STATE OF MICHIGAN
IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA

Adeline Hambley,

Plaintiff — Case No.: 23-7180-CZ

v — Hon. Jenny McNeil
Sitting by Assignment

Ottawa County, a Michigan County;
Ottawa County Board of Commissioners; and
Joe Moss, Sylvia Rhodea, Lucy Ebel,
Gretchen Cosby, Rebekah Curran,
Robert Belknap, and Allison Miedema,
Ottawa County Commissioners in their
Individual and personal capacities,

Defendants.
_____/

BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER TO QUASH SUBPOENA

I. The Subpoena Was Not Timely Served

As a starting point, it is not at clear what the purpose is of the subpoena served on Justing Roebuck, the Ottawa County Clerk, on November 22, 2023 – the day before the Thanksgiving holiday weekend. The subpoena purports to order Mr. Roebuck to appear in person before Judge McNeil on Monday, November 27, 2023 to "Testify at trial/examination/hearing." However, the proceeding scheduled to be heard on November 27, 2023 is a motion to enforce settlement agreement. Plaintiff's motion papers make no reference to the need for testimony at the November 27, 2023 hearing. In fact, the motion papers explicitly state that the existing writings are sufficient to allow the Court to rule on the motion. (Plaintiff's Brief in Support, pp 9, 10 – 11).

The reason this is potentially significant is that different rules govern discovery subpoenas and trial/hearing subpoenas. MCR 2.305 addresses discovery subpoenas to a

nonparty, while MCR 2.506 addresses trial and hearing subpoenas. However, regardless of which rule governs the subpoena issued to Mr. Roebuck, it was not timely served and Mr. Roebuck should be relieved of the obligation to comply with it.

MCR 2.305(A)(1) states that a represented party may issue a subpoena to a non-party for production or inspection of documents. The subpoena at issue seeks the production of Closed Session minutes of the November 6, 2023 Ottawa County Board of Commissioners meeting. However, MCR 2.305(A)(3) explicitly states that a "subpoena **shall** provide a minimum of 14 days after service of the subpoena (or a shorter time if the court directs) for the required act." (Emphasis added). Mr. Roebuck was electronically served with the subpoena at approximately 8:30 p.m. on November 22, 2023 – the day before Thanksgiving and a four-day holiday weekend. He was directed to appear on **the next business day** – November 27, 2023 – at 10:00 a.m. before this Court. The subpoena gives Mr. **Roebuck two hours** in a business day to comply with its commands.[1] This woefully fails to comply with the notice requirement of MCR 2.305(A)(3).

Plaintiff perhaps included in the subpoena the command to testify in an attempt to come within MCR 2.506(C)(1), given the abject failure to comply with MCR 2.305(A)(3). MCR 2.506(C)(1) states that a subpoena must be served as least two days before the required appearance.[2] However, that rule goes on to state the subpoena must be served "14 days before the appearance **when documents are requested**." (emphasis added). Again, Plaintiff

[1] Mr. Roebuck traveled to Arizona to visit family over the Thanksgiving holiday.

[2] Even under the two day requirement of MCR 2.506(C)(1) the subpoena was not timely served. MCR 1.108(1) states that "the day of act … after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed … In that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday or day on which the court is closed …"

has not complied with the notice and service requirements of MCR 2.305(A)(3) or MCR 2.506(C)(1).

Justin Roebuck is entitled to a protective order under MCR 2.302(C) excusing him from complying with the untimely served subpoena.

II. Justin Roebuck Is Entitled to a Protective Order Quashing the November 22, 2023 Subpoena as It Seeks to Compel Mr. Roebuck to Perform an Illegal Act.

MCR 2.506(H)(1) provides that a person served with a subpoena may appear before the court to explain why the person should not be compelled to comply with the subpoena. MCR 2.506(H)(3) sates that the court may excuse a witness from compliance with a subpoena for good cause. MCR 2.506(H)(5) states that any party may move to quash a subpoena under MCR 2.303(C). Additionally, MCR 2.305(A)(4)(a) states that a subpoena directed to a non-party is subject to the provisions of MCR 2.302(C), and on motion made by the subpoenaed non-party may quash the subpoena "if it is unreasonable or oppressive."

The subpoena served on Mr. Roebuck directs him to produce "Closed session meeting minutes for Ottawa County Board of Commissioners meeting held on November 6, 2023." The closed session minutes are prohibited by statute from disclosure. Violating the statute exposes Mr. Roebuck to potential civil and criminal sanctions. Therefore, the subpoena should be quashed as it is both unreasonable and oppressive.

MCL 15.267(2) states:

> A separate set of minutes shall be taken by the clerk or the designated secretary of the public body at the closed session. These minutes shall be retained by the clerk of the public body, are not available to the public, and **shall only be disclosed if required by a civil action filed under section 10,**

> **11, or 13.** These minutes may be destroyed 1 year and 1 day after approval of the minutes of the regular meeting at which the closed session was approved.

Sections 10, 11 and 13 refer to MCL 15.270, MCL 15.271, and MCL 15.273 respectively. MCL 15.270 allows "any person" to file an action "to challenge the validity of a decision of a public body made in violation of this act." MCL 15.270(1). MCL 15.271 provides that if "a public body is not complying with this act, the attorney general, prosecuting attorney of the county in which the public body serves, or a person may commence a civil action to compel compliance or to enjoin further noncompliance with this act." MCL 15.271(1). MCL 15.273 states:

> (1) A public official who intentionally violates this act shall be personally liable in a civil action for actual and exemplary damages of not more than $500.00 total, plus court costs and actual attorney fees to a person or group of persons bringing the action.
> (2) Not more than 1 action under this section shall be brought against a public official for a single meeting. An action under this section shall be commenced within 180 days after the date of the violation which gives rise to the cause of action.
> (3) An action for damages under this section may be joined with an action for injunctive or exemplary relief under section 11.

The current action pending before the Court is not an action brought under MCL 15.270, MCL 15.271, or MCL 15.273. Therefore, under the plain language of MCL 15.267(2) any disclosure would be in violation of the Open Meetings Act. The subpoena issued to Mr. Roebuck directing him to produce the minutes of the November 6, 2023 closed session is directing him to perform an illegal act. This Court should not countenance that attempt to compel the performance of an illegal act and should quash the November 22, 2023 subpoena.

Arguably, MCL 15.267(2) is ambiguous in terms of the prohibited disclosure. The statute states: "These minutes shall be retained by the clerk of the public body, are not

available to the public, and shall only be disclosed if required by a civil action filed under section 10, 11, or 13." One could read the language to state: "These minutes shall be retained by the clerk of the public body, are not available to the public, and shall only be disclosed **to the public** if required by a civil action filed under section 10, 11, or 13." However, that is not how the statute was written. The legislature could have easily included that language if that had been its intent. Moreover, that reading of the statute still does not address the situation in this litigation: this is not an action brought under Section 10, 11, or 13 of the Open Meetings Act which is a prerequisite for disclosure.

The few cases addressing this issue all have done so in the context of lawsuits brought under the Open Meetings Act. In *Manning v City of East Tawas*, 234 Mich App 244, 246–247, 593 NW2d 649, 652 (1999), *abrogated on other grounds by Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 860 NW2d 51 (2014), plaintiff brought an action alleging a violation of the Open Meetings Act, alleging the city council held a closed session in violation of the Act. The trial court reviewed the minutes of the closed session in camera and ultimately ordered the disclosure of a redacted version of the minutes that revealed any subject matter that exceeded the scope of the privilege cited for closing the meeting.

In *Detroit News, Inc v City of Detroit*, 185 Mich App 296, 299, 460 NW2d 312, 313–314 (1990), plaintiff sought a declaratory judgment that closed meetings of January 29, and February 3, 1988, of the Detroit city council violated the OMA. The Court of Appeals held the trial court acted properly in conducting an in camera review of the minutes. *Id*. at 301.

In *Emsley v Charter Twp of Lyon Bd of Trustees*, (No 353097, 2021 WL 5750688 (Dec 2, 2021), *appeal denied sub nom Mr Sunshine v Charter Twp of Lyon Bd of Trustees*, 511 Mich 968, 990 NW2d 338 (2023), plaintiff initiated a lawsuit against the Lyon Township alleging

that it repeatedly violated the requirements of the OMA when the Board of Trustees went into closed session during public board meetings on April 5, 2010, August 7, 2017, November 6, 2017, December 4, 2017, January 2, 2018, February 5, 2018, June 4, 2018, September 4, 2018, and November 7, 2018. In each instance, the Board went into a closed session for the stated purpose of considering attorney-client privileged communications. *Id* at *1. The trial court granted the Township's motion for summary disposition and plaintiff sought reconsideration. "After reviewing *in camera* the Board's meeting minutes, closed session minutes, and attorney-client communications for the relevant meetings including the August 5, 2019 meeting, the trial court denied the motion for reconsideration." *Id* at *2.

In *Berryman v Madison School Dist*, (No 265996, 2007 WL 549230, at *3 (Feb. 22, 2007), plaintiff brought an action for an alleged violation of the OMA after the school board went into closed session to discuss an attorney-client privileged letter. Plaintiff alleged the meeting went beyond the scope of discussing the letter. The trial court granted the defendants motion for summary disposition after reviewing in camera the privileged letter and the minutes of the closed session. *Id* at *3.

What all of these cases have in common – beyond the fact that an in camera review took place – was that every case was brought under the Open Meetings Act. No case has been located holding that disclosure of closed session minutes can be required for an action that is not brought under the OMA. However, the Court of Appeals has explicitly held that disclosure **cannot** be required if the litigation is not brought under the OMA:

> Therefore, **plaintiff's proposed reading of the statute to require disclosure of the minutes though no claim has been brought under the OMA cannot be supported by the language of the statute** itself and would require judicial construction to achieve. But this Court is precluded from engaging in statutory construction because the very nature of its judicial role

> requires the Court to respect the constitutional role of the Legislature as the policy making branch of government and to refrain from encroaching on that branch's constitutional responsibility.

Local Area Watch v City of Grand Rapids, 262 Mich App 136, 146, 683 NW2d 745, 751 (2004). (Emphasis added).

Because the matter before the Court was not brought under the OMA, there is no bass to require or allow disclosure of the closed session minutes. Therefore, Mr. Roebuck's motion for protective order to quash the subpoena should be granted.

Assuming the Court determines that it will review the closed meetings minutes in camera, under no circumstances should Plaintiff or Plaintiff's Counsel be permitted to review the closed meeting minutes. They are unquestionably members of the public and there is no basis to allow them to review the closed meeting minutes.

RELIEF REQUESTED

Justin Roebuck respectfully requests this Court grant his motion for protective order and quash the November 22, 2023 subpoena directed to him and relieve him from compliance with the subpoena.

Respectfully submitted,

DATED: November 27, 2023

PLUNKETT COONEY

BY: */s/ Michael S. Bogren*

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