

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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PENNSYLVANIA SENATE VETERANS	:	
AFFAIRS & EMERGENCY PREPAREDNESS	:	No. 293 MD 2020
COMMITTEE,	:	
	:	Petitioner,
v.	:	
	:	
THE HONORABLE TOM WOLF, GOVERNOR	:	
OF THE COMMONWEALTH OF	:	
PENNSYLVANIA and DENNIS M. DAVIN,	:	
SECRETARY OF THE PENNSYLVANIA	:	
DEPARTMENT OF COMMUNITY AND	:	
ECONOMIC DEVELOPMENT,	:	
	:	Respondents.

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**INTERIM ORDER**

AND NOW, this \_\_\_\_ day of May, 2020, upon consideration of the Application for Expedited Summary Relief filed by Petitioner, it is hereby ORDERED as follows:

1. Respondents shall file an answer to the Application on or before May 20, 2020.
2. Petitioner shall file a brief in support of the Application on or before May 27, 2020.
3. Respondents shall file a brief in support of their answer to the Application on or before June 3, 2020.
4. Petitioner shall file a reply, if any, on or before June 5, 2020.
5. The Application shall be listed for argument during the Court's June 8-12, 2020 session.

BY THE COURT:

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**APPLICATION FOR EXPEDITED SUMMARY RELIEF  
BY PETITIONER PENNSYLVANIA SENATE VETERANS  
AFFAIRS & EMERGENCY PREPAREDNESS COMMITTEE**

The matter before the Court poses a pure question of law upon which the material facts are not in dispute. The question is simple: Can the Governor and the Secretary of the Department of Community and Economic Development lawfully refuse to comply with subpoenas duces tecum issued by a Pennsylvania Senate Committee? They say “yes.” Yet because their refusals to comply thwart the exercise of exclusive constitutional powers conferred on the General Assembly, and are

otherwise not supported by constitutional or equitable grounds, the answer must be “no.” Accordingly, Petitioner Pennsylvania Senate Veterans Affairs & Emergency Preparedness Committee (“the Senate Committee”) hereby moves under Pa.R.A.P. 1532(b) for summary relief, and asks the Court to immediately enter an order compelling Governor Wolf and Secretary Davin to respond to the subpoenas previously served on them.

Furthermore, Petitioner respectfully requests that this application be addressed by the Court on an *expedited* basis. Expedited treatment is necessary because the information requested by the subpoenas is vital to addressing a host of time-sensitive concerns of the Senate Committee, including the need for potential legislation arising from the COVID-19 pandemic.<sup>1</sup> As such, the Senate Committee requests that the

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<sup>1</sup> Expedited treatment is also warranted since, based on a Philadelphia Inquirer news story from May 13, 2020, the number of waivers and exemptions, and the records related thereto, appears to be frequently changing even while this enforcement action is ongoing:

The administration rebuffed the subpoena request and refused to comply, but at the same time published a list of companies that had been approved for exemptions. Officials said they had granted just over 6,100 waivers, though that tally was inconsistent with previous statements about how many exemptions were granted.

In a news release on Friday, the Department of Community and Economic Development said it had approved 6,066 waivers. On its website, it said it

Court set expedited briefing on this application, and set this matter for argument during the Court's June 8-12, 2020 session.

## I. BACKGROUND

Petitioner the Senate Committee is a permanent standing committee of the Senate of Pennsylvania composed of 11 total members and chaired by Senator Mike Regan. The Senate Committee was established by Rule 14 of the Pennsylvania Senate, adopted by Senate Resolution 3 on January 1, 2019, for the governing of the 203<sup>rd</sup> and 204<sup>th</sup> Regular Session. *See* Senate Rule 14 (Petition for Review (“PFR”), Exh. C); *see also* S.R. 3, 203<sup>rd</sup> Leg., Reg. Sess. (2019) (adopting the Rules of the Senate of Pennsylvania for the 203<sup>rd</sup> and 204<sup>th</sup> Regular Sessions and authorizing committees to issue subpoenas pursuant to Rule 14). Among the “powers and responsibilities” of the Senate

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had approved 6,104, and within an hour, that number had been updated to 6,123.

But all are fewer than what was reported by the administration at the end of April. At that time, they said they had approved 6,171 exemptions.

*See* Angela Coulombis and Charlotte Keith, *Pa. officials revoked coronavirus shutdown business waivers the night before publishing list of recipients*, Philadelphia Inquirer (May 13, 2020), available at: <https://www.inquirer.com/business/spl/pennsylvania-business-waivers-revoked-coronavirus-shutdown-20200513.html>. Such inconsistencies raise concerns that Respondents may be changing, altering or otherwise manipulating the records that are the subject to this enforcement action while the action is pending adjudication.

Committee is to “maintain a continuous review of the work of the Commonwealth agencies concerned with [Veterans Affairs & Emergency Preparedness] and the performance of the functions of government within each such subject area, and for this purpose to request reports from time to time[.]” Rule 14(d)(1) (PFR, Exh. C). In order to carry out its duties, the Senate Committee is “empowered with the right and authority to inspect and investigate the books, records, papers, documents, data, operation and physical plant of any public agency in this Commonwealth” and “may issue subpoenas, subpoenas duces tecum and other necessary process to compel the attendance of witnesses and the production of any books, letters or other documentary evidence desired by the committee.” Rule 14(d)(2)&(3); *see also* 46 P.S. § 61.

On or about March 19, 2020, Governor Tom Wolf issued an order mandating the closure of all non-life-sustaining businesses in the Commonwealth in response to the COVID-19 pandemic. *See* 3/19/20 Order (PFR, Exh. D). Despite Governor Wolf’s March 19<sup>th</sup> business closure order, any non-life-sustaining business that believed it may provide a life-sustaining service was permitted to file a request for a

waiver from the March 19<sup>th</sup> closure order with the Department of Community and Economic Development (“DCED”) and/or DCED Secretary Dennis Davin. According to public statements made by Governor Wolf, a “team of professionals at DCED” would be responsible for reviewing each waiver request and would respond “based on the guiding principle of balancing public safety while ensuring the continued delivery of critical infrastructure services and functions.” All correspondence granting a business’s waiver request from Governor Wolf’s March 19<sup>th</sup> closure order was issued and sent out under Governor Wolf’s signature.

According to public statements made by Governor Wolf, DCED received more than 42,000 requests from businesses for waivers from his March 19<sup>th</sup> closure order, with approximately 1/3 of those requests being denied.

On April 23, 2020, the Senate Committee and the Senate Community, Economic and Recreational Development Committee hosted a joint public hearing to address concerns raised about the response of Governor Wolf and his administration to the COVID-19 pandemic. The purpose of the April 23<sup>rd</sup> joint hearing was for the

Committees to obtain a better understanding of Governor Wolf's response to the COVID-19 pandemic, which, in turn, would help the Committees in their consideration of current and future legislative proposals. Secretary Davin attended and testified at the April 23<sup>rd</sup> joint hearing on behalf of DCED.

A focal point of the April 23<sup>rd</sup> joint hearing was the need for more transparency, accountability, and consistency in the actions and decisions being made by Governor Wolf and his administration during the COVID-19 pandemic, and particularly with respect to the classification of certain businesses as non-life-sustaining and subject to his March 19<sup>th</sup> closure order and the subsequent waiver process overseen by DCED to exempt businesses from that closure order. Members of both Committees raised serious and significant concerns regarding the waiver process overseen by DCED generally, as well as perceived inconsistencies and irregularities in businesses to whom DCED had granted or denied waiver requests from Governor Wolf's March 19<sup>th</sup> closure order.

The members of Governor Wolf's administration who testified at the April 23<sup>rd</sup> public hearing, including Secretary Davin, pledged

transparency and accountability in the process, and confirmed that Governor Wolf and his administration were working diligently to provide the citizens of Pennsylvania with additional information on the business waiver and exemption process overseen by DCED with respect to the March 19<sup>th</sup> closure order. But when pressed at the April 23<sup>rd</sup> joint hearing for a date on when additional information related to the business waiver and exemption process overseen by DCED would be made publicly available, Secretary Davin refused to commit to any set timeline of when records would be publicly released.

The next day, on April 24, 2020, the Chairmen of both the Senate Committee and the Senate Community, Economic and Recreational Development Committee sent separate letters to Governor Wolf and Secretary Davin, requesting that all records related to the business waiver and exemption process be produced to the Committees no later than April 29, 2020. *See 4/24/20 Letter Requests (PFR, Exhs. E & F).* The April 24<sup>th</sup> letters expressly set forth fourteen (14) different record requests related to the waiver and exemption process, including, but not limited to, how the waiver process worked generally, how waiver requests were being evaluated, and lists of businesses who had their



waiver requests either granted or denied. *See id.* The April 24<sup>th</sup> letters sought the cooperation and voluntary production of the requested records from Governor Wolf and Secretary Davin—consistent with their public statements of transparency and accountability—but warned that the Committees would take appropriate steps to formally order production of the records, if necessary. *See id.*

On April 29, 2020, neither Governor Wolf nor Secretary Davin provided a single record to the Committees in response to the April 24<sup>th</sup> letter requests, contrary to the Governor’s and Secretary’s public promises of transparency and accountability. Instead, after the close of business on April 29, 2020, Secretary Davin emailed a letter to the Chairmen of the Committees, indicating that he and Governor Wolf would not be responding to their individual April 24<sup>th</sup> letter requests for documents and information. *See 4/29/20 Letter (PFR, Exh. G).*

The next day, on April 30, 2020, the Senate Committee met and voted to issue subpoenas duces tecum to Governor Wolf and Secretary Davin, ordering them, as provided for under Senate Rule 14 and 46 P.S. § 61, to produce all records related to the process by which businesses could request a waiver or exemption from Governor Wolf’s March 19<sup>th</sup>

closure order. *See* Subpoenas (PFR, Exhs. A & B). That same day, on April 30, 2020, the subpoenas duces tecum issued by the Senate Committee were separately served on Governor Wolf and Secretary Davin, with counsel for each individual acknowledging and confirming receipt of the subpoenas. *See* 4/30/20 Emails (PFR, Exhs. H & I). The April 30<sup>th</sup> subpoenas duces tecum issued and served by the Senate Committee expressly “ordered” Governor Wolf and Secretary Davin to produce the same records sought in the April 24<sup>th</sup> letter request from the Committee Chairman, and commanded that those records “shall” be delivered to legal counsel for the Committee no later than 4:00 PM on May 8, 2020. *See* Subpoenas (PFR, Exhs. A & B).

Despite the Senate Committee’s order compelling production of all records related to waiver/exemption process, neither Governor Wolf nor Secretary Davin provided a single record to the Committee by 4:00 PM on May 8, 2020, again, contrary to the Governor’s and Secretary’s public promises of transparency and accountability. Instead, by letter dated May 8, 2020 (PFR, Exh. J), sent at 4:05 PM, Governor Wolf responded to *both* subpoenas (i.e., Secretary Davin did not submit a separate response) and appeared to claim as grounds for refusing to comply with

the subpoenas the following: (1) “Chief Executive Privilege,” and (2) privacy grounds on behalf of persons who may have submitted exemption requests. Of note, in his letter, Governor Wolf makes no attempt to explain why even those parts of the subpoenas that seek communications his office transmitted externally, directly to exemption applicants, cannot be complied with; that is, he does not attempt to explain why communications that were made to the public at large are still somehow cloaked in privilege. Of further note, in the Governor’s letter he advised that he intended to later release some of the information requested in the Senate Committee’s subpoenas.

To that end, at 5:26 PM on May 8, 2020, Governor Wolf published a website listing the names of businesses that received exemptions to operate; the information ordered to be produced in the eighth document demand in the subpoenas. *See* DCED, *Businesses that Received an Exemption from Closure*, <https://dced.pa.gov/covid-19-exempt-businesses/>. The website did not respond to all of the information demanded in the subpoenas, including, critically, the methodology of how exemption decisions were made. Also, the website information was

not supplied directly to the Senate Committee as a response to the subpoenas: it was published on the internet.

Since the posting of the DCED website, it has been publicly reported that the list of names of businesses appearing on the website may have been altered or amended at the last minute, with some businesses having their waivers rescinded or revoked on the eve of the list's publication. In addition, since the posting of the DCED website, DCED has been contacting those businesses that submitted waiver requests and advising them to contact the Senate Committee directly about whether they believe that their waiver request submissions should or should not be disclosed to the Senate Committee.

## **II. SUMMARY RELIEF STANDARDS**

Pennsylvania Rule of Appellate Procedure 1532(b) provides that “[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear.” In other words, an application for summary relief may be granted if “a party’s right to judgment is clear and no material issues of fact are in dispute.”

*Jubelirer v. Rendell*, 953 A.2d 514, 521 (Pa. 2008) (quoting *Calloway v. Pa. Bd. of Prob. & Parole*, 857 A.2d 218, 220 n.3 (Pa. Cmwlth. 2001)).

### **III. ARGUMENT**

Summary relief is appropriate here because the challenges to the subpoenas pose pure issues of law, and the facts necessary to resolve those issues are not in dispute. And upon examination of the record and arguments, the Court will find that summary relief in favor of the Senate Committee is immediately warranted.

To illuminate, Article II, Section 11 of the Pennsylvania Constitution provides that “[e]ach House shall have power to determine the rules of its proceedings and ... to enforce obedience to its process[.]” Pa. Const. art. II, § 11. Further, pursuant to 46 P.S. § 61, “[e]ach branch of the legislature shall have the power to issue their subpoena, as heretofore practiced, into any part of the commonwealth[.]” Pursuant to this constitutional and statutory authority, the Senate of Pennsylvania promulgated and approved Rules that permit the Senate Committee to issue subpoenas duces tecum and to order the production of records from Governor Wolf and Secretary Davin in the performance of the Committee’s duties and responsibilities. *See* Rule 14(d)(2)&(3) (PFR,

Exh. C); *see generally Camiel v. Select Comm. on State Contract Practices of H.R.*, 324 A.2d 862, 865-66 (Pa. Cmwlth. 1974) (“We are here faced with action by the House of Representatives. No question has been raised concerning the authority of the House of Representatives to establish this Select Committee. No question can be raised concerning the power of the House of Representatives to subpoena witnesses and evidence for legitimate legislative purposes.”). Indeed, basic separation of powers principles embodied in the Pennsylvania Constitution mandate that the Senate Committee perform its legislative oversight function, particularly in the face of an executive branch blanket refusal to comply, in any respect, with validly issued subpoenas duces tecum from the Committee.

The April 30<sup>th</sup> subpoenas duces tecum issued and served by the Senate Committee are clearly within its authority, the records demanded are sufficiently specific, and the records sought are reasonably relevant to its investigation of the waiver process overseen by DCED to exempt businesses from Governor Wolf’s March 19<sup>th</sup> closure order. *See* Subpoenas (PFR, Exhs. A & B). To this investigative end, the Supreme Court of Pennsylvania has consistently recognized that the

legislative branch’s “power to investigate is an essential corollary of the power to legislate. The scope of this power of inquiry extends to every proper subject of legislative action.” *Com. ex rel. Carcaci v. Brandamore*, 327 A.2d 1, 3 (Pa. 1974). Thus, in light of the foregoing, neither Respondent can legitimately challenge the exercise of subpoena power by the Senate Committee on procedural or technical grounds, since the subpoenas and the purpose of the subpoenas are demonstrably within the Committee’s constitutional powers.

Still, based on correspondence to date, the Senate Committee understands that Governor Wolf and Secretary Davin claim a right to resist the subpoenas on substantive privilege grounds and on as-yet unsupported privacy grounds.

**A. Neither chief executive privilege nor ordinary executive privilege supports Respondents’ refusals to respond to the subpoenas.**

As to privilege grounds, Governor Wolf has claimed Chief Executive Privilege on behalf of himself *and* Secretary Davin, yet that is not a valid basis to refuse compliance with the subpoenas for at least two reasons.

*First*, “Chief Executive Privilege” is available *only* to a Governor and not an Executive Branch Secretary, as the Commonwealth Court made clear in *League of Women Voters v. Commonwealth*, 177 A.3d 1010 (Pa. Cmwlth. 2017) (single judge opinion), on which Governor Wolf and Secretary Davin relied in their joint May 8 letter response (PFR, Exh. J at 1):

Thus, the Supreme Court in *Hartranft* recognized a chief executive privilege enjoyed by the Governor, which appears to be broader (and perhaps more absolute although not entirely absolute) than the concepts of executive privilege and deliberative process privilege addressed by Governor Corbett and Petitioners. *Whereas the chief executive privilege relates to the Governor, the executive and deliberative process privileges potentially available to executive branch officials, in general, are more narrow and qualified than the chief executive privilege described by the Supreme Court in 1877.*

*League of Women Voters*, 177 A.3d at 1016 (emphasis added).

Accordingly, as a matter of law, Secretary Davin cannot claim “Chief Executive Privilege” to avoid responding to his subpoena.

And to the extent he is claiming the “more narrow and qualified” privilege known as “executive privilege,” he has utterly failed to meet his burden to invoke it, which burden requires him to satisfy a three-part test and supply an affidavit supporting his claims in support of the test—which he has not done. *See League of Women Voters*, 177 A.3d at



1017 (citing *Van Hine v. Dep't of State*, 856 A.2d 204, 208 (Pa. Cmwlth. 2004)).

*Second*, despite the Governor's apparent claim that the "Chief Executive Privilege" gives him blanket immunity from subpoena compliance, *see* 5/8/20 Letter (PFR, Exh. J) ("[t]he Pennsylvania Supreme Court has recognized that a governor—and agents and officials acting under his authority—are exempt from subpoenas relating to the exercise of such authority"), that is not the case as a matter of law. Indeed, returning to *League of Women Voters*, the Commonwealth Court there explained that certain "extreme cases" warrant overriding the privilege. 177 A.3d at 1014 ("The Supreme Court in *Harding* cited its earlier decision in *Hartranft* as the basis for the general proposition that only in 'extreme cases' would the Supreme Court restrain the Governor, such as in instances 'where his action is in conflict with constitutional provisions.'" (quoting *Harding v. Pinchot*, 159 A. 16, 18 (Pa. 1932))). The COVID-19 crisis that sparked the legislative need to review the Governor's actions here must surely by an "extreme case," standing alone. But further, this is also an "extreme case" since the Senate Committee is trying to vindicate *two*

constitutional provisions within its ambit: (1) the “legislative power” in Article II, Section 1; and (2) the *exclusive* power of the Legislature to control the suspending of laws under Article I, Section 12 (“No power of suspending laws shall be exercised unless by the Legislature or by its authority.”).

As to the latter constitutional provision, the Senate Committee is inquiring into the Governor’s use of power under 35 Pa.C.S. § 7301, under which he suspended laws of the Commonwealth by, among other things, shutting down lawfully operating businesses. Under Article I, Section 12—a provision among the fundamental and “inviolable” rights of the people of the Commonwealth—the power the Governor, his Secretaries, and his agents are exercising is one that the Legislature has the *ultimate* authority to control: suspending laws. Absent Legislative control, Article I, Section 12 is rendered meaningless, which creates an Executive answerable to no one—the very outcome Article I, Section 12 is designed to prevent. *See Baker v. Fletcher*, 204 S.W.3d 589, 592 (Ky. 2006) (citing nearly identical provision of Kentucky Constitution and noting “[t]his section ... was modeled after a similar provision in the Pennsylvania Constitution, and was originally designed

to reflect the will of the framers to prevent suspension of duly-enacted laws by any entity other than the constitutionally-elected legislative body, a power the British government had ruthlessly exercised over the colonies”).

Accordingly, for each of the above reasons, no privilege justifies Governor Wolf’s and Secretary Davin’s refusals to respond to the Senate Committee’s subpoenas.

**B. No privacy concern of third-party businesses justifies Respondents’ refusals to respond to the subpoenas.**

Finally, as to privacy grounds cited by Governor Wolf and Secretary Davin in the May 8 letter as a basis for refusing compliance with the subpoenas, such grounds are not supported by them. Indeed, Governor Wolf and Secretary Davin have now taken the additional step of abdicating their responsibility to address any privacy concerns to the businesses themselves.

To this end, DCED recently contacted those approximately 42,000 businesses that submitted waiver requests to DCED to advise them to contact the Senate Committee directly if they wish to consent or object to the disclosure of their waiver submission information to the Senate Committee. The DCED even went so far as to provide the email address

of the Chairman of the Senate Committee for the businesses to contact directly. But, pursuant to the subpoenas duces tecum, the burden is on Governor Wolf and Secretary Davin to consent or object to the disclosure of the requested records, not the individual businesses themselves. Governor Wolf and Secretary Davin must respond and produce the records pursuant to the subpoenas served on them, not the individual businesses. And, accordingly, Governor Wolf and Secretary Davin, not the Senate Committee or its Chairman, are responsible for coordinating with the individual businesses about whether they consent or object to the disclosure of their waiver applications.

Ultimately, this objection appears more in the nature of an equitable concern for the very same citizens of the Commonwealth that the Senate Committee is also entrusted to care for. Thus to the extent Governor Wolf's and Secretary Davin's refusal to comply is based solely on equitable privacy grounds of third-party businesses, the Senate Committee is fully able to address those concerns when the records are delivered to its custody. In other words, no privacy grounds justify their refusals to act as ordered by the subpoenas.

#### IV. CONCLUSION

In pursuit of its legislative responsibilities, the Senate Committee issued subpoenas on Governor Wolf and Secretary Davin for records necessary for the Committee's understanding of pressing public policy matters. Rather than meet their promises of "transparency," Governor Wolf and Secretary Davin refused to supply a single record in response. Not one. Not even records that they sent to citizens in the Commonwealth; i.e., records that had already been made public in one way or another. Instead, Respondents invoked privileges and equitable concerns that do not apply under the circumstances. Their refusals to answer should be corrected by this Court.

Therefore, the Senate Committee respectfully requests that the Court grant this application for summary relief, and immediately enter an order: (1) directing Governor Wolf and Secretary Davin to fully comply with the Committee's April 30<sup>th</sup> subpoenas duces tecum; and (2) compelling Governor Wolf and Secretary Davin to immediately produce to the Committee all records responsive to the April 30<sup>th</sup> subpoenas duces tecum, subject to the imposition of fines, costs and imprisonment, *see* 18 Pa.C.S. § 5110 ("Contempt of General Assembly").

Respectfully submitted,

Dated: May 13, 2020

/s/ Matthew H. Haverstick  
Matthew H. Haverstick (No. 85072)  
Mark E. Seiberling (No. 91256)  
Joshua J. Voss (No. 306853)  
Shohin Vance (No. 323551)  
KLEINBARD LLC  
Three Logan Square  
1717 Arch Street, 5<sup>th</sup> Floor  
Philadelphia, PA 19103  
Ph: (215) 568-2000  
Fax: (215) 568-0140  
Eml: [mhaverstick@kleinbard.com](mailto:mhaverstick@kleinbard.com)  
[mseiberling@kleinbard.com](mailto:mseiberling@kleinbard.com)  
[jvoss@kleinbard.com](mailto:jvoss@kleinbard.com)  
[svance@kleinbard.com](mailto:svance@kleinbard.com)

*Attorneys for Petitioner Pennsylvania  
Senate Veterans Affairs & Emergency  
Preparedness Committee*