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**FILED
HARRISBURG**

FEB 19 2002

MARY E. D'ANDREA, CLERK

Per
DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD VIETH, et al,

Plaintiffs,

v.

THE COMMONWEALTH OF
PENNSYLVANIA, et al.

Defendants.

No. 1:CV-01-2439
(Judge Rambo)

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO QUASH SUBPOENA OR FOR PROTECTIVE ORDER**

This memorandum of law is filed in support of the motion to quash subpoena or for protective order filed by Defendants Lieutenant Governor Jubelirer and Speaker Ryan ("Presiding Officers") against the subpoena *duces tecum* issued by Plaintiffs to the Custodian of Records of Carnegie Mellon University.

I. BACKGROUND

Discovery in this action, which challenges Act 1 (i.e., legislation putting into place 19 congressional districts in the Commonwealth of Pennsylvania pursuant to the 2000 Census), is currently underway. By order dated January 30, 2002, this Court set an expedited discovery in advance of the evidentiary hearing scheduled for March 11-12, 2002. All discovery other than that requested by the subpoena

duces tecum at issue here has been scheduled using e-mail, fax, telephone and face to face communication.

At approximately 5:00 PM on Thursday, February 14, 2002, counsel for Presiding Officers received a telephone message from Walter P. DeForest, General Counsel of the Carnegie Mellon University ("CMU"). When counsel spoke to Mr. DeForest approximately a half-hour later, she learned for the first time that a subpoena *duces tecum* had been issued by counsel for Plaintiffs, Robert Hoffman, Esq., to the Custodian of Records of CMU. Because she was unable to reach Mr. Hoffman by phone or by e-mail that evening, Mr. DeForest agreed to fax her a copy of the subpoena *duces tecum*. The fax, received at 7:31 PM, included a cover letter from Mr. DeForest (appended at Tab 1) and a copy of a subpoena *duces tecum* (attached at Tab 2).

The faxed copy of the subpoena *duces tecum* showed that the subpoena commanded the Custodian of Records of CMU (or a designee) to appear for deposition and requested production of the following documents:

(1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; an[d] (2) all communications, including request for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

Tab 2 (boxes checked for "You are commanded to appear" and "You are commanded to produce"). The date and time set for compliance was listed as February 14, 2002 at 9:30 AM. *Id.*

Mr. DeForest had explained, during the initial telephone conversation with counsel for Presiding Officers, that Plaintiffs' counsel, Mr. Hoffman, had agreed to limit the production request to the contract, invoices, checks and correspondence

and that a deposition would not be necessary. The purpose of Mr. DeForest's initial contact with counsel for Presiding Officers had been to inquire whether she wanted copies of the documents that he intended to produce. As counsel for Presiding Officers had not received a copy of the subpoena *duces tecum* prior to its fax transmission from Mr. DeForest, and the faxed copy did not include a certificate of service, counsel asked Mr. DeForest to hold production until she could discern why she had not received notice and assess whether a privilege objection by Presiding Officers would be appropriate.

Counsel for Presiding Officers was informed the next day (Friday, February 15, 2002) by Mr. Hoffman that a service copy of the subpoena *duces tecum* had been sent to her by first class mail on February 8, 2002. Mr. Hoffman faxed her a Notice of Service, along with a copy of a subpoena and certificate of service, that had been filed with the Clerk of the Middle District on February 8, 2002.¹ The copy of the subpoena did not have any boxes checked (copy attached as Tab 3).

That afternoon, Presiding Officers submitted written objections to the subpoena *duces tecum* (copy appended at Tab 4). First, pursuant to Fed.R.Civ.P.32(d)(1), Presiding Officers objected that they had not, as a party, received notice of the deposition shown on the subpoena copy received from CMU, as required by Fed.R.Civ.P. 30(d)(1) ("[a] party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action").² Second, Presiding Officers objected to the document production because

¹ She later learned from counsel for Executive Officers, J. Bart DeLone, that Mr. DeLone's office had received a service copy of the subpoena *duces tecum* by mail but had not brought it to the attention of counsel for Presiding Officers prior to her present inquiry.

² Counsel for Presiding Officers raised an objection based on Fed.R.Civ.P. 30(b)(1) because, based on the copy of the subpoena *duces tecum* received from Mr. DeForest, it appeared that the Custodian of Records (or a designee) had been summoned for deposition. See Tab 3.

the documents sought are protected from disclosure by the federal common law legislative privilege. With the latter objection in writing, and pursuant to Fed.R.Civ.P. 45(c)(2)(B), counsel for Presiding Officers informed both Mr. Hoffman and Mr. DeForest (copy of letter appended at Tab 5) that disclosure of the requested documents should not occur unless pursuant to court order.

On Monday, February 18, 2002, counsel for Presiding Officers received by first class mail a service copy of subpoena *duces tecum* and certificate of service (copy attached at Tab 6); *see also* Affidavits of Cory Angell (Tab 7), Alan Moore (Tab 8) and Wanette Legaspi (Tab 9). Like the copy of the subpoena *duces tecum* faxed by Mr. Hoffman on February 15, 2002 (but unlike the copy faxed by Mr. DeForest), the service copy received by mail had no boxes checked.

Having unsuccessfully attempted to resolve this discovery dispute with Plaintiffs' counsel (*see* certificate of conferral attached to Motion), Presiding Officers now seek a protective order against the subpoena *duces tecum* pursuant to Fed.R.Civ.P. 26(b)(1) and 26(c). Expeditious resolution of this discovery dispute is appropriate as Mr. DeForest has indicated in writing that he intends to comply with the production request by February 20, 2002 unless ordered not to do so by this Court. *See* Tab 1. Additionally, the close of discovery in this matter is imminent.

II. QUESTIONS PRESENTED

1. Should the subpoena *duces tecum* be quashed because Presiding Officers did not receive a notice of deposition?

Suggested answer: YES.

2. Should a protective order be issued because the subpoena *duces tecum* requests documents and information protected against disclosure by the federal common law legislative privilege?

Suggested answer: YES.

III. ARGUMENT

A. Subpoena *Duces Tecum* Should Be Quashed

Presiding Officers do not contend that a copy of the subpoena *duces tecum* was not served on them by first class mail. Rather, they contend that they were not served with the notice of deposition required by Fed.R.Civ.P. 30(b)(1). Notably, the copy of the subpoena served on counsel for Presiding Officers is materially different than the copy received from Mr. DeForest and believed to have been served on the Custodian of Records of CMU. The copy received from Mr. DeForest had boxes checked next to "You are commanded to appear" and "You are commanded to produce." The copy faxed by Mr. Hoffman, and ultimately received by counsel for Presiding Officers by first class mail on February 18, 2002, had no boxes checked. As a party to this action, Presiding Officers are entitled to reasonable notice of deposition. Fed.R.Civ.P. 30(b)(1). In the absence of such, the subpoena *duces tecum* should be quashed.

B. A Protective Order Should Issue

1. Standard

Under Fed.R.Civ.P.26 (b)(1), a party "may obtain discovery regarding any matter, *not privileged*, which is relevant" to the subject matter involved in the pending action. (emphasis added.) "As an initial matter, [] all relevant material is discoverable *unless an applicable evidentiary privilege is asserted* [;] ... any material covered by a properly asserted privilege would necessarily be protected from discovery pursuant to Rule 26(b)(1)." *Pearson v. Miller*, 211 F.3d 57, 65 (3d Cir. 2000) (emphasis added). *See also Rhone-Poulenc v. The Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994) (writ of mandamus issued to district court directing it to vacate order requiring the production of documents subject to attorney-client and work product privileges).

Presiding Officers, as explained below in Argument Section 4, have standing to raise this privilege objection to the subpoena *duces tecum* because it infringes upon their rights. *See e.g., Minnesota School Boards Association Ins. Trust v. Employers Ins. Co.*, 183 F.R.D. 627, 629 (N.D. Ill. 1999) (agreeing that "it is well settled that a party has standing to object to a subpoena directed at a nonparty when the party claims a 'personal right or privilege' regarding the documents sought."); *see also Dreyer v. GASC, Inc.*, 204 F.R.D. 120, 121 n.3 (N.D. Ind. 2001) (citing *Minnesota School Boards* and allowing plaintiff to assert privilege under Fed.R.Civ.P. 45(c)(2)(B) against non-party subpoena issued to plaintiff's psychiatrist); 9 MOORE'S FEDERAL PRACTICE § 45.04[2] (3d ed. 2001) (party to action has standing to object to subpoena directed to a nonparty when the party claims a personal right or privilege regarding the documents sought).

2. The common-law legislative privilege

In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the United States Supreme Court recognized a common-law legislative immunity for state legislators that protects them, absolutely, from liability for their legislative activities. This immunity is co-extensive with the protection provided to members of Congress by the Speech or Debate Clause of the United States Constitution. *See Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 733 (1980). *See also Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (reaffirming *Tenney* and extending common law legislative immunity to local legislators); *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.3d 240, 249 (3d Cir. 1998) ("[T]he Supreme Court has recognized that in civil cases, the scope of the common law legislative immunity accorded state legislators is coterminous with that of the immunity provided by the Speech or Debate Clause"). The legislative privilege "preserve[s] the constitutional structure of separate, coequal, and independent branches of government," *United States v. Helstoski*, 442 U.S. 477, 491 (1979),

and "insures that legislators are free to represent the interests of their constituents without fear [] they will be later called to task in the courts for that representation." *Powell v. McCormack*, 395 U.S. 486, 503 (1944).

The absolute legislative immunity applicable in civil matters extends beyond protection from liability and provides legislators with protection from "the burden of defending themselves" when "engaged 'in the sphere of legitimate legislative activity.'" *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (quoting *Tenney*, 341 U.S. at 376). The immunity operates as a privilege to protect legislators and others performing legislative activities from questioning in any context, including discovery. *See Gravel v. United States*, 408 U.S. 606, 616 (1972) ("[w]e have no doubt that Senator Gravel may not be made to answer - either in terms of questions or in terms of defending himself from prosecution - for the events that occurred at the subcommittee meeting"); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) (quashing deposition subpoena to non-party deponent former Congressman); *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856 (D.C. Cir. 1988) (affirming the quashing of subpoenas *duces tecum* to custodian of records and staff director of congressional subcommittee seeking information and documents within the subcommittee's possession); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (quashing subpoenas *duces tecum* issued to two Congressman for documents stolen from a law firm and submitted to congressional subcommittee).³ As explained by the district court in *Marylanders*

³ *See also Chapman v. Space Qualified Systems Corp.*, 647 F. Supp. 551, 554 (N.D. Fla. 1986) (quashing deposition subpoena issued to General Accounting Office investigator who, at the behest of the House of Representatives Committee on Governmental Operations, had been assigned to investigate the plaintiff, because the investigator's conduct and activities were "absolutely immune from discovery under the Speech or Debate Clause"); *United Transportation Union v. Springfield Terminal Railway Co.*, 132 F.R.D. 4 (D.C. Me. 1990) (denying motion to compel documents and deposition testimony from senator's assistant regarding subjects of potential and pending legislation).

for *Fair Representation v. Schaefer*, 144 F.R.D. 292, 297 (D.Md. 1992), in a challenge to a legislative redistricting plan, "legislative immunity not only protects state legislators from civil liability, it also functions as an evidentiary and testimonial privilege."

"Absolute legislative immunity attaches to actions taken 'in the sphere of legitimate legislative activity.'" *Bogan*, 523 U.S. at 54 (quoting *Tenney*, 341 U.S. at 376). The determination of "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it" because "it [is] simply 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Id.* at 54-55 (quoting *Tenney*, 341 U.S. at 377). Document requests that seek information related to "actions taken in the sphere of legitimate legislative activity" are, accordingly, prohibited by the privilege.

The determination of whether the activity involved falls within the sphere of legitimate legislative activity is straightforward, as the Third Circuit pointed out in *Government of the Virgin Islands v. Lee*:

In general [] the cases interpreting the Speech or Debate Clause in which legislative immunity has been triggered have involved manifestly legislative acts; acts which were so clearly legislative in nature that no further examination had to be made to determine their appropriate status. See e.g., *United States v. Helstoski*, 442 U.S. 477 (1979) (introducing proposed legislation); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (subpoenaing records for committee hearing); *Doe v. McMillan*, 412 U.S. 306 (1973) (inserting material in the Congressional Record); *Gravel v. United States*, 408 U.S. 606 (1972) (introducing evidence during committee hearings); *United States v. Johnson*, 383 U.S. 169 (1966) (delivering a speech on the floor of the House); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (interrogating witnesses during committee hearing); *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (voting on resolutions) ... [T]he acts themselves were obviously legislative in nature. *It is the very legislative character of these acts which triggers the protection of legislative immunity.*

775 F.2d 514, 522 (3d Cir. 1985) (parallel citations omitted, emphasis added).⁴

⁴ While a criminal case, *Lee's* discussion of how a court identifies a legislative act is applicable whenever a court must decide if legislative activities are involved.

3. Application

The subpoena *duces tecum* at issue here is necessarily addressed to legislative activities because it seeks documents involving research requested and conducted in preparation for legislative redistricting proposals.⁵ Redistricting is a legislative process. *See e.g., Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("legislative reapportionment is a matter for legislative consideration and determination"). The litigation in which the subpoena in question was issued involves the constitutionality of the law enacted by the General Assembly that puts in place the 19 congressional districts allocated to Pennsylvania after the 2000 census. The process of enacting legislation, including the investigation and evaluation done before a bill is introduced, is legislative activity. *See e.g., Doe*, 412 U.S. at 313 (authorizing an investigation, holding hearings and preparing a report are all "integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation ..."); *Lee*, 775 F.2d at 521 ("factfinding, information gathering and investigative activities" are afforded legislative immunity); *Pentagen Technologies Int'l. Ltd. v. Committee on Appropriations of the United States House of Representatives*, 20 F. Supp.2d 41, 43-45 (D. D.C. 1998) (quoting *Eastland*, 421 U.S. at 504) ("the Supreme Court has

⁵ Presiding Officers note that the contract sought is available to any member of the general public upon request to the leader of the House Republican Caucus. Fed.R.Civ.P. 26(b)(2) authorizes a court to limit the extent of discovery if the documents sought are "obtainable from some other source" *See also Allen v. Howmedica Leibinger, Inc.*, 190 F.R.D. 518 (W.D. Ten.. 1999) (in the absence of a showing that the publicly available information is inadequate, court finds the production request burdensome); *Duskin Pub. Group, Inc. v. Kinko's Service Corp.*, 136 F.R.D. 334 (D. D.C. 1991) (plaintiff not entitled to compel production of publicly available documents); *Bass v. Gulf Oil Corp.*, 304 F. Supp. 1041, 1049 (S.D. Miss. 1969) ("good cause" not shown in context of motion for production where "most, if not all, [of the documents requested], are readily available to the movants as public records").

concluded that the power to investigate falls within the legislative sphere because 'a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change'). The documents requested are protected absolutely from disclosure.

4. Presiding Officers Can Assert The Legislative Privilege

The legislative privilege is institutional when raised in the context of a constitutional challenge to legislation. *See United States v. Craig*, 528 F.2d 773, 780-81 & n.2 (7th Cir. 1976) (privilege provides "an institutional immunity for the legislature itself"); *see also In re Grand Jury Investigation*, 587 F.2d 589, 593 (3d Cir. 1978) (privilege is of "great institutional importance to the House as a whole, [and] it is also personal to each member"). Legislators seeking to preserve the privilege on the institution's behalf must be permitted to assert it against those who would subvert its protections. *See Montgomery County v. Schooley*, 627 A.2d 69, 120-121 (Md. App. 1993) (county could raise privilege against councilman to prevent testimony about redistricting process). Otherwise, a privilege which serves as a bulwark of separation of powers could be consistently lost for reasons conflicting with the interests of the institution. Presiding Officers must be allowed to assert the privilege against production of documents that implicate legitimate legislative activity.⁶

To permit waiver through the release of documents by a non-party who has been involved in the legislative process is inconsistent with the institutional purposes served by the privilege:

The privilege protects the institution of the Legislature itself from attack [as well as] the individual legislators personally. ... *To allow the privilege to be waived would be inconsistent with these purposes.* The privilege is *institutional* in its protection of the Legislature, ensuring the separation of powers among the coequal branches of government.

⁶ The House Republican Caucus has filed a motion to intervene for the limited purpose of supporting the present motion.

[Allowing] an individual legislator to waive the institution's privilege *would be to allow one to act on behalf of the whole in waiving the protection of a significant bulwark of our constitutionally mandated system of government.*

Holmes v. Farmer, 475 A.2d 976, 985 (R.I. 1984) (emphasis added) (refusing waiver in challenge to redistricting plan); *see also U.S. Football League v. NFL*, 842 F.2d 1335, 1375 (2d Cir. 1988) (purposes of Speech or Debate protection would be "'ill-served' if such waivers were permitted"). Indeed, in *Helstoski*, the Supreme Court strongly intimated that the legislative privilege cannot be waived. *See* 442 U.S. at 492 (Congressman's words and conduct were not explicit and unequivocal waiver ... "*assuming such a waiver can ever be made*") (emphasis added). Where legislation is challenged on constitutional grounds, and "the legislative process itself or [] the end product of that process," is under attack, "waiver by a non-party of the privilege may, in effect, dictate the waiver by other legislators of their privilege," and lead to the dismantling of the separation of powers pillar upon which the privilege is, in part, based. *See Montgomery County v. Schooley*, 627 A.2d at 121 (refusing waiver in challenge to redistricting plan).⁷

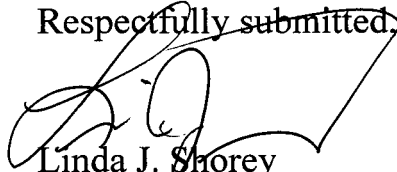
⁷ This is just the first time the Court will need to address issues of the legislative privilege in this matter. At the hearing held in state court in *Erfer v. Commonwealth et al.*, 14 M.M. 2002, Petitioners (represented by the same counsel as Plaintiffs here) called, *inter alia*, Representative DeWeese (Minority Leader of the Pennsylvania House of Representatives) to testify concerning the legislative process of enacting Act 1. Presiding Officers' counsel repeatedly objected to Rep. DeWeese's testimony as prohibited by Speech or Debate immunity under the Pennsylvania Constitution. The objections were taken under advisement. Commonwealth Court's recommended findings and conclusions did not rely on the testimony to which Presiding Officers objected and so made no ruling on the testimony. Final resolution of the issue, however, is unknown since the Pennsylvania Supreme Court has not yet issued an opinion in support of its denial of the *Erfer* Petitioners' state constitutional claims. It is anticipated that Plaintiffs will, at a minimum, proffer Rep. DeWeese's testimony for the same purposes in this matter. Permitting even one breach of the legislative privilege that protects legitimate legislative activity will lead to the potential of testimony from each of the legislators, in both chambers, who considered and voted on the legislation, as well as that of those who assisted them in the process. Even the Governor, who signed the legislation, becomes a potential witness.

CONCLUSION

For the reasons set forth above, Presiding Officers respectfully request that the subpoena *duces tecum* issued to CMU be quashed or a protective order be issued, on the basis of the common law legislative privilege, to prevent the disclosure of the documents requested.

February 19, 2002

Respectfully submitted,



Linda J. Shorey
Pa. ID No. 47477

Julia M. Glencer
Pa. ID No. 80530

Jason E. Oyler
Pa. ID No. 84473

John P. Krill, Jr.
Pa. ID No. 16287

KIRKPATRICK & LOCKHART LLP

240 North Third Street

Harrisburg, PA 17101

(717) 231-4500

(717) 231-4501 (fax)

Counsel for Defendants

Jubelirer and Ryan

EXHIBIT - 1

DeFOREST & KOSCELNIK

ATTORNEYS AT LAW

3000 KOPPERS BUILDING
436 SEVENTH AVENUE
PITTSBURGH, PA 15219

WRITER'S DIRECT DIAL NUMBER
(412) 227-3101

TELEPHONE: (412) 227-3100
FACSIMILE: (412) 227-3130

February 14, 2002

by fax (717) 231-4501

Linda Shorey, Esquire
KIRKPATRICK AND LOCKHART LLP
240 N. Third St.
Harrisburg, PA 17101-1507

Dear Ms. Shorey:

Enclosed is a copy of the subpoena I received last Friday. As you see it was returnable today, and I plan to be in compliance therewith. When I called to discuss with you the fact that I would be sending documents to Mr. Hoffman, you stated that you had not received a copy of the subpoena. If I do not receive a court order precluding such by February 20, 2002, I will send the documents to Mr. Hoffman, since I have no basis for not doing so.

Very truly yours,

DeFOREST & KOSCELNIK

by 
Walter P. DeForest

Enclosure

cc: J. Bart DeLone, Esq. **fax (717) 772-4526**
Robert Hoffman, Esq. **fax (717) 236-3777**

EXHIBIT - 2

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH et al

Plaintiff(s),

SUBPOENA IN A CIVIL CASE

v.

THE COMMONWEALTH OF PENNSYLVANIA, et al
 Defendant(s).

CASE NUMBER:¹ CV 01-2439
 (MIDDLE DISTRICT OF PENNSYLVANIA)

TO: Custodian of Records, Carnegie Mellon University
 5000 Forbes Avenue Pittsburgh, PA 15213

☒ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in
 above case

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the
 above case

PLACE OF DEPOSITION

DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects): (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; and (2) all communications, including requests for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

PLACE REED SMITH, LLP

435 Sixth Avenue, Pittsburgh PA 15219-1886

DATE AND TIME

February 14, 9:30 AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

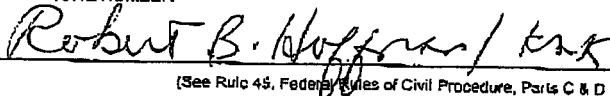
Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

DATE February 7, 2002

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Robert B. Hoffman



¹ If action is pending in district other than district of issuance, state district under case number.
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EXHIBIT - 3

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD VIETH, NORMA JEAN
VIETH et al

Plaintiffs,

v.

THE COMMONWEALTH OF
PENNSYLVANIA, et al
Defendants.

COPY

No. 1: CV 01-2439
Judge Nygaard, Judge Rambo
Judge Yohn

PLAINTIFFS' NOTICE OF SERVICE OF SUBPOENA

Plaintiffs hereby provide notice as per Rule 45(b) that they have served the
attached subpoena upon the entity there noted.

**FILED
HARRISBURG**

FEB 08 2002

MARY E. D'ANDREA, CLERK
Per [Signature]
DEPUTY CLERK

REED SMITH LLP

By [Signature]
Robert B. Hoffman
P.O. Box 11844
Harrisburg, PA 17108
(717) 257-3042

Paul M. Smith
Thomas J. Perrelli
Bruce V. Spiva
Daniel Mach
Brian P. Hauck
JENNER & BLOCK, L.L.C.
601 Thirteenth Street, NW
Washington, D.C. 20005
(202) 639-6000

FEB. 15. 2002 10:15AM

REED, SMITH, LLP, Hbg, Pa. 17101

NO. 0343 P. 3

AO 88 (Rev. 1/94) Subpoena in a Civil Case

**Issued by the UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD VIETH et al

Plaintiff(s),

SUBPOENA IN A CIVIL CASE

v.

THE COMMONWEALTH OF PENNSYLVANIA, et al

Defendant(s).

CASE NUMBER:¹1: CV 01-2439

(MIDDLE DISTRICT OF PENNSYLVANIA)

TO: Custodian of Records, Carnegie Mellon University
5000 Forbes Avenue Pittsburgh, PA 15213

☒ E
☐ r

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

☐

YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case

PLACE OF DEPOSITION

DATE AND TIME

☐

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; and (2) all communications, including requests for maps or data, between Beverly Clayton and/or Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

PLACE REED SMITH, LLP

435 Sixth Avenue, Pittsburgh PA 15219-1886

DATE AND TIME

February 14, 9:30 AM

☐

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

DATE February 7, 2002

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Robert B. Hoffman

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

¹ If action is pending in district other than district of issuance, state district under case number.

G:\LIT\FORMS\SUBPOENA.FED.ac

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH et al
Plaintiffs,

v.

THE COMMONWEALTH OF PENNSYLVANIA;
MARK S. SCHWEIKER, et al
Defendants

No. 1: CV 01-2439
Judge Nygaard, Judge Rambo,
and Judge Yohn

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2002, I caused a true and correct copy
of the foregoing document to be served upon the following counsel of record by first
class mail, postage prepaid:

J. Bart DeLone
Senior Deputy Attorney General
Office of Attorney General
15th Floor
Strawberry Square
Harrisburg, PA 17120

Linda Shorey
John A. Krill
Kirkpatrick and Lockhart LLP
240 N. Third St.
Harrisburg PA 17101-1507

Counsel for Hon. Mark Schweiker, Hon. Kim
Pizzingrilli, Richard Filling, and the
Commonwealth of Pennsylvania

Counsel for Hon. Robert Jubelirer and Hon.
Matthew Ryan

REED SMITH LLP

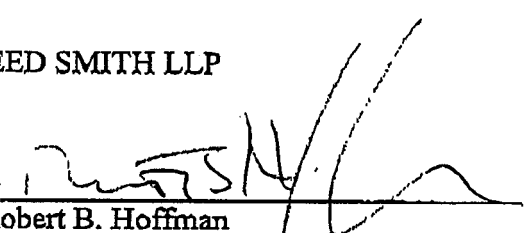
By 
Robert B. Hoffman
I.D. No. 23846
213 Market Street, Ninth Floor
P. O. Box 11844
Harrisburg, PA 17101
(717) 257-3042

EXHIBIT - 4

Kirkpatrick & Lockhart LLP

Payne Shoemaker Building
240 North Third Street
Harrisburg, PA 17101-1507
717.231.4500
www.kl.com

February 15, 2002

Linda J. Shorey
717.231.4510
Fax: 717.231.4501
lshorey@kl.com

VIA FACSIMILE

Robert B. Hoffman
REED SMITH LLP
213 Market Street, 9th Floor
P.O. Box 11844
Harrisburg, PA 17108

**RE: *Vieth v. Commonwealth*, 1:CV 01-2439 (Middle District of Pennsylvania)
Subpoena *duces tecum* issued to Carnegie Mellon University**

Dear Mr. Hoffman,

As previously explained to you through e-mail, it came to my attention late yesterday that Carnegie Mellon University ("CMU") had received from your office a subpoena dated February 7, 2002, issued to the Custodian of Records for CMU. The copy of the subpoena provided to us by Walter DeForest, CMU's General Counsel requests (1) that a designee of CMU appear for deposition, and (2) production of the following documents:

(1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; and (2) all communications, including requests for maps and data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any members of that Caucus, and/or any employee or representative of any member pertaining to that contract.

The date and time listed for compliance with the subpoena was yesterday February, 14, 2002.

We have not to date received a copy of the subpoena and notice of deposition or certificate of service, as required under Fed.R.Civ.P. 30(b)(1) ("[a] party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action"). While you have provided a copy of a proof of service you filed with the Middle District, I reiterate that we did not receive service and, accordingly, pursuant to Fed.R.Civ.P. 32 (d)(1), we hereby file, on behalf of Defendants Lieutenant Governor Jubelier and Speaker Ryan (Presiding Officers of the Pennsylvania General Assembly), a written objection to the notice of deposition which was not properly served on counsel.

Kirkpatrick & Lockhart LLP

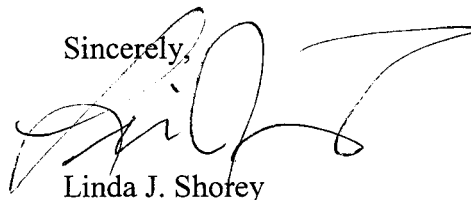
Additionally, we object to the subpoena *duces tecum* because the documents sought are protected from disclosure by the federal common law legislative privilege. Our clients have standing to make this objection as the subpoena *duces tecum* infringes on their rights. *See e.g., Minnesota School Boards Association Ins. Trust v. Employers Ins. Co.*, 183 F.R.D. 627, 629 (N.D. Ill. 1999) (agreeing that "it is well settled that a party has standing to object to a subpoena directed at a nonparty when the party claims a 'personal right or privilege' regarding the documents sought."); *see also* 9 MOORE'S FEDERAL PRACTICE § 45.04[2].

All the documents identified in the subpoena are protected by the legislative privilege as each is related to the process of developing legislation and is within the sphere of legitimate legislative activity. The protections of the legislative privilege extend to discovery. Moreover, the documents requested have no bearing on the issue that is before the court, i.e. the validity the congressional redistricting plan put in place by Act No. 2002-1.

Pursuant to Fed.R.Civ.P. 45(c)(2)(B), now that this objection on the basis of privilege has been made in writing, Plaintiffs, as the party serving the subpoena, "shall not be entitled to inspect and copy the materials ... except pursuant to an order of the court by which the subpoena was issued." We will inform Mr. DeForest that CMU should not comply with the subpoena until ordered to do so by the court.

Unless we can resolve this dispute, Presiding Officers will seek a protective order against this discovery pursuant to Fed.R.Civ.P. 26(c). Please contact me at your earliest convenience. Thank you for your prompt attention.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Shorey", written over the word "Sincerely,".

Linda J. Shorey

cc: Paul Smith
Tom Perrelli
Bart DeLone
Jack Krill

EXHIBIT - 5

Kirkpatrick & Lockhart LLP

Payne Shoemaker Building
240 North Third Street
Harrisburg, PA 17101-1507
717.231.4500
www.kl.com

February 15, 2002

Linda J. Shorey
717.231.4510
Fax: 717.231.4501
lshorey@kl.com

VIA FACSIMILE

Walter P. DeForest
DeForest & Koscelink
3000 Koppers Building
436 Seventh Ave.
Pittsburgh, Pennsylvania 15219

Dear Mr. DeForest,

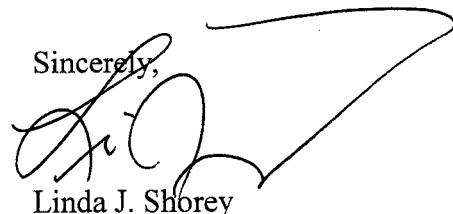
Enclosed please find a copy of a letter sent today to Robert Hoffman of Reed Smith, LLP in connection with the subpoena *duces tecum* which his office served upon the Custodian of Records of Carnegie Mellon University, and you faxed to me late last evening.

As explained in the letter, Lieutenant Governor Jubelirer and Speaker Ryan (Presiding Officers of the Pennsylvania General Assembly), object to that portion of the subpoena compelling a designee of CMU to appear for deposition on the grounds that this office did not receive service of the subpoena.

Additionally, Presiding Officers object to the production of the documents requested by Mr. Hoffman on the grounds of the common law legislative privilege. With this privilege objection now in writing, it is my understanding that Fed.R.Civ.P. 45(c)(2)(B) prevents Mr. Hoffman from inspecting and copying the requested documents, unless pursuant to court order. Accordingly, we believe it is appropriate for you to withhold the requested documents pending resolution of the discovery dispute. Please be advised that Presiding Officers are also exploring the necessity of seeking a protective to prevent the requested discovery.

If you have any questions, please feel free to contact me. I will keep you informed of the status of this discovery issue.

Sincerely,



Linda J. Shorey

EXHIBIT - 6

FEB 18 2002

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD VIETH, NORMA JEAN
VIETH et al

Plaintiffs,

v.

THE COMMONWEALTH OF
PENNSYLVANIA, et al
Defendants.

:
:
:
:
:
:
:
:
:
:
:

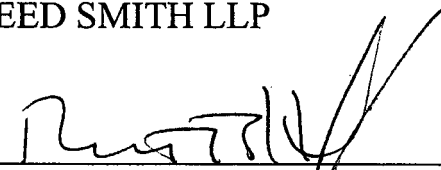
No. 1: CV 01-2439
Judge Nygaard, Judge Rambo
Judge Yohn

PLAINTIFFS' NOTICE OF SERVICE OF SUBPOENA

Plaintiffs hereby provide notice as per Rule 45(b) that they have served the
attached subpoena upon the entity there noted.

REED SMITH LLP

By


Robert B. Hoffman
P.O. Box 11844
Harrisburg, PA 17108
(717) 257-3042

Paul M. Smith
Thomas J. Perrelli
Bruce V. Spiva
Daniel Mach
Brian P. Hauck
JENNER & BLOCK, L.L.C.
601 Thirteenth Street, NW
Washington, D.C. 20005
(202) 639-6000

AO 88(Rcv. 1/94) Subpoena in a Civil Case

**Issued by the UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD VIETH et al

Plaintiff(s),

v.

THE COMMONWEALTH OF PENNSYLVANIA, et al
Defendant(s).

SUBPOENA IN A CIVIL CASE

CASE NUMBER:¹ CV 01-2439
(MIDDLE DISTRICT OF PENNSYLVANIA)

TO: Custodian of Records, Carnegie Mellon University
5000 Forbes Avenue Pittsburgh, PA 15213

E
r

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case

PLACE OF DEPOSITION

DATE AND TIME

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; and (2) all communications, including requests for maps or data, between Beverly Clayton and/or Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

PLACE

REED SMITH, LLP

435 Sixth Avenue, Pittsburgh PA 15219-1886

DATE AND TIME

February 14, 9:30 AM

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

DATE February 7, 2002

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Robert B. Hoffman

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

¹ If action is pending in district other than district of issuance, state district under case number.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH et al
Plaintiffs,

v.

THE COMMONWEALTH OF PENNSYLVANIA;
MARK S. SCHWEIKER, et al
Defendants

No. 1: CV 01-2439
Judge Nygaard, Judge Rambo,
and Judge Yohn

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2002, I caused a true and correct copy
of the foregoing document to be served upon the following counsel of record by first
class mail, postage prepaid:

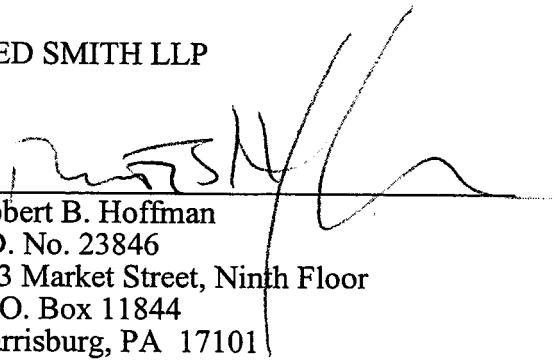
J. Bart DeLone
Senior Deputy Attorney General
Office of Attorney General
15th Floor
Strawberry Square
Harrisburg, PA 17120

Linda Shorey
John A. Krill
Kirkpatrick and Lockhart LLP
240 N. Third St.
Harrisburg PA 17101-1507

Counsel for Hon. Mark Schweiker, Hon. Kim
Pizzingrilli, Richard Filling, and the
Commonwealth of Pennsylvania

Counsel for Hon. Robert Jubelirer and Hon.
Matthew Ryan

REED SMITH LLP

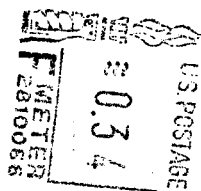
By 
Robert B. Hoffman
I.D. No. 23846
213 Market Street, Ninth Floor
P. O. Box 11844
Harrisburg, PA 17101
(717) 257-3042

Robert B. Hoffman

ReedSmith
LLP

Reed Smith LLP
213 Market Street
9th Floor
Harrisburg, PA 17101

Linda Shore, Esquire
John A. Krill, Esquire
Kirkpatrick & Lockhart, LLP
240 North Third Street
Harrisburg, PA 17101-1507



[REDACTED]

EXHIBIT - 7

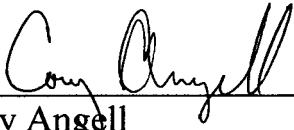
**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD VIETH, et al,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	No. 1:CV-01-2439
	:	(Judge Rambo)
	:	
THE COMMONWEALTH OF	:	
PENNSYLVANIA, et al.	:	
	:	
Defendants.	:	

AFFIDAVIT OF CORY ANGELL

1. My name is Cory Angell and I am employed in the Office Services department of Kirkpatrick & Lockhart LLP in Harrisburg, Pennsylvania.
2. One of my regular duties is to retrieve the mail from the firm's post office box, sort it according to floor and recipient and deliver any mail addressed to the attorneys to the attorneys' respective secretaries.
3. On Friday, February 15, 2002, I retrieved the mail from the post office box at approximately 9:20 AM.
4. I sorted the mail according to floor and delivered Ms. Shorey's mail to her Secretary, Wanette Legaspi.
5. On Monday, February 18, 2002, I helped to sort the mail retrieved from the post-office box. Although this day was a federal holiday, there was mail in the post office box delivered on Saturday, February 16, 2002.

6. I then delivered Ms. Shorey's mail to Ms. Legaspi at approximately 10 AM.


Cory Angell

Sworn and subscribed before me
this 18th day of February, 2002


Notary Public

My commission expires

NOTARIAL SEAL
TROY ROHRBAUGH, NOTARY PUBLIC
HARRISBURG, DAUPHIN COUNTY
MY COMMISSION EXPIRES JUNE 30, 2003

EXHIBIT - 8

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD VIETH, et al,

Plaintiffs,

v.

THE COMMONWEALTH OF
PENNSYLVANIA, et al.

Defendants. :

No. 1:CV-01-2439
(Judge Rambo)

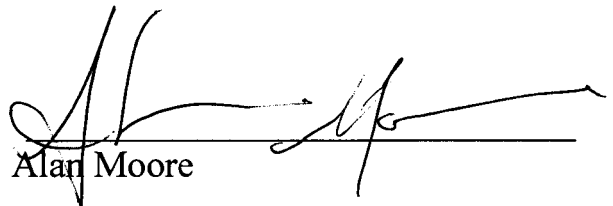
AFFIDAVIT OF ALAN MOORE

1. My name is Alan Moore and I am employed in the Office Services department of Kirkpatrick & Lockhart LLP in Harrisburg, Pennsylvania.

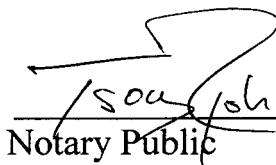
2. One of my regular duties is to retrieve the mail from the firm's post office box, sort it according to floor and recipient and deliver any mail addressed to the attorneys to the attorneys' respective secretaries.

3. On Monday, February 18, 2002, I retrieved the mail from the firm's post office box. Although this day was a federal holiday, there was mail in the post office box delivered on Saturday, February 16, 2002.

4. Together with Cory Angell, I sorted the mail according to floor and recipient. Mr. Angell delivered the mail to the recipients on the 11th Floor, where Ms. Shorey's office is located.


Alan Moore

Sworn and subscribed before me
this 18th day of February, 2002


Notary Public

My commission expires

NOTARIAL SEAL
TROY ROHRBAUGH, NOTARY PUBLIC
HARRISBURG, DAUPHIN COUNTY
MY COMMISSION EXPIRES JUNE 30, 2003

EXHIBIT - 9

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD VIETH, et al,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	No. 1:CV-01-2439
	:	(Judge Rambo)
	:	
THE COMMONWEALTH OF	:	
PENNSYLVANIA, et al.	:	
	:	
Defendants.	:	

AFFIDAVIT OF WANETTE LEGASPI

1. My name is Wanette Legaspi and I am employed as a secretary to Ms. Linda Shorey, Esq., at Kirkpatrick & Lockhart LLP, Harrisburg, Pennsylvania.

2. One of my regular duties is to open Ms. Shorey's mail on a daily basis and to personally bring to her attention any documents that pertain to legal actions in which she is involved.

3. Another of my regular duties is to update pleadings and discovery logs for the actions in which Ms. Shorey is involved. In the *Vieth* action, because of the expedited nature of the proceedings, I was asked to and have been updating the pleadings and discovery logs on a daily basis.

4. Ms. Shorey did not receive a mailed service copy of a subpoena *duces tecum* addressed to the Custodian of Records of Carnegie Mellon University or a copy of the Certificate of Service filed with the Clerk of Court for the Middle District prior to Monday, February 18, 2002.

5. On that day, Cory Angell, who works for the Office Services department delivered Ms. Shorey's mail to me. There were four envelopes from Reed Smith, which I then opened.

6. One envelope bore a postmark that I recognize as an internal law firm-type postmark made by a post-mark machine. The postmark date was February 8, 2002. Enclosed was a service copy of the subpoena *duces tecum* (with no boxes

checked) addressed to the Custodian of Records of Carnegie Mellon University and a copy of the Certificate of Service.

7. Another envelope bore a post-mark that I recognize as one made by the United States post office. The postmark date was February 15, 2002. Enclosed was a copy of the subpoena *duces tecum* (with no boxes checked) addressed to the Custodian of Records of Carnegie Mellon University and a copy of the Certificate of Service (bearing a time-stamp from the Clerk of Court for the Middle District). On the last page (i.e., the Certificate of Service) was the handwritten notation: "& duplicate copy to L. Shorey by fax and mail 2/15 RBH."

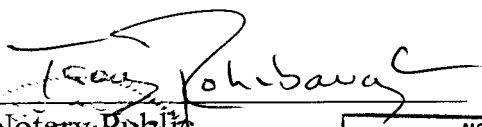
8. The other two letters received from Reed Smith on Monday, February 15, 2002 pertained to the state court matter, *Erfer v. Commonwealth* (No. 14 MM 2002).

9. I personally brought all of these letters to Ms. Shorey's attention.

10. None of these documents or copies thereof had been received by first class mail prior to Monday, February 18, 2002.


Wanette Legaspi

Sworn and subscribed before me
this 18th day of February, 2002


Notary Public
My commission expires.

NOTARIAL SEAL
TROY ROHRBAUGH, NOTARY PUBLIC
HARRISBURG, DAUPHIN COUNTY
MY COMMISSION EXPIRES JUNE 30, 2003

CERTIFICATE OF SERVICE

I certify that on February 19, 2002, I caused a copy of the foregoing Memorandum of Law in Support of Motion to Quash Subpoena or For Protective Order to be served on the following in the manner indicated:

Fax and First class mail

Paul M. Smith
Thomas J. Perrelli
Daniel Mach
Brian P. Hauck
JENNER & BLOCK, L.L.C
601 Thirteenth Street, NW
Washington, D.C. 20005
(202) 639-6000
Counsel for Plaintiffs

Hand Delivery

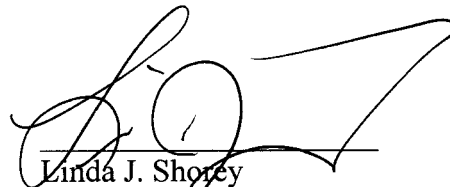
Robert B. Hoffman
REED SMITH LLP
213 Market Street, 9th Floor
P.O. Box 11844
Harrisburg, PA 17108
(717) 257-3042
Counsel for Plaintiffs

Hand Delivery

J. Bart DeLone
Senior Deputy Attorney General
Office of Attorney General
Appellate Litigation Section
15th Floor Strawberry Square
Harrisburg, PA 17120
(717) 783-3226
*Counsel for the Commonwealth, Governor
Schweiker, Secretary Pizzigrilli, &
Commissioner Filling*

First Class Mail and Fax

Walter P. DeForest
DeForest & Koscelnik
3000 Koppers Bldg.
436 Seventh Ave.
Pittsburgh, PA 15219
(412) 227-3101
Counsel for Carnegie Mellon University



Linda J. Shorey
Pa. ID No. 47477
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
(717) 231-4501 (fax)
*Counsel for Defendants
Jubelirer and Ryan*