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

DANIEL ZIMMER,

Plaintiff,

Case No: 2024-8070-CZ
Scott A. Noto – By Assignment

OTTAWA COUNTY and
OTTAWA COUNTY BOARD OF
COMMISSIONERS,

Defendants

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO QUASH SUBPOENA FOR DEPOSITION DUCES TECUM OF JUSTIN ROEBUCK ON MAY 8, 2025

I. Procedural Background

The Ottawa County Board of Commissioners entered into closed session on December 10, 2024, pursuant to the Michigan Open Meetings Act, MCL 15.261 et seq. The Board entered into closed session pursuant to MCL 15.268(1)(a) to discuss two employees' potential dismissal at their request. Four months later Plaintiff filed this lawsuit alleging that the Board of Commissioners violated the Open Meetings Act by going into closed session.

The Plaintiff issued a subpoena to the Ottawa County Clerk, Justin Roebuck, on April 24, 2025, seeking the "Closed session minutes and recordings from the Ottawa County Board

of Commissioners meeting on December 10, 2024." (**Exhibit 1,** April 24, 2025, Subpoena). Plaintiff has issued this subpoena to the County's Clerk seeking information protected under the Open Meetings Act despite lacking any standing to do so.

MCR 2.506(H)(5) states that any party may move to quash a subpoena under MCR 2.302(C), and MCR 2.305(A)(4)(a) states that a party may move to quash a subpoena to a non-party if it is unreasonable or oppressive. This subpoena should be quashed and the Clerk, Justin Roebuck, should not be forced to comply with a subpoena that is untimely, has no legal justification, and seeks to coerce an illegal act.

II. Plaintiff's Subpoena of April 24, 2025, lacks a Legal Basis and Seeks to Coerce an Illegal Act

a. The Subpoena does not comport with Michigan Law

Michigan has long espoused a liberal discovery policy that permits the discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case. MCR 2.302(B)(1); *Reed Dairy Farm v. Consumers Power Co.*, 227 Mich. App. 614, 616, 576 N.W.2d 709 (1998). However, the court rules also ensure that discovery requests are fair and legitimate by providing that discovery may be circumscribed to prevent excessive, abusive, irrelevant, or unduly burdensome requests. MCR 2.302(C); *Cabrera v. Ekema*, 265 Mich. App. 402, 407, 695 N.W.2d 78 (2005); *In re Hammond Estate*, 215 Mich. App. 379, 386, 547 N.W.2d 36 (1996). Plaintiff has brought a claim under the OMA but is wholly ignoring the statutory requirements concerning closed session minutes in this subpoena to the Defendant County's clerk.

Although a public body may meet in closed session, MCL 15.267(1), a closed session may be held only for limited purposes, including discussion of the discipline or dismissal of

a public employee, but only if the employee requests a closed hearing. MCL 15.268(1)(a). That is precisely what happened in this case. However, if a public body fails to comply with the requirements of the Open Meetings Act, a private litigant may seek relief by filing an action in the circuit court to invalidate a decision of a public body, MCL 15.270(1), to compel compliance or enjoin future noncompliance with the act, MCL 15.271, and to seek damages against a public official who intentionally violates the act. MCL 15.273. Under MCL 15.270(3)(a), an action seeking to invalidate a decision of a public body for violation of the OMA must filed within 60 days after the approved minutes of the meeting are made available to the public by the public body. That statutory section provides:

> (3) The circuit court shall not have jurisdiction to invalidate a decision of a public body for a violation of this act unless an action is commenced pursuant to this section within the following specified period of time:
> (a) Within 60 days after the approved minutes are made available to the public by the public body ....

Green v. Pontiac Pub. Libr., No. 363459, 2024 WL 994950, at *3–4 (Mich. Ct. App. Mar. 7, 2024), appeal denied, 10 N.W.3d 271 (Mich. 2024) citing MCL 15.270(3)(a).

Importantly, there are specific directions to municipalities such as Ottawa County when it comes to the minutes referenced above:

> 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.

M.C.L. § 15.267(2) (emphasis added).

The Michigan Courts have considered this language before, and their holding was clear: the "only viable way to interpret the pertinent statutory language is minutes of closed sessions are exempt from disclosure to the public under the OMA unless a civil suit filed

under the OMA itself *results in a judgment requiring disclosure*." *Loc. Area Watch v City of Grand Rapids*, 262 Mich App 136, 146, 683 NW2d 745, 751 (2004)(emphasis added). The *Area Watch* ruling dictates that it is not simply the filing of a complaint under OMA that triggers a disclosure requirement, but instead a *judgment* must be issued requiring the disclosure of the protected minutes. Plaintiff's subpoena is based on nothing more than the existence of the lawsuit he filed. If the filing of a lawsuit were all it took to invade the closed session privilege, there would be no purpose to Freedom of Information Act requests, or indeed any point to obtain a judgment under the statute. That OMA explicitly requires that the minutes of a closed session may be disclosed only upon entry of a judgment finding the challenged meeting improper under Sections 10, 11 or 13 of the Act – not that all closed session minutes are required to be handed over any time a suit is filed challenging the meeting. MCL 15.271(1).

MCL 15.267(1) provides that "the purpose or purposes for calling the closed session shall be entered into the minutes of the meeting at which the vote is taken." See also MCL 15.269(1) ("Each public body shall keep minutes of each meeting showing ... the purpose or purposes for which a closed session is held."). The County Board of Commissioners explained their reasoning for entering into closed session in the minutes:

> Gretchen Cosby moved to go into closed session at 11:26 a.m. pursuant to MCL 15.268(1)(a) to consider the dismissal, suspension, or discipling of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of, a public officer, employee, staff member, or individual agent, as requested by Senior Executive Aide Jordan Epperson (require 2/3 vote).
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> . . .
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> Gretchen Cosby moved to go into closed session at 1:00 p.m. pursuant to MCL 15.268(1)(a) to consider the dismissal, suspension, or discipling of, or to hear complaints or charges brought against, or to consider a periodic

> personnel evaluation of, a public officer, employee, staff member, or individual agent, as requested by Interim Administrator Benjamin R. Wetmore (require 2/3 vote).

Exhibit 2, Ottawa County Board of Commissioners Meeting Minutes of 12/10/2024. The Defendant Board clearly stated in its meeting minutes that its purpose in entering the closed session was to "consider material exempt from discussion or disclosure by state or federal statute." *Mr Sunshine v Delta College Bd of Trustees*, 343 Mich App 597, 604; 997 NW2d 755 (2022). In *Mr Sunshine,* the plaintiff argued that a description that repeated the statutory language from the OMA was insufficient because it was a "mere recitation." *Id*. at 610-611. This Court rejected the plaintiff's argument because the description went beyond the OMA's statutory language by indicating that the purpose was to discuss the employment status of two employees at their own request. *Id*. at 611. Likewise, here, Defendant's stated purpose for the closed session did not simply recite the OMA's statutory language, which provides that a public body may enter into a closed session "[t]o consider material exempt from discussion or disclosure by state or federal statute." MCL 15.268(1)(h).

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, asserting 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), plaintiff initiated a lawsuit against 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 nine separate occasions over an 18-month span. 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.

All these cases ultimately found that the stated purposes given by the municipalities for the closed session was valid, and did not require the disclosure of the closed session minutes absent a court's judgment to do so. If the Court determines that it should review the closed meeting minutes *in camera*, under no circumstances should Plaintiff or his counsel be permitted to review these minutes. Both plaintiff and his attorney are unquestionably members of the public, and there is no basis to allow them to review the closed meeting minutes at this stage of the litigation. This case is no different than those referenced above, and the subpoena should be quashed.

b. Plaintiff's Subpoena seeks to Coerce an Illegal Act

As explained above, the closed session minutes from the Ottawa County Board of Commissioners meeting on December 10, 2024, are prohibited by statute from disclosure.

Despite this, Plaintiff is seeking to coerce the Ottawa County Clerk to violate the statute and invite both civil and criminal sanctions. 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 his act." For the criminal aspect, 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 subpoena issued to Mr. Roebuck directing him to produce the minutes from the closed session of the Ottawa County Board of Commissioners on December 10, 2024, is directing him to perform an illegal act. This Court should not countenance such attempts on the part of Plaintiff and should quash the subpoena.

Relief Requested

The Defendants, Ottawa County and the Ottawa County Board of Commissioners, and Ottawa County Clerk Justin Roebuck respectfully request this Court quash the Plaintiff's Subpoena to Ottawa County Clerk Justin Roebuck of April 27, 2025, and relieve him from compliance with the terms stated therein.

Respectfully submitted,

DATED: May 5, 2025

PLUNKETT COONEY

BY: */s/ Michael S, Bogren*

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