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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Todd Shepherd and Broad + Liberty,	:	
	:	
Petitioners	:	
v.	:	No. 445 MD 2024
Pennsylvania Office of the Governor,	:	
Respondent	:	

TRANSCRIPT OF PROCEEDINGS

Before: THE HONORABLE MICHAEL H. WOJCIK, Judge
Date: February 12, 2025, 10:58 a.m.
Place: Commonwealth Court of Pennsylvania
 Pennsylvania Judicial Center
 601 Commonwealth Avenue, Courtroom No. 3001
 Harrisburg, Pennsylvania

APPEARANCES:

 Thomas E. Breth, Esquire
 For - Petitioners

 Thomas P. Howell, Esquire
 For - Respondent

ALSO PRESENT:

 Mark Holland, Court Crier
 Thomas Howell
 Madison A. Peticca, Staff Attorney
 Todd Shepherd, Petitioner

1 MR. HOLLAND: All rise. Commonwealth Court is now
2 in session. The Honorable Michael Wojcik presiding.

3 You may be seated.

4 THE COURT: All right. Good morning, all.

5 MR. HOWELL: Good morning, Your Honor.

6 MR. BRETH: Good morning, Your Honor.

7 THE COURT: So we are here on the matter of Todd
8 Shepherd and Broad and Liberty, Petitioners versus
9 Pennsylvania Office of the Governor, Respondent; Number 445
10 MD 2024.

11 It was originally scheduled as a merits hearing,
12 but as is often the case in litigation, there were filings
13 that were fluttering back and forth that I believe merited
14 converting this into a hearing on those filings. So we'll
15 deal with that today, and then we will reconvene if necessary
16 for a hearing on the merits. And I have cleared out time
17 March 4th -- it's a Tuesday -- at 1 p.m. here in the PJC.

18 So any problems with those dates, counsel?

19 MR. BRETH: Your Honor, without checking my
20 calendar, I will accommodate Your Honor, so I don't believe.
21 There's no travel plans; I'll be in the area.

22 THE COURT: All right. Wonderful.

23 MR. BRETH: Thank you.

24 MR. HOWELL: I have no conflict, Your Honor.

25 THE COURT: Okay.

1 MR. HOWELL: That's fine.

2 THE COURT: So to the extent -- and I'm sorry,
3 counsel; could you just identify yourselves for the record
4 because we have --

5 MR. BRETH: Sure. Thomas Breth, counsel for the
6 Petitioner. Beside me is Todd Shepherd, who is one of the
7 petitioners.

8 MR. HOWELL: Good morning, Thomas Howell for the
9 Office of the Governor. And, Your Honor, if you would
10 permit, I'm joined today by my son, also Thomas Howell, who's
11 here on his junior career day.

12 THE COURT: Oh.

13 MR. HOWELL: He wants to sort of follow in my
14 footsteps, but he's going to try to become an entertainment
15 lawyer; a much more exciting area of the law, I think, than
16 many of us get to experience.

17 THE COURT: Well, welcome. I won't be offended
18 that you don't think administrative law and government law is
19 the most exciting practice area, but maybe you'll grow a
20 little and learn that this is truly where the heartbeat of
21 the law is.

22 MR. HOWELL: For the record, Your Honor, I find it
23 fascinating.

24 (Laughter.)

25 THE COURT: Oh, now you're just pandering; that's

1 -- but I'll accept it.

2 All right. So what we have going on today, two
3 things. We have the Commonwealth's application for summary
4 relief. We also have the Commonwealth's application -- or
5 application to quash certain subpoenas.

6 So why don't we first hear argument on the
7 application for summary relief? We'll -- I'll hear argument
8 on that. I'm not going to rule from the bench today. Then
9 we'll pivot over to the application for quashal. Okay.

10 And looking forward, I -- assuming for argument's
11 sake that this proceeds forward on May -- March 4th, will you
12 concede that any subpoenas or notices to attend that I find
13 appropriate will not need to be re-served; we can just apply
14 those to March 4th?

15 MR. HOWELL: Yes, Your Honor.

16 THE COURT: Okay.

17 Is that acceptable to the petitioner --

18 MR. BRETH: It is, Your Honor.

19 THE COURT: -- that rep- -- okay. Good.

20 MR. BRETH: Thank you.

21 THE COURT: Because I want to do this, you know, as
22 clean and as quick as possible. I know it's very -- it's got
23 a profile, shall we say.

24 All right. So on that note, Mr. Howell, you may
25 proceed.

1 MR. HOWELL: Thank you, Your Honor.

2 Recently the Court decided the matter of *Anand*
3 *versus Pennsylvania Department of Insurance*. That case is
4 ultimately dispositive of where we sit here today.

5 In *Anand*, one of the primary issues that this Court
6 addressed is whether under the petition for enforcement under
7 the Pennsylvania Rules of Appellate Procedure a petitioner
8 can attempt to enforce a Right-To-Know Law determination
9 against a Commonwealth agency while simultaneously appealing
10 that underlying Right-To-Know Law determination.

11 The answer that this Court provided in that case
12 was no. While *Anand* was initially written as a memorandum
13 opinion, in December this Court ordered publication. It's
14 now binding precedent.

15 In this case, petitioner has filed an appeal of the
16 Right-To-Know Law determination that they are currently
17 attempting to enforce. I do not know why, but for some
18 reason petitioner has appeared to contest that filing in
19 their answer to the Commonwealth's application for summary
20 relief and has stated that instead they filed a mandamus
21 application.

22 It is true they filed a mandamus petition on this
23 docket. They also filed a separate docket, 954 CD 2024,
24 appealing the underlying Right-to-Know Law determination.
25 Pursuant to *Anand*, that puts them out of court. There's

1 nowhere for this Court to go.

2 The matter is currently on appeal. And as the
3 *Anand* court said, for purposes of enforcing a determination
4 of the Office of Open Records, an appeal renders that
5 underlying determination not yet enforceable.

6 Secondly, the great weight of authority of this
7 Court establishes that where the Commonwealth agency needs to
8 demonstrate to the Office of Open Records and to the
9 requester that no records exist upon a good faith search of
10 the office's records, an affirmation of the agency open
11 records officer is sufficient to establish that.

12 Because here petitioner has not even proffered any
13 suggestion that they have evidence to contravene the
14 affirmation of the agency open records officer, they are
15 again out of court. They simply provide no claim. And this
16 attempt to file an enforcement petition, frankly, appears to
17 be a means by which they seek to acquire evidence to
18 demonstrate that something in the affirmation is incorrect.

19 That's not what the law provides. The enforcement
20 mechanism provides a means to challenge that affirmation or
21 that record when, in fact, you have evidence to the contrary
22 of that.

23 Here, the agency open records officer asserted and
24 demonstrated that he had conducted a search of the
25 Commonwealth records and went beyond that, consulted with

1 others within the office who may have possession of the
2 records and determined after that exhaustive search that
3 there were no responsive records as to the mailbox of [REDACTED]
4 [REDACTED] who had departed Commonwealth employment, I would
5 note, I believe over a year before this request even came in.

6 There is no reason and no evidence even suggested
7 that that affirmation was incorrect. And petitioners'
8 citation to *Uniontown* doesn't get them over that hurdle. In
9 *Uniontown*, the agency open records officer admittedly or in
10 the Court's opinion did not conduct a search, not conduct the
11 outreach; simply deferred, passed the request along to
12 someone else; and then on the basis of no knowledge, executed
13 an affirmation.

14 That's not what happened here. Here, we have an
15 affirmation establishing that the agency open records officer
16 actually conducted the search, looked at the records of the
17 office, inquired with other people to find out where the
18 records may be. That's clearly sufficient. And it's more
19 than this Court required in *Hodges*.

20 In *Hodges*, the affirmation of the agency open
21 records officer stated simply: Based on the information
22 provided to me, I do hereby affirm that to the best of my
23 knowledge, information, and belief, such records do not exist
24 within our agency.

25 The Court in *Hodges* said we agree with the OOR that

1 with this affidavit -- and it was an affirmation; it wasn't a
2 sworn affidavit -- the department met its burden of proof
3 that the requested records do not exist in its possession.

4 *Mahon* is similarly convincing. In *Mahon*, this
5 Court addressed a request addressed to the Department of
6 Health. And this Court established that where the agency
7 open records officer conducts the search, a non-sworn
8 affirmation drafted under penalty of perjury is entitled to
9 deference and weight and is not to be upset in the absence of
10 evidence to the contrary.

11 The use of an enforcement application such as this
12 to overcome that law will put this Court in the position of
13 having to hold these types of hearings whenever anyone wishes
14 to challenge the evidence and satisfaction of the OOR's
15 determination such as was presented to the OOR and to the
16 petitioner in this case.

17 And with that, Your Honor, I would like to defer
18 argument on the motion to quash until --

19 THE COURT: Yeah. We'll --

20 MR. BRETH: -- petitioners' response. Thank you.

21 THE COURT: I want to hear ASR first, and then
22 we'll go to quashal.

23 MR. HOWELL: Thank you.

24 THE COURT: Mr. Breth.

25 MR. BRETH: Good morning, Your Honor.

1 With respect to the affidavit, with due respect to
2 counsel, he's mischaracterizing what's stated in the
3 affidavit. The affidavit is very clear. The Office of Open
4 Records officer did not conduct a search. And I'll point you
5 -- I'll point you to the specific language.

6 Paragraph 4 of the affidavit --

7 THE COURT: With the Office of Open Records or the
8 off- --

9 MR. BRETH: The agency off- --

10 THE COURT: The agency --

11 MR. BRETH: Sorry. The -- I misspoke, Your Honor.

12 THE COURT: Okay.

13 MR. BRETH: The agency open records officer did not
14 conduct a search.

15 THE COURT: Gotcha.

16 MR. BRETH: This is what is stated in the
17 affirmation. Paragraph 4: In response to the Off- -- Office
18 of Open Records' determination, I reviewed the operations and
19 programs of the Office.

20 Now we need to put this into context. The final
21 determination indicates that the Governor's Office is to turn
22 over all inbound and outbound, sent and received emails from
23 [REDACTED] from March 2nd -- I believe the exact language
24 is between March 2nd and March 10th.

25 Well, reviewing the operations and programs of the

1 office is not searching. There is one way in which you
2 search for emails sent and received by an individual,
3 particularly a governmental employee that has a government
4 issued email address that goes through a secure government
5 controlled server. You have to access the server to conduct
6 that.

7 So pursuant to the affidavit, the agency office --
8 open records officer reviews operations and programs and
9 consulted with individuals, including those individuals the
10 Governor's -- within the Governor's Office of Information
11 Systems.

12 Once again, that makes it clear that there is no
13 search that the -- this individual has conducted.

14 I looked at our operations and programs materials.
15 I spoke to some individuals.

16 I'm not sure what they told him because it's not in
17 here.

18 The case law we've cited, the Pennsylvania Supreme
19 Court in *Uniontown* as well as the unreported decision by
20 Judge Covey in -- coming out of this Court make -- makes it
21 clear; the individual that actually conducts the search needs
22 to sign the affirmation or the affidavit and needs to explain
23 the extent to which that individual engaged in a good faith
24 investigation.

25 Someone -- a good faith investigation is someone

1 that has access to the government's server has to go into
2 that server and say, Let's see what emails were sent and
3 received by the [REDACTED]

4 Your Honor, the -- this -- this position --
5 throughout the responses that have been filed by the Office
6 of the Governor, throughout the various Right-to-Know request
7 matters that are before this Court, we've heard voluminous
8 emails.

9 Nobody in this courtroom would be shocked if they
10 were told that the [REDACTED]
11 for the Governor of the Commonwealth of Pennsylvania over a
12 period of a little over a week received hundreds, if not
13 thousands and sent an equal number of emails back and forth.

14 The response that we have in this affidavit is
15 during that time period, the [REDACTED] of Legislative
16 Affairs received no emails and sent no emails.

17 Your Honor, on its face -- I don't -- I don't want
18 to insult, but on its face, that's really, really difficult
19 to -- to fathom that scenario.

20 THE COURT: Mr. Breth, let me just go back to
21 something you said about the affidavit and how the affiant,
22 the declarant -- I don't know if it's -- I can't remember if
23 it's an affidavit or a declaration; but attested that he
24 conducted a review of the procedures, I guess is how you put
25 it.

1 MR. BRETH: Operations and programs, Your Honor.

2 THE COURT: How would one, in your opinion, conduct
3 a proper search?

4 MR. BRETH: Well --

5 THE COURT: Mechanically, what would they have to
6 do?

7 MR. BRETH: On the Governor's website, the Office
8 of the Governor's website, you can locate -- and one of the
9 individuals -- and not to get ahead of ourselves, but one of
10 the individuals that we sent a notice to attend was David
11 Partsch, P-A-R-T-S-C-H, Chief Data Officer, Office of the
12 Governor.

13 As Your Honor knows, I represent a fair number of
14 governmental entities. Someone has to have the authority to
15 access a secured governmental server. So as we all I think
16 would understand, the Governor's Office would have a very,
17 very secure email system. There would probably be a small
18 number of individuals that would have access to go into that
19 system, into that server and to search it.

20 If they're conducting a good faith search to
21 determine whether there are any sent or received emails from
22 this individual during that time period, some -- I'm assuming
23 the office -- or the open -- the agency open records officer
24 doesn't have the authority to just go in and search the --
25 the server. He certainly doesn't indicate that in his

1 affirmation. Nor does he indicate that anyone on behalf of
2 the Governor's Office in response to the final determination
3 conducted that search.

4 We've sent letters asking for the Governor's Office
5 to identify the individuals, including those individuals
6 within the Governor's Office of Information Systems, that
7 Mr. Eisenstein spoke to. We haven't gotten a response.

8 Those are the individuals. Maybe some of them are
9 from the -- the data security. Maybe some of those are
10 individuals that have the authority to access the server to
11 determine whether any emails were sent or received by this
12 individual. But those are the individuals under the case law
13 and the standard for a proper good faith search to be
14 conducted.

15 Those are the individuals -- Judge, get to the
16 chase of it. That's the -- that's the solution to this.
17 Give us an affidavit. Identify those individuals.

18 Have those individuals submit supplemental
19 affidavits saying: I was asked by Mr. Eisenstein in response
20 to the final determination that was issued by the Office of
21 Open Records to conduct a good faith search to identify
22 whether there were any sent or received emails from [REDACTED]
23 during March 2nd through March 10th. I have the authority to
24 access the Governor's secure server. I accessed the
25 Governor's secure server. I went into her email account --

1 I've done it with the assistance of my clients countless
2 times -- I was able to identify no sent or received emails.

3 With respect to whether they exist, Your Honor, we
4 have received through this process and the Office of the
5 Governor has provided us emails. We were provided an email
6 on March 7th, 2023. And it's not dispositive of the issue of
7 whether emails exist, but it's certainly evidence that would
8 indicate that emails should have existed within her email
9 account.

10 Effective immediately, [REDACTED] is no
11 longer staff in the Governor's Office of Legislative Affairs.
12 Please from now on, forward work with Cindy Cashman (ph),
13 copied here, on any matter you would have otherwise elevated
14 to [REDACTED] or -- [REDACTED] or GOLA, Governor Office of
15 Legislative Affairs, until we finish our plans for staffing.
16 And we'll keep you updated.

17 That's -- that's March 6th. The email goes out to
18 about a dozen people, Your Honor; basically saying she's no
19 longer here with the Governor's Office, don't send her
20 additional work via email. That's my interpretation, Your
21 Honor.

22 We also have an email that was provided by the
23 Governor's Office dated March 16th, 2023. This post- --
24 postdates the time period covered by the Right-to-Know final
25 determination, and also it postdates the time period where

1 [REDACTED] was still employed through the Governor's
2 Office.

3 In this email, it says -- and I apologize; I don't
4 know the -- each of the individuals and their titles -- I
5 want to reach out because we received an auto-reply stating
6 that [REDACTED] is no longer with the State. I have suspended
7 her account. However, I want to let you know that there were
8 two bills in her alert track that are not currently being
9 tracked by anyone else in Legislative Affairs. In case you
10 want to reassign them for tracking to someone else, the two
11 bills are SB 121 and SB 188.

12 So clearly she had an active email account. She
13 had a very significant position within the Office of the
14 Governor. It's -- it's very difficult to understand how
15 someone in that position over a -- you know, not a time
16 period of hours but a time period of days, a little longer
17 than a week would not have received or sent emails.

18 That explanation isn't provided within the
19 affidavit. The affidavit just says -- no disrespect to the
20 -- to -- to Mr. Eisenstein; but generally it says: I got the
21 final determination. I asked around. There's nothing there.

22 That's not the legal standard.

23 With respect to the matter whether this Court has
24 jurisdiction, the final determination granted in part and
25 denied in part the Right-to-Know request. An appeal was

1 taken or a petition for review was filed with this Court,
2 asking for the Court to review the denied part. That still
3 leaves the part granting the determination to be an
4 enforceable final determination because the granted part was
5 not. And --

6 THE COURT: So what authority do you have for that,
7 because my understanding is when you appeal from an order,
8 everything that's tied up in that order comes to the
9 appellate court and that's where the jurisdiction is.

10 MR. BRETH: Then this would be a cautionary appeal
11 then if that were the case, Your Honor. I don't believe that
12 to be the case. I'm sorry I didn't brief that for this
13 today.

14 They filed -- they didn't wait. They didn't say,
15 Oh, that's up on appeal; we don't have to file an affidavit
16 in response to the final determination. Within 30 days, they
17 filed an aff- -- an agency affirmation.

18 I -- I won't -- I won't guess, but I would
19 anticipate if 30 days passed and we hadn't filed a petition
20 for review or a petition to enforce either, we'd be hearing,
21 You're out of court; 30 days have passed.

22 THE COURT: Uh-huh.

23 MR. BRETH: So I'll leave that to the Court's sound
24 discretion on -- on how you want to resolve that.

25 I just go back to the -- and I've been in front of

1 you a couple times, Your Honor, and you've encouraged me to
2 try to work things out. I think there's a way to work this
3 out that the Governor's Office really shouldn't have a
4 problem with. And that at least resolves this matter that's
5 before this Court.

6 If they would have filed appropriate -- what we
7 would believe to be appropriate affirmations by the
8 individuals that actually conducted the search, explaining
9 the steps -- I don't think the steps are real complicated.

10 THE COURT: Uh-huh.

11 MR. BRETH: You access the server. You look at her
12 email account, and you download all incoming and outgoing
13 emails during the time period required.

14 If they would have -- if -- if somebody that has
15 the authority to do that signs an affidavit that that was
16 done, I don't have a complaint, Your Honor -- I mean my
17 client doesn't have a complaint. My counsel then would
18 be that's --

19 THE COURT: On this; but you do have a complaint on
20 the other half --

21 MR. BRETH: That's --

22 THE COURT: -- which is --

23 MR. BRETH: -- a whole different --

24 THE COURT: -- for another day.

25 MR. BRETH: Correct.

1 THE COURT: Okay.

2 MR. BRETH: Correct.

3 THE COURT: So is it your contention then that
4 Mr. Partsch is maybe the right person to either do an amended
5 affidavit with greater detail or direct -- who -- direct
6 people who may have done the search?

7 MR. BRETH: I don't know --

8 THE COURT: Whoever the person is who did the
9 search, they need to do the affidavit.

10 MR. BRETH: He -- he was noticed to appear for two
11 reasons, Your Honor. I believe, my review, he was here
12 during this time period.

13 THE COURT: Okay.

14 MR. BRETH: And his title seems to lead me to
15 believe that he would have knowledge or information regarding
16 the security operations.

17 So whatever the process is that the Governor's
18 Office -- and I'm sure that it has gone through this process
19 many times; whoever is authorized to access the server and --
20 and did that.

21 THE COURT: Okay.

22 MR. BRETH: Short of accessing the server, Your
23 Honor, I don't believe you can do a good faith search. I
24 think -- I don't think that issue is in dispute. I think you
25 have to go into the secure server.

1 If she had a laptop or something, that doesn't
2 necessarily preserve the -- the deleted, deleted emails. You
3 actually have to go into the server.

4 So if they produce an affidavit saying, Yes, we did
5 this, and that those records don't exist, I don't believe my
6 client has a legal argument that that's a deficient
7 affidavit.

8 THE COURT: Thank you.

9 MR. BRETH: Thank you, Your Honor.

10 THE COURT: I understand it. Thank you.

11 MR. HOWELL: May I rebut?

12 Thank you.

13 THE COURT: I was hoping you would.

14 MR. HOWELL: Just a -- just a few quick notes, Your
15 Honor.

16 There are a lot of suppositions, I think, in
17 petitioners' argument, and I think the practical
18 ramifications of those suppositions and suggestions need to
19 be addressed.

20 The agency open records officer is the entity under
21 the Right-To-Know Law that is charged with conducting the
22 search. That is why the OOR and this Court rely so strongly
23 on the affirmations of agency open records officer.

24 There is not great authority, particularly in light
25 of *Hodges* and *Moore*, for petitioners' assertion that one

1 needs to drill down the line to the individuals who worked
2 with or helped the agency open records officer conduct a
3 search.

4 What we have here is an affirmation from the agency
5 open records officer who established that he didn't just fire
6 this off to someone else to handle; he engaged in a
7 consultation and direction with the IT security team, with
8 the folks who if the record existed would have possession and
9 was informed that it does not exist.

10 I also take some exception to the concept that the
11 affirmation is attempting to establish that no emails were
12 sent for this one- or two-week period. That's not what the
13 affirmation says.

14 What the affirmation says is that the Office of
15 Governor no longer possesses the records of this employee who
16 was -- who left Commonwealth employment I think about a year
17 to a year and a half before this Right-To-Know Law request
18 came in.

19 That, frankly, should not be surprising that an
20 account of a departed employee would be disposed of in
21 accordance with the records retention schedules. Those
22 retention schedules are public, and they establish that, you
23 know, your general emails are deleted as soon as they're no
24 longer necessary.

25 That is not, again, an issue that the office is

1 required to drill down on and get affirmations from everyone
2 who may have touched that record, the individuals in the
3 office of IT who may at a given point address an inquiry from
4 the agency open records officer.

5 What the law requires is that agency -- that agency
6 open records officer do what he or she needs to do to locate
7 those records if they exist. That's precisely what happened
8 here. That's precisely what the law of this Court has held.

9 And *Uniontown* does not hold to the contrary. What
10 *Uniontown* says is you can't just defer action and send it off
11 to folks and not engage in that search yourself.

12 Anything further, Your Honor?

13 THE COURT: Yeah; could you respond to the
14 procedural hiccup, I guess, that Mr. Breth mentioned where
15 you appeared to -- the -- the timing concerning the service
16 of the affidavit post appeal. That seems to cut against what
17 you're saying now, that the --

18 MR. HOWELL: Okay.

19 THE COURT: -- appeal divested jurisdiction of
20 anyone else to enforce, yet you complied with enforcement
21 procedures.

22 MR. HOWELL: That's correct. As the appeal period
23 runs, so was the time frame for the office to provide the
24 affirmation. They are, in essence, coexistent. It's 30 days
25 for each of those actions to occur.

1 The office had determined that it was not going to
2 appeal and, therefore, provided the affirmation. Petitioner,
3 however, did appeal. They had their choice. You know, they
4 -- they can't appeal --

5 THE COURT: So let me put it another way. Is it
6 your contention that compliance, providing the affidavit,
7 happened before the appeal was filed?

8 MR. HOWELL: Yes. I -- it would have necessarily
9 happened before or at the time the -- well, I don't know. I
10 would have to review the record.

11 THE COURT: Okay.

12 MR. HOWELL: It's possibly filed early; I don't
13 know.

14 THE COURT: Is it in the records in front of this
15 Court right now or --

16 MR. HOWELL: It is in the docket. It would be in
17 the docket.

18 THE COURT: So we can review the docket. We'll --

19 MR. HOWELL: Yeah. I do not know if they filed 954
20 CD early. If --

21 THE COURT: Okay.

22 MR. HOWELL: If they did, the affirmation may have
23 come later.

24 THE COURT: Okay.

25 MR. HOWELL: I just don't know the answer to that.

1 But in any event, I don't think that the failure to
2 establish a ripe claim at this point would preclude them from
3 refiling if this Court were to address the 954 matter. I
4 think what *Anand* says is you can't have both balls in the air
5 at the same time.

6 THE COURT: So --

7 MR. HOWELL: As far as --

8 THE COURT: So assuming that I agree with you and
9 say yeah, the -- the appeal rendered everything else null and
10 void, we erase it and we move forward, assume that
11 petitioner, requester loses their appeal, that then opens the
12 door to enforcement. So they get another bite at the apple,
13 don't they? They can come back to you and say, Okay, let's
14 enforce it; your -- your affidavit is bad.

15 MR. HOWELL: I think that's right, and that's
16 because it -- it rests in the appellate jurisdiction of this
17 Court. Otherwise, you've, in essence, got two appeals
18 pending at the same time.

19 There is a judicial economy function served by that
20 as well because if the opposite were to occur on the 954
21 matter, if the -- if this Court were to reverse the Office of
22 Open Records, it would remand to the Office of Open Records.
23 Why have multiple enforcement actions when we may be back
24 here again on whether the office has complied with whatever
25 that remand order is? We -- the fact of the matter is we

1 just don't know that until this Court addresses 954.

2 THE COURT: Gotcha. All right.

3 MR. HOWELL: Thank you.

4 THE COURT: Thank you.

5 Mr. Breth, I'll give you an opportunity to have the
6 last word.

7 MR. BRETH: Thank you, Your Honor. I'll try to be
8 brief.

9 With respect to -- I guess I have to -- because
10 I've heard something new. I've heard the assertion that --
11 that the affiant is now -- the position is that we're --
12 we're to interpret Mr. Eisenstein's affirmation that it's not
13 that they didn't exist, they no longer exist; that the Office
14 of the Governor didn't preserve the emails of the Deputy
15 Secretary of Legislative Affairs for whatever time period.

16 This -- there's -- there was an active
17 investigation to allegations of sexual harassment. She
18 leaves the employment of the Office of the Governor
19 March 6th, March 7th, somewhere in that time frame, Your
20 Honor.

21 There's a subsequent settlement agreement that
22 comes -- becomes public in October of that year. And less
23 than a year -- from the time she left the employment, the
24 Office of the Governor's position is they -- they -- I don't
25 want to say destroyed; they did not preserve emails in her

1 email account and that that's in accordance with the -- I
2 guess that's the reference to the operation and programs.

3 I mean, Your Honor, I think that -- I think it's
4 reasonable to require the Governor's Office -- if that's
5 their position that -- that those emails no longer exist
6 because they were -- they were expunged, they were erased, or
7 whatever in the Office of the Governor's server, I don't
8 think that's what this affirmation says.

9 If that's the case, once again, the solution to
10 this is provide us with a detailed, which is the requirement
11 under the law.

12 I will note that in reference to the obligation to
13 preserve, that's contained and addressed by the Supreme Court
14 in the *Uniontown* decision. So I just draw your attention to
15 that. They clearly have an obligation; a governmental entity
16 has an obligation to preserve that information.

17 And I'd also assert that I'm assuming if there were
18 an investigation through the Pennsylvania Human Relations
19 Commission that had the jurisdiction of this matter, they
20 would have been provided access and digital copies of all of
21 the emails.

22 This individual was only employed for a relatively
23 short period of time; months. So to accumulate all of her
24 sent and received email, I would assume that that was
25 preserved as part of the investigation.

1 There's been allegations that the Governor's Office
2 conducted an investigation. That would be contrary to the
3 policies and procedures out of the Governor's Office when a
4 -- when a complaint is filed with the Pennsylvania Human
5 Relations Commission. The Pennsylvania Human Relations
6 Commission as an independent agency is charged with the
7 responsibility to do the investigation, not the Governor's
8 Office.

9 So I'm just -- I'm puzzled by the -- the fact that
10 we're now, I think, being told by counsel that to the extent
11 that they existed, they don't exist anymore because they
12 weren't preserved.

13 Once again, if there's an affidavit -- I can't undo
14 what's -- if that's the case, I need an -- a clear affidavit
15 from whoever has the authority to say that and I would assume
16 somebody has access to the server, say, We looked, and they
17 no longer exist.

18 And if they were provided to an independent agency
19 like the PHRC, I still think they have an obligation to
20 contact the PHRC and retrieve those. That's still within
21 their -- in -- in my opinion, Your Honor, their -- their
22 control.

23 With respect to the issue that you were asked about
24 the appeal, I have this Court's docket on the 954 CD 2024
25 case which was the petition for review on the final

1 determination.

2 The petition for review was filed July 26th, 2024,
3 with this Court. The affidavit -- or the affirmation that
4 was filed by Mr. Eisenstein is dated August 14th, 2024. So
5 it's -- postdates the petition for review being filed.

6 THE COURT: So --

7 MR. BRETH: And with that --

8 THE COURT: So give me that date again that the --
9 the affirmation was filed.

10 MR. BRETH: The affirmation is dated --

11 THE COURT: Dated.

12 MR. BRETH: -- August 14th, 2024. The final
13 determination was July 15th, 2024. So they had 30 days. So
14 they filed it within that 30-day time period.

15 THE COURT: Okay.

16 MR. BRETH: But the petition for review asking the
17 Court to review the denial portion of the final determination
18 was filed July 26th, 2024.

19 THE COURT: Okay. And then I am looking at your
20 exhibit list. You have Mr. Eisenstein's agency information
21 -- affirmation dated April 3rd, '24, as Exhibit B.

22 MR. BRETH: I think one of those is misdated, Your
23 Honor. The August 14th, '24. We'll file a supplemental
24 before --

25 THE COURT: Okay. I have --

1 MR. BRETH: If we're -- if we're granted a hearing
2 in March, we'll file a supplemental exhibit list.

3 THE COURT: Yeah. I have 4/3/24 and then 5/10/24.

4 MR. BRETH: Correct. That was a misdate on our --

5 THE COURT: 5/10 is misdated?

6 MR. BRETH: The --

7 THE COURT: Exhibit C?

8 MR. BRETH: -- 4- -- the prior one I think is the
9 misdated. It's not -- it should include the August 14th,
10 2024 --

11 THE COURT: Okay.

12 MR. BRETH: -- affirmation.

13 THE COURT: Okay. One -- I'm looking now here.
14 Exhibit 2 is dated April 3rd, 2024. And then Exhibit 3 is
15 dated May 10th, 2024. So I don't see in my file here an
16 August 14th, 2024 affirmation.

17 MR. BRETH: Correct. That -- that was an error in
18 the --

19 THE COURT: Oh --

20 MR. BRETH: -- in the dating on the witness -- or
21 the exhibit list. We'll correct that. The -- the last
22 affirmation noted there should have been dated August 14th,
23 2024.

24 THE COURT: Okay. I think -- there's -- I'm
25 looking at them. Exhibit 2 is 4/3/24. Exhibit 3 is 5/10/24.

1 But there's no August 14th at all. There's no misdate.
2 There's none at all in your -- on your exhibit list.

3 MR. BRETH: Correct. The wrong affidavit was
4 included there.

5 THE COURT: Oh, okay.

6 MR. BRETH: The August 14th --

7 THE COURT: I thought you meant there was a typo.
8 Okay.

9 MR. BRETH: No. No.

10 THE COURT: And then one other question. And I
11 don't -- and it confused me a bit, so -- in your papers, you
12 identify yourself as special counsel to the Thomas More
13 Society.

14 MR. BRETH: Correct, Your Honor.

15 THE COURT: And they're a party to this?

16 MR. BRETH: They are not a party to this.

17 THE COURT: Okay. Why are you indicating that
18 you're special counsel to the Thomas More Society?

19 MR. BRETH: Because they're -- they're working with
20 us on this case. They're a special interest law firm out of
21 Chicago.

22 THE COURT: Okay.

23 MR. BRETH: So they get involved --

24 THE COURT: Oh, they're a law firm. Okay.

25 MR. BRETH: Correct.

1 THE COURT: I thought there was another counsel.
2 Okay. Never mind. I understand. Thank you.

3 MR. BRETH: Thank you, Your Honor.

4 MR. HOWELL: Your Honor, can I briefly?

5 THE COURT: You may.

6 MR. HOWELL: Thank you.

7 THE COURT: I figured you would.

8 And we're boring the younger Mr. Howell. I
9 apologize.

10 MR. HOWELL: I'm sure.

11 THE COURT: This is exciting.

12 MR. HOWELL: Your Honor, with respect to the
13 office's preservation requirements, counsel has not and
14 cannot provide to any requirement that would require any
15 governmental agency to preserve emails six months after any
16 litigation had concluded and over a year after an affected
17 individual had left Commonwealth employment.

18 The records retention --

19 THE COURT: Was he entitled, though, to an
20 affidavit that says, Oh, by the way, none of these documents
21 would be in existence because of the retention policy?

22 MR. HOWELL: I think he's entitled to what the
23 affirmation provides which is that these documents do not
24 exist.

25 THE COURT: Okay.

1 MR. HOWELL: You know, and it wasn't -- the
2 affirmation does not say I think what counsel is asserting it
3 said which is these documents never existed. He seems to be
4 taking the position that his initial read of the affirmation
5 was that these documents, you know, had never occurred.

6 That's not what it says. It says: I've conducted
7 the search. I've checked with the people who would have
8 this. They are not there. They do not exist.

9 That's the appropriate response. And, again, that
10 is -- it's Right-To-Know Law practice throughout not just
11 Commonwealth agencies but local agencies. And I think really
12 to require that everyone whose hand touches a search execute
13 an affirmation runs counter to the efficient and timely
14 response purposes of the Right-To-Know Law.

15 The office here did what it was commanded to do by
16 the Office of Open Records, and that's conduct a search and
17 provide an affirmation establishing that after such a search,
18 those records don't exist in the agency's possession,
19 custody, or control.

20 And on possession, custody, or control, again,
21 there's no authority for the assertion that a Commonwealth
22 agency has a responsibility to go and recreate records based
23 upon their existence in the hands of some other independent
24 agency.

25 It's simply -- there's -- there's no provision of

1 law that provides for the office to reach out to the PHRC and
2 try to recreate what it may have had at one time if they were
3 even provided to the PHRC which is something that we can't --

4 THE COURT: Well, you're saying recreate. If --

5 MR. HOWELL: -- say on the record right now.

6 THE COURT: If -- if PHRC has this in a file
7 somewhere --

8 MR. HOWELL: It's not in the office's possession,
9 custody, or control. And I have no reason to believe and the
10 record contains no indication that they have any emails of
11 [REDACTED] let alone her entire inbox --

12 THE COURT: All right.

13 MR. HOWELL: -- or sent box or what have you.

14 THE COURT: All right.

15 MR. HOWELL: Thank you.

16 THE COURT: Okay. Let's pivot to the quashal.

17 MR. HOWELL: I suppose I'm up again, Your Honor.

18 THE COURT: You are. I apologize for making you
19 sit down, but --

20 MR. HOWELL: If I may have a moment to --

21 THE COURT: Sure.

22 MR. HOWELL: -- flip pages here please.

23 Thank you.

24 Your Honor, I should initially state that the
25 office's position continues to be that all of these subpoenas

1 and notices should be quashed because this matter is -- is
2 not properly before this Court for the reasons we just
3 discussed.

4 But in any event, it's clear that the subpoenas
5 that we know were provided to Ms. Muller, who this office
6 does represent, and we understand were provided to Mr. Vereb,
7 who this office does not represent, be quashed because
8 there's no indication that they have any information that's
9 relevant to the disposition of this case.

10 My understanding of the offer of proof presented by
11 Mr. Shepherd, through counsel is that Mr. Vereb and Ms. Muller
12 would know how many emails [REDACTED] sent or received.
13 Again, that's simply not relevant. The only relevant
14 question is the sufficiency of the affirmation of
15 Mr. Eisenstein.

16 That affirmation is not anything that was drafted
17 while either of those individuals were within the employ of
18 the Office of the Governor or any executive agency. There is
19 no indication that they have any knowledge about the drafting
20 of that affirmation, that they have no -- that they have any
21 knowledge about the disposition of any of [REDACTED]
22 emails many, many months after both of those individuals left
23 office.

24 There's simply no reason to call two individuals
25 who, again, have left Commonwealth service many months ago to

1 discuss something which occurred long after they left office
2 without any indication they had an interaction with the
3 office on those issues.

4 Moving on to the notices to appear, again,
5 Mr. Eisenstein's affirmation is sufficient on its face.
6 Certainly he understands why he drafted that affirmation, but
7 I think the real question for this Court is whether it's
8 appropriate to require this Court to revisit or pierce into
9 the allegations, the individual sentences and parentheses of
10 an affirmation constructed in satisfaction of the Office of
11 Open Records' determination in the absence of any extrinsic
12 evidence that that affirmation is itself incorrect.

13 The concern, I think, is that agencies will be in
14 continual litigation. There will be no finality at the
15 Office of Open Records if affirmations are deemed
16 potentially, quote, enforceable or insufficient after the
17 fact.

18 Because Mr. Eisenstein's affirmation is sufficient
19 on its face, it would be inappropriate and burdensome to call
20 him to testify as to whether what he stated is true and how
21 he arrived at those conclusions, again, in the absence of any
22 extrinsic evidence that the assertions of that affirmation
23 are in some material way incorrect.

24 We simply don't have that here. There's a lot of
25 supposition. But I haven't seen any allegation, I haven't

1 seen any pleading, I haven't seen any evidence that there is
2 an incorrect statement in that affirmation.

3 Frankly, it comes down to the fact that
4 Mr. Eisenstein, as the agency open records officer, did what
5 the law required. And to now try to enforce that by further
6 inquiring into the processes and individual assessments that
7 he used to question the way in which the agency decided to
8 litigate the case and the choices that it -- that it made
9 would subject Mr. Eisenstein to an inappropriate, burdensome,
10 and potentially vexatious inquiry.

11 Lastly, with respect to Mr. Partsch, it appears
12 that counsel has filed a notice on Mr. Partsch based simply
13 upon the Commonwealth's directory. It's not my understanding
14 that that reflects a proper understanding of the
15 Commonwealth's IT functions.

16 Again, a lot of what we're hearing is based on
17 supposition, and that -- that type of supposition isn't
18 sufficient to support pulling an Office of Administration IT
19 specialist out of his regular job to discuss material that
20 plaintiff thinks he might know something about, again, in the
21 -- in the absence of any evidence or indication to the
22 contrary.

23 We simply don't have that evidence here to tilt the
24 seesaw in that direction, to trip the wire to allow those
25 subpoenas or notices to appear to stand.

1 Thank you.

2 THE COURT: All right.

3 MR. BRETH: Your Honor, on this issue, I believe
4 the Rules of Appellate Procedure are clear. We've talked
5 about Rule 3761, Enforcement Proceedings; paragraph (b),
6 Enforcement of Final Determinations of the Office of Open
7 Records. This spells out the -- the process the Court is to
8 follow.

9 I cite the Court's attention to paragraph (8),
10 Hearing and Notice. This Court provided notice to the
11 parties through an order of court on December 18, 2024,
12 scheduling a hearing, directing the parties to engage in a
13 number of tasks. We did that. One of the tasks is exchange
14 of a witness list, exchange of exhibits.

15 The relief that's available under Section 3761 --
16 I'll draw the Court's attention to paragraph (10), Relief.
17 "Following the hearing, the Court will enter such orders as
18 may be appropriate." The Court has broad discretion as --
19 with respect to the relief.

20 As Your Honor knows, original jurisdiction matters
21 that are filed in the Commonwealth Court as an appellate
22 court unless expressly provided otherwise within the Rules of
23 Appellate Procedure are governed by Pennsylvania Rules of
24 Civil Procedure.

25 I'd cite the Court's attention to Rule 1542 of the

1 Rules of Appellate Procedure, evidentiary hearings, where it
2 clearly indicates that the Court has the discretion on an
3 original jurisdiction matter if there are issues of fact --
4 the last hour or so I'm sure has illustrated that there are
5 significant issues of fact in this matter -- to schedule an
6 evidentiary hearing.

7 I believe the Court's order of December 18th, 2024,
8 is exactly that, that the Court -- the Court's intent was to
9 schedule an evidentiary hearing, hence, the list of witnesses
10 and exhibits.

11 I'd also draw the Court's attention to Rule of
12 Appellate Procedure 1551, Scope of Review. Once again, that
13 talks about original jurisdiction matters that are before the
14 Court.

15 Further down, Rule of Civil -- or Rule of Appellate
16 Procedure 1561, disposition of petitions for review.
17 Subparagraph -- or paragraph (b) talks about, once again, the
18 relief that the Court has the ability in its plenary powers
19 to grant.

20 Rule of Appellate Procedure 1571, application rule
21 of pleadings. Once again, that -- that Rule of Appellate
22 Procedure cites the Rules of Civil Procedure that are
23 applicable to this Court when this Court functions in its
24 original jurisdiction to review a matter.

25 And finally, Your Honor, Rule of Appellate

1 Procedure 106, Original Jurisdiction Matters, once again,
2 references the Rules of Civil Procedure that are applicable
3 in the Court of Common Pleas that apply to this Court's
4 proceedings when this Court is acting in its capacity under
5 original jurisdiction.

6 The subpoenas that were issued were obtained from
7 the Commonwealth Court through the Prothonotary's Office.
8 Rule of Civil Procedure 234.1 provides the mechanism and
9 authority for litigants to obtain subpoena -- subpoenas in
10 matters under the Rules of Civil Procedure which, once again,
11 are applicable to this Court in original jurisdiction
12 matters, which is what's before this Court.

13 Also referencing you to 234.3 of the Pennsylvania
14 Rules of Civil Procedure, Notice to Attend and Notice to
15 Produce. Notice to attend were issued upon individuals in
16 the Office of the Governor.

17 At the time that a subpoena -- I'll address them in
18 order, Your Honor, just so that -- that may be a little bit
19 easier.

20 THE COURT: Thank you.

21 MR. BRETH: A notice to attend was issued upon Marc
22 Eisenstein, agency open records officer. Obviously that's
23 the individual that filed the -- or signed the agency
24 affirmation that we have discussed. I'm not going to review
25 my argument on -- on the deficiencies with that.

1 Adrienne Muller, Executive ██████████ of
2 Legislative Affairs. She has left the employment of the
3 Office of the Governor end of 2023, I believe. She's now in
4 private practice, so a subpoena was issued upon her.

5 Counsel has notified me that -- that he represents
6 her in her capacity as an employee at the time at issue. So
7 a subpoena would not be necessary in our opinion; an
8 attendance -- or a notice to attend would be sufficient.

9 It's a little bit -- we're -- part of this, Your
10 Honor, is we've got a -- we've got an affirmation. That's
11 the extent of the information we have saying, We don't have
12 this.

13 So counsel has made a lot of representation about,
14 Well, they don't have evidence of this or evidence of that.
15 We have an affirmation. That's why the affirmation -- it's
16 so important to hold the government accountable for filing
17 detailed affirmation in accordance with the law.

18 Counsel had argued that an affirmation that says, I
19 spoke to some people, and there's nothing there -- which is
20 what that says, Your Honor -- that that's sufficient. I
21 don't believe any citizen of the Commonwealth of Pennsylvania
22 believes that their government should function in such a
23 manner that when a Right-to-Know request is filed to say, We
24 want access to public records, that we have to blindly rely
25 upon a government official that says, We looked, and they're

1 not there. Trust us; we're from the government.

2 That's just a standard that is just not within the
3 intent or the text of the Right-To-Know Law and certainly
4 inconsistent with the case law that's come out of this Court
5 and the Pennsylvania Supreme Court.

6 I think Ms. Muller could go away if we had an
7 affidavit that said, Listen, the records don't exist anymore.
8 To the extent they existed before, they don't exist now
9 because they've been -- pick the word: purged, written over,
10 deleted from the server.

11 She worked closely with [REDACTED] Obviously
12 she would have knowledge with respect to the frequency with
13 which they communicated in their positions, and potentially
14 personally, via email. So that's the offer of proof on her.

15 David Partsch. We sent two letters. When we
16 received the Court's order on December 18th, we sent two
17 letters to counsel, asking counsel, Would you please identify
18 the individuals that Mr. Eisenstein references in paragraph 4
19 of his affirmation? Tell us, consulted with individuals;
20 what individuals, including those within the Governor's
21 Office of Information Systems? What individuals?

22 We sent one letter early January. We sent a second
23 letter a week later. We got zero response. He's standing
24 here saying, They have no evidence. We don't have -- we
25 picked Mr. Partsch not because we wanted to, because the

1 Governor's Office refused to disclose what should be very
2 simple information.

3 Marc, who did you speak to that you referenced in
4 your affirmation? Okay. Let's tell them that.

5 Why would that not be a very simple task for the
6 Governor's Office and very simple information for them to
7 provide?

8 THE COURT: Mr. Breth, let me get your reaction to
9 this. And then I'm sure Mr. Howell is going to want to come
10 up and respond.

11 So put this -- put this in the back of your mind,
12 Mr. Howell. I'd like to hear your response to this too.

13 Is there a mechanism in place here that we could
14 borrow from the civil rules regarding discovery, something
15 that could -- a corporate representative deposition where you
16 say, This -- I want someone who can testify as to these five
17 issues?

18 MR. BRETH: I think that -- I think most certainly
19 there's a couple -- there's a -- that we could borrow.
20 There's a corporate designee under the Rules of Civil
21 Procedure.

22 THE COURT: Have you thought about that?

23 MR. BRETH: We're open to anybody that is a
24 legitimate individual that has the knowledge with respect to
25 what search was conducted. We don't have a name, so --

1 THE COURT: Yeah.

2 MR. BRETH: -- any --

3 THE COURT: Exactly.

4 MR. BRETH: -- any name they would give us would be
5 a better -- a better avenue than where we are right now.

6 THE COURT: So I take it from your response that
7 you didn't consider that before.

8 MR. BRETH: I -- I considered asking for the
9 individuals that were referenced in the affirmation.

10 THE COURT: But not --

11 MR. BRETH: That was the intent.

12 THE COURT: Not reversing and saying, These are the
13 functions; give me someone who can testify as to these
14 functions.

15 MR. BRETH: That was Mr. Partsch, was, quite
16 honestly --

17 THE COURT: You --

18 MR. BRETH: -- in our mind. That was our -- our
19 intent.

20 THE COURT: You assumed it was Mr. Partsch because
21 you --

22 MR. BRETH: I assumed it was Mr. Partsch.

23 THE COURT: -- from what I understand from Mr.
24 Howell, you looked at the director --

25 MR. BRETH: Yeah.

1 THE COURT: -- the directory and --

2 MR. BRETH: Well, I looked at -- I looked at a
3 little more than directory. On the website, it gives a
4 description of his job.

5 THE COURT: So you tried to match up what his
6 description was to what you were looking for.

7 MR. BRETH: I looked -- this individual seems to
8 have the job responsibilities and the criteria and --

9 THE COURT: Yeah.

10 MR. BRETH: -- expertise to be the one to ask.

11 If there's somebody else that we should have asked
12 for, I'm -- I don't mind being correct- -- well, I do mind
13 being corrected.

14 (Laughter.)

15 MR. BRETH: But in this case, I wouldn't -- I
16 wouldn't be -- mind -- I wouldn't mind having accurate
17 information.

18 Mr. Vereb, same as Ms. Muller. You know, he would
19 be familiar with her, worked with her. He would be familiar
20 at a level. This isn't -- this isn't an issue about the
21 allegations. This is an issue about the government properly
22 responding to a Right-to-Know request.

23 The other thing I might suggest, Your Honor,
24 referencing what might occur through a Rule of Civil
25 Procedure, having been through the Court's mediation process,

1 a discovery master would be someone to oversee and -- and
2 have the authority to hold the parties accountable to comply
3 with the requirements.

4 We're looking for a definitive answer whether these
5 exist; if they exist, that they be produced; if they don't
6 exist, a clear explanation as to how they came to not exist,
7 Your Honor.

8 THE COURT: Gotcha.

9 MR. BRETH: With that, thank you very much.

10 THE COURT: Thank you.

11 MR. HOWELL: Thank you, Your Honor.

12 Counsel makes a lot of references to the Rules of
13 Civil Procedure and to the Rules of Appellate Procedure that
14 govern when those Rules of Civil Procedure are incorporated
15 into this Court's operations.

16 The problem with that is this Court has made clear
17 and the rules make clear enforcement petitions lie in this
18 Court's appellate jurisdiction. And they further provide --
19 and I think this goes to your question about a designee --
20 that there shall be no discovery except upon order of court.

21 It's very clear that the system is designed to
22 operate quickly and efficiently to avoid things like having a
23 discovery master where the only question is, Did the office
24 do what the Open Records Office required them to do?

25 The inescapable conclusion here is that the Office

1 of the Governor did precisely what the Office of Open Records
2 ordered it to do. If there were a situation where we did not
3 provide an affirmation from the open records officer, sure;
4 fair game. If there was a situation where the agency open
5 records officer said, I don't think there are any records,
6 sure; fair game.

7 But here we have the agency open records officer
8 doing exactly what he's supposed to do under law. And that,
9 by the way, is exactly why the idea of a corporate designee
10 is also inappropriate because there's no such thing under the
11 Right-To-Know Law.

12 The Right-To-Know Law doesn't say that the agency
13 shall provide an affidavit from other individuals in the
14 office who may have had custody or control of the record. It
15 says that the agency open records officer shall conduct a
16 good faith search.

17 That's why the Office of Open Records and this
18 Court is so concerned with the agency open records officer --

19 THE COURT: So, Mr. Howell, how does -- how does a
20 requester then test the sufficiency and adequacy of an
21 attestation? Is there any mechanism for that to happen?

22 MR. HOWELL: Well, I think there is -- there is a
23 mechanism to test the sufficiency of an affirmation where
24 there is an indication that it is incorrect. And that's what
25 this Court said in *Mahon*, if you've got -- and that's what

1 happened in *Uniontown*.

2 You know, they had extraneous evidence. They had
3 other documents that indicated that those records really were
4 out there.

5 As a matter of fact, I think they had a -- if I
6 recall, they had a release or some other investigative report
7 that was from or involved that agency that indicated on its
8 face that the records that they said weren't there were
9 actually there.

10 THE COURT: So are you suggesting then that this
11 Court does not have the ability to independently test the
12 sufficiency of what Mr. Eisenstein said --

13 MR. HOWELL: I think this Court --

14 THE COURT: -- just take it at face value?

15 MR. HOWELL: I think this Court has the ability to
16 -- to probe that affirmation only where there is external
17 evidence that it is in some mechanism incorrect. And that's
18 really what the standard has been as expressed in *Mahon* and
19 its progeny, that when there is evidence that the affirmation
20 is in some meaningful way incorrect, that it is false, then
21 there's certainly means to inquire. But it almost comes down
22 to --

23 THE COURT: So we need a --

24 MR. HOWELL: -- the parol evidence rule.

25 THE COURT: We need a smoking gun somewhere.

1 MR. HOWELL: You need -- if not a smoking gun, you
2 need some indication that --

3 THE COURT: A warm gun.

4 MR. HOWELL: Yeah. Yeah. The affirmation
5 establishes, in essence, the prima facie case. And unless
6 there's something to overcome that, it continues to exist.

7 THE COURT: Uh-huh.

8 MR. HOWELL: And I'd suggest that this Court likely
9 does not want to put itself in a place where these matters
10 are coming before it routinely because agencies have been
11 really commended by this Court, by the Supreme Court to use
12 these affirmations to establish the nonexistence of records
13 in every case; not just the exciting ones; not just the ones
14 involving Governor's Office officials; you know, not just the
15 ones involving salacious allegations and things of that
16 nature but also inmate cases about inmate accounts and where
17 the dollars and cents went and what kind of bedding did you
18 use; also cases involving the zoning boards and what did they
19 decide, you know, based upon where this creek should be
20 routed.

21 The -- the panoply of possibilities that could be
22 subject to this Court's review if it were to expand the
23 jurisdiction of an enforcement action to provide an original
24 jurisdiction action really are kind of astounding.

25 And, again, this -- you know, this is not an

1 original jurisdiction action. All of the Rules of Civil
2 Procedure that get incorporated into this Court's processes
3 are incorporated in those original actions.

4 I think counsel thinks that he's still got a
5 mandamus action. This Court -- or the Supreme Court in
6 establishing that rule recognized that allowing those
7 original actions to proceed here would provide parties with a
8 right of immediate appeal to the Supreme Court.

9 That's not the process that is contemplated by the
10 rule. It expressly said no, this is an appellate rule.
11 That's why it's limited. That's why there's no discovery
12 absent an order of court.

13 Thank you.

14 THE COURT: Thank you.

15 Anything further, Mr. Breth?

16 Can't resist the offer, huh?

17 MR. BRETH: I can't resist. Just briefly, Your
18 Honor. And I appreciate the Court's time and patience with
19 this.

20 With respect to the issue of it's -- it's our
21 obligation to produce an email during that time period, I'm
22 -- I'm a little bit confused because I don't know how that
23 changes things because at one point, you're being told they
24 no longer exist within the server, they've been destroyed; at
25 another point, you're saying, But if they had an email during

1 that time period, that would change something. Well, it
2 doesn't change something if they don't exist because you
3 can't recreate them in the server.

4 So the other frustrating part about this is the --
5 the settlement agreement has a nondisclosure provision, so
6 the -- the victim in this case isn't able to -- to freely
7 discuss that. If the Governor's Office is willing to do
8 that, we're happy to reach out to her and say, Do you have
9 any emails that cover this time period?

10 Or you can release her from it, Your Honor. I
11 believe she's probably released from it by an order of this
12 Court.

13 Under that circumstance, we may be very well
14 capable of producing emails that were sent or received from
15 her during the time period in question. And then the
16 Governor's Office can explain how they're saying that those
17 emails no longer exist or they didn't have custody, care, or
18 control of them.

19 Thank you, Your Honor. That's all I would have
20 unless you have any questions.

21 THE COURT: No. I think I'm good.

22 MR. BRETH: Thank you.

23 THE COURT: Food for thought.

24 MR. BRETH: Thank you, Your Honor.

25 THE COURT: We'll take this under advisement, and

1 we'll have a ruling out well in advance of the next hearing
2 date that's been scheduled.

3 Well argued. Well briefed. Thank you very much.

4 MR. BRETH: Thank you, Your Honor.

5 MR. HOWELL: Thank you, Your Honor.

6 THE COURT: And entertainment law may be a better
7 way to go.

8 (Laughter.)

9 MR. HOLLAND: Commonwealth Court is now adjourned.

10 (Whereupon, the proceedings adjourned at
11 12:02 p.m.)

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I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the proceedings of the above cause and that this copy is a correct transcript of the same.

DATED: February 26, 2025



Rebecca Toner, RPR

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