

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL DIVISION

DOROTHY RIVERA, et. al.,
Plaintiffs

VS.

BOROUGH OF POTTSTOWN, et al.
Defendants.

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:
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:
:

NO. 2017-04992

COVER SHEET OF RESPONDENT

Date of Filing September 9, 2020 Respondent Plaintiffs

Counsel for Respondent Michael F. Faherty I.D. No. 55860

Document Filed (Specify) Plaintiffs' Response in Opposition to Defendants' Motion for Protective
Order

RULE RETURN DATE of Related Motion September 28, 2020

Matter is (Check One) (Appealable) X (Interlocutory)

Oral Argument X (Yes) (No)

Respondent Requires (Specify Reason Only if Interlocutory) :

 DISCOVERY _____

**IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
38TH JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

DOROTHY RIVERA, an Individual,
EDDY OMAR RIVERA, an Individual,
KATHLEEN O'CONNOR, an Individual,
ROSEMARIE O'CONNOR, an
Individual, THOMAS O'CONNOR, an
Individual, and STEVEN CAMBURN,
an Individual,

Plaintiffs,

v.

BOROUGH OF POTTSTOWN, and
KEITH A. PLACE, in his official
capacity as Pottstown Director of
Licensing and Inspections,

Defendants.

COURT OF COMMON PLEAS

CIVIL ACTION NO: 2017-04992

**PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION FOR
PROTECTIVE ORDER**

Plaintiffs Dorothy and Omar Rivera, Steven Camburn, and Kathleen, Rosemarie, and Thomas O'Connor respectfully submit this Memorandum of Law in Response to Defendants' Motion for Protective Order. (Docket No. 105).

I. INTRODUCTION

1. The Borough refuses to comply with this Court's June 23, 2020 Order requiring production of all requested documents within 30 days. (Docket No. 103). Without producing a single scrap of paper or a single electronic file, the Borough

has moved for a protective order on the ground that document production is burdensome—something it never argued during the past three years of litigation. The Borough maintains detailed electronic records regarding completed rental inspections, thus enabling it to easily retrieve pertinent documents whenever it wishes to do so. Despite being ordered by this Court to turn over these documents, the Borough continues to obfuscate.

2. This Court should deny the Borough’s Motion because it is meritless—wholly lacking in the evidentiary support required to demonstrate good cause. In light of the Borough’s obstinate unwillingness to satisfy its discovery obligations, the Court should appoint a computer forensics expert selected by Plaintiffs and trained in data recovery to retrieve the Borough’s files.

II. MATTER BEFORE THE COURT

3. The Borough’s Motion for Protective Order. (Docket No. 105).

STATEMENT OF QUESTIONS INVOLVED

4. Should the Borough’s Motion for Protective Order be granted?

5. *Suggested Answer:* No.

III. FACTS

6. The relevant facts have been briefed extensively. Plaintiffs allege that the Borough’s “ordinance provisions for unwanted inspections, both facially and as applied, violate their rights of privacy and freedom from unreasonable searches under Article I, Section 8 of the Pennsylvania Constitution.” *Rivera v. Borough of Pottstown*, No. 722 C.D. 2019, 2020 WL 57181, at *1 (Pa. Commw. Ct. Jan. 6, 2020).

Plaintiffs need discovery regarding completed inspections to balance “an individual’s privacy interest against a countervailing state interest which may or may not justify an intrusion into privacy.” *Pa. Soc. Servs. Union, Local 688 v. Commonwealth*, 59 A.3d 1136, 1144 (Pa. Commw. Ct. 2012).

A. The Initial Document Requests: The Clock Begins to Tick.

7. Plaintiffs first requested relevant documents, including inspection reports, more than three years ago on July 28, 2017. The Borough’s duty to grapple with the scope of responsive documents—produced or not—began that day. *See* Pa.R.C.P. No. 4009.12(b) (“Documents or things not produced shall be identified with reasonable particularity together with the basis for non-production[.]”).

8. The Borough now admits to the Court that it did not perform “due diligence respective to the request” until *after* compelled to respond. (Mot. for Protective Order (Docket No. 105) ¶ 15.) Only then did Pottstown “advise[] that over five-thousand two-hundred (5,200) rental units were subject to inspection, resulting in thirty to forty thousand (30,000–40,000) pages of documents.” (*Id.*). The Borough knew, throughout the entire course of this litigation, the precise number of rental units in Pottstown, which are tracked in its Geographic Information Software (“GIS”) and CMIS Municipal Manage (“CMIS”) software. (*See, e.g.*, 2d Mot. Compel (Docket No. 56) ¶ 51 (citing Place Dep. 76:10–18)).

9. The responses the Borough did provide were evasive and incomplete, consisting mainly of forms available on its website. It was clear, then and now, that

the Borough, despite having knowledge regarding unproduced documents at its fingertips, did not even attempt to meet its due diligence obligations.

10. Plaintiffs filed three motions to compel seeking all relevant documents, including electronically-stored records, in their native format. (*See* Jan. 15, 2018, 1st Mot. Compel (Docket No. 34) ¶ 18 (seeking, among other things, copies of all inspection reports that had been produced under the Borough’s rental-inspection program); Nov. 16, 2018, 2d Mot. Compel (Docket No. 56) ¶¶ 47–52 (requesting data from the Borough’s GIS); April 18, 2019, 3d Mot. Compel and for Sanctions (Docket No. 72) ¶ 1 (seeking sanctions for failure to appear at properly noticed depositions); *see also* 1st Mot. Compel, Ex. A (Pls.’ 1st Set Req. for Prod. of Docs.) (Definitions) ¶ 10 (“All electronically stored information should be produced in its native format or as close to native format as practicable in its original, searchable, usable form.”).) The trial court denied most of the relief sought in these motions to compel, and Plaintiffs appealed.

11. On January 4, 2020, the Commonwealth Court vacated all discovery orders entered against Plaintiffs and remanded the matter, noting “the need for development of a full factual record.” *Rivera*, 2020 WL 57181 at *4. Again, despite the Commonwealth Court’s opinion, the Borough did not review the scope of completed inspection reports at this time. The Court will recall that during the last conference with counsel, the Borough’s counsel gave no information regarding the nature or scope of responsive documents.

12. Nevertheless, this Court gave the Borough yet another chance to mount a burden argument, granting the Borough a full opportunity to explain its position regarding production of documents. The Borough filed an “Omnibus Brief” in opposition to all pending discovery motions. (Docket No. 100.) Yet again, the Borough failed to comply with Rule 4009.12—refusing to identify the scope and nature of responsive documents. Indeed, the Omnibus Brief made no argument regarding the burden the Borough complained of here, did not discuss the nature and scope of documents, and did not mention electronic discovery at all. *Cf. Smokowicz v. Carpenter*, 39 Pa. D. & C.4th 353, 356 (Com. Pl. 1999) (“[A] responding party is required to identify those documents or things that are being withheld . . .”).

13. The GIS and CMIS computer systems, which the Borough refuses to tender, are the sole repositories for much of the rental inspection information that has otherwise been shredded:

Q. How does the Borough store the information from the tenant list?

A. Electronically.

Q. Are they filed in the GIS database?

A. GIS/CMIS. Yes.

Q. And what is the policy for retention of the tenant list?

A. The paper copy is shredded once the electronic information is listed under that tab that you had questioned about units, tenants and inspections.

(2d Mot. Compel (Docket No. 56) Ex. B (Place Dep. 218:4–14).)

B. The June 23, 2020 Order: The Clock Stops.

14. On June 23, 2020, the Court ordered the Borough to produce “all requested documents” within thirty days. As a matter of courtesy, Plaintiffs gave the Borough an additional 30 days to respond. The August 24, 2020 deadline came and went, however, and the Borough chose not to comply with this Court’s June 23 Order. Instead, the Borough has attempted to negotiate against this Court’s Order, raising various waived arguments with Plaintiffs’ counsel—and now with this Court.

15. To date, no discovery responses have been received, in violation of the Court’s June 23, 2020 Order.

16. The Borough’s counsel wrote to the undersigned, stating that they would not be producing electronic files, even though the Borough’s representative has already testified that many of the requested files are indeed stored electronically. *See* Ex. A at 6–7.

17. The Borough also stated that “personal and identifying information must be redacted in accordance with state and local rules.” *Id.* (The Borough cites no statute or rule mandating redaction—that is because none exists.)

18. The Borough now belatedly requests a laundry list of unwarranted modifications to its discovery obligations, including “a random selection of rental inspection reports” rather than “all” documents, per the Court’s Order. (Mot. Protective Order (Docket No. 105) ¶ 24.) The Borough also demands payment from Plaintiffs for copies and alleged but unspecified “overtime costs incurred by the

Borough” and permission to withhold “police call information referenced in the Better Landlord, LLC Municipal Services Study,” and a total of 60 additional days to respond to discovery requests that have been pending for more than three years. (*Id.*)

19. None of the Borough’s sought-after relief is appropriate. This case has reached a point where the Borough’s meritless discovery litigation is causing an unnecessary drain on the judicial system. The Motion for Protective Order does not even hint at a legal reason why it should be granted.

IV. ARGUMENT

A. The Borough’s Motion for Protective Order Is Meritless.

20. Although the Borough has a section of its Motion for Protective Order titled “Legal Argument,” it cites no law. That is because no law supports abdicating discovery obligations.

21. The Borough now belatedly argues a new theory for resisting discovery—burdensomeness. But if a party objects to discovery as burdensome, it must explain why. “Litigants should expect that almost any discovery request causes some annoyance, embarrassment, oppression, burden, or expense.” *Cravath v. Mercy Hosp.*, No. 2010-CV-7496, 2013 WL 6991989 at *2 (Com. Pl., April 10, 2013) (internal quotations omitted). The proper inquiry is thus whether the party objecting to the discovery has established unreasonableness. *See id.*

22. Indeed, “the mere fact that an examination will be time consuming, burdensome and costly is no ground for a protective order, *if all this is the*

inevitable result of the facts under examination.” *Provident Nat. Bank v. Soltoff*, 1 Pa. D. & C.3d 600, 603 (Com. Pl. 1977) (emphasis added). In addition, the party objecting to the production of electronically stored information bears the burden of showing undue hardship or expense. *See Susquehanna Commercial Fin., Inc. v. Vascular Res., Inc.*, No. 1:09-CV-2012, 2010 WL 4973317, at *13 (M.D. Pa. Dec. 1, 2010).

23. The Borough did not even attempt to meet its burdens in resisting document production—paper and electronic—throughout three years of trial court motions practice and on appeal. Nowhere in its papers did the Borough ever attempt to develop any argument regarding burdensomeness.

24. The Borough has only now identified “30,000 to 40,000 pages” of responsive documents. But this is not an unreasonable or burdensome production, even in absolute terms. *See, e.g., Universal Del., Inc. v. Comdata Corp.*, 2010 WL 2330284, at *4 (E.D. Pa. June 4, 2010) (holding discovery not unduly burdensome when it required review of over 1,000 gigabytes of material in the possession of 38 custodians).

25. Moreover, the number of documents does not tell the whole story. These pages mostly constitute a single category of document—reports of city inspectors of rental housing—that is stored in a single location. Producing these pages electronically should be as simple as dragging and dropping a folder onto a thumb drive. If any documents are available in only hardcopy, they can be stacked on an autoloading photocopier. This is not a situation where attorneys must review

hard drives to search for responsive needles hidden in a haystack of irrelevance. Nor is there need for a privilege review, since nothing in the inspection reports could conceivably be covered by any privilege.

26. It is worth remembering that the cost of producing the inspection reports is directly proportional to the significant income that the Borough derives from charging for inspections. If the Borough has conducted 5,200 inspections, then at \$70 per inspection, the Borough has collected over half a million dollars from property owners during the course of this program.

27. The Borough implies that it is withholding production so that it can extensively redact those documents. But this Court's Order did not provide for redactions. Indeed, no such redactions are required or even permitted during the discovery process. To the extent responsive documents contain personal information, that information will be redacted in any court *filing*—such as summary judgment briefing—but not in discovery *production*. See Pa.R.C.P. No. 4002.1. The Borough is asking this Court to manufacture some unique exception to well-settled discovery rules. This throwaway contention cannot stand.

28. Relatedly, Plaintiffs are entitled to all “[d]iscoverable police reports”—and do not waive requests for police call information referenced in the Better Landlord, LLC Municipal Services Study. This study was the *only* empirical support for the challenged inspection program and is highly relevant. (See 2d Mot. Compel (Docket No. 56) ¶ 38).

29. The Borough's request that Plaintiffs' pay for discovery costs is ironic, given that the Borough is the one that should pay Plaintiffs' expenses. In dealing with a similar protracted discovery dispute, the Philadelphia County Court of Common Pleas issued monetary sanctions in the amount of \$126,897.81 against the defendant in *General Refractories Co. v. Fireman's Fund Ins. Co.*, 45 Pa. D & C 4th 159 (Com. Pl. 2000). The court described the familiar situation:

The sad history of defendant's discovery responses in this case reveals a clear pattern of delay, stonewalling, deception, obfuscation and pretense. Defendant intentionally withheld critical documents, ignored court orders, permitted false testimony at depositions and misrepresented facts to opposing counsel and the court. The defendant through its employees, its house counsel and its engaged litigation counsel participated in an intentional campaign to hide critical facts and documents. At every stage of discovery, reasonable and relevant requests have been met by incomplete responses, unreasonable objections, unfounded claims of privilege and intentionally incomplete privilege logs. Whenever plaintiff sought court intervention, additional documents were "found", "voluntarily produced" and the privilege log expanded.

Id. at 165–66; *see also Markey v. Marino*, 521 A.2d 942, 943 (Pa. Super. Ct. 1987) (award of counsel fees upheld as sanction for “stonewalling discovery proceedings without any reasonable basis and for deliberately ignoring court orders”). The Borough has absolutely no claim to compensation of any kind. Rather, Plaintiffs would be entitled to significant sanctions in the form of attorneys' fees, if requested. Plaintiffs are not, however, seeking any fees. Plaintiffs seek only what they have always wanted—the documents.

30. In sum, the Borough cites no cases, statutes, or rules supporting its protective order. It only makes conclusory statements regarding a burden it should have been aware of years ago.

B. The Borough's Failure to Comply with the Court's Order Merits the Appointment of a Discovery Expert.

31. As described in Plaintiffs' prior motions, the Borough has consistently failed to produce discovery and properly noticed witnesses pursuant to the rules of civil procedure. *See, e.g.*, 3d Mot. Compel and for Sanctions (Docket No. 72). Now, the Court has compelled discovery and the Borough has violated that Order. The Order compelling discovery "serve[s] as a warning that if there is future non-compliance, sanctions will be imposed." *See Griffin v. Tedesco*, 513 A.2d 1020, 1023 (Pa. Super. Ct. 1986). The Borough did not heed that warning.

32. Because the Borough maintains that electronically stored data will not be produced, this Court should appoint an expert chosen by Plaintiffs to analyze the Borough's computer system by way of a mirror image. *See Cenveo Corp. v. Slater*, No. 06-CV-2632, 2007 WL 442387, at *3 (E.D. Pa. Jan. 31, 2007) ("Plaintiff's expert shall recover all documents from the mirror images, including but not limited to all wordprocessing documents, email messages, PowerPoint or similar presentations, spreadsheets and other files, including 'deleted' files.").

33. To effectuate this relief, Plaintiffs request that this Court enter an order that, in addition to denying the motion for a protective order, grants access to all rental-inspection files, including archived and deleted files. *See Playboy Enters. v. Welles*, 60 F. Supp. 2d 1050, 1055 (S.D. Cal. 1999) (compelling deleted electronic data by way of a "mirror image' copying of the hard drive, and the production of relevant documents").

34. The degree of prejudice caused to Plaintiffs by the discovery abuses is severe. Plaintiffs' counsel has had to expend thousands of dollars' worth of legal time fighting to obtain documents that should have been produced voluntarily years ago.

35. The Borough's persistent efforts to frustrate Plaintiffs' legitimate discovery demands cannot be condoned where a government body seeks to hide evidence relating to unconstitutional conduct.

V. RELIEF

WHEREFORE, for these reasons, Plaintiffs respectfully ask the Court to enter an order **DENYING** Defendants' Motion for Protective Order (Docket No. 105); and appointing a computer forensics expert, chosen by Plaintiffs and trained in the area of data recovery, to produce a digital mirror image of all the Borough's computers and portable hard drives that contain responsive files, including, but not limited to, the Borough's GIS and CMIS systems, and including archived and deleted files. Once the expert is chosen, Plaintiffs shall notify the Borough, and the expert shall agree to submit to the jurisdiction of this Court. Defendants shall then make all the computer equipment available to Plaintiffs' expert at the earliest mutually agreeable time.

DATED: September 9, 2020

Respectfully submitted,

/s/ Michael F. Faherty

FAHERTY LAW FIRM

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Attorneys for Plaintiffs

*Admitted *Pro Hac Vice*

**IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
38TH JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

DOROTHY RIVERA, an Individual,
EDDY OMAR RIVERA, an Individual,
KATHLEEN O'CONNOR, an Individual,
ROSEMARIE O'CONNOR, an
Individual, THOMAS O'CONNOR, an
Individual, and STEVEN CAMBURN,
an Individual,

Plaintiffs,

v.

BOROUGH OF POTTSTOWN, and
KEITH A. PLACE, in his official
capacity as Pottstown Director of
Licensing and Inspections,

Defendants.

COURT OF COMMON PLEAS

CIVIL ACTION NO: 2017-04992

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this day a true and correct copy of *Plaintiffs' Response in Opposition to Motion for Protective Order and Cross-Motion for Rule 2019 Sanctions* along with the attached *Proposed Order* and *Certificate of Service* was filed via the Court's electronic filing system and served via electronic mail and first class mail, postage prepaid, addressed as indicated:

Sheryl L. Brown, Esquire
Brian Conley, Esquire
SIANA, BELLWOAR & MCANDREW, LLP
941 Pottstown Pike, Suite 200
Chester Springs, PA 19425

DATED: September 9, 2020 By:

/s/ Michael F. Faherty

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**IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
38TH JUDICIAL DISTRICT OF PENNSYLVANIA
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DOROTHY RIVERA, an Individual,
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CIVIL ACTION NO: 2017-04992

[PROPOSED] ORDER

This matter is before the Court on Plaintiffs' Response in Opposition to Motion for Protective Order. After considering the reasons set forth in the Defendants' motion, Plaintiffs' Response, and the arguments of counsel at the hearing (if applicable), the Court **ORDERS** that Defendants' Motion for a Protective Order is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs shall select a computer forensics expert trained in the area of data recovery to produce a digital mirror image of all computers and portable hard drives that have responsive information in Defendants' custody, possession, or control since 2014, including, but not limited

to the Borough's GIS/CMIS systems. Once the expert is chosen, Plaintiffs shall notify the Defendants, and the expert shall agree to submit to the jurisdiction of this Court. Defendants shall then make all the computer equipment described above available to Plaintiffs' expert at their place of business or residences at the earliest mutually agreeable times. After the inspection and imaging, Plaintiffs' expert may perform the remainder of his or her responsibilities outside Defendants' premises.

Dated: ____ day of _____, 2020.

Honorable Judge Richard P. Haaz

EXHIBIT A

SIANA LAW

EXPERIENCE - SERVICE - RESULTS

BRIAN C. CONLEY

bccconley@sianalaw.com

August 6, 2020

Via Email Only

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Institute for Justice
901 North Glebe Road; Suite 900
Arlington, VA 22203-1854

Via Email Only

Michael F. Faherty, Esquire
Faherty Law Firm
75 Cedar Avenue
Hershey, PA 17033

**Re: Dorothy Rivera, et al. v. Borough of Pottstown, et al.
Montgomery County C.C.P. No.: 2017-04992
Our File No.: 4293.01**

Dear Counsel:

In accordance with the Court's June 23, 2020 Order granting Plaintiffs' Motions to Compel in their entirety, the Borough has been diligently identifying and preparing for its response, as you are aware from our July 9, 2020 teleconference wherein we requested an extension of time due to the volume of documents responsive to the requests.

We have since been advised that the responses will be approximately 30,000 to 40,000 pages of documents, as Plaintiffs continue to request all inspection reports from all rental properties in the Borough of Pottstown since the Ordinance took effect in 2015. Currently, there are over 5,200 properties subject to inspection. Accordingly, production of all inspection documents amounts to a hardship in both time and expense for the municipality. The Borough has limited and budgeted resources; and, the time and costs to retrieve, copy and redact will require overtime, copying expenses, and time and expense for redaction of private information on the tens of thousands of pages.

As such, before we request a conference with Judge Haaz, I would recommend that we work together to either limit the production so as not to incur unnecessary costs to the Borough; or Plaintiffs agree to reimburse the Borough for costs associated with copying inspection reports for all licensed properties from 2014 to the present. The following is recommended:

- The production be limited to a random selection of rental properties; but to include all properties owned by Plaintiffs Camburn and O'Connor;

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Phone: 610-321-5500 | Fax: 610-321-0505 | www.sianalaw.com

To: Robert Peccola, Esquire and Michael F. Faherty, Esquire
Re: Dorothy Rivera, et al. v. Borough of Pottstown, et al.
Date: August 6, 2020
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- The random selection will be determined by the parties geographically and by number;
- Plaintiffs agree to remit payment in the amount of .40/page (in accordance with Pennsylvania Statute regarding the production of medical records);
- Plaintiffs remit payment for overtime costs incurred by the Borough in having to retrieve and copy the requested records;
- Discoverable police reports are limited to only those resulting from rental inspections; and
- Plaintiffs waive any formal or informal requests for police call information referenced in the Better Landlord, LLC Municipal Services Study (“Pottstown 457 – Pottstown 471”).

As you know, the Borough has consistently maintained and objected to the requests to include that the requests are overly burdensome. (And continue to assert that the only properties at issue are the Plaintiffs’ properties – as the Commonwealth Court did not overturn that the only persons with standing were the named Plaintiffs). Accordingly, without waiving any objections, and in conjunction with the Court’s Order granting the various Motions to Compel, we request that you review this request, along with discovery requested, in an effort to come to a middle ground on rental inspection documents, etc.

If we are unable to reach an agreement, please advise if you consent to a conference call with Judge Haaz.

Very truly yours,

/s/ **Brian C. Conley**

Brian C. Conley

BCC/sbf

cc: Jeffrey Redfern, Esquire (via email only)
Sheryl L. Brown, Esquire (via email only)



INSTITUTE FOR JUSTICE

August 11, 2020

VIA ELECTRONIC MAIL

Mr. Brian Conley, Esq.
Ms. Sheryl Brown, Esq.
SIANA, BELLWOAR, & MCANDREW
941 Pottstown Pike, Suite 200
Chester Springs, PA 19425
BCConley@Sianalaw.com;
Slbrown@Sianalaw.com

RE: Response to August 6, 2020 Letter | *Rivera v. Pottstown*

Dear Mr. Conley,

Plaintiffs have tried for three years to ascertain the scope of discoverable documents in the Borough's possession, custody or control—to no avail. That the Borough's counsel is just now asking the Borough whether, and how many, responsive documents exist undercuts any argument that production is somehow burdensome. The Borough should have grappled with the universe of documents years ago. *See* Pa. R. Civ. P. 4009.12 (b)(2) (a party must identify all documents or things not produced). In addition, if the Borough is claiming a privilege not to disclose documents, it had the burden of proving facts necessary to sustain the claim of privilege during the motion to compel briefing. It did not.

Plaintiffs did not contribute, even peripherally, to the Borough's current, perceived predicament, and will not bear costs associated with the Borough's litigation tactics. Plaintiffs address your specific requests below.

1. The Production is not Burdensome, and the Borough Waived Any Argument to the Contrary.

The Borough has not "consistently . . . objected . . . that the requests are overly burdensome." To the extent you included burdensomeness in your boilerplate objections, those objections were overruled in Judge Haaz's order. The Borough never developed an argument regarding burden in any of its briefing in the extensive motions practice or on appeal.

You identified “30,000 to 40,000 pages” of responsive documents. This is not an unreasonable or burdensome¹ production. Accordingly, Plaintiffs do not agree to a “random” selection of documents. Relatedly, Plaintiffs are entitled to “[d]iscoverable police reports” – and do not waive requests for police call information referenced in the Better Landlord, LLC Municipal Services Study. This study was the *only* empirical support for the challenged inspection program and is highly relevant.

2. E-Discovery Must Be Produced.

Your letter implies that to the extent you will produce documents, the production will consist solely of paper files, but there are electronic records as well. Keith Place testified that the Borough’s GIS and CMIS systems contain relevant information about rental inspections, but data from those systems has never been produced. Plaintiffs specifically requested that all electronically stored information be produced in *native format* – including metadata. *See, e.g.,* Plf’s 1st Set Req. for Prod. of Docs. (“Definitions”) ¶ 10 (“All electronically stored information should be *produced in its native format* or as close to native format as practicable in its original, *searchable, usable form.*”) (emphasis added). Again, Plaintiffs are ready and willing to assist with electronic production by finding a mutually agreeable method for transferring GIS and CMIS electronic files in their native format. This alone would save the Borough time and money.

3. No Cost-Shifting Provision Applies Here.

The 11th-hour discovery delays cited in your letter are exclusively the product of obstructionist tactics from the Borough’s defense team. Judge Haaz’s order contains no cost-shifting provision to reimburse the Borough, and Plaintiffs do not consent to payment of same.

4. Conclusion

It is unclear why the Borough believes that producing a straightforward category of documents – which should presumably already be stored in an organized manner and which should not require a review for either responsiveness or privilege – would be burdensome.

Finally, Plaintiffs do not consent to a conference call with the court. Document production has already been thoroughly briefed, and the parties met with Judge Haaz *prior to* his ruling on production of documents. Judge Haaz’s order states that it may be appropriate to have a conference call regarding

¹ Counsel for Plaintiffs have litigated cases with hundreds of thousands, and even millions, of documents.

August 11, 2020
Mr. Brian Conley, Esq.
Page 3 of 3

deposition questions – not questions relating to the production of documents,
which must necessarily precede further depositions in this matter.

Sincerely,

/s/ Robert Peccola
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**Admitted Pro Hac Vice*

SHERYL L. BROWN

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August 21, 2020

Via Email Only

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**Re: Dorothy Rivera, et al. v. Borough of Pottstown, et al.
Montgomery County C.C.P. No.: 2017-04992
Our File No.: 4293.01**

Dear Mr. Peccola:

In response to our request for a conference with the Court to address discovery due to the burdensome obligations, you responded with a letter dated August 11, 2020, which misinterprets the discovery posture of the instant matter and the rules related to discovery obligations.

I. Defendants have not waived arguments relating to the burdens of production.

As you are undoubtedly well aware, prior to Judge Haaz's June 23, 2020 Order, Defendants' position regarding discovery in this matter has been consistent. Specifically, Defendants' have consistently objected to the burdensome nature of the discovery requests in addition to arguing that discovery relating to non-party entities was irrelevant to the instant matter and that discovery was not necessary, as Defendants' legal position was that the Plaintiffs were precluded from pursuing an "as applied" constitutional challenge. Accordingly, it was only after the June 23, 2020 Order that Defendants became aware of the full scope and burden of producing responses to Plaintiffs' Discovery Requests. Accordingly, Defendants have not waived any argument concerning the burdens relating to production.

Additionally, to the extent that your letter argues for production of all police reports referenced in the Better Landlord, LLC Municipal Services Study, the argument misrepresents the scope of discovery in this matter. Specifically, Plaintiffs have requested police reports resulting from rental inspections. The Municipal Services Study may include additional police reports that are not related to or resulting from rental inspections. Not only are such police reports irrelevant, but they were not requested.

II. Production may be in physical format.

The documents and information requested are primarily in physical format, production of which requires an individual to search, retrieve, and physically copy the information. Moreover,

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Date: August 21, 2020
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the documents include personal identifying information on thousands of individuals residing in the Borough. Such personal and identifying information must be redacted in accordance with state and local rules. This issue was discussed at the prior conference with the Court.

Additionally, to the extent that you request access to the GIS and CMIS systems, such unfettered access is denied (nor was it formally requested in discovery). Moreover, Defendants have no obligation to *create* documents or information that is not already in existence. Accordingly, Defendants' discovery obligations are limited to those requested in Plaintiffs' formal discovery requests, subject to the applicable rules of discovery.

III. Reimbursement would facilitate discovery.

Defendants object to the phrase "eleventh-hour discovery delays." As set forth herein, Defendants have attempted to diligently respond to Plaintiffs' discovery requests following the June 23, 2020 Order. The burden of production was only identified as the retrieval process has proceeded, of which you were then notified. Reimbursement for a portion of the production costs is a reasonable compromise for production of the voluminous records Plaintiffs seek in light of the limited and budgeted resources of the Borough. Defendants respectfully request that Plaintiffs reconsider remittance of payment for production costs.

IV. Conclusion.

As production has only recently been ordered (and considering Judge Weilheimer's Order as to the scope of discovery and the Commonwealth Court's decision not to weigh in on the "necessity" of discovery), the Borough's position on the burden and expense of discovery, and proposed solution, is reasonable.

Accordingly, we will be requesting a conference with the Court to review these issues and request limitation on discovery in accordance with our August 6, 2020 correspondence, noting your non-consent.

Very truly yours,

/s/ Sheryl L. Brown

Sheryl L. Brown

BCC/avf

cc: Michael Faherty, Esquire (via email only)
Jeffrey Redfern, Esquire (via email only)
Brian C. Conley, Esquire (via email only)



INSTITUTE FOR JUSTICE

August 25, 2020

VIA ELECTRONIC MAIL

Mr. Brian Conley, Esq.
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RE: Response to August 21, 2020 Letter | *Rivera v. Pottstown*

Dear Mr. Conley,

The deadline to produce documents and interrogatories was yesterday, and Plaintiffs still have not received responses from the Borough. What is the status of production? The Court's June 23, 2020 order granted Plaintiffs' requests for documents in their entirety. If the Borough does not intend to comply with that order, Plaintiffs will be forced to seek sanctions against the Borough.

In addition, in your letter of August 21, you stated that "personal and identifying information must be redacted in accordance with state and local rules." But the rules require redactions for filings, not discovery production absent a court order or prior agreement of the parties. The court's prior order required production of inspection reports, not redacted inspection reports. Please identify the basis for redacting this information.

August 25, 2020
Mr. Brian Conley, Esq.
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Sincerely,

/s/ Robert Peccola
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**Admitted Pro Hac Vice*