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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

WYATT B. et. al., Plaintiffs, vs. KOTEK, *et. al*., Defendants.	Civil No. 6:19-cv-00556-AA MEMORANDUM IN SUPPORT OF THIRD-PARTY WITNESS SENATOR SARA GELSER BLOUIN'S MOTION TO QUASH OR MODIFY DEFENDANTS' SUBPOENA *DUCES TECUM*

PROCEDURAL POSTURE AND UNDISPUTABLE FACTS

On April 25, 2024, Senator Sara Gelser Blouin (the Senator) was personally served with an expansive Subpoena *duces tecum* issued by Defendants (the Subpoena). (Senator's Decl., Exhibit 1.) The Subpoena demands that the Senator review potentially thousands of documents and produce those documents to the offices of Defendants' Counsel on Friday, May 10, 2024 at 9:00 a.m. The trial starts on May 13, 2024.

Defendants' and Plaintiffs' first deadline to complete fact discovery was April 1, 2020. After many extensions, the final discovery cutoff date was set for October 16, 2023. Decl. of Kramer, ¶s 3-4. Defendants served the Senator with the Subpoena almost six months after

discovery closed without seeking leave of the Court to issue or serve the Subpoena after the final deadline.

The Senator is not a party to this case. She is a member of the Oregon Senate. Decl. of Sen. Gelser Blouin, ¶s 1 and 3. Plaintiffs named her as a fact witness for the upcoming bench trial. *Id.* As the Court previously noted in its Opinion denying Plaintiff's Motion to Quash (for lack of standing), "Defendants seek documents and communications between Senator Gelser Blouin and the named Plaintiffs (Request Nos. 1 and 2); the Next Friends of the Plaintiffs (Requests Nos. 3 and 4); counsel for Plaintiffs (Request No. 5); a list of specific individuals (Request No. 6); counsel and plaintiffs in other federal litigation involving Oregon DHS (Request Nos. 7, 8, 9); and media entities (Requests Nos. 10, 11)." It also seeks records about the Honorable Jane Aiken, who presides over this case.

At approximately the same time Defendants served the Subpoena on the Senator, Defendants also served a public records request on the Oregon Legislature pursuant to Oregon Public Records Law, ORS Chapter 192. That request is now pending before the Oregon Legislative Counsel, who says his review will involve thousands of records and that it will not be completed until late May or early June of 2024. Decl. of Sen. Gelser Blouin, ¶ 12.

The Senator now appears in this matter and moves for an Order to quash the Subpoena, or, alternatively, to significantly limit the scope of the Subpoena and to extend the time for her response.

POINTS AND AUTHORITIES

In its Order denying Plaintiffs' Motion to Quash, this Court aptly observed that: "A nonparty may be compelled to produce documents and tangible things via a Rule 45

subpoena. Fed. R. Civ. P. 34(c). Rule 45 permits a party to issue a subpoena commanding the person to whom it is directed to attend and give testimony or to produce and permit inspection of designated records or things. Fed. R. Civ. P. 45(a)(1)(C), (D). The recipient may object to a subpoena or move to quash or modify it. Fed. R. Civ. P. 45(d)(2)(B), (3). 'The district court has wide discretion in controlling discovery' and 'will not be overturned unless there is a clear abuse of discretion.' *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). '[T]he court that issued the subpoena . . . can entertain a motion to quash or modify a subpoena.' *S.E.C. v. CMKM Diamonds, Inc.*, 656 F.3d 829, 832 (9th Cir. 2011). The issuing court *must* quash or modify a subpoena that: (i) fails to allow a reasonable time to comply; (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c); (iii) requires disclosure of privileged or protected matter if no exception or waiver applies; or (iv) subjects a person to undue burden. Fed. R. Civ. P. 45(d)(3)(A)." (Emphasis added.)

Fed. R. Civ. P. 26(b)(1) describes undue burden as that which is not proportionate to the needs of the case considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

A. MOTION 1: QUASH THE SUBPOENA AS IT VIOLATES THE COURT'S SCHEDULING ORDERS AND BECAUSE IT IS RETALIATORY.

Defendants' violation of the Court's Scheduling Order, as discussed above, is difficult to understand and is not excusable. Defendants claim the Senator is a "surprise witness" but offer no authorities holding that, if true, the "surprise" justifies violating the Court's Order. Also, there

is no surprise. On the contrary, the Senator regularly does business with the State Defendants and her thoughts and concerns about Oregon's children and disabled persons are well known. Over her many years of public service, the Senator has been a strong and persistent advocate for Oregon's children, including foster children and disabled children. Defendant Fariborz Pakseresht and his staff regularly communicate with the Senator, whose Declaration herein aptly details the frequency and scope of her communications with DHS. Decl. of Sen. Gelser Blouin, ¶s 9-10. Her views are often expressed in news articles, for instance, a 2019 Oregonian article featuring discussion about Class Representative Unique L. and quoting the Senator. *See,* https://www.oregonlive.com/politics/2019/04/new-federal-lawsuit-accuses-oregon-foster-system-of-revictimizing-children.html. Given the Senator's prominence in this field, and DHS' frequent communications with her, Defendants cannot reasonably claim they are "surprised" this outspoken champion of children's rights is named as a fact witness for trial.

Surprised or not, it is indisputable that Defendants violated the Court's Scheduling Orders and, therefore, lacked the authority to issue and serve the Subpoena. This raises the question of what motivated the Defendants to commit the violation. There are two alternative explanations for the violation. First, it may be that Defendants mistakenly overlooked the fact that discovery had closed, and forgot they needed leave of the Court to issue the Subpoena. That is unlikely since Defendants are represented by the Oregon Department of Justice and one of the largest and most reputable defense firms in Oregon. Alternatively, it may be that the unauthorized process was intended to intimidate the Senator as a fact witness at trial, to harass her by forcing her to do a massive document search and redaction process, and/or to punish her

for taking public positions contrary to those of DHS. The second motive seems more realistic given today's state of hardball politics and punitive litigation tactics.

Failure to comply with this Court's Scheduling Order "brings into play the full panoply of sanctions under Fed.R.Civ.P. 37(b)(2)(A)(i)-(vii).'..." *Transamerica Life Ins. Co. v. Arutyunyan*, 22-55199 (9th Cir. Feb 22, 2024). Fed.R.Civ.P. 37 authorizes the court to direct parties or attorneys who fail to participate in good faith in the discovery process to pay the expenses, including attorney's fees, incurred by other parties as a result of that failure. The presence or absence of bad faith is relevant to the choice of sanctions but not necessarily to the decision to grant sanctions. *Marquis v. Chrysler Corp*., 577 F2d 624, 642 (9th Cir 1978).

Given the foregoing, the Subpoena *duces tecum* should be quashed since it was served in direct violation of the Court's Scheduling Order, and because its apparent motive is to harass, intimidate and oppress the Senator for doing her job as a senator and as a witness. Accordingly, Defendants should be sanctioned with an Order to pay the Senator's expenses and attorneys' fees incurred in bringing her Motion.

B. MOTION 2: QUASH THE SUBPOENA BECAUSE OF CONFIDENCES AND PRIVILEGE.

The Subpoena should be quashed because many responsive documents are privileged or exempt from disclosure under the Oregon Public Records law.

Defendants made a records request of the Legislature that is more limited and focused than the Subpoena, but still substantially overlaps the Subpoena. ORS 192.355(9)(a) exempts disclosure of public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law. This exemption incorporates any Oregon confidentiality law found outside of the Public Records Law, to the extent the law

applies to the relevant public body. Information of a personal nature such as, but not limited to, that kept in a personal, medical, or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy. ORS 192.355.

Public document disclosure is not an "all-or-nothing" proposition. A redaction process typically takes place to exclude protected information. ORS 192.338; *Gray v. Salem-Keizer Sch. Dist.,* 139 Or App 556, 566 (1996). ORS 192.355. In federal civil litigation, state law governs privileges. FRE 501.

Many records within the broad range demanded by Defendants contain privileged or confidential information about children that comes with a reasonable expectation of privacy. Decl. of Sen. Gelser Blouin, ¶s 16-18. Children have a fundamental privacy interest in keeping their information private. These children and their representatives and advocates reach out to the Senator for help regarding their DHS experiences. They have a reasonable expectation of privacy in those communications if for no other reason than to avoid DHS retaliation which, as the Senator's experience shows herein, is not just hypothetical. Decl. of Sen. Gelser Blouin, ¶17.

Records relating to children in DHS records cannot be disclosed to the public. ORS 419B.035(1).

The Senator's communications with press media are privileged, at least in instances where the communications are not contained in a published story. ORS 44.510 to 44.540. The

privilege is absolute and protects not just confidential sources but all unpublished information of any sort.

The identity of a person who has furnished information relating to or assisting the investigation of a possible violation of law to a member of a legislative committee or its staff in the course of an investigation is privileged. OEC 510(2). The privilege extends to the Senator's efforts to investigate issues privately expressed to her by children, child advocates, and other constituents. OEC 510(2) and (3). The privilege may be claimed by the Senator. OEC 510(3).

Oregon's Public Officer privilege exists to protect those privileges and privacy interests at the behest of the Senator. Once invoked, OEC 509 triggers a Public Records Law analysis of the sought-after records -- like the process already underway in the Office of Legislative Counsel at Defendants' request. To that end, the agency must gather all records arguably responsive to the request. It then determines which of the requested public records may be disclosed, redacted or otherwise, and which should be withheld because of privileges and confidences. *Papadopoulos v. State Board of Higher Ed*., *supra. See also* ORS 192.500(1) and ORS 192.500(2). Given the breadth and scope of the public records request, Legislative Counsel's review will not be completed before the end of May 2024 or early June of 2024. Decl. of Sen. Gelser Blouin, ¶12. Defendants know the public records process is underway because they sent a public records request to the Legislature on the same day as the Subpoena was served. *Id.*

Oregon's Public Officer's Privilege protects against compelled disclosure in the courtroom of information of the foregoing documents that are exempt from disclosure in an administrative setting. OEC 509; *Papadopoulos v. State Board of Higher Ed*. 8 Or App, 494 P.2d 260 (1972)(which is incorporated by reference to FED. R. CIV. P. 501). The Senator's assertion

of the Public Officer Privilege is a primary means to protect the privileges and privacy expectations of the persons about whom Defendants seek records.

Defendants presumably will object to the Senator's assertion of this privilege. When they do, they will have the burden of demonstrating that, as a factual matter, the records sought are outside the category of records privileged against discovery pursuant to the Oregon Public Records Act. *See, Kahn v. Pony Express Courier Corp*., 173 Or App 127, 20 P3d 837 (Or. App. 2001) (relating to protected DHS records under ORS 419A.255(2)). Courts may determine an issue of privilege by conducting an *in camera* review of the documents. However, "`before a trial court may engage in *in camera* review at the request of the party opposing [a privilege on the basis of an exception to it] that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability.'" *Frease v. Glazer,* 330 Or. 364, 371-74, 4 P.3d 56 (2000); *Kahn v. Pony Express Courier Corp.,* 173 Or App 127, 20 P3d 837 (Or. App. 2001). *See, e.g., State v. Cunningham,* 164 Or.App. 680, 688, 995 P.2d 561, rev. den. 331 Or. 283 (2000). To date, no such evidence has been presented.

The ongoing public records review by Legislative Counsel will identify many of the privileges and confidences that likely will be at issue regarding the Senator's objections to the Subpoena. It seems both wise and efficient to defer to that process and review Legislative Counsel's determinations as a means to diminish the disproportionate burden imposed on the Senator and as a means to significantly reduce the unnecessary expenditure of judicial resources if the Court must eventually review the records *in camera* to do its own analysis of these issues.

C. MOTION 3: QUASH THE SUBPOENA BECAUSE IT IS DISPROPORTIONATELY BURDENSOME RELATIVE TO THE NEEDS OF THIS CASE.

The Senator certainly agrees that pleadings in this case show there are important substantive issues separating the Parties and that her expected testimony might be helpful to the finder of fact. However, the other factors set forth in a Fed. R. Civ. P. 26(b)(1) analysis weigh heavily in favor of quashing the Subpoena because the burden it imposes on the Senator is completely disproportionate to the needs of the case. Consider the following:

The Parties' Relative Access to Relevant Information. Defendants can readily access public information regarding the Senator's documents through a request for records pursuant to the Oregon Public Records Law. ORS Chapter 192. Indeed, as discussed above, Defendants have done so. There is no reason for the Senator to duplicate the public records search and analysis being conducted by Legislative Counsel.

The Parties' Resources. Defendants have infinitely more resources than the Senator. As a Legislator, she is paid less than her staff and makes slightly more than minimum wage for the hours she works. This makes the cost of the instant process burdensome to her family. Decl. of Sen. Gelser Blouin, ¶15. The Senator has the services of one lawyer and a part-time paralegal to respond to the Subpoena. She must pay for legal services out of her own pocket and, thereafter, "apply" for reimbursement from the Legislature. Decl. of Kramer, ¶ 5. By comparison, the State's defense resources are staggering. Decl. of Kramer, ¶ 8.

The Importance of The Requested Discovery In Resolving The Issues at Trial. Defendants are expected to claim they need the subpoenaed documents to impeach the Senator's expected testimony. Absent some further showing, it seems like this "impeachment" is more in the nature of treating her as DHS' "foe" by establishing her as a national advocate for children and the

disabled nudging DHS towards reform. Defendants will be hard pressed to show that this reasonably would be expected to reveal admissible impeachment evidence pursuant to FRE 608 - 610, or that such evidence could arguably impact the Court's findings of fact. Indeed, the Senator is nationally recognized for her work for Oregon foster children. Decl. of Sen. Gelser Blouin, Exh. 2.

In any case, "impeachment" of that nature hardly requires casting a wide net for the Senator's personal records. If Defendants seek evidence about the Senator's view and motives, they need not look far. She is in regular and close contact with the DHS director and many of his staff. She considers DHS as an important stakeholder in the fight to improve the lives of children and the disabled. Decl. of Sen. Gelser Blouin, ¶s 8-10. She gives direct, candid, and sometimes blunt feedback about child welfare directly to DHS and the public. *Id.* Her views are clear from the direct feedback she has given directly to DHS' Director and his subordinates at legislative hearings and informal meetings. Her views are available from a simple Google search of her name, from Plaintiffs' statement of the Senator's expected testimony, from her Declaration herein, and from many other accessible sources. DHS has certainly heard the Senator's views regarding DHS operations and reform. She wants DHS to succeed and help break "generational cycles of abuse and poverty." Decl. of Sen. Gelser Blouin, ¶ 20.

Predictably, the Senator and DHS do not always agree, but those differences are also a matter of record. "In my experience, DHS sometimes resists meaningful reform initiated particularly related to the safety and well-being of children and youth in its care." Decl. of Sen. Gelser Blouin, ¶ 10. Perhaps DHS is uncomfortable when she observes, in her oversight role, that, **"**Sometimes [DHS'] resistance to these efforts feels personally directed to or about me

rather than focused on the goal of improved services or the safety and well-being of children in the custody of DHS. Unfortunately, sometimes this focus on personalities or on controlling a narrative to ensure DHS is always painted in a flattering light comes at the expense of making real systemic progress on policies that impact the safety and well-being of children and disabled persons." *Id.* Still, her ongoing collaboration with DHS definitely underscores that the Senator wants DHS to succeed**.** Decl. of Sen. Gelser Blouin, ¶20. Even as to the instant litigation she thinks that, "Ideally, this [litigation] will resolve such that it paves a way for a system that provides Oregon children and youth with improved services and supports their need --not just to be safe, but to actually thrive, experience well-being and happiness and break generational cycles of abuse and poverty. If that were to occur, all parties would win." *Id.*

None of the foregoing amounts to admissible impeachment evidence. Even if it was otherwise, DHS certainly does not lack information from which its attorneys may establish that point and does not need nine years of records to do it.

The relative importance of impeachment documents is minimal for another reason: the Senator will not be testifying in front of a jury. The facts of this case will be decided by this Court after a bench trial. The facts are limited to alleged constitutional and statutory violations. The only remedy at issue is proposed injunctive relief. It is not apparent why this Court would need or admit impeachment documents that otherwise might titillate or interest a jury but would be of little or no impact to a Court sitting without a jury. This Court, unlike jurors, has decades of experience evaluating witness credibility. It is unlikely the Court needs speculative "impeachment" documents for it to assess the credibility of the Senator or any of the other professionals who may testify. It is highly likely that if proffered, reasonably expected

"impeachment evidence" as described above would be inadmissible, as it will be of little consequence in determining the action and because its probative value would likely be substantially outweighed by the danger of undue delay, wasted court time, or the needless presentation of cumulative evidence. *See* FRE 401(b) and FRE 403.

Whether the Burden or Expense of the Proposed Discovery Outweighs the Likely Benefit. The Senator's Declaration and the foregoing discussion detail the burden of time and expense necessary to comply with the Subpoena as it now reads. The Senator is a part-time citizen legislator. She works year-round serving her constituents and is paid barely more than minimum wage. Regardless, she is committed to hearing her constituents' needs, especially those of Oregon's children and disabled persons, and to finding ways to help meet those needs. Decl. of Sen. Gelser Blouin, ¶s 7 and 15.

The redundancy in Defendants' effort to find records adds to the burden, since the Senator's official email is stored on the Legislature's email server, and it is being searched by Legislative Counsel pursuant to Defendants' Public Records request, as discussed above.

Things are also complicated because the Legislature does not provide cell phones to its members. As the Senator's Declaration points out, "The Legislature does not provide its members with cell phones and does not reimburse members for dedicated cell phones. As a result, legislator private phones are used for both official business and personal business. Nearly all my routine communications are done using my personal cell phone. This includes both personal and official communications with colleagues, constituents, and others, including some of the people and organizations described in the Subpoena. Of course, I also use my cell phone to have private communications with my husband, family, medical providers, and friends. All told,

I expect that there will be a vast number of records held within my private devices that will need to be searched in order to locate any potentially responsive records." Sen. Gelser Blouin, ¶13. Typically, some of the ESI can be downloaded from her applications by the user. The rest may be stored in cloud servers maintained by the owners of the websites that host the applications. Given that Defendants demand a search going back over nine years one could expect that . That would normally include old, archived data – pertinent since archived ESI is often difficult to retrieve from website operators who are often hesitant to provide data without a subpoena. Once those hurdles are overcome, the Senator is still left to do the document review and screening process discussed above. Decl. of Kramer, ¶ 7.

Another burden is the expense the Senator will incur for legal services to help her comply with the Subpoena. Legislative Counsel advised the Senator that neither his office nor the Oregon Department of Justice can represent her regarding this Subpoena because the Subpoena was directed to her personally. With the Department of Justice's authorization, the Senator hired David L. Kramer, P.C., a sole practitioner with part-time paralegal support, to help her respond to the Subpoena. DOJ emphasized that the Executive Branch would not be paying for her attorney. The Senator and her counsel will need to spend considerable time and effort to review potentially responsive documents, screen them, prepare a privilege log, produce documents, and file further motions as may be necessary. Besides the investment of time, there is the matter of the cost for legal services the Senator will incur. Presently, the Office of the Senate President advises she must pay for her legal fees and expenses from her family's personal funds and then "apply" to the Senate President's Office for reimbursement. Decl. of Kramer, ¶s 5-6.; Decl. of Sen. Gelser Blouin, ¶ 14-15.

Conclusion regarding Disproportionality: The analysis of the pertinent FED. R. CIV. P. 26(b)(1) factors clearly shows that the burden of complying with the Subpoena is entirely disproportionate to the needs of this case. The Subpoena should be quashed for that reason.

D. ALTERNATIVE RELIEF IF THE COURT DENIES THE MOTIONS TO QUASH.

If the Subpoena is not quashed outright, for the reasons discussed above and those reflected in the Declarations filed herewith, the Senator asks for an Order granting the alternative relief set forth in her Motion. In all events, the Senator asks she be awarded her costs and fees for bringing her Motion to Quash the Subpoena.

Respectfully submitted this 8th day of May, 2024.

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