

IN THE COURT OF COMMON PLEAS  
DAUPHIN COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA, : No. CR-1993-2015  
:   
v. :   
:   
LOUISE E. BISHOP, :   
:   
Defendant :

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DAUPHIN COUNTY  
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**MOTION TO QUASH SUBPOENA DIRECTED TO PENNSYLVANIA  
ATTORNEY GENERAL KATHLEEN G. KANE INsofar AS THE SUBPOENA  
PERMITS INQUIRY THAT INFRINGES UPON THE DELIBERATIVE  
PROCESS PRIVILEGE<sup>1</sup>**

TO THE HONORABLE SCOTT A. EVANS:

NOW COMES, the Pennsylvania Attorney General Kathleen G. Kane, by and through her attorneys, who files this motion to quash the subpoena issued to her in connection with this matter insofar as the subpoena permits inquiry that infringes upon the deliberative process privilege, and, in support thereof, avers as follows:

1. The Commonwealth of Pennsylvania ("the Commonwealth") has charged Louise E. Bishop, ("Bishop") with the crimes of bribery, 18 Pa.C.S. § 4701(a)(1); restricted activities – accepted improper influence, 65 Pa.C.S. § 1103(c); statement of financial interests – form, 65 Pa.C.S. § 1105(a); conspiracy to commit bribery, 18 Pa.C.S. § 903(c); and, conspiracy to commit restricted activities – accepted improper influence, 18 Pa.C.S. § 903(c).

2. On May 6, 2015, Bishop, through counsel, filed a motion to dismiss her prosecution on the grounds of racial targeting. A hearing date was set and subpoenas

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<sup>1</sup> For clarification purposes, Movant does not seek to quash the subpoena for appearance and testimony altogether; instead, Movant merely seeks a ruling by this Court that would limit the scope of inquiry of the existing subpoena so as not to infringe upon the deliberative process privilege.

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*duces tecum* along with subpoenas for appearance were thereafter issued and directed to Seth Williams, District Attorney of Philadelphia (“District Attorney Williams”), Claude Thomas, Detective with the Philadelphia District Attorney’s Office (“Detective Thomas”), Marc Costanzo, Chief Assistant District Attorney (“Chief Assistant District Attorney Costanzo”) and Frank Fina, Assistant District Attorney (“Assistant District Attorney Fina”).

3. On June 2, 2015, the Commonwealth of Pennsylvania, through Dauphin County District Attorney Edward R. Marsico (“District Attorney Marsico”),<sup>2</sup> filed a motion to quash the subpoenas. In support of his position, District Attorney Marsico argued, *inter alia*, that: 1) Permitting the court’s subpoena power to be used for the purpose of investigating discretionary decisions of the elected District Attorney would violate the constitutional separation of powers; 2) The defendant’s misuse of the subpoena power violated the work product privilege; 3) The defendant’s misuse of the subpoena power violated the deliberative process privilege; and, 4) The information the defendant attempted to subpoena falls within the investigative privilege. See Motion to Quash Subpoenas Directed to the District Attorney of Philadelphia, et al., 6/2/15, pp. 6-13.

4. By order dated December 3, 2015, this Court denied the Commonwealth’s motion to quash the subpoenas directed to Detective Thomas and Assistant District Attorney Fina.<sup>3</sup>

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<sup>2</sup> Bishop’s case is being prosecuted in Dauphin County by the Philadelphia District Attorney’s Office. Attorneys from that Office have been designated as Special Assistant District Attorneys in Dauphin County for purposes of this prosecution.

<sup>3</sup> The subpoena issued to District Attorney Williams was quashed during a proceeding before this Court on June 5, 2015 after counsel for Bishop advised the Court that he no

5. A hearing on Bishop's motion to dismiss is presently scheduled for December 16, 2015. The Commonwealth, through Brad Bender, Special Assistant District Attorney, has issued a subpoena directed to Pennsylvania Attorney General Kathleen G. Kane ("Attorney General Kane"), to appear and testify at that proceeding. *See Exhibit "A."*

6. In addition to issuing a subpoena directed to Attorney General Kane, on December 7, 2015, the Commonwealth filed a motion for an order compelling her appearance at the hearing. There has been no ruling on this motion to date.

7. Movant believes that based upon a review of the motion for an order compelling the appearance of Attorney General Kane, as well as the transcript of the June 5, 2015 proceedings, the questioning of Attorney General Kane may not just be limited to facts and public statements regarding the decision not to prosecute Bishop. Movant believes that there may be further inquiry into deliberations of law or policymaking, reflecting opinions, recommendations or advice, in connection with her discretionary decision.

8. Movant, and the agency that she heads, the Office of Attorney General, represent the people of Pennsylvania and, as such, the deliberative process privilege is applicable here.

9. The deliberative process privilege benefits the public and not the officials who assert the privilege. *Unified Judicial System v. Vartan*, 733 A.2d 1258, 1263 (Pa. 1999) (opinion announcing judgment of the Court) (citing *Hamilton v. Verdow*, 414 A.2d

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longer intended to pursue the subpoena. The Office of Attorney General could not ascertain the disposition of the motion to quash Chief Assistant District Attorney Costanzo's subpoena.

914, 924 (Md. 1980) citing, *Kaiser Aluminum and Chemical Corp. v. United States*, 157 F.Supp. 939, 944 (Ct. Cl. 1958). Government officials may refuse to testify and may withhold documents containing “confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.” *Vartan*, 733 A.2d at 1263 (quoting *Redland Soccer Club, Inc. v. Department of the Army of the United States*, 55 F.3d 827, 853 (3d Cir.1995)). The purpose of the privilege is to allow the free exchange of ideas and information within government agencies. See *Vartan*, 733 A.2d at 1264. To claim the privilege, the government must show that (1) the communication was made before the deliberative process was completed; and, (2) the communication was deliberative in character, *i.e.*, it was a direct part of the deliberative process in that it made recommendations or expressed opinions on legal or policy matters. *Id.*

10. However, it is important to note that the *Vartan* Court also observed that:

Information that is purely factual, even if decision-makers used it in their deliberations is usually not protected. In *E.P.A. v. Mink*, 410 U.S. 73, 87-88, 93 S.Ct. 827, 836-37, 35 L.Ed.2d 119 (1973), the Court held, that absent “a claim that disclosure would jeopardize state secrets, memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.”

*Vartan*, 733 A.2d at 1264.


11. In light of the foregoing authority, Movant submits that while purely factual information and public statements may be appropriate subjects of inquiry during her examination, inquiry into confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice, should be foreclosed as it is clearly protected by the deliberative process privilege for the benefit of the public.

WHEREFORE, based on the aforementioned reasons, Movant respectfully requests this Court to quash the subpoena directed to the Pennsylvania Attorney General insofar as the subpoena permits inquiry that infringes upon the deliberative process privilege.

Respectfully submitted,

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Date: December 15, 2015