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21 Attorneys for the Commonwealth
22 of Pennsylvania

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24 UNITED STATES DISTRICT COURT
25 NORTHERN DISTRICT OF CALIFORNIA
26 SAN FRANCISCO DIVISION
27

28
29 **IN RE: VOLKSWAGEN "CLEAN DIESEL"
30 MARKETING, SALES PRACTICES, AND
31 PRODUCTS LIABILITY LITIGATION**

Case No. 15-MD-2672 CRB

**PENNSYLVANIA'S NOTICE OF
FILING CERTIFICATION FOR
BENEFICIARY STATUS UNDER
THE ENVIRONMENTAL
MITIGATION TRUST
AGREEMENT**

Judge Charles R. Breyer

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41 PLEASE TAKE NOTICE THAT the Commonwealth of Pennsylvania, by and through
42 the Pennsylvania Department of Environmental Protection and the Pennsylvania Office of Chief

1 Counsel, respectfully file the attached Certification for Beneficiary Status under the
2 Environmental Mitigation Trust Agreement (Appendix D-3).

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Respectfully submitted,

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Alexandra C. Chiaruttini

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Chief Counsel, Office of Chief Counsel

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Pennsylvania Department of Environmental

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Protection

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/s/ Douglas G. White

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Douglas G. White

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Office of Chief Counsel

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Pennsylvania Department of Environmental

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Protection

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Dated: November 16, 2017

CERTIFICATE OF SERVICE

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I hereby certify that, on November 16, 2017 I caused to be served true copies of Pennsylvania's Notice of Filing Certification for Beneficiary Status under the Environmental Mitigation Trust Agreement by electronic means by filing such document through the Court's Electronic Case Filing System.

/s/ Douglas G. White
Douglas G. White
Office of Chief Counsel
Pennsylvania Department of Environmental
Protection

APPENDIX D-3
Certification for Beneficiary Status
Under Environmental Mitigation Trust Agreement

APPENDIX D-3

**CERTIFICATION FOR BENEFICIARY STATUS
UNDER ENVIRONMENTAL MITIGATION TRUST AGREEMENT**

1. Identity of Lead Agency

The Commonwealth of Pennsylvania _____ (“Beneficiary”), by and through the Office of the Governor (or, if not a State, the analogous Chief Executive) of the Appendix D-1 and Appendix D-1A entity on whose behalf the Certification Form is submitted: (i) hereby identifies the Department of Environmental Protection _____ (“Lead Agency”) as the Lead Agency for purposes of the Beneficiary’s participation in the Environmental Mitigation Trust (“Trust”) as a Beneficiary; and (ii) hereby certifies that the Lead Agency has the delegated authority to act on behalf of and legally bind the Beneficiary for purposes of the Trust.

BENEFICIARY’S LEAD AGENCY CONTACT INFORMATION:

Contact:	Patrick McDonnell, Secretary, PA Department of Environmental Protection
Address:	400 Market Street, Harrisburg PA 17101
Phone:	717-787-2814
Fax:	717-705-4980
Email:	pmcdonnell@pa.gov

2. Submission to Jurisdiction

The Beneficiary expressly consents to the jurisdiction of the U.S. District Court for the Northern District of California for all matters concerning the interpretation or performance of, or any disputes arising under, the Trust and the Environmental Mitigation Trust Agreement (“Trust Agreement”). The Beneficiary’s agreement to federal jurisdiction for this purpose shall not be construed as consent to federal court jurisdiction for any other purpose.

3. Agreement to be Bound by the Trust Agreement and Consent to Trustee Authority

The Beneficiary agrees, without limitation, to be bound by the terms of the Trust Agreement, including the allocations of the Trust Assets set forth in Appendix D-1 and Appendix D-1A to the Trust Agreement, as such allocation may be adjusted in accordance with the Trust Agreement. The Beneficiary further agrees that the Trustee has the authorities set forth in the Trust Agreement, including, but not limited to, the authority: (i) to approve, deny, request modifications, or request further information related to any request for funds pursuant to the Trust Agreement; and (ii) to implement the Trust Agreement in accordance with its terms.

4. Certification of Legal Authority

The Beneficiary certifies that: (i) it has the authority to sign and be bound by this Certification Form; (ii) the Beneficiary’s laws do not prohibit it from being a Trust Beneficiary; (iii) either (a)

the Beneficiary's laws do not prohibit it from receiving or directing payment of funds from the Trust, or (b) if the Beneficiary does not have the authority to receive or direct payment of funds from the Trust, then prior to requesting any funds from the Trust, the Beneficiary shall obtain full legal authority to receive and/or direct payments of such funds within two years of submitting this Certification Form; and (iv) if the Beneficiary does not have the authority to receive or direct payment of funds from the Trust and fails to demonstrate that it has obtained such legal authority within two years of submitting this Certification Form, it shall become an Excluded Entity under the Trust Agreement and its initial allocation shall be redistributed among the Beneficiaries pursuant to subparagraph 5.0.1 of the Trust Agreement.

5. Certification of Legal Compliance and Disposition of Unused Funds

The Beneficiary certifies and agrees that, in connection with all actions related to the Trust and the Trust Agreement, the Beneficiary has followed and will follow all applicable law and will assume full responsibility for its decisions in that regard. The Beneficiary further certifies that all funds received on account of any Eligible Mitigation Action request that are not used for the Eligible Mitigation Action shall be returned to the Trust for credit to the Beneficiary's allocation.

6. Waiver of Claims for Injunctive Relief under Environmental or Common Laws

Upon becoming a Beneficiary, the Beneficiary, on behalf of itself and all of its agencies, departments, offices, and divisions, hereby expressly waives, in favor of the parties (including the Settling Defendants) to the Partial Consent Decree (Dkt. No. 2103-1) and the parties (including the Defendants) to the Second Partial Consent Decree (Dkt. No. 3228-1), all claims for injunctive relief to redress environmental injury caused by the 2.0 Liter Subject Vehicles and the 3.0 Liter Subject Vehicles (jointly, "Subject Vehicles"), whether based on the environmental or common law within its jurisdiction. This waiver is binding on all agencies, departments, offices, and divisions of the Beneficiary asserting, purporting to assert, or capable of asserting such claims. This waiver does not waive, and the Beneficiary expressly reserves, its rights, if any, to seek fines or penalties.

7. Publicly Available Information

The Beneficiary certifies that it will maintain and make publicly available all documentation and records: (i) submitted by it in support of each funding request; and (ii) supporting all expenditures of Trust Funds by the Beneficiary, each until the Termination Date of the Trust pursuant to Paragraph 6.8 of the Trust Agreement, unless the laws of the Beneficiary require a longer record retention period. Together herewith, the Beneficiary attaches an explanation of: (i) the procedures by which the records may be accessed, which shall be designed to support access and limit burden for the general public; (ii) for the Beneficiary Mitigation Plan required under Paragraph 4.1 of the Trust Agreement, the procedures by which public input will be solicited and considered; and (iii) a description of whether and the extent to which the certification in this Paragraph 7 is subject to the Beneficiary's applicable laws governing the publication of confidential business information and personally identifiable information.

8. Notice of Availability of Mitigation Action Funds

The Beneficiary certifies that, not later than 30 Days after being deemed a Beneficiary pursuant to the Trust Agreement, the Beneficiary will provide a copy of the Trust Agreement with Attachments to the U.S. Department of the Interior, the U.S. Department of Agriculture, and any other Federal agency that has custody, control or management of land within or contiguous to the territorial boundaries of the Beneficiary and has by then notified the Beneficiary of its interest hereunder, explaining that the Beneficiary may request Eligible Mitigation Action funds for use on lands within that Federal agency's custody, control or management (including, but not limited to, Clean Air Act Class I and II areas), and setting forth the procedures by which the Beneficiary will review, consider, and make a written determination upon each such request.

9. Registration of Subject Vehicles

The Beneficiary certifies, for the benefit of the Parties (including the Settling Defendants) to the Partial Consent Decree and the Parties to the Second Partial Consent Decree (including the Defendants) and the owners from time-to-time of Subject Vehicles, that upon becoming a Beneficiary, the Beneficiary:

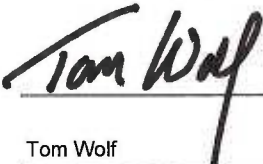
- (a) Shall not deny registration to any Subject Vehicle based solely on:
 - i. The presence of a defeat device or AECD covered by the resolution of claims in the Partial Consent Decree or in the Second Partial Consent Decree; or
 - ii. Emissions resulting from such a defeat device or AECD; or
 - iii. The availability of an Approved Emissions Modification, an Emissions Compliant Recall or the Buyback, Lease Termination, and Owner/Lessee Payment Program.
- (b) Shall not deny registration to any Subject Vehicle that has been modified in accordance with an Approved Emissions Modification or an Emissions Compliant Recall based solely on:
 - i. The fact that the vehicle has been modified in accordance with the Approved Emissions Modification or the Emissions Compliant Recall; or
 - ii. Emissions resulting from the modification (including, but not limited to, the anticipated emissions described in Appendix B to the Partial Consent Decree and Appendix B to the Second Partial Consent Decree); or
 - iii. Other emissions-related vehicle characteristics that result from the modification; or

- iv. The availability of an Approved Emissions Modification, an Emissions Compliant Recall or the Buyback, Lease Termination, and Owner/Lessee Payment Program.
- (c) May identify Subject Vehicles as having been modified, or not modified, in accordance with the Approved Emissions Modification or the Emissions Compliant Recall on the basis of VIN-specific information provided to the Beneficiary by the Defendants.
- (d) Notwithstanding the foregoing, the Beneficiary may deny registration to any Subject Vehicle on the basis that the Subject Vehicle fails to meet EPA's or the Beneficiary's failure criteria for the onboard diagnostic ("OBD") inspection; or on other grounds authorized or required under applicable federal regulations (including an approved State Implementation Plan) or under Section 209 or 177 of the Clean Air Act and not explicitly excluded in subparagraphs 9(a)-(b).


10. Reliance on Certification

The Beneficiary acknowledges that the Trustee is entitled to rely conclusively on, without further duty of inquiry, and shall be protected in relying upon, this Appendix D-3 Certification, or a subsequent communication from the Lead Agency designating new or additional authorized individuals, as setting forth the Lead Agency and the authorized individuals who may direct the Trustee with respect to all of the Beneficiary's rights and duties under the Trust Agreement. The Beneficiary and its delegated Lead Agency, including all authorized individuals, agree to comply with all security procedures, standard payment and signatory authorization protocols, as well as procedures for designating new or additional authorized individuals, as set forth by the Trustee.

FOR THE GOVERNOR (or, if not a State, the analogous Chief Executive):

Signature: 
Name: Tom Wolf
Title: Governor of Pennsylvania
Date: 10/10/17
Location: 225 Main Capitol Bldg., Harrisburg, PA 17120

[FOR OTHER REQUIRED SIGNATORIES]:

Signature: 
Name: Denise J. Smyler
Title: General Counsel
Date: 10/10/17
Location: 225 Main Capitol Bldg., Harrisburg, PA 17120

[FOR OTHER REQUIRED SIGNATORIES]:

Signature: _____


Name: Josh Shapiro

Title: Attorney General

Date: _____

Location: Strawberry Square, Harrisburg, PA 17120

[FOR OTHER REQUIRED SIGNATORIES]:

Signature:  _____


Name: Patrick McDonnell

Title: Secretary of Dept. of Environmental Protection

Date: 10/4/17

Location: 400 Market St., Harrisburg, PA 17101

[FOR OTHER REQUIRED SIGNATORIES]:

Signature:  _____

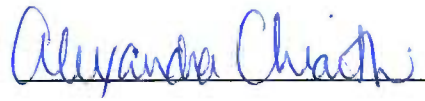
Name: Leslie S. Richards

Title: Secretary of Dept. of Transportation

Date: 10/6/17

Location: Keystone Bldg., Harrisburg, PA 17120

[FOR OTHER REQUIRED SIGNATORIES]:
APPROVED FOR FORM AND LEGALITY BY:

Signature:  _____


Name: Alexandra C. Chiaruttini

Title: Chief Counsel, Dept. of Environmental Protection


Date: Oct 4, 2017

Location: 400 Market St., Harrisburg, PA 17101

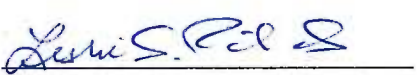
[FOR OTHER REQUIRED SIGNATORIES]:

Signature: 
Name: Josh Shapiro
Title: Attorney General
Date: 11-9-17
Location: Strawberry Square, Harrisburg, PA 17120

[FOR OTHER REQUIRED SIGNATORIES]:


Signature: 
Name: Patrick McDonnell
Title: Secretary of Dept. of Environmental Protection
Date: _____
Location: 400 Market St., Harrisburg, PA 17101

[FOR OTHER REQUIRED SIGNATORIES]:


Signature: 
Name: Leslie S. Richards
Title: Secretary of Dept. of Transportation
Date: _____
Location: Keystone Bldg., Harrisburg, PA 17120

[FOR OTHER REQUIRED SIGNATORIES]:


APPROVED FOR FORM AND LEGALITY BY:

Signature: 
Name: Alexandra C. Chiaruttini
Title: Chief Counsel, Dept. of Environmental Protection
Date: _____
Location: 400 Market St., Harrisburg, PA 17101


**[FOR OTHER REQUIRED SIGNATORIES]:
APPROVED FOR FORM AND LEGALITY BY:**

Signature: 
Name: Jason D. Sharp
Title: Acting Chief Counsel, Dept. of Transportation
Date: 10/5/17
Location: Keystone Bldg., Harrisburg, PA 17120

**[FOR OTHER REQUIRED SIGNATORIES]:
APPROVED FOR FORM AND LEGALITY BY:**

Signature: 
Name: Elizabeth L. Pettis
Title: Deputy General Counsel
Date: 10/6/17
Location: 333 Market St., Harrisburg, PA 17101

**[FOR OTHER REQUIRED SIGNATORIES]:
APPROVED FOR FORM AND LEGALITY BY:**

Signature: 
Name: Amy M. Elliott
Title: Chief Deputy Attorney General
Date: 10/30/17
Location: Strawberry Square, Harrisburg, PA 17120

**ATTACHMENT FOR PARAGRAPH 7
TO CERTIFICATION FOR BENEFICIARY STATUS
UNDER ENVIRONMENTAL MITIGATION TRUST AGREEMENT**

PENNSYLVANIA

(i) The procedures by which the records may be accessed, which shall be designed to support access and limit burden for the general public.

Pennsylvania has created, and will maintain, a public web site as a clearinghouse for information relating to the Volkswagen Environmental Mitigation Trust Fund. The web site can be accessed at: <http://www.dep.pa.gov/Business/Air/Volkswagen/Pages/default.aspx>. On this web site, Pennsylvania will make publicly available all public records supporting funding requests the Department of Environmental Protection (Department) submits to the Trustee in support of each funding request and all public records supporting all expenditures of the Trust Fund by Pennsylvania until the First and Second Partial Consent Decree Termination Dates, as applicable, and longer if Pennsylvania law requires a longer record retention period. A public record excludes confidential proprietary information, confidential business information, and personal identification information. The meaning of “public record” is explained more fully in paragraph (iii), below.

Pennsylvania’s web site will also include additional public information and public records, such as links to other helpful web sites related to the VW matter, general information about the relevant partial consent decrees in the multi-district litigation, links related to the Mitigation Trust Fund, and a link to the Trustee’s web site. Pennsylvania will also include its draft and final Beneficiary Mitigation Plan, notices and other information related to public input, specific programs for which funds can be requested, information about new and existing funding programs that the Department uses to distribute funding from the Mitigation Trust, and other useful information related to the Mitigation Trust Fund.

Having these documents available on a public web site supports access to, and limits the burden on, the public for accessing the documents. Prominently located on the web site is an email address (“resource account”) by which people may submit inquiries related to the Volkswagen matter and the Mitigation Trust Fund, and request an informal file review. The resource account is RA-EPVWMITIGATION@pa.gov.

(ii) For the Beneficiary Mitigation Plan required under Paragraph 4.1 of the Trust Agreement, the procedures by which public input will be solicited and considered.

Section 4.1 of the Trust Agreement requires that “[T]he Beneficiary Mitigation Plan shall explain the process by which the Beneficiary shall seek and consider public input on its Beneficiary Mitigation Plan.”

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To provide transparency and accountability, the Department will post Pennsylvania's draft and final Beneficiary Mitigation Plans, including information about the public participation process for the Beneficiary Mitigation Plan, and related information on its public web site for the Volkswagen Mitigation Trust Fund, available at <http://www.dep.pa.gov/Business/Air/Volkswagen/Pages/default.aspx>. Also on the public web site, the Department will post related information, as described more fully above in part (i), and including contact information for the Department. The Department will also include on the web site information about VW's National ZEV Investment Plan.

The Department will seek public input on the Beneficiary Mitigation Plan through the following public participation process.

- a. Draft Beneficiary Mitigation Plan – Notice of the opportunity for public comment on the draft Beneficiary Mitigation Plan was published in the *Pennsylvania Bulletin* on May 20, 2017 (47 Pa. Bull. 2,946). The *Pennsylvania Bulletin* is Pennsylvania's official gazette for information and rulemaking. Additionally, the Department issued a press release on May 18, 2017, relating to the draft Beneficiary Mitigation Plan, accessible at <http://www.ahs.dep.pa.gov/NewsRoomPublic/articleviewer.aspx?id=21203&typeid=1>.
- b. Public Informational Meetings and Comments – The *Pennsylvania Bulletin* notice included information about submitting comments during a 45-day public comment period and details for a webinar presented by DEP and six public listening sessions concerning the draft Beneficiary Mitigation Plan held in DEP's regional offices across the Commonwealth. The Department made all comments received during this period available through the Department's "eComment" web site, accessible at <http://www.ahs.dep.pa.gov/eComment/>.
- c. Final Beneficiary Mitigation Plan – In order to finalize the Beneficiary Mitigation Plan, the Department will consider all comments received and make any relevant revisions. The Department will post the final Beneficiary Mitigation Plan on the Department's Volkswagen web site, <http://www.dep.pa.gov/Business/Air/Volkswagen/Pages/default.aspx>, and submit it to the Trustee. The final Beneficiary Mitigation Plan will also be available by calling the Department at (717) 787-9495.

The Department will periodically evaluate implementation of the Beneficiary Mitigation Plan and implementation of the Eligible Mitigation Actions after the initial round of funding and will determine whether any revisions to the Beneficiary Mitigation Plan and funding levels are appropriate or necessary. If future revisions to the Plan are necessary, the Department intends to seek public input on major Plan revisions generally consistent with the process outlined above,

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including publishing a notice of the opportunity for public comment and providing a 30-day public comment period.

(iii) A description of whether and the extent to which the certification in this Paragraph 7 is subject to the Beneficiary's applicable laws governing the publication of confidential business information and personally identifiable information.

The certification in Paragraph 7 is subject to Pennsylvania's laws governing the publication of confidential business information and personally identifiable information.

Pursuant to Section 13.2 of the Pennsylvania Air Pollution Control Act, act of January 8, 1960, P.L. 2119 (1959), as amended, 35 P.S. §§ 4001 *et seq.* ("APCA"), and pursuant to the Pennsylvania Right-to-Know Law, act of February 14, 2008 (P.L. 6, No. 3), 65 P.S. §§ 67.101 *et seq.* ("RTKL"), records containing confidential business information and personally identifiable information are not public records. The RTKL defines a "public record" as "[a] record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708 [65 P.S. § 67.708]; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; (3) or is not protected by a privilege." 65 P.S. § 67.102. However, in exercising the discretion afforded the Department under 65 P.S. § 67.506(c) of the RTKL, Pennsylvania will make an otherwise exempt record accessible after redaction.

The Department will explain on its web site and in its funding application materials that the Department strongly recommends that an applicant for funds from the Mitigation Trust not include any confidential or proprietary information with its application. The Department will explain, however, that if an applicant believes it is absolutely necessary to include confidential or proprietary information, then the applicant must identify with specificity the confidential or proprietary information it seeks to protect, cite the specific statutory support under Pennsylvania's Air Pollution Control Act, Section 13.2, 35 P.S. § 4013.2, for its claim of protection, redact the material that it is claiming is confidential or proprietary information, and submit both a non-redacted and a redacted copy for review.

Confidential Business Information

Section 13.2 of the APCA, 35 P.S. § 4013.2, describes "confidential information" as:

All records, reports or information obtained by the department [of Environmental Protection] or referred to at public hearings under the provisions of this act shall be available to the public, except that upon cause shown by any person that the records, reports or information, or a particular portion thereof, but not emission data, to which the

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department has access under the provisions of this act, if made public, would divulge production or sales figures or methods, processes or production unique to such person or would otherwise tend to affect adversely the competitive position of such person by revealing trade secrets, including intellectual property rights, the department shall consider such record, report or information, or particular portion thereof confidential in the administration of this act. . . .

Only the non-redacted portions of the records that fall under the scope of Section 13.2 of the APCA will be available for public inspection.

Even when the APCA's protection of confidential business information does not apply, the Commonwealth of Pennsylvania's RTKL protects confidential proprietary information. As explained below, a record that reflects trade secrets or confidential proprietary information is not considered a public record pursuant to Pennsylvania's RTKL, 65 P.S. § 67.708(b)(11).

Under the RTKL, confidential proprietary information is defined as "[c]ommercial or financial information received by an agency: (1) which is privileged or confidential; and (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information." 65 P.S. § 67.102.

The RTKL also defines "trade secret" as:

Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

- (1) Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

65 P.S. § 67.102.

Only the non-redacted portions of the records that fall outside of the definitions of confidential business information or trade secret as defined by Pennsylvania's RTKL will be available for public inspection.

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If a claim of confidential business information is made to exempt application material from being disclosed under another Federal or State law or regulation or judicial order or decree, the Department will require the applicant to identify with specificity the confidential or proprietary information the applicant seeks to protect, cite the specific law, regulation or portion of judicial order or decree, for its claim of protection, redact the material that it is claiming is confidential or proprietary information, and submit both a non-redacted and a redacted copy for review.

Only the non-redacted portions of the records that fall under the scope of Federal or State law or regulation or judicial order or decree will be available for public inspection.

Personal Identification Information

Pennsylvania's RTKL exempts personal identification information from disclosure, at 65 P.S. § 67.708(b)(6). Personal identification information includes, but is not limited to, a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number, or other confidential personal identification number.

Based on the types of information listed, personal identification information is information which is unique to a particular individual or which may be used to identify or isolate an individual from the general population. It is information which is specific to the individual, not shared in common with others, and which makes an individual distinguishable from another. *Delaware County v. Schaefer*, 45 A.3d 1149, 1153 (Pa. Cmwlth. Ct. 2011). "Personal" does not mean that it has to involve a public official's "personal affairs" but that it is personal to that official in carrying out public responsibilities. *City of Philadelphia v. Philadelphia Inquirer*, 52 A.3d 456, 461 (Pa. Cmwlth. Ct. 2012).

Only the non-redacted portions of the records that fall outside the scope of Pennsylvania's RTKL exemption for personal identification information will be available for public inspection.

If a claim of personal identification information is made to exempt application material from being disclosed under another Federal or State law or regulation or judicial order or decree, the non-redacted portions of the records that fall under the scope of the requested legal exemption will be available for public inspection.