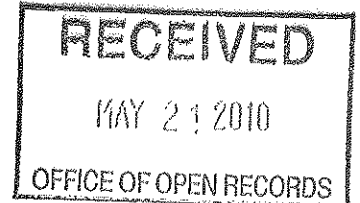




COMMONWEALTH OF PENNSYLVANIA
OFFICE OF GENERAL COUNSEL
333 MARKET STREET, 17TH FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 783-6563
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May 19, 2010



Nathanael Byerly, Chief Counsel
Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, Fourth Floor
Harrisburg, PA 17120-0225

RE: In the Matter of:
Michelle Cerulli and The New York Times v. Office of the Governor
Docket No. AP 2010-0249

Dear Mr. Byerly:

Attached, please find the Office of the Governor's Petition For Reconsideration regarding the above-referenced matter. Please feel free to contact me with any questions.

Sincerely,

Andrea Bowman
Deputy General Counsel

AB/mab

Attachment

cc: Terry Mutchler, Executive Director
Michelle Cerulli
Gayle C. Sproul, Esquire
Michael Berry, Esquire

BEFORE THE PENNSYLVANIA OFFICE OF OPEN RECORDS

IN THE MATTER OF

MICHELLE CERULLI and :
THE NEW YORK TIMES :

Complainant :

v. :

Docket No. AP 2010-0249

OFFICE OF THE GOVERNOR :

Respondent :

OFFICE OF THE GOVERNOR'S PETITION FOR RECONSIDERATION

The Governor's Office hereby petitions for reconsideration of the Final Determination (FD) of the Pennsylvania Office of Open Records (OOR), issued on May 12, 2010, in the above-captioned matter. In that FD, on page 8, the OOR stated as follows:

The Agency is required to release any and all e-mails and/or text messages related to the public business and/or activity of the Governor and/or or his staff and/or the Governor's family from July 1, 2009 through December 31, 2009 sent or received by K. Scott Roy, Suzanne P. Campbell, Steven L. Kniley, Donna Cooper and Gary Tuma.

The actual "CONCLUSION" of the OOR grants the requests made by Michelle Cerulli of the New York Times (NYT) for: "text messages that reflect the 'public' business or activities of the Governor and/or his staff and/or Governor's family, to the extent such records exist" and "emails that reflect the public 'business' of the Governor and/or his staff and/or Governor's family." (FD, pg. 10).

In an attempt to determine and satisfy both the direction given by the OOR and the expansive requests of the NYT, the Governor's Office is requesting that the OOR reconsider and amend its FD. Specifically, the Governor's Office petitions the OOR to clarify: 1) that the FD only requires the production of the requested text messages and/or e-mails that are public and, if exemptions are asserted, the exemptions are to be

specified by the Governor's Office (after which the NYT could appeal to the OOR from the assertion of any exemptions); and 2) that the texts or e-mail records are limited to those that were sent or received by K. Scott Roy, Suzanne P. Campbell, Steven L. Kniley, Donna Cooper and Gary Tuma between July 1, 2009 and December 31, 2009 that mention the Governor, his executive or senior staff (Steve Crawford, Sarah Battisti, Suzanne Campbell, Steve Kniley, Mary McDaniel-Pearsall, Naomi Wyatt, Colleen Kopp, Mary Soderberg, Donna Cooper, Gary Tuma and Amy Kelchner) and/or his immediate family (Judge Marjorie Rendell & Jesse Rendell).

I. Discussion

A. Non-public Records Are Not to Be Produced

The NYT made a request, under the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.* (RTKL), to the Governor's Office that was denied based on insufficient specificity, as well as requesting non-records. The OOR determined that the request was sufficiently specific, denied the part of the request that sought personal non-records, but afforded no recourse in the FD for the Governor's Office to exempt records that are not public records. See 65 P.S. § 67.102 (Definition of "Public Record"). The FD just stated that the records requested were to be provided, despite the fact that the Governor's Office has not had a chance to assess what records might be covered and what exemptions might properly be asserted.

A similar situation was presented in *Prison Legal News v. Office of Open Records*, ___ A.2d ___, 969, 997 C.D. 2009 (Pa. Cmwlth Ct. 2010, April 8, 2010). In that case, the Department of Corrections (DOC) requested prepayment before the production of records. On appeal, the OOR determined that the prepayment sought by DOC was not warranted, but then simply directed DOC to provide the records requested, without affording DOC the opportunity to assert exemptions, make redactions or otherwise

withhold non public information. The Commonwealth Court of Pennsylvania noted that, on appeal, “the OOR agrees with the Department’s analysis, arguing that it erred by requiring the Department to provide all the requested records to [the requester] without first giving the Department the opportunity to remove or redact any non-public records.”

The Court went on to state that under “65 P.S. § 67.901’s mandatory language,” an agency must make a good faith determination to determine whether the record requested is public and whether the agency has control over the identified record. Where, as here, the agency asserts that it has been unable to determine what records are being identified, the agency has not had the opportunity to assess whether the records are public. Therefore, ordering production of all records with no exemptions is inappropriate and premature. In *Prison Legal News*, as in this case, under the RTKL the Governor’s Office is “required to go through this analysis [to determine whether the records are public] before releasing the requested records. ... Before any records are released, the Department must have the opportunity to determine whether any of the information requested is exempt from disclosure.” *Id.* at 12.

In many other cases, the OOR has directed that records be provided, yet afforded the agency the opportunity to redact or only to provide public records, when the breadth of the request was at issue. For example, in *Urbina v. Office of the Governor*, OOR Dkt. AP 2009 – 0972, the OOR stated that the Governor’s Office “must release the requested records **subject to redaction of nonpublic information.**” (*Urbina*, above, at pg. 10; emphasis added).

In this case, the absence of appropriate language in the FD that would have limited the production by the Governor’s Office to only “public” or “non-exempt” records, as was done in *Urbina*, may simply have been an oversight, or poorly constructed language; however, the Governor’s Office must respond to the FD on its face.

Accordingly, the FD should be amended to clarify that non-public information is exempt from production. However, the NYT should also have an opportunity to appeal to the OOR, should the Governor's Office, once it has had the opportunity to accumulate and review the responsive records, determine that certain information is exempt.

B. Interpretation of "Relating to" the "Governor's Staff," Governor's "Family" and the Governor

The Governor's Office includes hundreds of people, and has been considered to include approximately 450 lawyers in the Office of General Counsel, approximately 500 employees in the Office of Administration, as well as employees in the Office of the Budget, Cabinet Secretaries, etc. See 71 P.S. § 71, "Employees of the Governor's Office." In attempting to sufficiently define this request so as to be able to answer it, which was why it was denied initially as being insufficiently specific, the Governor's Office proposes to define the Governor's staff as it has in response to other RTKL requests, with the current list of those identified on the Governor's website as his senior or executive staff. Specifically, it would include the following people: Steve Crawford, Sarah Battisti, Suzanne Campbell, Steve Kniley, Mary McDaniel-Pearsall, Naomi Wyatt, Colleen Kopp, Mary Soderberg, Donna Cooper, Gary Tuma and Amy Kelchner. Further the Governor's Office proposes to define the Governor's family as his immediate family, which is both his wife, Judge Marjorie Rendell and their son, Jesse Rendell.

Therefore, while the "CONCLUSION" by the OOR has no limitation on the texts and e-mails that are to be produced, the Governor's Office suggests that specificity be added to this request and that it be narrowed to exclude non-public records, so that an appropriate response may be made, by defining the requests as production as follows:

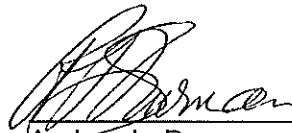
Text or e-mail public records that were sent or received by K. Scott Roy, Suzanne P. Campbell, Steven L. Kniley, Donna Cooper and Gary Tuma between July 1, 2009 and December 31, 2009 that mention the Governor, his senior staff and/or his immediate family.

II. Conclusion

In an effort to protect exempt records from disclosure under the RTKL and to fully and accurately fulfill the extensive and confusing request of the NYT for "public business" records, the Governor's Office asks the OOR to reconsider its FD and amend it to provide sufficient definition for the Governor's Office to provide an appropriate response, as set forth above.

Respectfully submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA,
OFFICE OF THE GOVERNOR



Andrea L. Bowman,
Deputy General Counsel
Governor's Office of General Counsel
Attorney I.D. No. 30188

OGC
17th Floor, 333 Market St.
Harrisburg, PA 17101
Phone: 717-787-9354

Dated: May 19, 2010



May 28, 2010

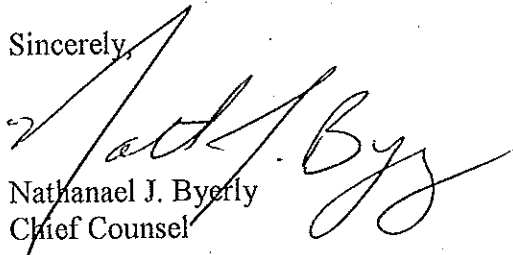
Andrea Bowman, Esquire
Deputy General Counsel
Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101

RE: Petition for Reconsideration received May 19, 2010, OOR Dkt. AP 2010-0249

Dear Ms. Bowman:

We are in receipt of your Petition for Reconsideration dated May 19, 2010 that was received by this office on the same day in connection with the Office of Open Records Final Determination in *Cerulli and The New York Times v. Office of the Governor*, OOR Dkt. AP 2010-0249. We hereby deny your Petition.

Sincerely,


Nathanael J. Byerly
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records
Michelle Cerulli
Gayle Sproul, Esquire
Michael Berry, Esquire



May 28, 2010

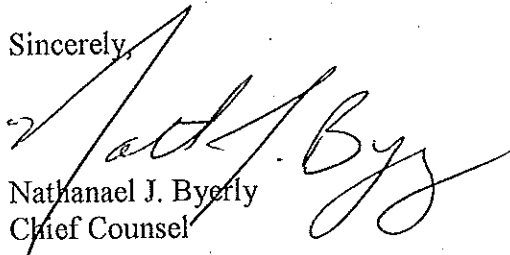
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Sincerely,


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Michael Berry, Esquire