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

DANIEL ZIMMER

Plaintiff,

v.

OTTAWA COUNTY and
OTTAWA COUNTY BOARD OF COMMISSIONERS,

Defendants.

Case No: 24-8070-CZ

Hon. Scott A. Noto

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO QUASH SUBPOENA FOR DEPOSITION DUCES TECUM OF JUSTIN ROEBUCK

Plaintiff, Daniel Zimmer, asserts that Defendants, Ottawa County ("the County") and the Ottawa County Board of Commissioners ("the Commission"), violated the Open Meetings Act (OMA) by engaging in prohibited closed-session deliberations. Plaintiff now seeks the best evidence of what occurred during that closed session meeting – a copy of the Board's recording and minutes kept by County Clerk Justin Roebuck. Defendants object, asserting that Plaintiff must accept their statement of what occurred during the closed session meeting. This is contrary to OMA. Plaintiff urges the Court to reject Defendants' request to quash the subpoena and instead enter a protective order shielding the recordings and minutes from public view pending a decision from this Court on the merits of Plaintiff's OMA claim.

BACKGROUND

I. The OMA Framework

The OMA requires that "[a]ll decisions of a public body must be made at a meeting open to the public." MCL 15.263(2). With limited exceptions, "[a]ll deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public." MCL 15.263(3). A public body's decision may be invalidated if the body did not make the decision at a public meeting or if the public body engaged in deliberations outside a public meeting. MCL 15.270(2). If there is an action to invalidate a decision of a public body, the public body may "reenact the disputed decision in conformity with [the OMA]." MCL 15.270(5).

The OMA specifically enumerates exceptions under which a public body may deliberate in a closed session. MCL 15.268. One such circumstance is to:

> consider the dismissal, suspension, or disciplining 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, if the named individual requests a closed hearing.

MCL 15.268(1)(a).

II. The Commission's Closed Session Meetings at Issue Here

On December 10, 2024, the Commission met for a regular meeting. The Commission voted to go into closed session to discuss the employment of Senior Executive Aide Jordan Epperson and Interim County Administrator Benjamin Wetmore. The motions to go into closed session each parroted the statute that they were made pursuant to MCL 15.268(1)(a) "to consider the dismissal, suspension, or disciplining 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" each of the employees. However, all available evidence is that the stated reasons for going into closed session were not the actual reasons, which would be an OMA violation if proved.

Epperson and Wetmore began working for the County in 2023, when they were each hired by former County Administrator John Gibbs. Both Epperson and Wetmore were supported by Commissioners affiliated with Ottawa Impact ("OI"), a far-right Political Action Committee that the Commission's Chairperson, Joe Moss, founded and continues to lead.[1] Candidates who ran for the Commission under the OI label won a majority of seats in the November 2022 election and held a 6-vote majority on the 11-member Commission (the "OI-affiliated Commissioners") in 2024. However, OI-affiliated Commissioners lost a majority of seats on the Commission in the November 2024 election. Only four OI-affiliated Commissioners were re-elected to the Commission for terms beginning in January 2025, which put them in a minority voting bloc for the 2025-2026 term.

Although the Commission cited MCL 15.268(1)(a) in its motion to go into closed session, the Commission was not actually considering the dismissal, suspension, or discipline of either Epperson or Wetmore, and there were no pending complaints or charges against either of them. Furthermore, it was not the time for their periodic personnel evaluations, nor had such an evaluation been completed for

[1] Moss was the Chairperson for the Commission for the 2023-2024 term. Moss was not elected Chairperson when the new Commission took office in 2025, but Plaintiff will refer to him as Chairperson to reflect his status during the events at issue.

any reason. Nonetheless, the Commission deliberated in closed session and then returned to open session to authorize a separation agreement for each employee. There was no public discussion about either agreement, and the Commission did not disclose any details about the terms of the agreements.

The terms of the agreements did not become public until they were disclosed by a local news reporter pursuant to a Freedom of Information Act (FOIA) request. The County agreed to make total payments under both agreements of more than $280,000, not including the cost of providing health insurance to Epperson in his agreement. The County also had to pay those amounts in a lump sum by December 17, 2024, even though Epperson and Wetmore were to work until January 1, 2025.

Moss made a public statement after the Commission meeting that the Commission approved the severance agreements "[t]o help facilitate a smooth transition," and that "[i]f anyone—including the press, tries to malign [Epperson and Wetmore] or say they were fired, that is completely false." Moss went on to state that Epperson and Wetmore "are valued employees who will continue to serve the county through the end of the year." Moss's statements confirm that the purpose of the closed session was not to discuss dismissal or discipline of Epperson and Wetmore, nor for any other permitted purposes under the OMA. Other commissioners also confirmed in public statements that the Commission never discussed the dismissal of Epperson and Wetmore during the closed session.

After the meeting, Commissioner Bonnema made public statements that Chairperson Moss had lobbied other Commissioners for an extravagant severance,

allegedly to avoid what Moss claimed was a potential lawsuit that could leave the County liable for "millions" of dollars. Moss indicated that the County's employment counsel – Nathaniel Wolf of the Mika Meyers law firm – had provided the legal advice that Epperson and Wetmore had potentially valuable liability claims against the County. Upon information and belief, Chairperson Moss's statements were false, and the County's employment attorney never made such statements. Moreover, there was no valid reason to go into closed session to discuss potential claims by Epperson and Wetmore. Although a public body may go into closed session to consult with its attorney regarding specific *pending* litigation, MCL 15.268(e), there is no exception to the general requirement that deliberations take place in open session for *potential* litigation.

On December 16, 2024, Plaintiff filed his original complaint in this suit seeking invalidation of the Wetmore and Epperson severance agreements due to OMA violations. At the Commission's next meeting on December 19, 2024, Chairperson Moss urged the Commission to reenact the decisions on the Epperson and Wetmore severance agreements. During the discussion of the severance agreements, Commissioner Bonnema tried to raise the statements that Moss and others made during the previous closed-session deliberations. Chairperson Moss admonished Commissioner Bonnema for discussing the closed-session deliberations. Upon Chairman Moss's request, Corporation Counsel advised Commissioner Bonnema that he could not discuss any of the closed-session deliberations publicly. Chairman Moss ended discussion about the severance agreements, while conceding

that there had been "a lot of discussions" about the agreements in closed session of the prior meeting. Moss directed the Commissioners to vote on whether to approve the severance agreements "based on everything that the Board has already had discussions on[,]" presumably referring to the deliberations in closed session.

The Commission voted to approve the severance agreements by a vote of 6-5, with three Commissioners changing their vote from the previous meeting. The Commissioners did not state why they had changed their vote, presumably because Corporation Counsel had previously advised that they could not reveal closed-session deliberations through discussion in the public meeting. The Commission has never agreed to release the closed session minutes and/or the recording of the closed session. Moreover, Moss and Corporation Counsel instructed members of the Commission that they may not discuss the closed-session deliberations.

On March 7, 2024, Plaintiff filed an amended complaint alleging that the OMA violation had not been cured by the Commission's purported reenactment of the Epperson and Wetmore severance agreements.[2] On April 24, 2025, Plaintiff served a subpoena on Ottawa County Clerk Justin Roebuck seeking recordings and minutes of the closed session meeting held on December 10, 2024. Plaintiff's counsel also offered to enter into a protective order to prevent public release of the discovery

[2] The votes on December 19, 2025, did not serve as a proper, lawful reenactment of decisions made at the previous meeting's closed session. MCL 15.270(5) requires a public body to reenact a disputed decision in conformity with the OMA. The December 19, 2024, decision to approve the severance agreements without deliberations in open session or release of the closed session minutes was not made in conformity with the OMA, particularly when Corporation Counsel shut down any discussion.

she sought. Defendants have moved to quash the subpoena, and not responded to the offer for protective order.

LEGAL STANDARD

A represented party may issue a subpoena to a non-party for production or inspection of documents, as well as inspection of tangible things. MCR 2.305(A)(1). Upon a motion from a party or the subpoenaed non-party, a court may quash or modify the subpoena only if it is unreasonable or oppressive. MCR 2.305(A)(4). A court may also enter a protective order under MCR 2.302(C) to protect a person from annoyance, embarrassment, oppression, or undue burden or expense. "The movant must demonstrate good cause for the issuance of a protective order." *Arabo v Mich Gaming Control Bd*, 310 Mich App 370, 398 (2015). A protective order entered under MCR 2.302(C) may, among other things, authorize parties to file materials under seal. *See* MCR 2.302(C); MCR 8.119(I)(8).

ARGUMENT

Defendants assert that the closed session minutes are exempt from disclosure absent a judgment that there was an OMA violation, and that the subpoena seeks to coerce Clerk Roebuck to perform an "illegal act." Defendants misconstrue the language of the OMA, which provides merely that closed session minutes are not available ***to the public*** unless required by the court in an OMA action. Plaintiff is not seeking a public disclosure of the closed session minutes through his subpoena at this stage, and thus the prohibition in the OMA is not implicated.

Defendants rely on the following single sentence from the OMA about the

keeping of closed session minutes: "… 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). This provision of the OMA only refers to disclosure of closed session meeting minutes **to the public**. It does not address the recording of the meeting at all. This OMA section also does not require keeping closed session meeting minutes from a party in litigation upon a valid discovery request or subpoena, even if the OMA prevents **public** disclosure of the minutes. It would be absurd to do so, since no plaintiff could prove an OMA violation from a closed session act if no one but the defendant public body could review the minutes and meeting recording.

It is telling that the primary authority relied upon by Defendants is based on FOIA rather than the OMA. *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 143; 683 NW2d 745 (2004). In *Local Area Watch*, the plaintiff filed a claim for violation of FOIA after his request for closed session minutes was denied. *Id.* at 140. The complaint did not include an OMA claim. The court concluded that closed session minutes are exempt from disclosure *to the public* – the exact kind of disclosure FOIA requires – unless there is a civil suit under the OMA that requires disclosure. *Id.* at 146. Because the court had no authority to determine whether there was a violation of the OMA in the absence of an OMA claim, it could not order disclosure of the closed session minutes. *Id.*

The court's analysis in *Local Area Watch*, 262 Mich App 136, has no bearing

on this case since this **is**, in fact, an OMA case. The court was clear that its analysis was dependent upon the fact that the plaintiff's suit was based on FOIA and did not include an OMA claim. The stated purpose of FOIA is "to provide for public access to certain public records of public bodies[.]" Pub. Act 442 of 1976. Because closed session minutes "are not available to the public," MCL 15.267(2), they are not subject to the public access that FOIA requires. Plaintiff does not dispute that Clerk Roebuck could legitimately deny a FOIA request seeking the closed session recording and minutes. However, Plaintiff seeks the materials as a legitimate part of discovery in pursuing a claim under the OMA.

Defendants' argument that closed session minutes are shielded from review by the Commission's recitation of the statutory language in open session is similarly unavailing. Defendants argue, in effect, that so long as a public body cites the correct statutory language in entering closed session, the substance of the closed session deliberations does not matter. If that argument were taken to its logical conclusion, a public body could shield from public view any deliberations over controversial matters—such as their own salaries or tax increases—so long as it cited one of the exceptions in the OMA before entering closed session, no matter what was actually discussed. Defendants' interpretation of the OMA would negate its entire purpose to promote transparency in government.

The opinion in *Mr. Sunshine v Delta College Bd of Trs*, 343 Mich App 597; 997 NW2d 755 (2022), does not support Defendants' argument either. In that case, the plaintiff argued that a public body failed to satisfy the OMA's *procedural*

requirements before entering closed session. *Id.* at 609. Plaintiff's argument, in contrast, is not about the procedure by which the Commission entered closed session – it is about the substance of what occurred once the Commission was behind closed doors. The Commissioners' own public statements admit that the closed session deliberations did not conform to the purpose stated by the Commission before entering closed session. The surrounding facts as alleged in the complaint also belie what was claimed in the motion to go into closed session. The Commissioners did not discuss dismissal or suspension of Epperson and Wetmore, as Chairman Moss's own statements made clear. Rather, the Commissioners deliberated about potential claims and generous severance agreements – subjects that are not exempted from the OMA's general rule requiring public deliberations.

As Defendants' own cited cases recognize, closed session minutes are not shielded from view just because a public body cited a valid reason for entering into closed session. *See Manning v City of East Tawas*, 234 Mich App 244, 253-54; 593 NW2d 649 (1999). In *Manning*, the Court ordered that a portion of the closed session minutes be disclosed because "not all of the subject matter of the closed session came under the cited statutory ground for closing the session." *Id.* As that court recognized, a public body's recitation of the statutory language is not sufficient to assume that the body complied with the OMA. Rather, the closed session minutes must be reviewed to determine whether the public body actually confined its discussions to the cited subject matter. If a public body discussed matters that are not within the narrow range of subjects for which the OMA allows deliberations

outside of public view, the minutes of a closed session are not shielded from view.

Although the minutes of a closed session may not be disclosed "to the public" except as required by an OMA action, MCL 15.267(2), they may be provided to certain individuals even without an OMA violation. For example, the Attorney General has concluded that a clerk may release the closed session minutes to a member of the public body even in the absence of an OMA case. Mich Op Atty Gen No 7061 (8/31/2000). The statement that the notes "shall only be disclosed" makes sense only as a modifier to the previous phrase of "the public," or else the clerk could not even release them to a member of the public body who wanted to refer to them. Thus, a clerk would only be committing an illegal act, as Defendants assert, if he were to disclose the closed session recording and minutes *to the public* without a court order.

The OMA should be broadly construed to "promote openness in government." *Wexford County Prosecutor v Pranger*, 83 Mich App 197, 204 (1978). Thus, 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 Mich Bd of Regents*, 444 Mich 211, 223; 507 NW2d 422 (1993). In particular, "[a] strict construction must be given to closed-door exceptions in order to limit the situations in which meetings are not opened to the public." *Detroit News, Inc v Detroit*, 185 Mich App 296, 302, 460 NW2d 312 (1990). Plaintiff has alleged that Defendants violated the OMA by asserting one of the narrow closed-door exceptions while actually engaging in

deliberations that the OMA requires be conducted in view of the public. Defendants cannot be allowed to prevent Plaintiff from making out his claim by denying him access to the only records that would prove it.

CONCLUSION

Plaintiff requests that the Court deny Defendants' request to quash the subpoena. Plaintiff urges the Court to instead enter a protective order that prohibits *public disclosure* of the closed-session meeting recordings and minutes (while allowing their review by Plaintiff and his counsel) until there is a further order of this Court on the merits of Plaintiff's claim.

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