



## **I. PROCEDURAL BACKGROUND**

On November 22, 2017, the undersigned received a Subpoena directing the appearance of Governor Corbett at a deposition on December 1, 2017, and seeking the production of documents described in a request for production attached to the Subpoena and entitled “Requests.” On November 27, 2017, the undersigned filed a Motion to Quash the Subpoena, along with a supporting Memorandum of Law. In response, and in accordance with this Court’s Order dated November 27, 2017, Petitioners filed an Answer to the Motion to Quash on November 29, 2017.

This Reply Brief is submitted to succinctly address three flawed points in Petitioners’ Answer that further support granting the Motion to Quash.

## **II. LEGAL ARGUMENT**

- A. *Petitioners contend that the Motion to Quash should be denied because 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.” (Pet. Ans. p. 2).*

As the Motion to Quash informs this Court (*see* footnote 2 of Motion to Quash), Governor Corbett is not in possession of any documents potentially responsive to the “Requests” included in the Subpoena.<sup>1</sup> Petitioners’ counsel is long-aware of this fact, not only from the undersigned’s representations in

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<sup>1</sup> Governor Corbett’s attendance at a deposition to simply confirm that he is not in possession of any documents responsive to the Subpoena should not be required, as it would not be required of any other witness who has asserted similarly applicable privileges to those asserted by Governor Corbett.

conversations with counsel preceding service of the Subpoena, but since August 11, 2017, when Respondent Governor Wolf, through the Governor's Office of General Counsel, served discovery responses on Petitioners.

On August 11, 2017, the Office of General Counsel, on behalf of Respondent Governor Wolf, served counsel for Petitioners with a Response to Petitioners' First Set of Requests for Production Directed to All Respondents. The individually itemized document requests from Petitioners directed to all Respondents mirror the "Requests" enumerated in the Subpoena directed to Governor Corbett. In response to the discovery request, appreciating the adoption and enactment of the 2011 Plan occurred prior to him becoming Governor, Respondent Governor Wolf provided the following response to Petitioners:

Documents generated during the Corbett Administration for the period January 18, 2011, to January 20, 2015, are not subject to the care, custody and control of Respondent Governor Wolf, but are governed by a separate agreement entered between former Governor Corbett and the Pennsylvania Historical Museum Commission (PHMC). The agreement is attached as Exhibit "A" to this response. In addition, to the extent those documents are publicly available in accordance with the terms of that agreement, they can be located by searching <https://archon.klinpa.org/psa/?p=collections/classifications&id=1735>.

Additional records may be located at Lebanon Valley College. The contact for that institution is:

Sarah E. Greene  
Direction of the Bishop Library  
Lebanon Valley College

101 N. College Avenue  
Annville, PA 17003-1400  
717-867-6985  
sgreene@lvc.edu

Accordingly, it is not in dispute that Petitioner's counsel has known for more than three (3) months the location and custodians of any potentially responsive, albeit likely still privileged, documents that are now improperly sought directly from Governor Corbett. This fact renders Petitioner's denial of paragraph 6 of the Motion to Quash, and footnote 2 appended thereto, suspect, to say the least. Conspicuously absent from Petitioners' response is any assertion that they have inquired of any of the custodians of records identified in the August 11, 2017, response from the Office of General Counsel before seeking to compel production from a privileged source, or that they attempted any search of the electronic address that was provided to them for any publicly available records.

More glaringly, Petitioners' insistence that the Motion to Quash should fail because Governor Corbett did not produce a privilege log of documents that they know he does not possess, and of which he is not the custodian, particularly in the face of the information they have been in possession of since August 11, 2017,<sup>2</sup> is

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<sup>2</sup> It is observed that counsel never challenged Respondent Governor Wolf's August 11, 2017, discovery responses by way of a Motion to Compel or similar process, and presumably never served any document request or subpoena on the custodians of Corbett Administration records about whom they had been informed, instead electing to issue the Subpoena directly to Governor Corbett and inviting this eleventh hour discovery dispute.

undeserving of any consideration by this Honorable Court. The Motion to Quash should be granted.

*B. Petitioners contend that the Executive Privilege is not absolute and Governor Corbett did not address the relevant factors, the balance of which weigh in favor of disclosure. (Pet Ans. p. 2, ¶15).*

Petitioners' suggestion that the Motion to Quash fails to address the relevant factors misapprehends two key points.

*First*, it is readily apparent from the list of deposition topics that Petitioners included with the Subpoena, and about which they intend to examine Governor Corbett, that the executive privilege will necessarily attach to any question Petitioners would pose to Governor Corbett. Indeed, the topics disclose that Petitioners seek to examine Governor Corbett on precisely that which the privilege is designed to protect – the function of the executive branch and the “sensitive decisional and consultative responsibilities of the Governor which can be discharged most effectively with privacy and security.” *Hayes v. Reed*, 1997 U.S. Dist. LEXIS 2992, at \*30 n.8 (E.D. Pa. Mar. 13, 1997); *see also Van Hine v. Dep't of State*, 856 A.2d 204, 208 (Pa. Cmwlth. Ct. 2004).

*Second*, contrary to Petitioners' assertion, it is Petitioners' burden, not Governor Corbett's, to show that the balance of the relevant factors weigh in favor of disclosure. *See Haber v. Evans*, 2004 U.S. Dist. LEXIS 7961, at \*10 (E.D. Pa. May 4, 2004) (holding that once the Office of the Governor has asserted the

privilege, “the burden shifts to Plaintiff to demonstrate the need for the requested information.”)

The factors to which Petitioners refer are: (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 Petitioner's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the Petitioner's case.

While factors 5, 6, and 7 are admittedly not applicable in the context of the relevant Subpoena or underlying substantive matter, Petitioners have not carried their burden of showing that any of the remaining factors weigh in favor of disclosure. Petitioners' mere conclusory averment is not sufficient. Indeed, as to

factor 3, courts have expressly held that non-disclosure results in the Governor's duties being discharged "most effectively." *Hayes v. Reed*, 1997 U.S. Dist. LEXIS 2992, at \*30 n.8 (E.D. Pa. Mar. 13, 1997). As to factor 4, the Subpoena clearly seeks information on "evaluative" materials because it expressly seeks information on how elements were "measured" "considered" "developed" "assessed" as well as information pertaining to the "proposals" "analyses" and "goals." This information is plainly evaluative and Petitioners have not carried their burden to demonstrate that any factors warrant exception from the asserted privilege. Accordingly, the Motion to Quash should be granted.

*C. Petitioners contend that the Deliberative Process Privilege does not apply to factual information and the subpoena only seeks factual information. (Pet. Ans. p. 2-3, ¶ 25.)*

As discussed above, the subpoena plainly seeks more than just "factual" materials. Petitioners specifically seek information on how elements were "measured," "considered," "developed," and "assessed," as well as information pertaining to the "proposals" "analyses" and "goals." This is precisely the type of evaluative – not factual – information that the deliberative process privilege is designed to protect from disclosure.

Moreover, "factual material can still qualify as deliberative information if its 'disclosure would so expose the deliberative process within an agency that it must be deemed exempted;' or, in other words, when disclosure of the factual material

‘would be tantamount to the publication of the [agency's] evaluation and analysis.’” *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 387 (Pa. Cmwlth. Ct. 2014) (quoting *Trentadue v. Integrity Communication*, 501 F.3d 1215, 1228-29 (10th Cir. 2007) in light of the fact that *Vartan* also “relied upon” federal case law interpreting the federal FOIA statute when analyzing this privilege); *see also Dep't of Corr. v. Fiorillo*, 167 A.3d 305 (Pa. Cmwlth. Ct. 2017). The information that Petitioners seek to obtain, both in documentary and testimonial form, from Governor Corbett is precisely that – disclosure of information that would reveal the evaluation and analysis that the Office of the Governor undertook in considering the 2011 Plan. Simply characterizing requests for evaluative information as demands for factual information does not change the true character of the information sought. Accordingly, the Motion to Quash should be granted.

### **III. CONCLUSION**

In closing, the undersigned is constrained to clarify the facts surrounding Petitioners’ averments in response to paragraph 3 of the Motion to Quash. Although Petitioners accurately aver that the undersigned requested that counsel “issue the subpoena for a date as late next week or Monday, December 4 if possible,” Petitioners omit a critical portion of the communication from which they quote. The full relevant text of the communication regarding scheduling, authored by the undersigned, is as follows:



Accordingly, I request that you just issue the subpoena for a date as late next week or Monday, December 4 if possible, to occur at a location in Pittsburgh to be determined. With the holiday (Court is closed Friday too), I will be unable to file a Motion until the earliest Monday. Thus, I do not want a deposition date pending the day after the Motion is filed, or close to it, so as to allow the Court to rule on the objections without the threat of a next day deposition.

Further complicating the scheduling issue (aside from I do not know Governor Corbett's availability) is that I am unavailable in the early part of next week, and I leave for New York on Thursday (the 30<sup>th</sup>) where I will remain through Saturday.

(Email communication chain between counsel dated November 21, 2017).

Thus, Petitioners' counsel was aware that the only day the undersigned was not available to participate in Governor Corbett's deposition, in the event it was permitted to proceed, was Friday, December 1, 2017, the very day that counsel selected above any other available day this week, or Monday December 4, 2017.<sup>3</sup> Accordingly, while the Motion to Quash should be granted, in the event any process were to proceed, it is respectfully requested that a date on which both the undersigned and Governor Corbett are available be accommodated.

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<sup>3</sup> As indicated in the Motion to Quash, Governor Corbett is similarly unavailable on Friday, December 1, 2017.

Respectfully submitted,

**ELLIOTT GREENLEAF, P.C.**

Dated: November 29, 2017

*/s/ Jarad W. Handelman* \_\_\_\_\_

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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<b>LEAGUE OF WOMEN VOTERS OF</b>	:	
<b>PENNSYLVANIA, et al.,</b>	:	
	:	
<i>Petitioners,</i>	:	<b>No. 261 MD 2017</b>
	:	
v.	:	
	:	
<b>COMMONWEALTH OF ,</b>	:	
<b>PENNSYLVANIA, et al.,</b>	:	
	:	
<i>Respondents.</i>	:	
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**CERTIFICATE OF SERVICE**

I, Jarad W. Handelman, Esquire, hereby certify that on November 29, 2017, I caused a true and correct copy of the foregoing document to be delivered via email to counsel for answering Respondents as indicated below and otherwise on November 30, 2017 by first class mail, upon all other person(s) below:

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