

IN THE CIRCUIT COURT OF THE JUDICIARY OF ALABAMA

IN THE MATTER OF:)
)
STATE OF ALABAMA JUDICIAL INQUIRY)
COMMISSION,)
)
v.)
)
THE HONORABLE TRACIE A. TODD,)
CIRCUIT JUDGE, BIRMINGHAM DIVISION,)
JEFFERSON COUNTY, ALABAMA,)
)

CASE NO. 0058

FILED

NOV - 1 2021

COURT OF THE JUDICIARY
Rebecca C. Oates
Secretary

MOTION TO QUASH CIVIL SUBPOENA DUCES TECUM

COMES NOW the State of Alabama, by and through DANNY CARR, District Attorney for the Tenth Judicial Circuit, Jefferson County, Alabama, pursuant to Ala. R. Civ. P. 45(c)(3) and moves the Court to quash the Defendant's Subpoena directed to Michael Heathman and/or the Information Technology Representative and/or the Custodian of Records for the Office of the District Attorney for Tenth Judicial Circuit of Alabama ("District Attorney's Office"). In support thereof, the State submits as follows:

1. On about October 15, 2021, Defendant, the Honorable Tracie A. Todd, issued a subpoena to the District Attorney's Office which contained requests for production of documents.¹
2. The State submits that the District Attorney's Office is incapable of compliance with the subpoena, as its employees and agents do not have access to or the ability to retrieve the items requested. Computer systems for the District Attorney's Office are hosted by the Jefferson County Department of Information Technology. The District Attorney's Office does not maintain its electronic servers and has no access to historical data and/or other files related to the emails and/or "instant messages" of its individual employees.

¹ See Exhibit A.

3. Michael Heathman is the Systems Manager for the Office of the District Attorney for the Tenth Judicial Circuit. He is not employed by the Jefferson County Department of Information Technology and does not have administrative access to its servers, cloud storage, and/or other back-up data. The Office of the District Attorney for the Tenth Judicial Circuit does not employ any additional Information Technology Representatives or Custodians of Records with the ability to comply with the subpoena.

4. Upon information and belief, the State submits that the text messages requested by the subpoena are hosted and/or maintained by various cell phone providers. The Office of the District Attorney for the Tenth Judicial Circuit does not provide a cellular phone for each of its employees and no such messages are maintained by the District Attorney's Office.

5. For these reasons alone, this Court should quash the subpoena. In the alternative, should the Court find that the District Attorney's Office must employ some "work-around" to comply with the Defendant's subpoena, the State offers the following grounds in support of its motion to quash.

6. The State objects as compliance with the subpoena constitutes undue burden and expense. The subpoena is overly broad, unduly burdensome, and not reasonably limited in time and scope. Compliance with the subpoena requires an unreasonable and/or unnecessary amount of time for response and would result in an unnecessary diversion of limited taxpayer resources from the essential functions of the District Attorney's Office.

7. The State objects as document requests contained in the subpoena are vague and ambiguous.

8. The State objects as not all records requested are relevant to the instant litigation.

9. The State objects that the subpoena fails to allow a reasonable time for compliance. The subpoena was issued on or about October 15, 2021, and service came thereafter, yet requires compliance within ten (10) days. This short amount of time is unreasonable and inadequate, particularly given the breadth of the documents requested.

10. The State objects as the subpoena requires the disclosure of privileged or other protected matter and no exception or waiver applies.

11. The State also objects as the District Attorney's Office is not the custodian of records for the requested documents, and therefore cannot certify all the elements necessary to ensure their admissibility in the above-named action.

12. Further, the State objects to the Subpoena as it requests work product, which is expressly protected under Alabama law. Ala. Code 1975 § 12-21-3.1 provides as follows:

- (a) Neither law enforcement investigative reports nor the testimony of a law enforcement officer may be subject to a civil or administrative subpoena except as provided in subsection (c).
- (b) Law enforcement investigative reports and related investigative material are not public records. Law enforcement investigative reports, records, field notes, witness statements, and other investigative writings or recordings are privileged communications protected from disclosure.

Any such privileged communications are protected from disclosure to civil parties except “upon proof by substantial evidence, that the moving party will suffer undue hardship and that the records, photographs or witnesses are unavailable from other reasonable sources.”²

9. The Defendant has failed to demonstrate that the documents and materials requested in the subpoena are unavailable from other reasonable sources. In fact, the State avers that the documents and materials requested in the subpoena should be properly sought from the

² Ala. Code 1975 § 12-21-3.1(c)

entity or agency that hosts its email and/or other electronic servers, rather than from the District Attorney's Office.

10. The Defendant has failed to demonstrate any proof by substantial evidence that she will suffer any undue hardship in seeking to obtain these materials from other reasonable sources.

11. The State objects to the extent that the requests for production could be interpreted to encompass grand jury information. "The long-time rule, sanctioned by our courts, is that the proceedings before a grand jury are essentially secret."³ Additionally, the laws of the State of Alabama prohibit the District Attorney's Office, or any person, from disclosing the evidence presented for consideration by the grand jury.⁴

WHEREFORE, PREMISES CONSIDERED, the State respectfully asks the Court to quash the subpoena on the basis as set forth above, and for such other, further and general relief as is proper.

Respectfully submitted this the 1st day of November, 2021.

/s/ Shawn Allen

SHAWN ALLEN
Deputy District Attorney

OF COUNSEL
STATE OF ALABAMA
ex rel DANNY CARR, District Attorney
10th Judicial Circuit of Alabama
Jefferson County Courthouse
801 Richard Arrington Jr. Blvd N
Birmingham, Alabama 35203
PHONE: (205) 325-5252
FACSIMILE: (205) 325-5780

³ *McKissack v. State*, 926 So. 2d 367, 369 (Ala. 2005)(citations and additional quotation marks omitted).

⁴ See Ala. Code. §§ 12-16-214, 12-16-215, 12-16-216, & 12-16-225.

CERTIFICATE OF SERVICE

I do hereby certify that on this, the 1st day of November, 2021, a copy of the following was served, via electronic means and/or United States Mail, upon the following:

Emory Anthony, Jr., Esq.
1117 22nd Street South
Birmingham, Alabama 35205
Email: bgemorye@aol.com
ATTORNEY FOR JUDGE TODD

/s/ Shawn Allen

OF COUNSEL

EXHIBIT A

IN THE COURT OF THE JUDICIARY OF ALABAMA

IN THE MATTER OF:

STATE OF ALABAMA JUDICIAL INQUIRY
COMMISSION

V.

THE HONORABLE TRACIE A. TODD
CIRCUIT JUDGE, BIRMINGHAM DIVISION,
CRIMINAL DIVISION, JEFFERSON COUNTY, ALABAMA

*
*
*
*
*
*
*
*
*
*

FILED

OCT 15 2021

COURT OF THE JUDICIARY
Rebecca C. Oates
Secretary

Case # 58

CIVIL SUBPOENA DUCES TECUM

TO: Michael Heathman and/or the Information Technology Representative and/or the Custodian of Records for the Office of the District Attorney Tenth Judicial Circuit
OFFICE OF THE DISTRICT ATTORNEY FOR THE TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY ALABAMA
801 Arrington Blvd N
Birmingham, AL 35203-2324
(205) 325-5252

YOU ARE HEREBY NOTIFIED of the following request of the Defendant that you produce, within TEN (10) days, unless the Court orders otherwise, after service of this subpoena, a copy of the following documents to the offices of Emory Anthony, Jr., Esq., 1117 22nd Street South, Birmingham, Alabama 35205, to-wit:

1. Electronic messages on all county issued, funded or supported equipment, programs and applications, including but not limited to emails, text messages and instant messaging, exchanged between Michael Anderton, Carlos Gonzales, Patrick Lamb, Rob Drake, Tabitha Champion, Brandon Falls, Danny Carr, Kandice Pickett, Joe Roberts, employees in the Jefferson County Office of the District Attorney, support staff for said employees, and any other person or employee, related to Judge Todd and/or Judge Todd's staff from 2013 to present; and
2. Electronic messages on all county issued, funded or supported equipment, programs and applications, including but not limited to emails, text messages and instant messaging, exchanged between investigators in the Jefferson County District Attorney's Office, support staff for said employees, and any other person or employee, related to Judge Todd and/or Judge Todd's staff from 2013 to present.

NOTICE

Rule 45 Ala. R. Civ. P., Paragraphs (c) & (d)

(c) Protection of persons subject to subpoenas.

1) *A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court from which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.*

2) (A) *A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents, or tangible things or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.*

(B) *Subject to subdivision (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling at any time before the time specified for compliance may serve upon the party or attorney designated in the subpoena written objection to producing any of or all the designated materials or to inspection of the premises or to producing electronically stored information in the form or forms requested. "Serve" as used herein means mailing to the party or attorney. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.*

3) (A) *On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it fails to allow reasonable time for compliance:*

i. *requires a resident of this state who is not a party or an officer of a party to travel to a place more than one hundred (100) miles from the place where that person resides, is employed, or regularly transacts business in person, or requires a nonresident of this state who is not a party or an officer of a party to travel to a place within this state more than one hundred (100) miles from the place of service or, where separate from the place of service, more than one hundred (100) miles from the place where that person is employed or regularly transacts business in person, except that, subject*

to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

- ii. requires disclosure of privileged or other protected matter and no exception or waiver applies, or*
- iii. subjects a person to undue burden.*

(B) If a subpoena

- i. requires disclosure of a trade secret or other confidential research, development, or commercial information, or*
- ii. requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or*
- iii. requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.*

(C) Duties in responding to subpoena.

- i. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.*
 - ii. When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.*
- 4) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.*

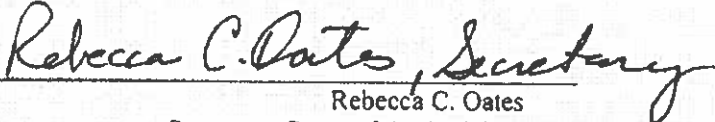
- 5) *A person responding to a subpoena need not produce the same electronically stored information in more than one form.*
- 6) *A person responding to a subpoena need not provide discovery of electronically stored information from sources the person identifies to the requesting party as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(B). The court may specify conditions regarding the production of the discovery.*
- 7) *If information is produced in discovery that is subject to a claim of privilege or of protection as trial- preparation material, the person or party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. Any party or the producing person may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.*

DATED:

October 15, 2021

Attorney for the Judge:

/s/ William Pompey
117 Broad Street
Camden, Alabama 36726
(334) 682-9032


Rebecca C. Oates
Secretary, Court of the Judiciary