

IN THE COURT OF THE JUDICIARY OF ALABAMA



In The Matter of )

ANITA KELLY )

Circuit Judge, )

15<sup>th</sup> Judicial Circuit. )

Case No.: COJ 50

**NON-PARTY DEPARTMENT OF HUMAN RESOURCES' RESPONSE IN  
OPPOSITION TO RESPONDENT'S RESPONSE TO THE MOTION TO QUASH AND  
FOR PROTECTIVE ORDER REGARDING REQUEST NO. 28**

COMES NOW the Alabama Department of Human Resources (hereinafter "ADHR"), non-party to this action, and submits the following in opposition to the Respondent's Response to No-Party Alabama Department of Human Resources' Motion to Quash as to Request No. 28:

**I.  
Introduction**

ADHR was served with a Civil Subpoena *Duces Tecum* from the Respondent with regard to 46 numbered requests.<sup>1</sup> The Respondent's counsel and ADHR counsel have conferred and were not able to resolve issues related to Item 28. However, the Respondent's counsel and agency counsel have engaged in good faith to resolve as many issues as possible related to discovery. The Civil Subpoena is attached Exhibit 1.<sup>2</sup>

<sup>1</sup> Counsel for the agency met with the Respondent's counsel on December 7, 2017 to discuss the discovery issues related to the subpoena *duces tecum* and the deposition notices for two agency attorneys.

<sup>2</sup> The subpoena did not specify a time to respond with the requested information. On December 7, 2017 Attorney Englehart for the Respondent and Attorney Brooks for DHR met for over four hours in good faith to resolve the issues for all subpoenas issued related to DHR. Correspondence and, emails, and phone calls were utilized to resolve the bulk of the discovery propounded on behalf of the Respondent. For example, see Email dated December 5, 2017 attached as Exhibit 2.

ADHR is not a party to this matter. ADHR recognizes that the JIC has investigative powers.<sup>3</sup> There is evidence from correspondence that shows that DHR was submitting information in response to the request of the JIC, and there was supplementation of information.<sup>4</sup>

ADHR administers a child welfare program that entails many responsibilities. *See* Ala. Code §§ 38-2-6, 26-14-6.1 (1975) which deal with the enabling statute and child abuse and neglect investigations respectively. Additionally, the agency as a part of its duties, safety and permanency planning is at the core of service for children.<sup>5</sup> Cases are staffed with agency attorneys and county staff every day to address the best possible outcomes for children. Request 28 on the service appears to be a generic request about general information. However, there are serious legal issues with Request No. 28 which states:

28. As to any and all persons who resigned or transferred, were terminated, or were involuntarily transferred from their employment with the Montgomery County DHR at any time from January 1, 2012 through the present, produce a list of all such persons, identifying for each such person their name, last position with the Montgomery County DHR, current employer (if known), and last known address and telephone number (s); or alternatively, produce documents sufficient to identify all such persons, including for each such person their name, last position with the Montgomery County DHR, current employer (if known), and last known address and telephone number (s).

The Alabama Supreme Court has noted that Ala. R. Civ. P. 26(c), which permits the trial court to issue protective orders, “recognizes that the right to discovery is not unlimited, and the trial court has broad powers to control the use of the process to prevent its abuse by any party.” *Ex parte Loube Consulting Int'l, Inc.*, 45 So. 3d 741, 748 (Ala. 2010), citing *Ex parte Compass*

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<sup>4</sup> Pursuant to Article VI, § 156(c), the Alabama Supreme Court has adopted rules governing the procedures of the Judicial Inquiry Commission. Every six weeks, the Commission must serve upon the judge any materials collected during the investigation (Rule 6.D). Counsel for the Respondent did begin the deposition of the agency’s Chief Legal Counsel. Approximately two hours into the deposition after a delay of commencing (from an apparent miscommunication about obtaining a court reporter), counsel for the Respondent asked questions about the correspondence which clearly had been provided by the JIC.

<sup>5</sup> DHR also is guided by Adoption and Safe Families Act (ASFA), Public Law 105-89. Additionally, there are state statutes that are referenced in the JIC Complaint which relate to permanency for children.

*Bank*, 686 So. 2d 1135, 1137 (Ala. 1996). The appellate court has advised that “ ‘to be entitled to a protective order, a movant must either show good cause why the objected-to deposition or production of documents would be unduly burdensome or expensive, oppressive, embarrassing or annoying, or that the subject matter sought to be discovered is privileged....’ ” *Ex parte Scott*, 414 So. 2d 939, 941 (Ala. 1982) (quoting *Assured Inv'rs Life Ins. Co. v. Nat'l Union Assocs., Inc.*, 362 So. 2d 228, 231 (Ala. 1978), overruled by *Ex parte Norfolk S. Ry. Co.*, 897 So. 2d 290 (Ala. 2004)).

Discovery is not unfettered. This situation is very unique in that while the Respondent is seeking information about agency staff who are not parties and may have no idea about the JIC complaint. It is clear that none of the employees of Montgomery County DHR have filed a complaint against the Respondent so it is unclear what information they could provide that would provide any clarity unless it is to discuss specific cases outlined in the JIC complaint. It must be noted that not every employee of Montgomery County DHR would have had any cases before the Respondent. The records from the juvenile cases will reflect the parties involved and the agency staff involved. There is no need for the expansion of fishing expedition as to Request 28.

#### I.

**Request No. 28 is overly broad and will inherently involve an attempt to discover confidential information.**

The JIC Complaint contains chares that relate to specific cases. By court order of this Court, the Respondent has digital access to the Alabama Administrative Office of Courts (AOC) system. By virtue of this access, the Respondent will have access to the juvenile court records. It is unclear if the documents have been fully reviewed by the Respondent and counsel given the voluminous documents at issue. What is clear is the Respondent would like to contact agency

employees. The only issues relevant in this case pertain to specific cases as outlined in the JIC Complaint about specific cases.

Social workers, supervisors etc., are not AOC and cannot under law discuss juvenile cases without a court order or testifying directly in a court proceeding that is protected as in juvenile court. *See* Ala. Code § 36-12-40 and 41-13-1 (1975). ADHR records are confidential under state law, pursuant to Ala. Code § 26-14-8 (c), 38-2-6 (8), 38-7-13, and 38-9-6 (e) (1975), and are not subject to disclosure unless an exception or waiver applies. Respondent cannot bypass the confidentiality provisions.

Request No. 28 seeks information that is overly broad and irrelevant the JIC Complaint. The appointing authority for each County DHR County Office is the county director. The county director for each of DHR's sixty-seven (67) counties is responsible for management of employees in the following areas: Adult Protective Services, Child Protective Services, Food Assistance, Child Support, Adoption, Foster Care, Family Assistance, and Family Services . The Merit System Act, Ala. Code § 36-26-1 et seq., (1975), defines "appointing authority" as "[t]he officer, board, commission, person or group of persons having the power to make appointments to offices or positions of trust or employment in the state service." Request No. 28 as written does not delineate as to any particular program. Hence, the first objection dealt with the request being overly broad and not narrowly tailored.

## II.

**Employee records regarding addresses and phone numbers is confidential information and should be protected pursuant to the Rules of the Alabama Personnel Board and state law.**

The director of State Personnel, as executive head of the department, shall direct and supervise all its administrative and technical activities. Ala. Code § 36-26-2 (1) (1975). One of

the said duties for the director is to establish and maintain a roster of all the officers and employees in the state service. Ala. Code § 36-26-8 (1975).

DHR utilizes forms that are developed and required for use by State Personnel. DHR also adheres to guidelines established by State Personnel. State Personnel requires that a Form 11 entitled "Recommendation for Personnel Action" be completed for personnel changes for an employee. For example, the Form 11 includes notation of such changes as separation from service due to death, retirement, Family Medical Leave, or change in name. The Form 11 must be submitted to State Personnel for approval to be considered finalized. *See* Ex. 3, Aff. of DHR Personnel Director.

DHR does not require employees to notify the agency of changes in terms of address or employment once there is a separation from state service. DHR does not track this type of information. If an employee does enter into state service again, this type of information can be requested to State Personnel. *See* Ex. 3.

The Director of State Personnel "shall maintain a service file for each employee in state service showing his name, title of the class of position held ... change in employment status, and such other information as he may consider pertinent." *See* Rules of the Alabama State Personnel Board Section 670-x-17-.01 attached as Ex. A to Ex. 3. The Personnel Procedure Manual of the State of Alabama Personnel Department addresses procedures to view any personnel file under the category of Subpoenas/Court Orders. This section states as follows:

If State Personnel receives a subpoena or court order, the State Personnel Legal Division will honor these valid documents by submitting redacted copies. Redaction consists of blacking out all personal information identified in Act 2009-759. Charge will be at the rate of 50 cents per page plus postage.

*See* Section X Page 104 of Personnel Procedures Manual attached as Ex. B to Ex. 2.

### III.

#### **Respondent cannot attorney client communications and circumvent rules regarding government client and its agents.**

A “client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, that is rendered professional legal services by an attorney, or that consults an attorney with a view to obtaining professional legal services from the attorney.<sup>6</sup>

Ala. R. Evid. 502. *See Ex parte City of Leeds*, 677 so. 2d 1171 (major considered a client when he made communications with city attorney in preparation for deposition). According to Ala. Code § 36–15–1(2) (1975), the attorney general—or his assistants—has the duty to “attend to all cases other than criminal that may be pending in the courts of this state, in which the state may be in any manner concerned.” Specifically, the legal counsel for [the Alabama DHR] must “devote his entire time to the business of the Department of Human Resources.” Ala. Code § 38–2–4 (1975). The Department of Human Resources encompasses the Alabama DHR along with

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<sup>6</sup> This motion also pertains to Montgomery County DHR, which is one of sixty-seven (67) counties under ADHR.

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or a representative of the client and the client's attorney or a representative of the attorney, or (2) between the attorney and a representative of the attorney, (3) by the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party concerning a matter of common interest, (4) between representatives of the client and between the client and a representative of the client resulting from the specific request of, or at the express direction of, an attorney, or (5) among attorneys and their representatives representing the same client.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the attorney, or the attorney's representative, at the time of the communication may claim the privilege, but only on behalf of the client. The attorney's or the representative's authority to do so is presumed in the absence of evidence to the contrary.

Ala. R. Evid. 502

the 67 county departments of human resources. See *Williams v. James*, 420 So. 2d 773, 774 (Ala.1982).

Ala. R. Evid. 502 commentary states as follows:

Subsection (a)(2). Definition of “Representative of the Client.” Alabama has long recognized a principle, carried forward in Rule 502, that the attorney-client privilege applies to communications made by the client's servant or agent to the attorney. *Vacalis v. State*, 204 Ala. 345, 86 So. 92 (1920). See C. Gamble, McElroy's Alabama Evidence § 393.03 (4th ed. 1991). The privilege also applies to vicarious communications made in behalf of a corporate client. *Jay v. Sears, Roebuck & Co.*, 340 So.2d 456 (Ala.Civ.App.1976). While Alabama has had few appellate cases dealing with corporations claiming the privilege, Rule 502 was drafted in light of significant federal case law in this area. Historically, the federal position was that the privilege applied only to corporate employees who possessed authority to obtain professional legal services or to act on advice given by the attorney. This so-called “control group test” was rejected in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Rule 502 follows this decision in expanding the scope of the corporate attorney-client privilege beyond those employees within the control group, to include anyone who “for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.”

#### **IV. Conclusion**

ADHR has asserted intra-governmental executive privilege as to any materials reflecting advisory opinions, recommendations and deliberations by government officials and employees in the course of decision making and policy formulation and any other recognized privileged materials such as those covered by the attorney-client, attorney work-product, and confidential informer privilege. Ala. Admin. Code 660-1-6-.01. The case files that AOC has made available speak for themselves. There is no need for the invasion of the intra-governmental executive privilege. The fact that a mandamus or a motion has been filed on behalf of the department

within the judicial system is sufficient guidance as to what has been requested to a court. In fact, the AOC records are the best evidence.

ADHR also objected to each instruction, definition, and document request to the extent that it imposes any requirement or discovery obligation greater than or different from those under the Alabama Rules of Civil Procedure. Again, the AOC records are the best evidence.

Any employee whose records are sought should have an individual right to object to any sensitive information being released. *See Stone v. Consol. Pub. Co.*, 404 So. 2d 678 (Ala. 1981). *See also* Opinion of Attorney General to Aune, A.G. No. 96-3 dated October 4, 1995.

ADHR does seek compensation for work performed as set out by Ala. Admin. Code 660-1-1-.02, which provides that copies may be obtained upon request and payment of the actual cost of searching, sorting, and duplicating those materials. Duplication of documents is available at a cost of 25 cents per page plus the actual cost of employee time involved in the duplication of any personnel records or spreadsheets.

WHEREFORE, THE ABOVE PREMISES CONSIDERED, ADHR respectfully requests that this Court to:

- (a) quash the subpoena; or, in the alternative
- (b) order that the Respondent issue a subpoena to State Personnel; and
- (c) enter a protective order that deals with the confidentiality protection of discussions related to confidential information; and
- (d) enter an order that requires an agency attorney to present during questioning of an agency employee as to their personnel history, juvenile cases, and any agency information; and
- (e) grant such other, further, and different relief as this Court may deem proper.

RESPECTFULLY SUBMITTED on this the 29<sup>th</sup> day of December, 2017.

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**CERTIFICATE OF SERVICE**

I, the undersigned hereby certify that a true and correct copy of the above and foregoing was filed via electronic mail and first class mail on this the 29th day of December, 2017.

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