

regulations on the industry, that Plaintiffs complain are more onerous and burdensome, such as regulations that require regular inspection of the vehicles, regular replacement of the vehicles, and driver testing and certification. The PPA approved these regulations on June 27, 2005.²

Plaintiffs are eight van companies that provide local ground transportation in the Philadelphia area, including trips between the Philadelphia airport and local hotels. These so-called “airport-transfer services,” which operate 14-passenger vans, are now classified as limousines under the Regulations, and therefore they, too, are subjected to the additional burdens that the Regulations impose. The Plaintiffs brought this action against both the PPA and Joseph Egan, its executive director,³ claiming that the Regulations violate both federal and state law, and request that the Court permanently enjoin Defendants from enforcing them against Plaintiffs.

In their Second Amended Complaint, Plaintiffs assert four legal challenges to the Regulations, namely: (1) that it unduly burdens interstate commerce in violation of Article I, Section 8 of the U.S. Constitution; (2) that it unfairly discriminates against the airport-transfer services in violation of the Equal Protection clause of the Fourteenth Amendment; (3) that the former regulatory regime under the PPUC preempts the new framework; and (4) that the framework violates the “legislative requirements for clear and open legislative action, and constitutes non uniform regulation in violation of the Pennsylvania Constitution.”⁴

² See Philadelphia Parking Authority, Taxicab and Limousine Regulations, June 27, 2005, http://www.philapark.org/taxi_limo/taxi_limo_regulations.aspx (“Regulations”).

³ According to a recent filing, as of November 17, 2006, it appears that Vincent J. Fenerty has replaced Mr. Egan as executive director. The Court will continue to refer to the two named defendants simply as “Defendants.”

⁴ Second Am. Compl. [Doc. # 34] ¶ 41.

On March 2, 2006, the Plaintiffs served Defendants with a request for the production of documents. In response to this discovery request, the Defendants produced 152 pages of documents, and withheld some 350 pages of additional documents, asserting the attorney-client privilege, the work-product doctrine, and executive privilege. On July 7, 2006, Defendants served Plaintiffs with a privilege log containing 22 entries. Each entry corresponds to a document, and describes the document's author, its recipients, the basic contents of the document, and the privilege asserted as a basis for withholding it. On September 15, 2006, the Defendants produced additional documents corresponding to at least six entries in the log, many of which evidence communications among PPA officials, the Office of the Honorable John M. Perzel, Speaker of the Pennsylvania House of Representatives,⁵ and representatives of the limousine industry.

The Court now turns its attention to the instant discovery motions, both of which pertain to Plaintiffs' efforts to explore the communications among the PPA, the limousine industry, and Representative Perzel's office, that took place in the run-up to the passage of Act 94 and the implementing Regulations.

II. DISCUSSION

A. MOTION TO COMPEL

1. Documents in the Privilege Log

Preliminarily, the Court notes that entries 4, 6, 8, 9, 10, 11, 12, 14, 18, 19, 21, and

⁵ The Court takes judicial notice that as of January 2007, Representative Perzel is no longer Speaker of the House, but remains an elected State Representative.

22 on the privilege log refer to documents that the Defendants have produced to the Court in camera, along with an affidavit executed by Vincent J. Fenerty, the current executive director of the PPA.⁶ The Court has reviewed these documents in the course of making the instant rulings. The Court also notes that entries 5, 13, 15, 16, 17, and 20 on the privilege log refer to documents that the Defendants have since disclosed to Plaintiffs.⁷ Finally, the Court notes that entries 1, 2, 3, and 7 on the privilege log refer to documents that the Defendants have not produced to either the Plaintiffs, or to the Court in camera.

a. Privilege Log Entry # 1

This entry refers to a document dated December 23, 2005, that is Bates stamped PPA00153–00163. The document has not been produced to either the Plaintiffs or to the Court in camera. According to the Defendants’ brief, this document “is a legal memorandum written by Alan Kohler, Esquire and William A. Loy, Esquire, both of the law firm Wolf, Block, Schorr and Solis-Cohen LLP, to Charles Milstein of the Philadelphia Parking Authority.”⁸ The document “contains the legal opinions of the Parking Authority’s attorneys and is marked as protected by both the attorney-client privilege and the work-product privilege.”⁹ The privilege log further describes the document as “Memorandum re: Limousine Certificate of Public

⁶ Doc. # 58 (“Fennerty Affidavit” or “Fennerty Aff.”).

⁷ The Court infers this based on the Plaintiffs’ statement that “some [documents in the privilege log] were already produced (on September 15, 2006),” Pls.’ Reply Br. [Doc. # 48], and the fact that Plaintiffs attached copies of these documents to their Opposition to Representative Perzel’s Motion to Quash. See Pls.’ Opp’n [Doc. # 52], Exs. C–M.

⁸ Defs.’ Opp’n to Mot. to Compel [Doc. # 45], at 2.

⁹ Id.

Convenience.”

This showing alone does not persuade the Court that the document is protected from disclosure by the attorney-client privilege. Previous decisions of this Court establish that a party asserting the attorney-client privilege “bears the burden of proving that [it] applies,”¹⁰ and “has the burden of demonstrating . . . that each of [the elements of the privilege] is satisfied.”¹¹ Furthermore, the proponent ““must by affidavit show sufficient facts as to bring the identified and described document within the narrow confines of the privilege.”¹²

Under the law of this Circuit,

[c]ommunications are protected under the attorney-client privilege when: (1) legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection [may] be waived.¹³

Defendants have not convinced the Court that the memo containing legal opinions satisfies this definition of the privilege. Nor have Defendants described with any precision

¹⁰ Scott Paper Co. v. United States, 943 F. Supp. 489, 499 (E.D. Pa. 1996). See also Thompson v. Glenmede Trust Co., No. 92-5233, 1995 U.S. Dist. LEXIS 18780, at *13 (E.D. Pa. Dec. 19, 1995) (“A party relying upon either the attorney-client privilege or work-product immunity, bears the burden of establishing the applicability of the privilege/protection.”).

¹¹ Barr Marine Prods. Co., Inc. v. Borg-Warner Corp., 84 F.R.D. 631, 636 (E.D. Pa. 1979).

¹² Id. (quoting Int’l Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 94 (D. Del. 1974)).

¹³ In re Grand Jury Proceeding Impounded, 241 F.3d 308, 316 (3d Cir. 2001) (internal quotation omitted).

whether or how this memo has been kept in a confidential manner.¹⁴ They have not explained the contents of the communication, other than the fact that it contains generic “legal opinions,” and they have not put forth any of this information by a sworn affidavit. Therefore, the Court finds that the Defendants have failed to carry their burden of demonstrating that the legal memo is protected by the attorney-client privilege.

Defendants also maintain that the work-product doctrine protects the memo from disclosure. Under Fed. R. Civ. P. 26(b)(3), “tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial [are discoverable] only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Although the memo purportedly contains legal opinions from the PPA’s attorneys, Defendants have not stated whether those opinions were prepared in anticipation of litigation or for trial.¹⁵ Therefore, the Court is not convinced that the work-product doctrine protects the memo from disclosure.

The Court, however, does not lightly order litigants to disclose allegedly confidential memoranda containing legal opinions. Therefore, the Court will give PPA ten days to supplement the record with an affidavit describing with precision and specificity whether and

¹⁴ See Scott Paper Co., 943 F. Supp. at 499–500 (“[D]efendant failed to establish that the documents it claims are protected by the attorney-client privilege were maintained . . . in a confidential manner.”).

¹⁵ See also Haines v. Liggett Group, Inc., 975 F.2d 81, 94 (3d Cir. 1992) (“A party seeking the protection of the work-product privilege must show that the materials were prepared in ‘the course of preparation for possible litigation’”) (quoting Hickman v. Taylor, 329 U.S. 495, 505 (1947)).

how the memo is protected by either the attorney-client privilege or the work-product doctrine.

b. Privilege Log Entries ## 2, 3, and 7

Entry # 2 refers to a “copy of PPA regulations with handwritten notes” belonging to James Ney, Director of the Taxi and Limousine Division of the PPA. The document is not dated, and is Bates stamped PPA00164–PPA00239. PPA asserts the executive privilege as grounds for withholding the document. Entry # 3 refers to “Note attaching BostonCoach Manual on Driver Training Program” The document is not dated, and is Bates stamped PPA00240–PPA00445. The document is authored by Charles Milstein and addressed to James Ney. PPA asserts “Confidential/Proprietary Information” as the basis of the privilege. Entry # 7 refers to “Memo re: Summary of Limo Only Sections (duplicate copies).” The document is not dated, and is Bates stamped PPA00459–PPA00463. The document is authored by the PPA, and addressed to an unknown recipient. PPA asserts the executive privilege as the basis for withholding the document.

PPA has not submitted any of these documents to the Court in camera, nor have the parties addressed any of them in their briefs. Accordingly, the Court will dismiss Plaintiffs’ Motion to Compel with respect to these three entries in the log.

e. Remaining Entries in the Privilege Log

Defendants assert that the remaining entries in the log (4, 6, 8, 9, 10, 11, 12, 14, 18, 19, 21, and 22) are protected by the deliberative-process privilege—a governmental privilege that protects “confidential deliberations of law or policymaking, reflecting opinions,

recommendations or advice.”¹⁶ The privilege protects such internal agency deliberations based on the rationale that “frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public.”¹⁷

In order to determine whether the executive privilege protects the agency communications, the Court applies a two-part test. First, the Defendants bear the burden of showing that the privilege applies by demonstrating that the communication memorialized in the document is both predecisional and deliberative. In other words, “[t]he government has the burden of showing that the materials were generated before the adoption of an agency policy and reflect the give-and-take of the consultative process.”¹⁸ By protecting only deliberative communications, the privilege protects “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.”¹⁹ Accordingly, “[t]he privilege does not protect factual or investigative material, except as necessary to avoid indirect revelation of the decision-making process.”²⁰ By protecting only predecisional material, the privilege does not apply to deliberative

¹⁶ Redland Soccer Club v. Dep’t of the Army, 55 F.3d 827, 853 (3d Cir. 1995) (internal quotation omitted).

¹⁷ NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (internal quotation omitted).

¹⁸ Tax Analysts v. IRS, 117 F.3d 607, 616 (D.C. Cir. 1997) (internal quotations omitted).

¹⁹ Grand Cent. P’ship, Inc. v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999) (internal quotation omitted).

²⁰ Scott Paper Co., 943 F. Supp. at 496.

communications made after the final agency decision.²¹ The Defendants have submitted these documents to the Court in camera, which “is a highly appropriate and useful means of dealing with claims of governmental privilege.”²²

Second, if the government sustains its burden of demonstrating that the privilege applies, the burden shifts to the party seeking discovery, who “bears the burden of showing that its need for the documents outweighs the government’s interest [in confidentiality].”²³ In other words, the privilege is qualified. At oral argument on November 21, 2006, Plaintiffs’ counsel argued that even if the executive privilege applies to the documents, Defendants’ objections should be overruled based on the Plaintiffs’ need to prove that the PPA was complicit in an alleged attempt by the limousine industry to push the airport-transfer industry out of the Philadelphia market. The Court, after reviewing these in camera submissions, has concluded that Plaintiffs have not demonstrated any particularized need for these documents that outweighs the PPA’s interest in candid internal communications as a general matter. Therefore, the Court bases its decision for each remaining privilege-log entry on a one-step analysis of whether the document is privileged.

i. Entry Number 4

According to the Fennerty Affidavit, entry number 4:

is a memorandum prepared by Charles Milstein of the [PPA] addressed to John Herzog of the [PPUC], with carbon copies to James Ney, Dennis Weldon, Susan Burns, and David Boonin, all

²¹ Tax Analysts, 117 F.3d at 616.

²² Redland Soccer Club, 55 F.3d at 855 (internal quotation omitted).

²³ Id. at 854.

individuals who were at the time employed by or acting as a consultant to the [PPA]. The subject of the Memorandum is “Definitions of Limousine Service and Potential Related Jurisdictional Issues. The document is also labeled as “Draft—For Discussion Purposes Only.” The memorandum discusses the regulatory authority granted to the Parking Authority by Act 94 in relation to limousines. It also discusses the implications of the [PPA]’s authority and how that may affect limousine carriers in Philadelphia.²⁴

First, the communications in the document express Mr. Milstein’s interpretation of Act 94, as well as suggestions about jurisdictional conflicts resulting from the division of regulatory authority between the PPA and the PPUC. Therefore, the communication is deliberative. Second, the PPA and the PPUC entered into a Jurisdictional Agreement²⁵ on February 3, 2005, that purports to resolve any jurisdictional conflicts between the two agencies. The communication is predecisional, and the privilege applies. Therefore, the Court will deny Plaintiffs’ Motion to Compel with respect to this document.

ii. Privilege Log Entry # 6

According to the Fennerty Affidavit, entry number 6:

is a June 7, 2004 e-mail from David Boonin to James Ney and Dennis Weldon. Mr. Boonin was engaged by the [PPA] as a consultant at the time of this e-mail. Mr. Ney was and is the Taxi Limousine Director for the [PPA]. Mr. Weldon is General Counsel for the Parking Authority. The subject of the document is “Legislation—Limo Definition Issue.” The document contains the thoughts of Mr. Boonin in relation to a potential conflict among two sections of the limo legislation and poses questions to both Mr. Weldon and Mr. Ney regarding that issue.²⁶

²⁴ Fennerty Aff. ¶ 4.

²⁵ Defs.’ Mot. to Dismiss [Doc. # 4], Ex. D.

²⁶ Fennerty Aff. ¶ 5.

Because the email reflects the opinions of Mr. Boonin, a PPA consultant, about the meaning of a section of Act 94, the contents of the email are deliberative. Further, this deliberation occurred over a month before July 16, 2004, when Act 94 was enacted. Therefore, the email is predecisional. The privilege applies, and the Court will deny Plaintiffs' Motion to Compel with respect to this document.

iii. Privilege Log Entry # 8

According to the Fennerty Affidavit, entry number 8 "is a May 16, 2004 e-mail from [PPA consultant] David Boonin to [PPA Taxi and Limousine Director] James Ney entitled 'Mileage.' This document contains the thoughts and reflections of Mr. Boonin in relation to the regulations of taxicabs and limousines regarding age of vehicle and mileage requirements."²⁷

The Court notes that the email contains the proposals of Mr. Boonin, an outside consultant, as to the content of the Regulations. Mr. Boonin's proposals are addressed to Mr. Ney, a PPA officer. Therefore, this intra-agency communication is deliberative in nature. And because the communication took place over a year before the PPA adopted the Regulations, the communication is predecisional. Accordingly, the privilege applies, and the Court will deny Plaintiffs' Motion to Compel with respect to this document.

iv. Privilege Log Entry # 9

According to the Fennerty Affidavit, entry number 9:

is a April 29, 2004 email from Charles Milstein to James Ney, with a carbon copy to David Boonin, entitled 'New Legislative Language Regarding Limos.' The document describes a discussion between Mr. Ney and Mr. Milstein regarding a meeting with [limousine company owner] Nick Tropiano and proposed

²⁷ Id. ¶ 6.

legislative and regulatory changes. The document also describes an issue Mr. Tropiano asked the [PPA] to investigate, which pertains to a New Jersey limousine company and its operation in Philadelphia.²⁸

The Court notes that this email describes conversations between the PPA's Charles Milstein and Nick Tropiano, the owner of a limousine company. It also expresses the opinions of Mr. Tropiano, through Mr. Milstein. Therefore, because the email does not contain the thoughts, opinions, or policy suggestions of PPA personnel, the executive privilege does not apply. Thus, the Court will grant Plaintiffs' Motion to Compel with respect to this document.

v. Privilege Log Entry # 10

According to the Fennerty Affidavit, entry number 10 "is a copy of a facsimile sent from James Ney to David Boonin on October 22, 2003. The fax cover page asks for Mr. Boonin's interpretation of certain statutory language related to limousines."²⁹ The document is merely the fax cover page, with a handwritten note, and one page of the proposed language of Act 94.

The Court notes that in asking Mr. Boonin for his interpretation of a passage in Act 94 on the fax cover page, Mr. Ney himself suggests an interpretation of that same passage. Therefore, the fax cover page contains a deliberative communication. And because the communication occurred before Act 94 was enacted, the communication is predecisional. Accordingly, the privilege applies, and the Court will deny Plaintiffs' Motion to Compel with respect to this document.

²⁸ Id. ¶ 7.

²⁹ Fennerty Aff. ¶ 8.

vi. Privilege Log Entry # 11

According to the Fennerty Affidavit, entry number 11 “is a March 4, 2005 e-mail from David Boonin to James Ney entitled ‘Limos & DW.’ The e-mail concerns a two-page attachment that summarizes and comments on various regulations of limousines related to inspections, age requirement, fees and forms.”³⁰

Because the email contains Mr. Boonin’s comments on the proposed regulations, and because he sent the email in March of 2005, before the PPA adopted the Regulations, the communication is both deliberative and predecisional. Therefore, the privilege applies. Accordingly, the Court will deny the Motion to Compel with respect to this document.

vii. Privilege Log Entry # 12

According to the Fennerty Affidavit, entry number 12 comprises “two copies of a summary created by David Boonin entitled ‘Potential Settlement with Limousine Industry.’ This document contains Mr. Boonin’s opinions and thoughts regarding a potential resolution of an impending lawsuit threatened by certain members of the Limousine Industry. The document discusses the regulatory scheme involving inspections, vehicle requirements, fees and potential changes to the [PPA]’s regulations.”³¹

This document contains Mr. Boonin’s discussion of how the PPA can modify the proposed regulations in order to respond to a threatened lawsuit by the limousine industry. Therefore, the communication is deliberative. And although there is no date reflecting when this document was drafted, Mr. Boonin’s discussion references the date April 10, 2005 as the date

³⁰ Fennerty Aff. ¶ 9.

³¹ Id. ¶ 10.

that the Regulations become effective.³² The discrepancy between April 10, 2005, and June 27, 2005, as the date that the Regulations were “approved” is not important, because the document at issue contains thoughts and opinions that were predecisional. Accordingly, the privilege applies, and the Court will deny Plaintiffs’ Motion to Compel with respect to this document.

viii. Privilege Log Entry # 14

According to the Fennerty Affidavit, entry number 14 “is a February 3, 2004 e-mail from James Ney to Joseph Egan entitled ‘Limousine Meeting.’ At the time, Mr. Egan was the Executive Director of the [PPA]. The e-mail contains Mr. Ney’s thoughts and opinions on a scheduled meeting with industry representatives regarding the [PPA]’s regulations.”³³

The Court notes that because the document reflects Mr. Ney’s personal opinions about the implications of the timing of a meeting between the PPA and the limousine industry, the contents of the communication are deliberative. And because the email is dated February 3, 2004, before both Act 94 and the Regulations were enacted, it is predecisional. Accordingly, the privilege applies, and the Court will deny the Motion to Compel with respect to this document.

ix. Privilege Log Entry # 18

According to the Fennerty Affidavit, entry number 18 “is a March 17, 2005 e-mail from David Boonin to James Ney entitled ‘Reg Change List.’ The document contains the thoughts and opinions of Mr. Boonin regarding temporary changes in the [PPA]’s regulations, as

³² This date is consistent with the effective date given by the Defendants in their Motion to Dismiss, filed April 8, 2005. Mot. to Dismiss [Doc. # 4], at 3 (“[T]he regulations . . . will become fully effective on April 10, 2005.”).

³³ Id. ¶ 11.

well as a discussion of the impact of those changes.”³⁴

The Court disagrees with Defendants’ characterization of this document. The document appears simply to be a list of changes, without any “thoughts or opinions” that the law recognizes as deliberative. Aside from one parenthetical note directed from Mr. Boonin to Mr. Ney in the second line of the email, the rest of the communication is factual in nature, and not deliberative. Therefore, the Court will grant Plaintiffs’ Motion to Compel with respect to this document. Defendants should produce this document in full, except for the parenthetical note, which may be redacted.

x. Privilege Log Entry # 19

According to the Fennerty Affidavit, entry number 19 “is a January 15, 2005 email from David Boonin to . . . employees of the [PPA]. Also, Joseph Egan is carbon copied on the document. The document is entitled ‘Misc early Saturday morning ramblings on Taxis and Limos.’ The document contains two pages of Mr. Boonin’s thoughts, opinions, suggestions and analysis of issues concerning limousines, mileage, tipping and training.”³⁵

The “miscellaneous ramblings” in the email are indeed deliberative, since they reflect Mr. Boonin’s suggestions and opinions about the content of the proposed regulations. And because the document is dated January 15, 2005, the communication took place before the PPA adopted the regulations. Accordingly, the privilege applies, and the Court will deny the Motion to Compel with respect to this document.

³⁴ Id. ¶ 12.

³⁵ Id. ¶ 13.

xi. Privilege Log Entry # 21

According to the Fennerty Affidavit, entry number 21 “is two pages of Mr. Ney’s handwritten notes. The document contains notes on age and mileage limitations, inspections and fees.”³⁶ These handwritten notes appear to contain only factual information, and Defendants have not explained how they represent the opinions, suggestions, or thoughts of Mr. Ney. Therefore, the notes are not deliberative in nature, and the Court finds that they are not protected by the executive privilege. Accordingly, the Court will grant the Motion to Compel with respect to this document.

xii. Privilege Log Entry # 22

Finally, according to the Fennerty Affidavit, entry number 22 “is a January 26, 2005 memorandum from James Ney to D. Boonin, R Dickson, J. Egan, V. Fenerty, W. Moore and D. Weldon entitled ‘Taxi & Limousine Waivers Meeting.’ The memorandum attaches a five-page document entitled ‘Potential Waivers to PPA’s Taxi and Limousine Regulations.’ That document contains an in-depth discussion analysis, including opinions and suggestions concerning issues related to the Parking Authority’s regulations and potential waivers related to mileage, age of vehicle, inspections, and remote service providers.”³⁷

After reviewing this document, the Court is satisfied that it does contain deliberative material, because the document reflects Mr. Ney’s opinions about how to respond to constituent concerns to the proposed regulations. And because the document is dated January 26, 2005, about six months before the PPA adopted the Regulations, the materials are predecisional

³⁶ Id. ¶ 14.

³⁷ Id. ¶ 15.

as well. Accordingly, the privilege applies, and the Court will deny the Motion to Compel with respect to this document.

2. Answers to Interrogatory

On July 3, 2006, Plaintiffs served Defendants with a set of 21 requests for admission, followed by a blanket interrogatory. The interrogatory reads:

[A]s to each request which you do not unequivocally admit: Please state all facts which support and/or relate to your refusal to unequivocally admit; identify all documents relating to said request (and produce such documents); and identify all persons having knowledge of the reasons or basis for the refusal to admit, and state the knowledge of each such person.³⁸

Defendants served its response on July 30, 2006, answering each request for admission and adding subsequent detail to each, purportedly in response to the blanket interrogatory. Plaintiffs now ask the Court for an order that Defendants “fully answer the interrogatories.”³⁹

The Court notes that aside from a statement made by Plaintiffs’ counsel at oral argument, Plaintiffs have not pointed to any specific answer as deficient. Instead, they simply state that Defendants “did not provide the requested information.”⁴⁰ Plaintiffs do not refer the Court to any authority to guide its analysis of whether the responses are deficient. Therefore, in the absence of any guidance from legal authority to help conduct its review, the Court will deny the motion with respect to the interrogatories, with one exception.

At oral argument, Plaintiffs’ counsel asserted that the answer to Request for

³⁸ Pls.’ Reply, Ex. B, at 8.

³⁹ Pls.’ Mot. to Compel, at 4.

⁴⁰ Pls.’ Mem. of Law in Support of Mot. to Compel, at 8.

Admission number 11 was a “non-answer.” After reviewing that material, the Court agrees. Request for Admission number 11 reads, “Please admit that the Authority has conducted no economic analysis to determine the adverse impact or extent of adverse impact on financial liability of transfer vehicles.”⁴¹ Defendants’ response reads, “Denied. In carrying out its duties, PPA and its Board are cognizant of the economic impact of its decisions, and considers that factor.”⁴²

The Court agrees that by denying the request for admission, Defendants implied that they have conducted some type of formal economic analysis of the impact of the Regulations on the airport-transfer industry. And yet, Defendants’ answer to the blanket interrogatory indicates that they merely considered the fact that the Regulations would burden the industry economically. Therefore, the Court will grant the Plaintiffs’ Motion to Compel with respect to this Request for Admission. The Defendants will supplement their answer and change it to “Admitted,” or else identify the persons and produce the documents that relate to any formal economic analysis that they conducted.

3. Sanctions

Under the Federal Rules of Civil Procedure, if a motion to compel is granted in part and denied in part, “the court may . . . apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.”⁴³ Accordingly, because the Court will grant the Motion in part and deny it in part, the Court orders that the parties shall each bear

⁴¹ Pls.’ Reply, Ex. B, at 4.

⁴² Id.

⁴³ Fed. R. Civ. P. 37(a)(4)(C).

their own expenses in connection with their respective filings.⁴⁴

B. MOTION TO QUASH SUBPOENAS

The Motion to Quash concerns two subpoenas directed at Representative Perzel and Brian Preski, his Chief of Staff. The first subpoena, dated October 3, 2006, and directed to Representative Perzel, commands him to appear for a deposition and to bring “[a]ll documents relating to the interaction with witness directly or indirectly regarding limousine and/or transfer vehicles and Philadelphia Parking Authlrity [sic] in whole or in part.”⁴⁵ The second subpoena, also dated October 3, 2006, is directed to Preski, and contains the same commands. At oral argument, Plaintiffs’ counsel stated that the Plaintiffs seek the deposition testimony and documents in order to establish the existence of a conspiracy between Representative Perzel, the PPA, and the limousine industry to force the airport-transfer companies out of the market.

Perzel and Preski have asked the Court to quash the subpoenas, asserting that their communications with the PPA are protected by the legislative privilege.⁴⁶ Without reaching that issue, however, the Court concludes that the subpoenas subject Representative Perzel and

⁴⁴ See DiPietro v. Jefferson Bank, 144 F.R.D. 279, 282 (E.D. Pa. 1992).

⁴⁵ Mot. to Quash, Ex. A.

⁴⁶ See U.S. Const. art. I, § 6, cl. 1 (“[F]or any speech or debate in either house [the members of Congress] shall not be questioned in any other place.”); Pa. Const. art II, § 15 (same applies to members of the Pennsylvania General Assembly). This “speech or debate” clause protects from disclosure matters that form “an integral part 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 or with respect to other matters which the Constitution places within the jurisdiction of either House.” Fowler-Nash v. Democratic Caucus of the Pa. House of Representatives, 469 F.3d 328, 331 (3d Cir. 2006) (quoting Gravel v. United States, 408 U.S. 606, 625 (1972)).

Preski to an undue burden, and will quash the subpoenas on that ground instead.

Under the Federal Rules of Civil Procedure, “[o]n timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it . . . subjects a person to an undue burden.”⁴⁷ “An undue burden can be evaluated by considering factors such as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.”⁴⁸ Moreover, “[t]he witness’s status as a nonparty to the litigation should also be considered.”⁴⁹

Applying these factors, the Court concludes that the subpoenas impose an undue burden on Representative Perzel and Preski. First, Plaintiffs have not demonstrated how the existence of an alleged conspiracy against airport-transfer companies is probative of any of their claims.⁵⁰ Thus, the relevance of the information sought by these subpoenas is not clear to the

⁴⁷ Fed. R. Civ. P. 45(c)(3)(A)(iv).

⁴⁸ Gabe Staino Motors, Inc. v. Volkswagen of Am., Inc., No. 99-5034, 2003 U.S. Dist. LEXIS 3194, at *5 (E.D. Pa. Feb. 28, 2003).

⁴⁹ In re Auto. Refinishing Paint Antitrust Litig., 229 F.R.D. 482, 495 (E.D. Pa. 2005); see also Small v. Provident Life and Accident Ins. Co., 1999 U.S. Dist. LEXIS 18930, at *4 (E.D. Pa. Dec. 8, 1999) (“Courts have imposed broader restrictions on the scope of discovery when a non-party is targeted.”).

⁵⁰ Plaintiffs argue that the existence of a conspiracy between the limousine industry, the PPA, and the Speaker’s office helps to prove their dormant-commerce-clause and equal-protection claims. Under this Court’s reading of Supreme Court precedent, this is not so.

Under the dormant commerce clause, the ultimate issue is whether the Regulations “impose burdens on interstate trade that are ‘clearly excessive in relation to the putative local benefits.’” Am. Trucking Ass’ns v. Mich. Pub. Serv. Comm’n, 545 U.S. 429, 433 (2005) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). Such a claim is proved through expert testimony about the economic effect of the Regulations, not evidence of the motives

Court. Second, because of the dubious probative value of the testimony and documents sought under these subpoenas, Plaintiffs have not shown a convincing need for the evidence they seek to collect. Plaintiffs have also not shown that they cannot obtain the same information from the PPA, a party in this case that is subject to broad discovery under the Federal Rules.⁵¹ Third, the request for documents is broad and not narrowly tailored, as it seeks all documents having anything to do “directly or indirectly” with airport-transfer services. Finally, not only are Representative Perzel and Preski nonparties, they are also busy public servants who should not be compelled to participate as third parties in a civil suit unless Plaintiffs can demonstrate a compelling need for testimony or documents in their possession.

The Court makes this determination based on these factors, and also because under the Federal Rules and Third Circuit law, “district courts have broad discretion to manage

behind such regulations. See, e.g., Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd., 462 F.3d 249, 271 (3d Cir. 2006) (reviewing a trial record in a dormant-commerce-clause case, where the district court heard expert testimony about the local benefits of minimum wholesale prices in the dairy industry, and also the burden of such prices on interstate commerce).

And under the equal-protection clause, economic regulations are subject to rational-basis review. Tolchin v. Supreme Court, 111 F.3d 1099, 1113 (3d Cir. 1997); see also United States v. Williams, 124 F.3d 411, 422 (3d Cir. 1998). Under this test, the Regulations “enjoy[] a presumption of validity, and the plaintiff must negate every conceivable justification for the classification in order to prove that the classification is wholly irrational.” United States v. Pollard, 326 F.3d 397, 407 (3d Cir. 2003) (internal quotation omitted). Further, “[i]n the ordinary case, the law will be sustained if it can be said to advance a legitimate governmental interest, even if the law seems unwise or works to the disadvantage of a particular group.” Romer v. Evans, 517 U.S. 620, 632 (1996). Again, under this test, the existence of any conspiracy or improper motive against airport-transfer companies would not tend to prove or disprove that the Regulations violate the equal-protection clause.

⁵¹ See Fed. R. Civ. P. 26(b)(2) (Court may prohibit discovery if it is “obtainable from some other source that is more convenient, less burdensome, or less expensive”).

discovery.”⁵² Hence, without a much stronger showing that Representative Perzel’s office has evidence necessary to prove Plaintiffs’ claims, the Court finds the subpoenas of such third-party public officials to be unduly burdensome.

III. CONCLUSION

Although the Federal Rules of Civil Procedure provide for liberal discovery, that discovery may not include privileged material, nor may it impose an undue burden on a non-party. Therefore, in accordance with the foregoing reasons, the Court will grant in part and deny in part Plaintiffs’ Motion to Compel, and grant Representative Perzel’s Motion to Quash Subpoenas. An appropriate Order follows.

⁵² Sempier v. Johnson & Higgins, 45 F.3d 724, 734 (3d Cir. 1995).

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

LADY LIBERTY TRANSPORTATION CO., INC., et al.,

Plaintiffs,

vs.

PHILADELPHIA PARKING AUTHORITY, et al.,

Defendants.

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CIVIL NO. 05-1322
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ORDER

AND NOW, this 1st day of March 2007, upon consideration of the Motion to Compel Productions, Answers and for Sanctions [Doc. # 44], Defendants' Opposition thereto [Doc. # 45], Plaintiffs' Reply [Doc. # 48], and Plaintiffs' Supplemental Brief [Doc. # 62]; as well as the Motion to Quash Subpoenas filed by the Honorable John M. Perzel and Brian Preski [Doc. # 51], Plaintiffs' Opposition thereto [Doc. # 52], and the Reply brief of Messrs. Perzel and Preski [Doc. #53]; and after hearing Oral Argument on both Motions, it is hereby

ORDERED, that Plaintiffs' Motion to Compel is **GRANTED IN PART** and **DENIED IN PART**; it is further

ORDERED, that within 10 days of the docketing date of this Order, Defendant PPA will supplement Privilege Log Entry # 1 with an affidavit in accordance with the foregoing Memorandum Opinion; it is further

ORDERED, that within 10 days of the docketing date of this Order, Defendant PPA will produce documents corresponding to entries 9, 18, and 21 in the privilege log in accordance with the foregoing Memorandum Opinion; it is further

ORDERED, that within 10 days of the docketing date of this Order, Defendants will serve on the Plaintiffs an amended response to Plaintiffs' Request for Admission number 11, in accordance with the foregoing Memorandum Opinion; it is further

ORDERED, that Plaintiffs' remaining requests are **DENIED**; and it is further

ORDERED, that the Motion to Quash of the Honorable John M. Perzel is **GRANTED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.