

**PHILADELPHIA WATER, SEWER, AND STORMWATER RATE BOARD**  
**HEARING OFFICER RULING ON PA SET I DISCOVERY DISPUTE**  
**MARCH 23, 2018**

**HISTORY OF THE PA SET I DISPUTES**

On February 15, 2018, the Public Advocate served his first set of information requests, styled PA-I-1 through PA-I-21, on the Water Department. On February 21, 2018, the Water Department issued its objections to PA-I-1, PA-I-2, PA-I-3, PA-I-4, PA-I-5, PA-I-6, PA-I-7, PA-I-8, PA-I-11, PA-I-12, PA-I-13, PA-I-14, PA-I-17, PA-I-18, PA-I-19 and PA-I-20. Among other things, the Department characterized this discovery as burdensome and irrelevant to the rate case. On February 23, 2018, the Department provided its answers to PA-I-9, -10 and -21.

On February 26, 2018, the Public Advocate filed his Answer and Motion to Compel, requesting that the Hearing Officer deny the Department's Objections and compel PWD to respond to the Public Advocate's Interrogatories and Requests for Production of Documents. In this filing the Public Advocate stated that he withdrew PA-I-19. The Public Advocate also indicated that he was in discussions with the Department about the answers to questions PA-I-9 and PA-I-10. On February 27, 2018, the Department served answers to PA-I-1 through PA-I-8, and PA-I-11 and PA-I-12.

On March 5, 2018, the Public Advocate advised me that, based on discussions with counsel for the Department, he had been advised that some information regarding PA-I-13 and PA-I-14 might be forthcoming. The Public Advocate reiterated his availability to engage in any further discussions that might be required to reach a determination on PWD's Objections and our Answer and Motion to Compel Responses regarding Set I of the PA's discovery. By email, I advised the parties that it would be useful to convene a teleconference to discuss issues regarding PA Set I.

On March 6, 2018, the Public Advocate advised me that he and the Department had resolved their disputes over a number of the Set I discovery requests: PA-I-1, PA-I-2, PA-I-3, PA-I-4, PA-I-5, PA-I-6, PA-I-7, PA-I-8, PA-I-11, PA-I-12, PA-I-13 and PA-I-14.

On March 6, 2018, I convened a teleconference to discuss the outstanding objections. At the outset, I advised the parties that I would not consider the unsupported and unspecified "laundry list" objections at the beginning of the Department's Objection. I also stated that I had no authority to consider the Public Advocate's arguments to the effect that the data sought was necessary to determine whether the City Treasurer could participate impartially in Board decisions, given the suggested role of the Office of the City Treasurer in the development of financial goals for the Department. The balance of the discussion clarified some issues regarding the possible relevance to issues within the scope of the rate case of communications between the Office of the Treasurer and the Department, and the process required to identify and supply the correspondence sought in response to PA-I-17, 17 and 20. The Department agreed to report further on the process needed for compliance with the outstanding requests for documents.

On March 13, 2018, I convened a second teleconference concerning the outstanding disputes with regards to PA Set I. At the conference, among other things, the Department's attorney agreed to seek a "litigation hold" to prevent further automatic purging of emails from the Department's system under the Department's email protocols, and to put to the Department my proposal for an alternative phrasing of PA-I-17,18 and 20, the disputed questions regarding communications between the Department and the Office of the Treasurer.

On March 14, 2018, the Public Advocate sent an email to me urging that I determine the question of the Department's responses and objections to PA-I-9 and PA-I-10. The Public Advocate noted that the Department had told the Public Advocate it would provide a further answer to these questions, but that no further answers to PA-I-9 had yet been served. The Public Advocate also stated that a further answer to PA-I-10(a), filed by the Department on March 12, 2018, was evasive and misleading. The Department responded that day that it planned to file a response to PA-I-9 by March 16, 2018. The Department also stated that it would revisit its response to PA-I-10(a).

On March 16, 2018, the Public Advocate wrote seeking sanctions for the what he characterized as the Department's "deliberately evasive" answer PA-I-10(a). The Department replied, stating that the question required an answer that was "nuanced."

### **DISCUSSION RE PA-I-17, -18 AND -20**

The Department and the Public Advocate continue to disagree about the Department's objections to PA Set I questions 17, 18 and 20.

The disputes between the Department and the Public Advocate concerning PA information requests in Set I have been protracted and contentious. A good deal of the difficulty has been due to the Public Advocate's explicit statements in its Answer and Motion to Compel that it is seeking information to determine whether the City Treasurer should be disqualified from participation in the Board's determinations on account of the suggested influence of the Office of the City Treasurer on decisions made by the Department concerning bonding, and related issues. At our March 13 teleconference, I stated that my preliminary research persuaded me that I do not have authority to determine whether a Board Member should be recused from a particular decision on account of alleged bias. In this regard, I do not have authority to direct any party to provide information sought in order to determine whether such bias exists. If a participant wished to pursue a claim that a Board Member should be disqualified, as Hearing Officer I did not expect to have a part in the process.<sup>1</sup>

The questions propounded by the Public Advocate do arguably bear on an important question relevant to the Board's decision, however: what are the sources of the Department's choices regarding its Financial Stability Plan and the assumptions included in developing the proposed rates. Are the Department's choices on these items, reflected in its Financial Stability Plan and its proposed rates and charges, well-supported and reasonable?<sup>2</sup>

---

<sup>1</sup> I left open the possibility that the Board might direct me to ensure data was provided that would help decide the question, but that was not the situation and I did not need to decide whether that process might be followed.

<sup>2</sup> City Code section 13-101(4)(b) provides as follows

(i) In fixing rates and charges the Board shall recognize the importance of financial

Given the potential relevance of the questions to the ultimate decision of the Board, I turn next to the Objection by the Department to PA-I-17, 18 and 20 on the grounds among others that providing the correspondence between the Department and the Office of the City Treasurer over the time period requested would be unduly burdensome. Following are the discovery questions at issue, and the Department's objections:<sup>3</sup>

**PA-I-17.** Please provide copies of all correspondence (written, electronic or otherwise) between the Philadelphia Water Department and the City Treasurer from September 14, 2017 through present, regarding:

- a. PWD revenue bonds.
- b. PWD indebtedness other than revenue bonds.
- c. PWD revenues.
- d. PWD financial performance.

**Response:** The Department objects to this interrogatory as overly broad and unduly burdensome in requesting all correspondence (presumably emails, memoranda and other correspondence) related to the above subject matter. The interrogatory/request is particularly burdensome given the limited period allotted to compile discovery responses in this proceeding. PWD further objects to the above interrogatory and request for production of documents to the extent that same request privileged information (government decision-making and deliberations) which would be contained in the requested correspondence.

**PA-I-18.** Please provide a copy of all correspondence (written, electronic or otherwise) between the Water Department and the City Treasurer's Office regarding 2017 proposed legislation amending PWD's general bond ordinance, currently designated City Council Bill No. 171110.

**Response:** The Department objects to this interrogatory and request to the extent same seek privileged information (government decision-making and deliberations) contained in the requested correspondence (written, electronic or otherwise). The Department further objects to this interrogatory as overly broad and unduly

---

stability to customers and fully consider the Water Department's Financial Stability Plan. In addition, the Board shall determine the extent to which current revenues should fund capital expenditures and minimum levels of reserves to be maintained during the rate period. When determining such levels of current funding of capital expenditures and minimum levels of reserves, the Board shall consider all relevant information presented including, but not limited to, peer utility practices, best management practices and projected impacts on customer rates. The Board shall set forth any such determinations in the Board's written report pursuant to this chapter.

(ii) Rates and charges shall be developed in accordance with sound utility rate making practices and consistent with the current industry standards for water, wastewater and storm water rates. Industry standards include the current versions of: American Waterworks Association (AWWA) Principles of Rates, Fees and Charges Manual (M-1) and Water Environment Federation's Wastewater Financing & Charges for Wastewater Systems.)

<sup>3</sup> References in the Department's objections to numbered generic objections are deleted. Such argumentation is not helpful to resolution of the dispute, absent further explanation of the relationship between the specific objection and the question.

burdensome in requesting all correspondence (presumably emails, memoranda and other correspondence) related to City Council Bill No. 171110 over an undefined period of time. The interrogatory/request is particularly burdensome given the limited period allotted to compile discovery responses in this proceeding.

**PA-I-20.** Please provide a copy of all correspondence (written, electronic or otherwise) between the Water Department and the City Treasurer's Office regarding PWD's proposed rate increase for FY 2019-2021.

**Response:** The Department objects to this interrogatory as overly broad and unduly burdensome in requesting all correspondence (presumably emails, memoranda and other correspondence) related to the proposed rate proceeding over an undefined period. The interrogatory/request is particularly burdensome given the limited period allotted to compile discovery responses in this proceeding. PWD also objects to the above interrogatory and request for production of documents to the extent that same request privileged information (government decision-making and deliberations) which would be contained in the requested correspondence.

The Department raises 3 types of objections. The Department argues that each of the contested questions is burdensome, particularly given the limited period allotted to compile discovery responses in this proceeding. The Department states that PA-I-18 and PA-I-20 are particularly burdensome as they ask for documents from an undefined period of time. The Department also objects to these requests for documents to the extent the question seeks privileged information (government decision-making and deliberations) contained in the requested correspondence.

The attempted claim of privilege for government decision-making and deliberations is rejected. As the Public Advocate states in his Answer and Motion to Compel, quoting from *Van Hine v. Dept. of State of Com.* 856 A.2d 204, 206 (Pa. Commw. Ct. 2004, as "a general rule, Pennsylvania does not favor evidentiary privileges." The Public Advocate also argues that the Department has failed to satisfy its initial burden to assert the privilege, both substantively and procedurally. According to the Public Advocate, the Department has not shown how disclosure of the requested information would seriously hamper the function of government or contravene the public interest; the Department has not claimed the correspondence is confidential, and the Department has not satisfied the formal prerequisites to asserting the privilege.<sup>4</sup>

I turn next to the question of burden. Whether an information request is unduly burdensome requires a balancing of the importance of the information to the Board's ability to make a decision on all relevant evidence as against the burden on the Department of supplying the information in question.

In a memorandum dated March 13, 2018, the Department provided an update on efforts to define and narrow the scope of the requests for production. Counsel described the burden as follows:

---

<sup>4</sup> I would note that the privilege claims of the Department are in effect particular instances of the "burden" objection, in that the Department claims the process of identifying the universe of responsive documents is itself overly burdensome, without regard to the additional tasks of identifying the specific communications that the Department may claim are privileged.

[T]here are at least one dozen persons at PWD and other City departments that would be a part of the search.<sup>5</sup> This group may be larger, if financial advisors, bond counsel, disclosure counsel and bond engineering consultants and others are included.

[A]fter a very preliminary analysis (including input from PWD), ... there may be approximately 4,000 emails to be searched.<sup>6</sup> Please know that the number of emails to be searched is likely to be much larger than my estimate. But using this number as a benchmark --... if it took 3 minutes to review every email that it would take about 200 hours to review the emails internally and identify/redact privileged information (26 days). ...[T]he expense associated with this task would be roughly \$20,000....

In the first instance, the City's Office of Information Technology is involved (OIT). The protocols they apply are as follows:

First: Determine if the request is to "place a hold" on the account for a specified period or just search/cull for specific emails.

Second: Obtain as much information concerning email accounts to be searched as possible including, individual names, any group identification (CTO, PWD, etc), folders to be searched (inbox/sent/deleted/archived), and the parameters of the search (e.g., between anyone in Group A and anyone in Group B or just between certain individuals) and date range.

Third: Determine search terms that are applicable to requested information.

[W]hen discovery requests for electronic information are made (like this one) ... OIT is the main driver in obtaining the search information. ... [T]he City does not have "document review software" which makes the search a bit harder (without this software you have to create separate folders for documents as to which a privilege is asserted). The above limitation also impacts the timeline for producing the requested documents. [T]he estimated time to complete the request for production of documents is 26 days – analogous Right-to-Know requests take approximately 37 days to complete.

March 13 Department Memorandum to File. Footnote omitted.

On March 22, 2019, I convened a further teleconference with counsel for the Department and the Public Advocate to explore the possibility of resolving the outstanding objections. The 4000 email minimum estimate was represented to be solely emails from and to the Deputy Director for Finance and her assistant.

### **RULING ON MOTION TO COMPEL RE: PA-I-17, 18 AND 20**

In order to avoid the burden described by the Department of the OIT process of defining search terms and culling through all the emails of all the persons whose correspondence might

---

<sup>5</sup> By this, the Department referenced all persons at all City departments who might have participated in or been copied in the correspondence requested.

<sup>6</sup> The Department has since clarified that this is the best available estimate of all the emails between the Director of Finance and/or her assistant, and personnel at the Office of the Treasurer.

conceivably be within the question, there were a number of alternatives I could order, including:

1. Order the Department to turn over all the correspondence between Department personnel and the Office of the City Treasurer during the period in question, and leave it to the Public Advocate to sift through them and identify any documents relevant to the question of the involvement of the City Treasurer in forming assumptions for the Financial Stability Plan and the rate case. In this case, I would impose a protective order to preserve the privacy of those concerned and prevent the disclosure of confidential information.
2. Order the Department to turn over all such correspondence to me, for an *in camera* review, to identify relevant messages.
3. Limit the correspondence to that received by or sent by the Deputy Director for Finance and her assistant.
4. Direct the Department to answer in a narrative form the underlying question regarding the advice, suggestion, recommendation or requests, if any, from the Office of the City Treasurer to the Department regarding PWD revenue bonds, PWD indebtedness other than revenue bonds, PWD revenues, PWD financial performance, PWD financial goals, and assumptions on these topics to be included in the rate case.

There are a number of problems with each of these options. In order to move this issue along, however, I have determined to direct the Department to answer in a narrative form the underlying question regarding the advice, suggestion, recommendation or requests, if any, from the Office of the City Treasurer to the Department regarding the items of interest. This question should not require the development of search terms – rather, the two individuals would search their memories and supply information they remembered.

In addition, if the Department considers any of the information privileged or deserving of protection, it should provide the information under seal to me, with a redacted version to the Public Advocate, and a sufficiently-justified motion for protective treatment.

The Board is explicitly required to take into account a number of considerations that may have been influenced by advice from the Office of the City Treasurer. The Board may consider how those considerations were developed and incorporated in the rate case. Answers to the two directed questions should assist in understanding that process.

For the above reasons, I deny the motion to compel, subject to the Department's providing within one week (by Friday, March 30, 2018) its answers to the following questions:

1. Please state what the Deputy Director for Finance remembers about advice, suggestion, recommendation or requests, if any, from the Office of the City Treasurer to the Department regarding PWD revenue bonds, PWD indebtedness other than revenue bonds, PWD revenues, PWD financial performance, PWD financial goals, and assumptions on these topics to be included in the Financial Stability Plan and the rate case.
2. To the extent different from or additive to the statement of the Deputy Director for Finance, please state what the Assistant to the Deputy Director for Finance remembers about advice, suggestion, recommendation or requests, if any, from the Office of the

City Treasurer to the Department regarding PWD revenue bonds, PWD indebtedness other than revenue bonds, PWD revenues, PWD financial performance, PWD financial goals, and assumptions on these topics to be included in the Financial Stability Plan rate case.

### **MOTION TO COMPEL RE: PA-I-9 AND PA-I-10**

As noted above, the Public Advocate seeks an order requiring the Department to provide an answer responsive to PA-I-10(a). The Public Advocate characterizes the Department's answer to date as evasive and misleading. PA-I-10(a) asks the following question:

*Does the Water Department work with the City Treasurer's office to establish its debt service budget as part of the city's budgeting process, including projected debt service for five fiscal years, as described in the 2016 rate proceeding?*

In response, the Department has provided the following answer:

*The response to this question is not an unequivocal yes or no. The Water Department works with multiple stakeholders to formulate its debt service budget. See explanation below.*

The explanation given was as follows:

*...The Department's Five-Year Plan debt service budget is formulated in consultation with the Department's financial advisors, PFM and Acacia Financial, in addition to using the Black & Veatch projected total capital improvement program expenditures and construction fund cashflow.... The projected debt issuance as well as current debt payments due and payable are summarized and sent to the Executive Director of the Sinking Fund Commission, Matthew Bowman, for inclusion in the Sinking Fund Commission budget.*

The Department argues in response to the motion for sanctions as follows:

In the first instance, the Department's response to PA-I-10(a) is necessarily nuanced. As stated in the response, as supplemented, projected debt service used in the Department's Five Year Plan debt service budget is formulated with the financial advisors and PWD and, in addition, utilizes projections for the capital improvement program and flow of funds developed by B&V. There's a team of people involved. Secondly, it should be noted that the debt service budget is primarily driven by the Department's outstanding indebtedness authorized by the City; together with projections for the interest on outstanding variable rate debt and near term anticipated transactions. It is not authorized by directive or fiat.

The Public Advocate points out that question PA-I-10(a) calls for a yes or no answer. I agree. The question did not ask for the Department to identify all who participate in the development of the Five Year Plan debt service budget. Rather, the question asks whether the Department works with the Office of the City Treasurer in formulating its debt service budget.

As to sanctions, I am disappointed in the Department's parsing of the question in a way so as to avoid a direct answer to the question whether the Office of the City Treasurer works with the

Department as it formulates its debt service budget and other financial assumptions, as that process was described in the 2016 rate filing. This approach has created unnecessary confusion and delay. However, the Public Advocate does not explicitly request that sanctions be applied. It does not appear that the back and forth over this particular question will prevent the Public Advocate from fashioning his case and the evidence of his witnesses. If problems do develop in the ability of the Public Advocate to present his case, I will consider sanctions at that time.

### **RULING ON PA-9 AND PA-10**

I direct the Department to provide a yes or no answer to the part of the questions requiring a yes or no answer.

MARCH 23, 2018

BY THE HEARING OFFICER

*Nancy Brockway*

---

NANCY BROCKWAY