

IN THE COURT OF THE JUDICIARY OF ALABAMA

In The Matter of)
)
ANITA KELLY)
)
Circuit Judge,)
)
15th Judicial Circuit.)

Case No.: COJ 50



MOTION TO QUASH BY NON-PARTY ALABAMA DEPARTMENT OF HUMAN RESOURCES ¹FOR PROTECTIVE ORDER AND COMPENSATION

COMES NOW the Alabama Department of Human Resources (hereinafter “ADHR”), non-party to this action, and moves this Court for a Protective Order pursuant to Ala. R. Civ. P. 45 and 26 (1) prohibiting the release of certain records; or (2) directing an *in camera* review by the Court of certain DHR documents requested by Respondent; and (3) entering an appropriate Order regarding release of said documents, if indeed any are due to be released; and (4) order Respondent to pay the cost of any production. As grounds for its Motion, ADHR shows unto this Court as follows:

1. ADHR was served with a Civil Subpoena *Duces Tecum* from the Respondent with regard to 46 numbered requests. A copy of the Subpoena is attached hereto and incorporated by reference herein as Exhibit A.:

2. Ala. R. Civ. P. 45(c)(3)(A) and (B), provides as follows:

On timely motion, *the court* by which a subpoena was issued *shall quash or modify* the subpoena if it

...

(iii) requires disclosure of *privileged* or other protected matter and no *exception* or *waiver* applies....

¹ This motion also pertains to Montgomery County DHR, which is one of sixty-seven (67) counties under ADHR.

(Emphasis added.)

3. Ala. R. Civ. P. 26 provides that a court may limit discovery upon good cause as set out below:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or, alternatively, on matters relating to a deposition or production or inspection, the court in the circuit where the deposition or production or inspection is to be taken may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place for the discovery; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. A motion for a protective order shall be accompanied by a statement of the attorney for the moving party stating that the attorney, before filing the motion, has endeavored to resolve the subject of the discovery motion through correspondence or discussions with opposing counsel or, if the opposing party is not represented by counsel, with the opposing party.

4. The Alabama Open Records Law provides public access to government records, except where those records are otherwise protected by law. 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. Before discovery of DHR documents can be obtained, an *in camera* inspection of the records and a finding by the court that the records contain material and exculpatory evidence essential to the fairness of a trial in the case are required. *Ex parte Alabama Dep't of Human Res.*, 719 So. 2d 194, 199–201 (Ala. 1998) (“Moreover, the language of § 38-2-6 (8)

does not indicate that the legislature intended to give DHR or any other person the ability to waive that prohibition of disclosure.... In sum, we believe that § 38-2-6(8)...prohibits the wholesale discovery of DHR records.... We direct Judge Ramsey to conduct an *in camera* inspection of DHR' file on Harris, and to allow...information relevant and material”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 989, 94 L. Ed. 2d 40 (1987) (rape/sexual abuse prosecution); *Russell v. State*, 533 So. 2d 725 (Ala. Crim. App. 1988) (rape/sexual abuse prosecution); *Ex parte Murrhee v. Martin*, 433 So. 2d 184, 203 (La. Ct. App. 1982) (“the trial judge should conduct an in camera inspection of the subject records...from the files of the Department” in a civil action for damages for assault involving a schoolteacher and a student); *Ex parte Smith*, 555 So. 2d 1106 (Ala. Civ. App. 1989) (finding “no information which would be essential to the defense of this matter which has not been provided to the defense” attorneys in a juvenile case); *Schaefer v. State*, 676 So. 2d 947, 948 (Ala. Crim. App. 1995) (“strong public policy reasons for maintaining the confidentiality of such records...examination should be in camera”); *Gibson v. State*, 677 So. 2d 233 (Ala. Crim. App. 1994) (reversible error not to review rape victim’s DHR file in camera); *Gibson v. State*, 677 So. 2d 236 (Ala. Crim. App. 1995) (DHR confidential information must be both exculpatory and material to be required to be disclosed); *Allen v. State*, 659 So. 2d 135, 149 (Ala. Crim. App. 1994) (“review of the DHR records...reveals ...the notes taken by the social worker...contain no exculpatory information”); *Ex parte State v. Harris*, 28,517 (La. App. 2 Cir. 8/21/96), 679 So. 2d 549, 551, writ denied, 96-2954 (La. 9/26/97), 701 So. 2d 975 (“disclose to the petitioner any information that could be ‘conceivably exculpatory’ or used for impeachment purposes, including any evidence of prior reports of sexual abuse”); *Coats v. State*, 615 So. 2d 1260, 1261 (Ala. Crim. App. 1992) (“appellant is entitled, upon request, to have the trial court conduct an *in camera* review of the

victim's complete *file* maintained by DHR in order to determine whether the file contains any exculpatory information.”).

4. There are a number of good cause grounds to deny or limit the scope of the voluminous discovery requested by the Respondent. Many of the requests amount to a fishing expedition as to information that is not relevant or material to the issues pending before the Court of Judiciary. 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 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)).

5. ADHR further asserts 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.

6. ADHR objects 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. In this matter, there are 46 requests with many subparts, and which are not properly narrowed in scope. The issues pending before this Court pertain to specific cases in Domestic Relations Court and Juvenile Court. Hence, it is unclear as to relevance and materiality of a number of the requests.

7. The requests to the extent documents are sought as to communications of agency attorneys about litigation in juvenile court or any other court is prohibited:

“The work product doctrine is distinguished from the attorney-client privilege in that the latter applies only to communications between client and counsel. The work-product doctrine is broader in that it affords protection to all documents and tangible items prepared by or for the attorney of the party from whom discovery is sought ‘as long as they were prepared in anticipation of litigation or preparation for trial.’ C. Lyons, Alabama Rules of Civil Procedure Annotated, § 26.6 (2d ed. 1986)”

Ex parte Nationwide Mut. Ins. Co., 990 So. 2d 355, 364 (Ala. 2008), quoting *Ex parte Great Am. Surplus Lines Ins. Co.*, 540 So. 2d 1357, 1360 (Ala. 1989).

8. The requests to the extent documents are sought that invade the attorney-client privilege are protected pursuant to Ala. R. Evid. 502 (b):

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.

9. The specific objections to the requests are set out below:

A. **Item 1.** ADHR objects to item 1 in that is overly broad and unduly burdensome. ADHR submits reports to the United States of Human Health and Services. The reports contain information that is encrypted so as to protect confidentiality. The binary data submission for the National Child Abuse and Neglect Database reflects the exchange of information concerning 30, 0000 records with 150 data elements that is captured for federal reporting. This information is related to the child abuse and neglect (CA/N reports) received by the agency. Another report that concerns foster care, the Adoption Foster Care Analysis Reporting System contains up to 7000 records which is also binary in nature as to foster care and hundreds of adoptions. There are also reports that pertain to independent living resources for children and other financial reports. The financial reports are submitted pursuant to the funding source, i.e., grants. These reports are broad in nature. Some reports ae submitted quarterly and some are submitted annually. None of these reports contain information that pertains to a particular judge or one specific case. Hence, the said reports and supporting documents are not relevant to the matters pending before the Court of the Judiciary. In addition, ADHR objects to Item 1 on the grounds of lack of relevance and materiality essential to the trial of this case.

B. **Item 2.** ADHR objects to Item 2 to the extent it seeks attorney work product documents of Chief Legal Counsel, Sharon Ficquette. ADHR through its counsel has provided written submissions to the Judicial Inquiry Commission (JIC) which sets out the information provided to JIC. Further, it is our information and belief that the documents Ms. Ficquette provided to the JIC have been provided to the Respondent. The testimony provided by Ms. Ficquette was recorded by a Court Reporter. Thus, the transcript of the testimony can be obtained by the Respondent.

C. **Item 3.** ADHR objects to Item 3 as overly broad as to time and scope as to communications with any employees of ADHR or Montgomery County DHR and Circuit judges and employees of the judges regarding policies, practices and/or operations of the Family Court. ADHR employs over 4,000 employees that work in various capacities. Montgomery County DHR has nearly 150 employees that may interact with the Court on any number of issues. ADHR further objects on the basis of lack of relevance or materiality as to the specific charges in this matter. Without waiving said objections, ADHR has identified two letters submitted on behalf of the Department: letter dated 8/4/2016 to the Honorable Eugene Reese and a letter dated 3/6/2017 to the Honorable Johnny Hardwick.

C. **Item 4.** This request pertains to “policy on continuances.” ADHR does not have a “policy” on continuances. Any motion filed for a continuance would state the specific reasons for filing and the court file should reflect the ruling by a judge. Generally, ADHR does not allow its attorneys to file for continuances in termination of parental rights cases just as a matter of course. However, there are occasions in which an attorney may be ill or other unforeseen emergencies may arise.

D. **Item 5.** ADHR objects to Item 5 on a number of grounds: (1) information concerning adoptions and termination of parental rights petitions (TPR) are confidential; (2) the said request is overly broad and seeks information that is available from other sources such as juvenile court records or through the Administrative Office of Courts; and (3) ADHR also objects on the basis of relevance and materiality. It should be noted that adoption petitions are not filed in district courts.

E. **Item 6.** *See* objection to Item 5 above.

F. **Item 7.** ADHR objects to Item 7 on a number of grounds: (1) information concerning pick up orders are confidential; (2) the said request is overly broad and seeks information that is available from other sources such as juvenile court records or through the Administrative Office of Courts; and (3) ADHR also objects on the basis of relevance and materiality. This request is also unduly burdensome in that it would require a search of hundreds of files concerning child welfare cases for each year from 2012 to the present as to whether pick up orders have been granted or denied. Further, the Respondent has easier access to these records than ADHR.

G. **Item 8.** Item 8 requests a list of all cases of Termination of Parental Rights filings from 2010 to the present. This requires production of information that is confidential. The said request is overly broad and seeks information that is available from other sources such as juvenile court records or through the Administrative Office of Courts. ADHR also objects on the basis of relevance and materiality. Further, the Respondent has easier access to these records than ADHR. ADHR provided specific cases to the JIC, which, on information and belief have been provided to the Respondent.

H. **Item 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23,** seeks confidential case information for other Juvenile Judges in this Circuit. ADHR is not the custodian of this case information. ADHR objects on the basis of materiality and relevance. The requests are overly broad. Information regarding the cases of the other Juvenile Judges and their timeliness compliance is reflected in data from the Administrative Office of Courts that the Respondent would be able to access. Without waiving said objection, ADHR did file a Mandamus on May 14, 2012, against the Honorable Calvin Williams with regard to a home study order. The Petition was dismissed by the Court of Civil Appeals upon the Motion of the Department. The

information contained in the Petition relates to a juvenile case and is confidential. There are no other responsive documents for requests 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23.

I. **Item 13.** The information sought in Item 13 is also confidential and available from other sources such as the Administrative Office of Courts which would have data as to TPR petitions, the date filed, and the outcome etc., from 2012 to the present. Further, the Respondent was served with petitions filed against her and with any orders from the appellate court.

J. **Item 24.** The information sought in Item 24 is overly broad and not limited in time and scope. Gathering such information would be also unduly burdensome. ADHR also objects on the basis of materiality and relevance.

K. **Item 25.** The information sought in Item 25 is overly broad and not limited in time and scope. Gathering such information would be also unduly burdensome. ADHR also objects on the basis of materiality and relevance. Further, any information obtained at the meetings referenced that were attended by an agency attorney is their work product.

L. **Item 26.** The information sought in Item 26 is overly broad and not limited in time and scope. Gathering such information would be also unduly burdensome. ADHR also objects on the basis of materiality and relevance. ADHR has not proposed the candidacy of any agency attorney the election of 2016. ADHR does not maintain information in any type of database about communications on local elections.

M. **Item 27.** *See* objection to Item 26. ADHR avers that it does not have any such materials as requested in Item 27.

N. **Item 28.** The information requested in Item 28 is not properly directed to the official custodian of records. The official custodian of the information requested is the State of Alabama Personnel Department. The ADHR operates all personnel actions through the State of Alabama Personnel Department and its merit system Ala. Code § 36-26-1 *et seq.* (1975). The information requested in Item 28 is overly broad in that it seeks information as to any employee that has resigned, involuntarily transferred, current employer of said employees etc. ADHR objects also on the basis of relevance and materiality. Montgomery County DHR administers many programs and has nearly 150 employees. Further, 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.

O. **Item 29.** The request is overly broad. ADHR has a number of policies regarding families that address working with fathers. There is no such policy as to “non-custodial fathers in particular. ADHR also objects to the lack of materiality and relevance. Any motion filed requesting service by publication in any case from January 1, 2013 contains the basis for such request as required by the Juvenile Code. The legal basis for requesting publication is governed by Alabama law. Ala. Code § 12-15-318 (1975).

P. **Item 30.** The information sought in Item 30 is overly broad and not limited sufficiently in time and scope. Gathering such information would be also unduly burdensome. ADHR also objects on the basis of materiality and relevance. Also information concerning complaints to the agency is confidential.

Q. **Item 31.** See objection to Item 2. Also, on information and belief, these items have already been provided to the Respondent by the JIC.

R. **Item 32.** The information sought in Item 32 is overly broad and not limited sufficiently in time and scope. ADHR and Montgomery DHR also object on the basis of attorney client-privilege and attorney work product. *See also* Response to Item 31.

S. **Item 33.** The information sought in Item 33 is overly broad and not limited sufficiently in time and scope. ADHR and Montgomery DHR also object on the basis of attorney client-privilege, attorney work product for any agency attorney. Gathering such information would be also unduly burdensome and prejudicial. ADHR objects on the basis of confidentiality in that records in adoption proceedings are confidential pursuant to Ala. Code § 26-10A-31 (1975). ADHR also objects on the basis of materiality and relevance. Without waiving said objections, ADHR does not have any responsive documents to this request for Commissioner Buckner.

T. **Item 34.** ADHR does not have any responsive documents to this request.

U. **Item 35.** The information sought in Item 35 is overly broad and not limited sufficiently in time and scope. Without waiving said objection, ADHR will produce a copy of a blank foster parent agreement upon payment of production cost.

V. **Item 36.** The information sought in Item 36 is overly broad and not limited sufficiently in time and scope. ADHR also objects on the basis of materiality and relevance. However, ADHR will produce the policy on Child Abuse and Neglect investigations which is identified as Child Protective Services below in the list of policies under W.

W. **Item 37 through 44.** ADHR has numerous policies that address many issues related to families. For example, there is not a single policy on only drug use by parents. ADHR also objects on the basis of materiality and relevance. A list of policies includes:

- Adoption
- Child Protective Services*
- DHR Partnerships with Children, Their Families & Providers
- Family Planning
- Family Services Case Record
- Financial Procedures for Out of Home Care
- Foster Family Home/Adoptive Resources Approval
- Indian Child Welfare
- Individualized Service Plans
- Interstate/Intercountry Services to Children
- Language Assistance
- Minimum Standards for Foster Family Homes
- Multiple Needs Child
- Out-of-Home Care
- Provisional Approval of Foster Homes
- Referral, Admission and Discharge Procedures for Inpatient Psychiatric Services Policy
- Targeted Case Management
- Transfer of Cases
- Transitional and Independent Living Programs and Placement Requirements
- Minimum Standards for Day Care Centers and Nighttime Centers Regulations and Procedures
- Minimum Standards for Family Day Care Homes, Family Nighttime Homes and Group Day Care Homes, Group Nighttime Home Regulations and Procedures

It should be noted that the policies contain many sub-parts. Without waiving said objections, ADHR will produce the Child Protective Services Policy Manual (350 pages, identified with an * in the list) which addresses child abuse and neglect investigations and grounds for entry into foster care. ADHR is the seeking cost of production.

X. **Item 45.** This request is inappropriate and calls for a legal determination on prospective cases; (i.e. "any future legal position..."). Petitions for TPR are filed in juvenile court based upon applicable statutes. This request seeks information about policies; regulations etc. on future legal positions of the agency "when a parent does not challenge or resist an original or

earlier TPR petition in effect from January 1, 2010 to the present.” Decisions about termination of parental rights cases are extremely serious and require much legal research and analysis. Such petitions must be based upon the specific facts and circumstances of each case. Such legal analysis is attorney work product and ADHR also objects on that ground.

Y. **Item 46.** The information sought in Item 46 is overly broad and not limited sufficiently in time and scope. ADHR objects on the basis of confidentiality, materiality and relevance. Financial payments to lawyers in adoption cases are not relevant or material in this matter.

10. ADHR also moves that in the event documents are to be produced, the Respondent be directed to compensate ADHR for the 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.

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

(a) quash the subpoena; or, in the alternative

(b) conduct an *in camera* inspection of the relevant and material ADHR documents; and enter a Protective Order if this Court authorizes release of any ADHR records, subsequent to such *in camera* review, and enter an order directing all parties to disclose the said records only to:

1. the Court;
2. counsel for a party;
3. a person with prior legal access to said records;
4. officials involved in the litigation, including court reporters;

5. persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify or actually giving testimony, provided such persons are directed to keep confidential those matters protected by the order; and
6. outside consultants or experts retained for the purpose of assisting counsel in the litigation, or in anticipation of such, provided such persons are directed to keep confidential those matters protected by the order;

(c) direct that any records admitted into evidence or otherwise made a part of the record of this case shall be placed under seal and shall not be made a part of the public record of this case; and,

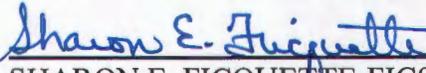
(d) if production of documents is ordered, direct any party seeking copies of the documents requested to compensate ADHR for the reasonable cost of the work performed, as set out in Ala. Admin. Code 660-1-1-.02; and

(e) prohibit production of attorney work product and/or attorney client privileged documents; and

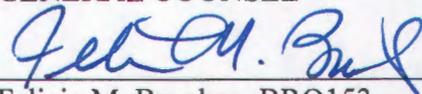
(f) grant such other, further, and different relief as this Court may deem proper.

RESPECTFULLY SUBMITTED on this the 21st day of November, 2017.

STEVE MARSHALL
ATTORNEY GENERAL



SHARON E. FICQUETTE-FIC002
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CERTIFICATE OF SERVICE

I, the undersigned hereby certify that a true and correct copy of the above and foregoing was served via first class postage prepaid, on this the 21st day of November, 2017.

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