scarnati are already defendants in this action and subpoenas have already been served on several non-party individuals and entities who may have been involved in making the 2011 Plan. Factor 3 weighs in favor of disclosure because enacting legislative districts is a requirement under the law. There will be no decrease in participation this activity because Governor Corbett is subjected to a deposition and document production. Factor 8 weighs in favor of disclosure because Petitioners' suit was indisputably brought in good faith. Indeed, the Pennsylvania Supreme Court determined that this case "involves issues of immediate public importance." 11/19/17 Order. Factors 9 and 10 weigh in favor of disclosure because the information sought by the subpoena is critical to Petitioners' case and cannot be obtained from other sources. This Court has determined that many of the documents relating to the 2011 Plan in the possession of the Legislative Respondents are privileged, and as such, Petitioners must be permitted to obtain this information from alternative, third-party, sources—such as Governor Corbett, who is no longer in office. Factor 4 weighs at least partially in favor of disclosure, because at least some responsive documents and communications would concern factual data, rather than evaluative summaries.

16. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

17. Denied. The averments in this paragraph, including those in the appended footnote, footnote 4, are conclusions of law to which no responsive pleading is required.

18. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

19. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

20. Denied. The averments in this paragraph, including those in the appended footnote, footnote 5, are conclusions of law to which no responsive pleading is required. By way of further response, the court in *Office of Governor v. Scolforo* did not “h[o]ld”—as Governor Corbett suggests—that the predecisional deliberative exception set forth in [the Right to Know Law] codifies the [common law] deliberative process privilege.” 65 A.3d 1095, 1100 (Pa. Commw. Ct. 2013). This case was about whether calendar entries were covered by the privilege, *see id.* at 1096, and the statement that the Right to Know Law codified a common law privilege was clearly dicta.

21. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

22. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

23. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

24. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, Governor Corbett reads entirely too far into the word “reflects,” as it is used in the statutory exception to

disclosure under the Right to Know Law. 65 P.S. § 67.708(b)(10)(i). That a record “reflects” the fact that predecisional deliberations occurred does not create a privilege where the document or communication was not made “before the deliberative process was completed,” or not “deliberative in character,” which are the basic requirements for privilege, as stated by the plurality in *Commonwealth v. Vartan*. *Vartan*, 733 A.2d at 1264.

25. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response:

a. Governor Corbett correctly acknowledges that “the Pennsylvania Supreme Court has not formally adopted the Deliberative Process Privilege. Motion ¶ 16. Indeed, Governor Corbett relies on the plurality opinion from the Pennsylvania Supreme Court in *Vartan*, *see id.*, but fails to address one of the key requirements from that case, specifically, that “information that is purely factual, ***even if decision-makers used it in their deliberations*** is usually not privileged.” *Id.* (emphasis added). In addition, Governor Corbett misapplies the other requirements for the privilege, that “the communication must have been made *before* the deliberative process was completed,” and that the communication must be “deliberative in character” or “it must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. *Id.* (emphasis added).

b. Governor Corbett’s assertion of a deliberative process privilege to every document and every deposition topic requested in the Subpoena is not consistent with the requirements under *Vartan*. Indeed, any documents or

communications regarding the 2011 Plan that were generated *after* the Plan was signed into law are plainly not covered by the privilege as they were not made “before the deliberative process was completed.” *Id.* Moreover, much of the information Petitioners seek is purely factual in nature and does not include any “recommendations” or “opinions.” Petitioners are seeking basic facts about the case—who drew the 2011 Map, who else was involved in developing it, and what considerations were used to develop it. This information is “purely factual” and is usually not privileged “even if decision-makers used it in their deliberations.” *Id.*

c. The other cases Governor Corbett cites either concern the statutory disclosure exemption under the Right to Know Law (which is not applicable here), *see McGowan v. Pa. Dep’t of Env’t Prot’n*, 103 A.3d 374, 376 (Pa. Commw. Ct. 2014); *Scolforo*, 65 A.3d at 1097; *Tribune-Review Pub. Co. v. Dep’t of Comm’y & Econ. Dev.*, 859 A.2d 1261 (Pa. 2004) , or are factually inapposite, in the case of *Ario v. Deloitte & Touche*. 934 A.2d 1290 (Pa. Commw. Ct. 2007). In the *Ario* case, the requesting party specifically sought ***advice*** that the governor’s staff gave to an insurance commissioner. *See id.* at 1293. Here, however, Petitioners’ requests are much broader. To whatever extent “advice” may be included in communications or documents subject to the Subpoena, it is highly unlikely that *all* documents or communications subject to the Subpoena are “advice.” As explained above, much of what Petitioners seek is “information that is purely factual.” *Vartan*, 733 A.2d at 1264. “Even if decision-makers used [this information] in their deliberations[, it] is usually not privileged.” *Id.* Similarly, the Superior Court in *Commonwealth v. McClure* determined that “a judge may

be questioned about the existence of an outside influence, but not about his or her subjective reasoning processes or the effect of any influence on his or her deliberations[,]" or, more simply he may be questioned where he "merely happened to be a fact witness." *Commonwealth v. McClure*, No. 145 MDA 2017, 2017 WL 4707485, at *18 (Pa. Super. Ct. 2017). Here, the privilege does not shield Governor Corbett from disclosure of information regarding "the existence of an outside influence" on his deliberations, such as information regarding who influenced development of the 2011 Plan and what the content of that influence was (i.e., what considerations were given).

26. Admitted in part; denied in part. Petitioners refer the Court to the Subpoena for its full and complete contents and deny anything inconsistent therewith.

27. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

28. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

29. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

30. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

31. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

32. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

33. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

34. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

35. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

36. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

37. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

38. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

39. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

40. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

41. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

42. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

43. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

44. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

45. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

46. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

47. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

48. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

49. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

50. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, Governor Corbett has not produced a privilege log or otherwise provided any description of documents or communications that are purportedly subject to attorney-client privilege or the work product doctrine. Governor Corbett should be required to provide a log of privileged documents just like any witness. To the extent Governor Corbett objects to deposition topics on attorney-client or work product grounds, his counsel may object to questions that seek privileged information. Quashing Subpoena and the deposition is not necessary.

51. Affirmed in part; denied in part. Petitioners refer the Court to the Order Granting in Part Respondents' Motion to Quash for its full and complete contents and deny anything inconsistent therewith.

52. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

53. Affirmed in part; denied in part. Petitioners refer the Court to the Subpoena for its full and complete contents and deny anything inconsistent therewith.

54. Affirmed in part; denied in part. Petitioners refer the Court to the Subpoena for its full and complete contents and deny anything inconsistent therewith.

55. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, quashing the deposition is not necessary to avoid disclosure of any privileged information. Rather, Claimant's counsel may simply object to questions calling for privileged information.

56. Affirmed in part; denied in part. Petitioners refer the Court to the Subpoena for its full and complete contents and deny anything inconsistent therewith.

57. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

58. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

59. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

60. Affirmed in part; denied in part. Petitioners refer the Court to the Subpoena for its full and complete contents and deny anything inconsistent therewith.

61. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

62. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

63. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

64. Affirmed in part; denied in part. Petitioners refer the Court to the Subpoena for its full and complete contents and deny anything inconsistent therewith.

65. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

66. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

67. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

68. Affirmed in part; denied in part. Petitioners refer the Court to the Subpoena for its full and complete contents and deny anything inconsistent therewith.

69. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

70. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

71. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

72. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

73. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

74. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

75. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

76. Petitioners deny the averments in the final unnumbered paragraph of the Motion. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, the Court should not grant the Motion to Quash. Governor Corbett has not been in public office for nearly three years. The documents and deposition sought by the Subpoena simply will not “hamper the function of government” as Governor Corbett insists.

Dated: November 28, 2017.

Mary M. McKenzie
Attorney ID No. 47434
Michael Churchill
Attorney ID No. 4661
Benjamin D. Geffen
Attorney ID No. 310134
Public Interest Law Center
1709 Benjamin Franklin Parkway, 2nd
Floor
Philadelphia PA 19103
Telephone: +1 215.627.7100
Facsimile: +1 215.627.3183

Respectfully submitted,

/s/Mary M. McKenzie

David P. Gersch*
John A. Freedman*
R. Stanton Jones*
Elisabeth S. Theodore*
Helen Mayer Clark*
Daniel F. Jacobson*
John Robinson*
Sara Murphy*
Lindsey Carson*
John Cella*

Arnold & Porter KAYE SCHOLER LLP

601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: +1 202.942.5000
Facsimile: +1 202.942.5999
David.Gersch@apks.com
* Admitted pro hac vice

Andrew D. Bergman*

Arnold & Porter KAYE SCHOLER LLP

700 Louisiana Street
Suite 4000
Houston, TX 77002-2755
Telephone: +1 713.576.2400
Fax: +1 713.576.2499
* Admitted pro hac vice

Counsel for Petitioners

