

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF
PENNSYLVANIA BY JOSH SHAPIRO,
Attorney General, et al.,

Petitioners,

v.

UPMC, A Nonprofit Corp, et al.,

Respondents.

NO. 334 MD 2014

THE GOVERNOR’S OFFICE, THE PENNSYLVANIA DEPARTMENT OF HEALTH, AND
THE PENNSYLVANIA INSURANCE DEPARTMENT’S REPLY IN SUPPORT OF ITS
APPLICATION TO QUASH AND FOR A PROTECTIVE ORDER

UPMC’s Response to the Application to Quash and for a Protective Order (the “Application”) filed by the Governor’s Office, the Pennsylvania Department of Health (“DOH”), and the Pennsylvania Insurance Department (“PID”) (collectively the “PA Agencies”) highlights how unnecessary the requested third-party discovery is to resolve Count I of the Attorney General’s Petition to Modify Consent Decree (the “Petition”). UPMC is clearly frustrated with the Attorney General’s decision to wait until February to file the Petition; however, this frustration should not be taken out on the PA Agencies—who are not parties to the Petition and did not choose to be subject to such voluminous fast-tracked third-party discovery. UPMC’s arguments are ineffective and not persuasive. As such, this Court should grant the PA Agencies’ Application in its entirety. This is especially so in light of this Court’s Order on UPMC’s Motion to Dismiss. If this Court’s ruling is upheld on appeal before the Supreme Court, then the burden that UPMC seeks to impose on the PA Agencies cannot be justified for a Petition relating to a Consent Decree that will terminate in less than three months.

A. UPMC's Response Reveals that the Documents It Seeks are Irrelevant to Count I of the Petition.

In its "Statements of Material Disputes" in the Opposition, UPMC highlights the various types of documents that it believes it needs from the PA Agencies with respect to the "public interest" question in Count I of the Petition. See Opp'n at 8-13. In doing so, however, UPMC only further highlights how irrelevant and unnecessary the broad third-party discovery is to the current dispute. Moreover, UPMC fails to tie any of these particular categories of documents to its expansive discovery requests in the Subpoenas.

For example, UPMC asserts that it can obtain discovery from the PA Agencies as to, among other things: (1) why PID and the Governor's Office chose specific UPMC hospitals and services to be negotiated in 2017 and not others; and (2) "why the PA Agencies did not join the Attorney General's Petition to Modify." See *id.* at 8, 12. However, the only issue currently before the Court is whether the modification is in the "public interest," and the PA Agencies' subjective views on this issue or reasons for not joining in the filing of the Petition are entirely irrelevant to this inquiry. See *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 (1991) ("The situation would not be better, but arguably even worse, if the courts were to apply a subjective test: not whether the action was in the public interest, but whether the officials involved thought it to be so. This would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid."). The Consent Decree is a written agreement. There is no justification for UPMC's attempt to pry into the PA Agencies' subjective views or decision-making process. Furthermore, UPMC's rationale in its opposition evidences that they are seeking documents that fall squarely within the PA Agencies' deliberative process privilege as described in the Application.

A further example is UPMC's claim that it seeks to "develop a factual record" of a January 2018 in camera discussion before Judge Pellegrini, in which the Commonwealth was directed to proceed at that time on any request to modify the end-date. Opp'n at 9. However, UPMC was present at that conference, as was the OAG—both of whom are actual parties to the Petition. See *Boyle v. Steiman*, 631 A.2d 1025, 1031 (Pa. Super. 1993) ("It is not a purpose of discovery for a party to supply, at its own expense, information already under the control or readily available to the opposing party."); *Schultz v. Schultz*, 184 A.3d 168, 184 (Pa. Super. 2018) (holding it is an abuse of discovery for a party already in possession of documents to turn around and request the product of the same documents). Again, it is unclear how this proceeding before Judge Pellegrini has any bearing on whether the requested modifications are in the "public interest."

Likewise, UPMC vaguely asserts that "the PA Agencies are certainly in possession of non-privileged, non-confidential communications that are relevant to the public interest and/or the claims and defenses in Count I, and that are not available through any other means," and that the Subpoenas would permit UPMC to obtain "properly authenticated copies of government records that can be admitted at the trial in this matter." See Opp'n at 13. However, UPMC fails to articulate what communications might be relevant to the Court's "public interest" inquiry or identify what authenticated government records are necessary in the case.

Finally, and importantly, UPMC has failed to align any of the particular documents outlined in its Opposition to the expansive requests in the Subpoenas. Accordingly, even if the documents were relevant (which they are not), UPMC's arguments do not justify the vast majority of the requests in the Subpoenas; and therefore the Application should be granted.

B. The PA Agencies Objected to the Subpoena in its Entirety and did not Waive any Objections to Specific Requests.

UPMC argues that the Application should be denied because the PA Agencies did not raise specific objections to five of the seven document requests. See Opposition at 22. This is not the case. While the PA Agencies pointed to particular document requests as examples to show their unnecessary breadth and scope, they by no means waived their objections to the others.¹ See Application at 8. The Application clearly seeks relief from the Subpoenas in their entirety, for a variety of reasons that applied to all of the document requests. Accordingly, this argument should be rejected and the PA Agencies should not be required to go forward with any of the document requests in the Subpoenas.

C. UPMC's Proposed Solutions to the Overly Burdensome and Privileged Document Requests are Unworkable.

UPMC also attempts to downplay the various privileges implicated in the Subpoenas by arguing that the PA Agencies must redact and log any such documents. However, this argument misses the point, as it ignores that certain categories of documents requested in the Subpoenas are privileged on their face. Thus, requiring the PA Agencies to still respond to the parts of the Subpoenas that seek such information would be an overly burdensome and fruitless exercise

Likewise, while UPMC proposed “a single, limited document request to each agency, as well as a handful of factual stipulations and document authentications” to the PA Agencies in response to their objections to the Subpoenas, this “proposal” did not reasonably tailor the requests. Rather, as evidenced in Exhibit 3 to UPMC's Opposition, the document request in the “proposal,” contained numerous subparts, and it is unclear who within the PA Agencies, who are not parties

¹ Moreover, UPMC is incorrect that the PA Agencies did not provide any specific objections to Document Request Nos. 1, 4, 5, and 6. See Application, at 19 (identifying the various issues with these requests with respect to PID).

to the Petition, would be able to attest to the numerous stipulations contained therein. Accordingly, this proposal was unworkable and did not narrowly tailor the requests.

In sum, the PA Agencies respectfully request that the Court reject the arguments set forth in UPMC's Opposition and grant the PA Agencies' Application to Quash the Subpoenas and for a Protective Order to UPMC's Subpoenas Duces Tecum.

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Dated: April __, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April __, 2019, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

/s/ Amy Joseph Coles

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2019, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

/s/ Amy Joseph Coles

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: April 11, 2019

/s/ Amy Joseph Coles