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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 Brianda  
4 Freistat 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 Ms. Freistat 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 Deputy Secretary of Legislative Affairs.

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 Deputy Secretary of Legislative Affairs  
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 Deputy Secretary 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 Freistat  
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, Brianda Freistat 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 Brianda or -- Brianda or GOLLA, 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 Ms. Freistat 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 Brianda 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 Ms. Freistat, 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 Ms. Freistat 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 Ms. Freistat's  
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 Deputy Secretary 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 Ms. Freistat. 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.)

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

5  
6 DATED: February 26, 2025

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9 Rebecca Toner, RPR

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