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

ADELINE HAMBLEY,

Case No: 23-7180-CZ

Plaintiff,

Hon. Jenny McNeill
Sitting by SCAO Assignment

v.

OTTAWA COUNTY,
a Michigan County;
OTTAWA COUNTY BOARD OF COMMISSIONERS; and
JOE MOSS, **SYLVIA RHODEA**,
LUCY EBEL, **GRETCHEN COSBY**,
REBEKAH CURRAN, **ROGER BELKNAP**,
and **ALLISON MIEDEMA**,
Ottawa County Commissioners in their
individual and official capacities,

Defendants.

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' AND CLERK ROEBUCK'S MOTIONS TO QUASH SUBPOENAS

Plaintiff's Counsel served subpoenas on Justin Roebuck, the Ottawa County Clerk and Register of Deeds; Defendant Joe Moss; and three other members of the Ottawa County Board of Commissioners (the Board) who are not individually named defendants. Plaintiff seeks testimony and the November 6 Board closed session meeting minutes in support of her motion to enforce the settlement.

Clerk Roebuck retained separate counsel, who filed a motion to quash the subpoena. Defendants' counsel also filed a motion to quash on behalf of Defendant

Moss and Commissioners Zylstra, Bonnema, and Bergman.[1]

Defendants and Mr. Roebuck argue that the subpoenas should be quashed for several reasons, including that Plaintiff has not asserted a claim under the Open Meetings Act (OMA). OMA contains a provision which states:

> … These [closed session] 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 [OMA] section 10, 11 or 13. …

MCL 15.267(2) (emphasis added). As Plaintiff briefed in her Reply, this section does not broadly prohibit release of the closed session minutes to the Court *in camera*, just to "the public." (See Reply, at 9-11.)

However, today Plaintiff also filed a motion for leave to amend her complaint to add OMA claims for violations in the October 10 meeting and as to the November 6 vote directly at issue in Plaintiff's motion to enforce the settlement. So, while Plaintiff disputes that the plain language of OMA precludes this Court's review under these circumstances, that argument is no longer available in any event. All of

---

[1] Although defense counsel's motion was ostensibly filed on behalf of the three Commissioners who are not named defendants, those Commissioners seem to have indicated they may not be opposed to testifying about the events at issue. For instance, Commissioner Bonnema published a Facebook post describing the negotiations in detail. (Ex. 6 to Pl's Offer of Proof.) Commissioner Bonnema's description of the events directly contradicts the statements in Defendants' Motion to Quash and Defendants' Answer to Plaintiff's Motion to Enforce Settlement that the Board never made any offers. (Defs' Motion to Quash, at 5-6; Defs' Ans. to Pl's Motion to Enforce Settlement, at 3.) For example, Defendants' Answer states that "no settlement offers were made by Corporate Counsel" (Defs' Ans. at 3), while Commissioner Bonnema's Facebook post states that "4 MM was offered to Hambley by Kallman on behalf of the BOC to counter the $4.55MM offer from Hambley." (Ex. 6 to Pl's Offer of Proof.) Commissioner Zylstra confirmed Commissioner Bonnema's description of the negotiations, and he stated that he would testify as much when he took the witness stand under his subpoena.

the other arguments to evade testimony and review of the closed session meeting minutes should also be rejected by this Court, and the Court should schedule a short evidentiary hearing to take testimony from these witnesses and review the meeting minutes *in camera*.

1. Defendant Moss, the other Commissioners, and Clerk Roebuck received reasonable notice to appear at the hearing.

Defendants' counsel and the lawyer for Clerk Roebuck assert that the subpoenas should be quashed because they were not served sufficiently before the original hearing date. MCR 2.506(C)(1) requires that a subpoena be served sufficiently in advance of a hearing to give the witness "reasonable notice" of the date and time to appear. The rule further states that the subpoena must be served at least two days before the appearance, or at least 14 days if documents are requested, "[u]nless the court orders otherwise." MCR 2.506(C)(1). Thus, although the rule provides a guideline for what constitutes "reasonable notice" to a witness – i.e., 2 days for testimony and 14 days for documents – it recognizes that what is reasonable may vary depending on the circumstances and provides for the court to order a different time period.

The hearing on Plaintiff's motion was originally scheduled for Monday, November 27. With the holiday in mind, Plaintiff filed and served her motion on November 16, ahead of the 7-day deadline required by MCR 2.116(C)(1)(b). Defendants filed their response at 4:52 p.m. on Wednesday, November 22, just minutes before the Court closed for the four-day Thanksgiving weekend. At that point, Plaintiff became aware of the need to subpoena witnesses and documents.

Not only do the facts stated in Defendants' brief directly contradict what Plaintiff and her counsel observed on November 6, but they are also contrary to public statements made by Board members who attended the closed session meeting. (E.g., Exs. 6-8.) Moreover, Defendants' response included an affidavit from Defendant Moss in which he made allegations about what transpired in the closed session, thereby creating further issues of fact that the Court must resolve.

Once Plaintiff's counsel became aware of the need for evidence, she acted as quickly as possible to serve subpoenas. Plaintiff served Clerk Roebuck with a subpoena on the evening of November 22, just hours after receiving Defendants' brief. Plaintiff served defense counsel with subpoenas for the remaining witnesses on November 24, the day after Thanksgiving.

Now that the Court has adjourned the hearing, Clerk Roebuck and the other witnesses have received more than sufficient notice to appear for testimony. See MCR 2.507(C)(1). Even if Defendants would not otherwise have the full 14 days to produce documents suggested by the Court rule, which they likely will at this point, the Court may order the witnesses to comply. MCR 2.506 simply requires "reasonable notice," providing 14 days as a guideline when documents are requested. Although 14 days may be required for "reasonable notice" where documents are voluminous or otherwise difficult to produce, that is not the case here. The closed session minutes are not voluminous and easily accessible by Clerk Roebuck. They may also be in the possession of the other subpoenaed witnesses. Thus, Plaintiff requests that the Court order the subpoenaed witnesses to testify

and Clerk Roebuck to produce a copy of the closed session minutes at an evidentiary hearing that it schedules at the parties' legal argument on December 4.

2. Defendants cannot use the OMA as a shield to protect them from the consequences of their violations of that statute.

Defendants repeatedly argue that the Board could not have made offers or agreed to approve a settlement in closed session because that would be a "legal impossibility." (Defs' Br in Supp of Motion to Quash, at 5-6.) Defendants appear to confuse a "legal impossibility" with a violation of the law. The OMA does not provide that actions which violate its requirements are "legally impossible"; rather, it provides that such actions violate the statute and subject offenders to consequences. Nonetheless, relying on their flawed reasoning, Defendants arrive at the conclusion that "this Court's review of the closed session minutes would be meaningless because there are no 'decisions' within the closed meeting minutes to review." (*Id.* at 6.) In Defendants' view, the OMA is not a tool for members of public to ensure transparency and accountability, but rather a shield for public bodies to block prying eyes.

"[T]he purpose of the OMA is to promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern." *Kitchen v Ferndale City Council*, 253 Mich App 115 (2002), overruled on other grounds by *Speicher v Columbia Twp Bd of Trs*, 497 Mich 125, 133 (2014). Michigan courts have "historically interpreted the statute broadly, while strictly construing its exemptions and imposing on public bodies the burden of proving that

an exemption exists." *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 223 (1993).

The OMA requires public bodies to conduct meetings, make decisions, and engage in deliberations in meetings open to the public. *Speicher*, 497 Mich at 134-135; see also MCL 15.263. The statute does, however, allow a public body to meet in closed session for certain enumerated purposes, including to "consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body." MCL 15.268(e). That exception to the requirement for open meetings exists so that a public body may "prepare for litigation without having to broadcast its trial or settlement strategy to the opposition with the rest of the general public." *Manning v East Tawas*, 234 Mich App 244, 251 (1999), overruled on other grounds by *Speicher*, 497 Mich 125. Nonetheless, courts construe the exception narrowly. *Id.* Such narrow construction recognizes the fact that "it is implicit in the purpose of 'sunshine laws' such as the OMA that there is real and imminent danger of irreparable injury when governmental bodies act in secret." *Detroit News, Inc v Detroit*, 185 Mich App 296, 301 (1990).

Although a public body may consult with its attorney in closed session, "all decisions of a public body" must be "made at a meeting open to the public." MCL 15.263(2). A "decision" is defined as a "determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill or

measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy." MCL 15.262(d).

At the beginning of the November 6 meeting, Defendant Moss moved to go into closed session to discuss pending litigation in the instant case. The motion passed unanimously, and the Board stayed in closed session for most of the remainder of the entire day. As the day was concluding, the parties reached an agreement to settle the case, as described in Plaintiff's previous briefing.

At that point, the Board returned to open session and voted 7-3 on Defendant Moss's motion to "accept Counsel's recommendation regarding litigation and settlement activities in the case of Hambley v. Ottawa County as addressed during closed session." There was no deliberation or further discussion on the motion. An observer of the meeting would have no insight into what the Board was deciding. By cloaking the decision in the language of "counsel's recommendation" and providing the public with no information about the recommendation, the Board violated the OMA's requirement that any decision take place in an open meeting.

The Court of Appeals addressed a similar situation in *Andrich v. Delta Coll Bd of Trs*, No. 337711, 2018 Mich App LEXIS 2574 (Ct App June 5, 2018). In that case, the plaintiff challenged a public body's practice of going into closed session with its counsel to discuss pending litigation before "returning to an open session to pass a motion to accept its counsel's recommendation, without any indication regarding to what that recommendation pertained." *Id.* at *1. During the litigation, it became clear that the defendants had discussed settlement strategy

during the closed session meetings, and that the decisions during open meeting were to allow its counsel to proceed with the strategy discussed. *Id.* at *14. The court noted, however, that the minutes of the open session "provide no indication of such a decision, reflecting only the acceptance of counsel's unknown recommendations." *Id.* The court explained that the defendant should tell the public what it was deciding, and that it could do so without discussing the details of its strategy. *Id.* at *15. For example, the court explained that the defendant could "inform the public that it has decided to authorize its counsel to settle a specific case within certain parameters, without disclosing what those parameters are." *Id.* at *14. The court ultimately held that the defendant's actions did not comply with the OMA. *Id.*

The practice of the Board here almost entirely mirrors that employed by the defendants in *Andrich*, 2018 Mich App LEXIS 2574. The Board went into closed session to discuss settlement and spent the day consulting with counsel and exchanging settlement offers with Plaintiff and her lawyer. At the conclusion of the day, the Board went back into open session, ostensibly to make a decision. However, by approving the motion, the Board provided the public with no information about their decision. Instead, they employed the same practice rejected by the Court of Appeals in *Andrich*; they simply stated that they were accepting counsel's recommendation. That action violated Section 3 of the OMA because it did not amount to a decision in an open meeting, since the public had no way to determine

what the Board had decided. Plaintiff's proposed Second Amended Complaint seeks to add her claim for this OMA violation pursuant to Section 11 of OMA.

Plaintiff asserts that Defendants were voting to approve the terms of a settlement. In that case, *Andrich* makes clear that Defendants should have informed the public that it was voting on the terms of a settlement with Plaintiff. However, even if Defendants were merely voting to continue settlement negotiations as Defendants suggest (and Plaintiff vigorously disputes), that was a decision that should have been made in an open meeting under the OMA. The fact remains that the Board provided the public with absolutely no insight into what it was deciding. The underlying principle articulated by the court in *Andrich* is that a public body cannot evade the OMA's requirement that decisions be made at an open meeting by failing to describe the decision at hand or describing it only as "Counsel's recommendation." Even if the Board were simply voting to continue negotiations, the OMA required that they make that clear to the public.

As the Court of Appeals has explained, "an OMA action challenging a closed-door session places the plaintiff at a distinct disadvantage in garnering factual support for its claim." *Detroit News*, 185 Mich App at 301. That disadvantage could not be more apparent in this case. Through their efforts to maintain secrecy from the public, Defendants created a lack of clarity about the decision they made on November 6. The OMA required the Board to state the purpose of their vote when they returned to open session. The Board attempted to evade that requirement by informing the public only that they were voting on "counsel's

recommendation." Now they seek to hide behind their own OMA violation, arguing that Plaintiff and the Court must simply accept their word for what happened in closed session, and that review of the minutes "would be meaningless." Because of their OMA violation, however, it is impossible to assess what the Board was voting on without access to the minutes and testimony of members of the Board.

Based on everything that occurred before the vote on November 6, Plaintiff believed that the Board was voting to ratify the settlement reached by the parties. Defendants now deny that, urging the Court to take their word that what transpired in closed session would demonstrate that the Board was simply voting to continue negotiations. There is simply no reason for the Court to accept Defendants at their word when there are minutes and testimony that could shed light on the decision made by the Board.

Defendants attempted to keep the public in the dark about their activities when they voted to accept "Counsel's recommendation" without providing any further details as to what that meant. Now they seek to hide behind their OMA violation by preventing the public and this Court from learning about any discussions that would illuminate the purpose of that vote. The only way to make the public aware of what Defendants decided is to disclose the closed session minutes and hear testimony from those attending the closed session meeting.

3. The Court can and must view the closed session minutes *in camera* to determine which parts should be disclosed.

The Court may view the minutes of the closed session immediately, and need not wait until Plaintiff's OMA claim has proceeded further. The Court can view the

closed session minutes *in camera* to determine whether all or part of the minutes should be publicly disclosed. See e.g., *Manning*, 234 Mich App at 248.

In *Manning*, the plaintiff sought the minutes of a closed session meeting, asserting claims under both the OMA and FOIA. *Manning*, 234 Mich App at 247 (1999). The trial court reviewed the minutes of the closed session *in camera*, and subsequently ordered the disclosure of a redacted version of the minutes that concealed what was appropriately discussed in closed session. *Id.* The Court of Appeals affirmed the trial court's decision on the merits. *Id.* at 654. As Manning demonstrates, a court can review minutes *in camera* in order to make a decision about disclosure to the public.

Plaintiff acknowledges that possibility that some of what transpired in closed session comports with the OMA's requirements. What does not comply with the OMA, however, is the Board's final decision, which they voted on in open meeting without description. Plaintiff urges the Court to review the minutes *in camera* and disclose those portions that reveal the decision made by the Board in open meeting.

4. Defendants have waived attorney-client privilege at least as to the substance of their decision on November 6.

Defendants also argue that any look inside the closed session would violate the attorney-client privilege. However, Defendants put their attorney's advice at direct issue when they voted in open session to accept the recommendation of counsel without providing the public any insight into the substance of that recommendation. Under the OMA, the public is entitled to know about the substance of the Board's decision. Defendants cannot evade the OMA's

requirements that decisions be made in an open meeting by cloaking those decisions in advice of counsel. (See Plaintiff's Reply, at 7-9.)

Defendants again puts their counsel's advice squarely at issue in responding to Plaintiffs' motion. Not only did Defendant Moss provide an affidavit regarding Counsel's advice, but Defendants argue that the November 6 vote was "simply what it stated – to continue the litigation and settlement activities and discussions to try and reach an agreement." (Defs' Response Br. at 5.) As discussed at length, however, that was **not** what the vote "stated." The vote stated that it was accepting Counsel's recommendation. Thus, Defendants' Counsel asserts by implication that its recommendation was to continue settlement activities and discussions to try to reach agreement.

As discussed in Plaintiff's Reply to the Motion, Defendants cannot claim the privilege after putting Counsel's advice squarely at issue. See *Rhone-Poulenc Rorer v Home Indem Co*, 32 F.3d 851, 863 (3d Cir. 1994) ("[B]y placing the advice in issue, the client has opened to examination facts relating to that advice."). Defendants attempt to "use the privilege as a shield and a sword," which they cannot do. *In re United Shore Fin Servs, LLC*, No. 17-2290, 2018 U.S. App. LEXIS 138, at *3-4 (6th Cir Jan. 3, 2018). Defendants repeatedly make assertions about the substance of the Board's vote which were not contained in the Board's simple statement that it was accepting the advice of counsel. As such, Defendants have at minimum waived privilege as to the issue of the recommendation that they voted to accept on November 6.

5. Defendants' failure to describe its decision at an open meeting, in violation of the OMA, necessitates the closed session minutes and testimony.

Defendants' argument that the closed session minutes and related testimony are inadmissible is based on a fundamental mischaracterization of the parol evidence rule. "The parol evidence rule may be summarized as follows: parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *UAW-GM Human Res Ctr v KSL Rec Corp*, 228 Mich App 486, 492 (1998) (internal quotation omitted). Plaintiff does not seek to vary the terms of the written contract – the emails between the parties directly preceding the November 6 votes contain clear and unambiguous terms, and Plaintiff does not seek to alter those terms.

Defendants argue that "[a]ll that matters is what the [Board] voted to do on November 6, 2023, as recorded in their vote to continue 'litigation and settlement activities.'" (Defs' Br. in Support of Motion to Quash, at 7.) Contrary to Defendants' assertion, however, the Board did not vote to "continue" litigation and settlement activities – the motion was not that detailed. They voted to "accept Counsel's recommendation regarding litigation and settlement activities." Such disagreements make clear the consequences of the Board's failure to state the substance of their decision. Because Defendant Moss's motion contained no detail and there was no further discussion, the public was left to wonder what the Board decided. Plaintiff seeks the closed session minutes and related testimony to remedy

the Board's failure and make its decision clear, and not to vary the terms of the agreement. Accordingly, the parol evidence rule has no application to the issue before the Court.

Conclusion

For the reasons discussed, Plaintiff requests that the Court deny the motions to quash subpoenas and order Clerk Roebuck and all of the subpoenaed Commissioners to appear for testimony and produce the closed session minutes if in their possession.

PINSKY SMITH, PC
Attorneys for Plaintiff Adeline Hambley

Dated: November 29, 2023 By: /s/ Sarah R. Howard

Sarah Riley Howard (P58531)
Elizabeth L. Geary (P76090)
146 Monroe Center St NW, Suite 418
Grand Rapids, MI 49503
(616) 451-8496
showard@pinskysmith.com