

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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SENATOR JAY COSTA, SENATOR :  
ANTHONY H. WILLIAMS, SENATOR : **CASES**  
VINCENT J. HUGHES, SENATOR STEVEN : **CONSOLIDATED**  
J. SANTARSIERO, AND SENATE :  
DEMOCRATIC CAUCUS, : No. 310 MD 2021  
Petitioners, :

V.

SENATOR JACOB CORMAN III, SENATE :  
PRESIDENT PRO TEMPORE, SENATOR :  
CRIS DUSH, AND SENATE SECRETARY- :  
PARLIAMENTARIAN MEGAN MARTIN, :  
Respondents. :

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COMMONWEALTH OF PENNSYLVANIA, :  
PENNSYLVANIA DEPARTMENT OF STATE, : No. 322 MD 2021  
AND VERONICA DEGRAFFENREID, :  
ACTING SECRETARY OF THE :  
COMMONWEALTH OF PENNSYLVANIA, :  
Petitioners, :

V.

SENATOR CRIS DUSH, SENATOR JAKE :  
CORMAN, AND THE PENNSYLVANIA :  
STATE SENATE INTERGOVERNMENTAL :  
OPERATIONS COMMITTEE, :  
Respondents. :

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ARTHUR HAYWOOD :  
JULIE HAYWOOD, : No. 323 MD 2021

V.

VERONICA DEGRAFFENREID, ACTING :  
SECRETARY OF STATE, :  
COMMONWEALTH OF PENNSYLVANIA, :  
Respondent. :

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**REPLY BRIEF IN SUPPORT OF PETITIONER ARTHUR HAYWOOD AND  
JULIE HAYWOOD'S MOTION FOR SUMMARY RELIEF AND IN  
OPPOSITION TO RESPONDENT'S CROSS- MOTION FOR SUMMARY  
RELIEF**

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**REPLY BRIEF IN SUPPORT OF PETITIONERS ARTHUR HAYWOOD AND JULIE  
HAYWOOD’S MOTION FOR SUMMARY RELIEF AND IN OPPOSITION TO  
RESPONDENT’S CROSS- MOTION FOR SUMMARY RELIEF**

Petitioners, Arthur and Julie Haywood (collectively referred to herein as the “Heywoods”), by and through undersigned counsel, Legis Group, LLC, hereby file this Reply Brief in further Support of their Application for Summary Relief, to address the misstatements of fact and misapplication of law found in Respondent’s brief (“ Response Brief”).

**I. RESPONDENTS’ MISPLACED ASSERTION REGARDING THE  
SENATE’S POWERS IS AN ATTEMPT TO DISTRACT FROM THE ACTUAL  
MATTERS AT ISSUE.**

It is well settled that the Senate can conduct an investigation or issue a subpoena to the Acting Secretary. Respondent’s assertion that Petitioners argue otherwise is an attempt to distract from the actual matters at issue. While the power to investigate can be exercised by the legislature through subpoenas according to the PA Const. Art II § 11, and 46 PS. § 1, there are two limitations: 1) where citizens’ rights are affected and 2) where the material at issue is outside the mission delegated to the legislative committee.



This court has limited the power to investigate where citizens' rights are affected and asserted as a reason for noncompliance with the subpoena. *See Camiel v. Select Committee on State Contract Practices of House of Representatives*, 15 Pa Commwlth. 60,67 (1974) (subpoena to political committee demanding documentation of contributions and sales and advertisements regarding any committee-sponsored events). While the court in *Camiel* found it did not have authority to restrain the legislative subpoena, it held that a court sitting in equity may restrain public officers to protect a citizen's constitutional rights after service of a subpoena and before a confrontation. *Id.*

Here, where petitioners have brought this matter in equity, and the Subpoena demands that the Department of State disclose to the Committee and an unknown third-party vendor the names, addresses and partial social security numbers of seven million Pennsylvania voters, the Court has that power.

While the Respondents argue that they have an unrestricted statutory right to information from the Department of State, such a right has been restricted where it infringes upon a citizen's constitutional rights, as explained further below.

Furthermore, the information requested in the Subpoena is outside of the sphere of the Intergovernmental Committee, as outlined in Part IV.

## II. RESPONDENTS MAKE THE BALD ASSERTION THAT THEIR LEGISLATIVE POWERS ARE UNLIMITED.

In its Response to Petitioner’s briefs, the Intergovernmental Committee states the legislative power to make, alter and repeal laws is the essential “power to investigate,” according to *Com. ex rel. Carcaci v. Brandamore*, 327 A. 2d 1. *See* Response Brief at 26. In that case, an officer of the State police was summoned to testify before the committee concerning his activities, and was placed in contempt as a result of his refusal to answer certain questions. The officer, in broad, sweeping arguments, argued on behalf of his own rights as a witness, and that the questions were a threat to his constitutional rights, of free speech, association and privacy. The court found that his testimony was with regard to public function and his arguments were unpersuasive. However, the court also held that “Broad as it is, however, the legislature’s investigative role, like any other governmental activity, is subject to the limitations placed by the Constitution on governmental encroachments on individual freedom and privacy.”

In the instant matter, Petitioners are not seeking redress for testimony regarding any **public** duties, but instead are seeking protection from any encroachments on their individual freedoms and privacy.

In that same vein, the Secretary’s so-called “absolute” duty to respond to requests from Committees is subject to the same limitations placed by the Constitution and other regulations, for that matter, on individual freedom and privacy. While Respondents are quick to cite *Thornburgh v. Lewis*, 470 A. 3d 952, 957 (Pa. 1983) in support of their contention that the Acting Secretary has an absolute duty to respond to requests for information from the Committee, that case is inapposite for two reasons. One, the demand in that case was for information relating to persons in their capacity as public function employees. Accordingly, those employees had a lower expectation of privacy that does not rise to the level of a private voter. Moreover, the Senate Committee in that case was operating under the specific function assigned to them under the Administrative Code. In the instant matter, as explained in Section IV, the Committee is not operating under the specific function assigned to them.

### III. THE HAYWOODS HAVE A RIPE CLAIM FOR CHILLED SPEECH.

Ripeness involves weighing two factors: (1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review.” *In re Appeal of Penneco Environmental Solutions LLC*, 205 A. 3d 401, 403 (Pa. Commwlth., 2019).

The Petitioners' claim is fully ripe. The parties would face significant hardship if the Court were to hold that the Petition for Review was unripe. The subpoena has demanded constitutionally private, sensitive and confidential information of seven million individuals, including the Petitioners, that was due October 1, 2021, and is only being stayed pending the outcome of this litigation. Respondents have not specified how they will handle the information once received, and have made several statements that they do not yet have a vendor. Respondents' supposition that the private information of 7 million voters may not even be given to a third-party vendor demonstrates that the Committee has not given this undertaking the due consideration it requires. See Response Brief, p. 28. As explained *infra*, the Committee is not authorized to have this information. However, it insists on the unfettered and unredacted release of the information detailed above without having implemented basic security protocols to ensure that the info demanded remains secure and not misused. See Ferrante Decl. Par. 12 and 13, Commonwealth Brief.

Further, if the Court were to find that Petitioners' claims were not ripe, Petitioners would be unduly burdened. This is because were the subpoena not complied with, the Department of State would have to choose between possible contempt proceedings, or release of millions of voters' private information to a Committee that is ill-equipped to handle or secure the information. Such an occurrence would further infringe upon

Petitioners' rights under the Pennsylvania Constitution and Election Code. Petitioners would then have to wait until the vendor is identified to bring this matter back to court, **after** their privacy has been violated and the harms occurred. This hardship makes judicial review at this time appropriate. The first factor is met.

The second factor the Court must consider in determining ripeness is “the fitness of the issues for judicial review.” *Penneco*, 205 A. 3d at 403. Contrary to respondents' argument that because no vendor has been identified, the claims based on what may happen if this is given to a vendor are unripe, the Petitioners submit that the Court must rule on this now. The Pennsylvania Courts have held, on several occasions, that **prior** to the release of information, where certain privacy rights are implicated, the court must engage in a balancing test to determine whether the right to privacy outweighs the public's interest in dissemination. *See PSEA v. Department of Community and Economic Development*, 637 Pa. 337, 340. (Certain information, including home addresses, implicate the right to privacy under Article I, Sec. 1)(also citing *Sapp Roofing Co. v. Sheet Metal Int'l, Local No. 12*, 552 Pa. 105 (1988); *Pa. State Univ. v. Retirement Board*, 594 Pa. 244 (2007)) A balancing test is required before the disclosure of any personal information. *See Reese v. Pennsylvanians for Union Reform*, 643 Pa. 530, 534 (2017). The information sought here is much more than home addresses. It is partial social security numbers, and drivers' license information, which includes home addresses. As

such, this controversy is properly ripe. <sup>1</sup>

In *PSEA*'s balancing test, the court found that the public school employees had a strong privacy interest in their home addresses, and "just wanted to work." *PSEA*, 637 Pa. at 364. In contrast, the court found that the requesting party identified "no public benefit or interest" in disclosure of thousands of addresses. *Id.* Here, the Respondents have identified no countervailing interest or benefit in the release of millions of voters' private information. As such, the rights of Petitioners and voters outlined in the subpoena supersede any proposed interest or benefit in disclosure.

#### IV. THE COMMITTEE'S ASSERTION THAT THE SUBPOENA DOES NOT IMPLICATE ARTICLE I, SECTION 5 IS MISPLACED.

##### **A. Article I Section 5 applies to the Haywoods.**

The Committee wants this court to believe that Article I Section 5 does not apply because the "subpoena does not touch on the electoral process." See Response Brief at 71. The information sought by the Committee is pursuant to who voted in these elections, and, per the Committee, is to study the impact of an election statute. The

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<sup>1</sup> See Section IV for further chilled speech analysis.

Committee notes in its brief the dicta from *Oughton v. Black* seeking to interpret Section 5, which states that “by no intimidation, threat, improper influence, or coercion of any kind shall the right [to suffrage] be interfered with. The test of the constitutional freedom of elections is the freedom of the elector to deposit his vote as the expression of his own unfettered will.” 212 Pa. 1, 4 (1905); Response Brief at 75. However, Petitioners submit that if they are worried about what will be done to their private, sensitive information upon exercising the right to vote, they are intimidated, and at risk of freely exercising the right to suffrage freely, causing a chilling effect on the voter. The information demanded by the subpoena absolutely involves the voting process, as it includes sensitive information of all voters who voted in past elections, elections that have been previously certified by the governing authority, the Department of State. See Haywood Petition, ¶ 14.

**B. The information demanded in the subpoena should not be released because it is not a constitutionally permissible exercise of legal authority.**

The Committee argues that if Article I Section 5 of the Pennsylvania Constitution is implicated, the subpoena is a permissible legislative act necessary for the General Assembly to perform its duty to regulate elections. While the General Assembly

may be given the power to regulate elections, elections are outside of the Intergovernmental Operations Committee's subject area. The Committee is not the General Assembly as a whole. It is one of 22 Standing Committees, which conduct oversight in a particular subject area, according to Senate Rule 14 (a) (1). According to Senate Rule 14 (d) (1), each standing committee may continually review "the work of the Commonwealth agencies concerned with their subject areas and the performance of the functions of government within each subject area." A Committee's subpoena authority is tied to its subject-area specific duties.

The history of the Intergovernmental Operations Committee reveals that its subject area is regulatory reform, not election matters.

The State Government Committee, instead, handles election matters. *See* Commonwealth's brief, p. 36. Any assertion of power over elections, which is outside of the Intergovernmental Operations Committee's purview, and there is already a Committee assigned to such matters, is without precedent.

As this court found in *Watkins v. United States*, 354 U. S. 178, (1957), 'It is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating committee spell out that group's jurisdiction and the purpose with sufficient particularity.' 354 U.S. at 201, 77 S. Ct. at 1186.



The Committee attempts to distinguish the Pennsylvania caselaw that have held Constitutional limitations on legislative subpoenas by stating that those cases are solely those that involved implication of individuals. See Response Brief, p. 84, footnote 27. However, the court has never made that distinction, and neither should this court. See *Carcaci*, supra.

If that reasoning is accepted by this Court, it would give the Committee nearly unlimited power, contrary to Senate Rule 14, the Intergovernmental Committee's mandate, and Consistent Senate practice.

As the Intergovernmental Operations Committee has no authority to issue this subpoena, the Department of State should not be forced to release the information requested.

V. ARTICLE I, SECTION 1 OF THE PENNSYLVANIA CONSTITUTION PROVIDES A SOURCE OF RELIEF TO THE HAYWOODS, AS THE DEPARTMENT OF STATE'S RELEASE OF THE SUBPOENAED INFORMATION IS NOT "INTER-GOVERNMENT SHARING."

The Haywoods concede that there is a critical distinction between disclosing information to the public and disclosing it to another government entity for a legitimate

legislative purpose, as Respondents have stated. See Respondent’s Brief, p. 111. However, as established *supra*, the Committee has no authority to issue the subpoena. As such, it is not “another government entity” being given information for a “legitimate legislative purpose.” Moreover, should the information be released to the Committee, with no plan for how the information would be secured, or whom the vendor would be to have access to said information, there stand to be no added protections than if this information were disclosed to the public.

VI. THERE IS NO PREJUDICE TO RESPONDENTS IF THE COURT  
HEARS PETITIONERS’ BREACH OF PERSONAL  
INFORMATION ACT CLAIM ON THE MERITS.

The Haywood Petitioners concede that their claim pursuant to the Pennsylvania Breach of Personal Information Act was first mentioned in their Brief. However, Respondents, who agreed that this matter would be resolved pursuant to applications for summary relief, have claimed no prejudice if the Court considered this claim.

Should the court hear this matter on the merits, the claim does not fail because, as established *supra*, the information demanded in the subpoena by an unauthorized Committee is not “good faith acquisition of personal information by an employee or

agent of the entity for the purposes of the entity.” Furthermore, the acquisition of the information is not used “for the lawful purpose of the entity,” which was regulatory reform, not elections. While a Committee may be authorized to examine the books of the Secretary according to 71 PS. § 272, Petitioners submit that where the Committee acts outside of its purpose, as is the case here, the Committee’s ability to access the records is limited. As such, any release of the last four numbers of nine million voters, and their drivers’ license and address information under these circumstances is substantially the same as a “breach” to the security of the SURE system. It follows from that argument that release to an unknown third party is in further violation of the Act.

Finally, for the reasons stated above, Respondents’ argument with regard to *Dittman v. UPMC* also fails, as the transfer of information to this particular Committee is certainly a breach of the common law duty recognized therein. Additionally, as there is no statutory obligation and the subpoena is unlawful as shown above, *Dittman* does preclude the Department of State from transferring private information to the Committee.

**CONCLUSION**

**WHEREFORE**, for the above stated reasons the Petitioners, pray that this Court

- 1) Grant summary relief to the Petitioners,
- 2) Deny the Committee’s Cross-Application and
- 3) Grant the relief requested in Arthur Haywood and Julie Haywood’s Petition for Review.

Respectfully Submitted by

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 8, 2021

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This brief complies with the word-count limitations of Pa R.A.P. 2135 because it contains 2707 words, including footnotes, based on the word count of the word processing system used to prepare it.

Dated: November 8, 2021           /s/Tamika N. Washington          

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