Case Number: PC-2017-3856
Filed in Providence/Bristol County Superior Court
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Envelope: 1294486
Reviewer: Alexa G.

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND, INC.	:	
vs.	:	C.A. No: PC-2017-3856
ST. JOSEPHS HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, as amended	:	

RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION TO OVERRULE THE R.I. ATTORNEY GENERAL'S PARTIAL OBJECTION TO SUBPOENA AND COMPEL COMPLIANCE WITH SUBPOENA DUCES TECUM

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November 17, 2017

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INTRODUCTION

As the Court well knows, in August of 2017 St. Joseph Health Services of Rhode Island announced that its pension plan was insolvent and proposed an immediate 40% reduction in pension benefits, which would impose significant hardship on virtually all of the 2,700 hard-working present and retired nurses and other hospital employees. The Receiver's recommendation to the Court whether or not to reduce benefits, and if so to what extent, is currently anticipated in February of 2018. To attempt to mitigate any economic loss to come, the Court has authorized the Receiver to engage counsel to investigate possible claims against third parties which may produce funds for the retirees or even accomplish the takeover of the plan by a solvent third party, and has authorized the issuance of subpoenas to aid that investigation. Of course, no recovery will make the pension plan participants whole for the anguish and uncertainty they have experienced and will continue to experience at least until this matter is fully resolved, if not for the rest of their lives.

Pursuant to that authorization, the Receiver on November 3, 2017 subpoenaed the Attorney General's documents concerning the two hospital conversion reviews conducted by the Attorney General that involve the entities who sponsored and administered the pension plan. That information may well prove helpful to the Receiver and the Court when the decision whether to cut benefits is made in February. Given the hardships of this case, and because the documents are already organized and aggregated since the Attorney General undoubtedly has them organized in files, the Receiver sought production by November 17, 2017. Undoubtedly the Attorney General knew the subpoena was coming for months, based on his own statements to the press

beginning in August, defending his handling of the pension liabilities and his statements that he was carefully "monitoring" this Receivership!

Rather than comply with this deadline, or even begin to comply by the scheduled date, the response of the Attorney General is to object to any production before February 15, 2018, over three and a half months after he received the subpoena! That dilatory response in the circumstances of this case is callous beyond belief.

In addition to this unconscionable request for delay, the Attorney General asks that it be relieved of producing documents that are allegedly publically available on the Attorney General's website or on file in the office of the Clerk of the Superior Court. That request is improper for at least three reasons discussed below: 1) it puts the onus on the Receiver to attempt to replicate the Attorney General's files, rather than on the Attorney General to produce them; 2) there is no hardship for the Attorney General to produce these documents; and 3) neither source is a substitute for the Attorney General's producing his actual files in response to subpoena.

The Attorney General also refuses to produce documents that were designated as "confidential" in connection with the hospital conversion act cases, unless the Receiver obtains waivers of confidentiality from the hospital entities involved in those cases. However, the fact that such records were designated "confidential" is irrelevant. Even the Attorney General admits they are not privileged from production in response to subpoena. Therefore, they must be produced unless those parties who designated them as confidential timely obtain a protective order. No protective order has even been requested by those parties. It is totally improper for the Attorney General to evade his responsibility to produce the documents by attempting to place the burden on the Receiver to obtain a waiver of confidentiality.

Finally, the Attorney General refuses to produce documents it contends are privileged, either under the deliberative process privilege or the work product privilege. However, the Attorney General does not identify the specific documents it seeks to shield. As the Attorney General or any other lawyer well knows, claims of privilege must be made document by document, through a privilege log that provides sufficient information for the Court to determine the claim of privilege.

ARGUMENT

I. The Time Limit is Appropriate for at Least Substantial Compliance with the Subpoena

A. The subpoena should have been anticipated

This Receivership action was instituted in August 2017. On August 24, 2017 the Attorney General issued a press release attempting to deflect responsibility for the pension insolvency, stating that the Hospital Conversion Act "neither gives the Attorney General nor the Department of Health the authority to oversee or manage private pension funds associated with the healthcare system."[1] However, the press release further stated that "[w]hile the Attorney General's Office is not directly or indirectly involved with the management of the pension fund, we have engaged with counsel for the Petitioner and the Court-appointed receiver, and will be closely monitoring the legal process, and assessing where we have legal standing to intervene."[2] Finally, the Attorney General used the press release to "urge the receiver of the pension fund and

[1] GoLocal Prov Friday, August 25, 2017, *After Week of Silence, Kilmartin Issues Statement on St. Joseph Pension Bankruptcy* http://www.golocalprov.com/news/new-kilmartin-issues-statement-on-st.-joseph-pension-bankruptcy (accessed November 17, 2017) (quoting Attorney General Press Release on August 24, 2017).

[2] Id.

the Court to establish and maintain complete transparency throughout this process, and to consider every available option to regain financial viability of the pension fund."[3] Press statements are easily made, but when the Attorney General has the opportunity to actually assist in this effort, he raises spurious objections and seeks months of delay. Is it too much to ask the Attorney General to follow through?

Any doubt that the Attorney General's role in the inquiry into possible third party claims would be front and center was dispelled the day after his statement, when House Speaker Mattiello publically disagreed with it and placed at least partial responsibility on the Attorney General.[4]

On November 3, 2017, eight days after appointment of the Permanent Receiver ("Receiver"), counsel for the Receiver served the subpoena on the Attorney General. Clearly the Attorney General knew months earlier that it would be called upon to produce documents.

B. The time allowed was more than sufficient for at least substantial compliance

Even if the subpoena came like a bolt out of the blue on November 3, 2017, two weeks was more than sufficient allowance for at least substantial compliance, because most of the documents sought were already aggregated in files from the Attorney General's reviews. The following documents were requested:

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[3] Id.

[4] GoLocal Prov, Friday, August 25, 2017 *Mattiello Blasts Kilmartin on St. Joseph Pension Fund Bankruptcy* http://www.golocalprov.com/live/mattiello-on-fall-session-assembly-turning-left-and-more-on-golocal-live (accessed November 17, 2017)(quoting Speaker Mattiello) ("Well, I am not sure I agree with that assessment (that the Attorney General didn't have authority). He certainly had the authority. And, he should have been looking at it (pension funds)").

1. All documents relating to the **Plan**;

2. All documents relating to **SJHSRI**, **RWH**, **CHARTERCARE**, or **Prospect**;

3. All documents relating to any **Hospital Conversion Act Proceedings** (as defined above), including all documents relating to applications, amended applications, supplemental applications, exhibits, supporting documentation, or other documents submitted in connection with **Hospital Conversion Act Proceedings**;

4. All notices or documents submitted or obtained in accordance with any of the conditions of the **May 16, 2014 Decision**, including CONDITIONS ## 3, 4, 5, 6, 7, 8, 11, 12, 13, 18, 19, 23, 24, 27, and 30;

5. All documents concerning the "engage[ment] with counsel for the Petitioner and the Court-appointed receiver" as stated in the **August 24, 2017 Statement**; and

6. All documents concerning the "broken promises" referred to in the **August 24, 2017 Statement**

Requests Nos. 3 and 4 were for the Attorney General's files from those two reviews. All the Attorney General had to do was produce those files, and a large part of his compliance would be done.

Moreover, Requests Nos. 5 and 6 pertained to the Attorney General's own statement on August 24, 2017, and simply asked for documents supporting two of his representations in that statement.

Furthermore, when counsel for the Attorney General met with the Receiver's counsel on November 15, 2017, the Receiver's counsel agreed to drop Request No. 2, without prejudice to later requests.[5]

Finally, although Request No. 1 was unlimited in time such that the Attorney General conceivably might need additional time to survey his office so that he could

[5] See Exhibit 1 (Attorney Max Wistow's letter to Attorney Rebecca Partington dated November 17, 2017) ("Per your request that we make written confirmation, we confirm our agreement at the meeting on November 15, 2017 to drop Request No. 2 without prejudice to later requests.").

definitely assert he had produced "[a]ll documents relating to the **Plan**," that is no excuse for not making at least partial compliance by producing readily identified documents.

II. The Attorney General Is Obligated to Produce All Non-Privileged Documents, Including Documents Considered "Confidential" by Third-Parties

The Attorney General claims that the statutory allowance for parties to designate documents as "confidential" in connection with hospital conversion reviews somehow shields those documents from discovery. However, even the Attorney General acknowledges that the designation of such documents as confidential does not make them privileged. See Attorney General's Partial Objection 5 ("The Subpoena also requests production of documents deemed confidential by statute, which are different than those documents that are privileged. "). Such statutorily "confidential" documents are not privileged. Gaumond v. Trinity Repertory Co., 909 A.2d 512, 517 (R.I. 2006) ("This Court has refused to recognize new privileges, even when a 'statute manifests and effectuates an important legislative policy favoring confidentiality and generally prohibits disclosure of information.' ") (quoting Mallette v. Children's Friend and Service, 661 A.2d 74, 76 (R.I. 1995) as "holding that the statute establishing the confidentiality of Department of Children, Youth and Families' records did not create a testimonial privilege"). See also Am. Commerce Ins. Co. v. Harris, No. CIV-07-423-SPS, 2008 WL 3456848, at *1 (E.D. Okla. Aug. 8, 2008) ("But while the file clearly is confidential, i.e., protected from disclosure to the public upon request… it is not protected from discovery by any evidentiary privilege.").

According such documents are discoverable. See Steinberg v. Mount Sinai Med. Ctr., Inc., No. 12 CIV. 51 SLT VMS, 2014 WL 1311572, at *2 (E.D.N.Y. Mar. 31, 2014) ("If the information sought is confidential but not privileged, FRCP 26 does not limit disclosure of otherwise discoverable information."). However, the Attorney General nevertheless asserts that "[b]ecause the Attorney General is bound by the confidentiality determination, confidential documents can only be disclosed pursuant to a waiver from the transacting parties, or an Order of this Court." The Attorney General cites no authority whatsoever for either assertion, either that the Attorney General "is bound by the confidentiality determination," or the assertion that "confidential documents can only be disclosed pursuant to a waiver from the transacting parties or an Order of this Court." Moreover, the regulations adopted by the Attorney General concerning the Attorney General's power to designate documents as confidential in proceedings under the Hospital Conversions Act make no such requirements.[6]

Accordingly, the proper procedure here is the procedure routinely followed whenever disclosure is sought to be prevented on grounds of confidentiality, viz., the party asserting confidentiality must seek a protective order under Rule 26(c). See Transcor, Inc. v. Furney Charters, Inc., 212 F.R.D. 588, 593 (D. Kan. 2003) (entering protective order allowing disclosure of confidential information but prohibiting further disclosure to non-parties). Certainly the Attorney General himself makes no claim of confidentiality and, therefore, cannot seek a protective order on behalf of the hospitals when they have the ability and right to make that request themselves.

[6] They merely recite the statutory language verbatim. See R. I. A. G. Rules and Regulations Pertaining to Hospital Conversions Act, R. 6 (http://sos.ri.gov/documents/archives/regdocs/released/pdf/AG/7926.pdf).

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III. The Attorney General has not made a proper claim of privilege

The Attorney General's unique approach to compliance with the subpoena extends beyond refusal to produce non-privileged documents for which no protective order has been obtained. It extends to improperly claiming a "deliberative privilege" or "work product privilege" for unidentified documents, in violation of Rule 45(d)(2), which states as follows:

> (2) 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.

This "requirement of a privilege log is mandatory: a claim of privilege '**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.' " Mosley v. City of Chicago, 252 F.R.D. 445, 449 (N.D. Ill. 2008) (emphasis by court) (quoting identical language in F.R.C.P. 45 (d)(2)(A)). Not only is the privilege not properly supported: by failing to provide a privilege log, the Attorney General has waived any claim of privilege. In re Grand Jury Subpoena, 274 F.3d 56 , 578 (1st Cir. 2008) ("A party that fails to submit a privilege log is deemed to waive the underlying privilege claim.") (failure to provide privilege log when claiming privilege in response to subpoena held to be a waiver). At the very least the Attorney General's claim of privilege cannot be allowed in the absence of a privilege log.

IV. Pointing the Receiver towards public sources is no substitute for producing documents

The Receiver is entitled to obtain the Attorney General's actual records, not merely copies of those the records the Receiver can find on the Attorney General's

website, or unspecified documents the Attorney General claims to have filed with the Court. Only then will there be a clear record of what is contained in the Attorney General's records.

As for documents allegedly on the Attorney General's website, requiring the Receiver to identify and download those files will raise issues of authentication and completeness that would be obviated if the Attorney General had the responsibility to produce those records. The Receiver will have the right and duty to file motions with the Court to compel further production if it appears that the Attorney General has not produced all of his documents. Are such motions to be responded to with the claim that the documents are somewhere on the Attorney General's website and the Receiver should have found them? Moreover, depositions will likely follow document production. It is unfair to require the Receiver to question the Attorney General's witnesses concerning their own documents based on copies of those documents from the Court's file or a website.

Clearly, it also would not be desirable for the Receiver to depose the Clerk of the Court to establish the identity and source of records in the Clerk's file, but how else will the Receiver authenticate those records if the Attorney General does not produce them? Moreover, it appears that the Attorney General filed more documents with the Clerk than are actually contained in the Clerk's files. Counsel for the Receiver has already sought documents from the Clerk's office that the Attorney General allegedly filed in connection with the *cy pres* proceedings, but there is only a skeleton file. Dozens of documents are not on file.

In short, allowing the Attorney General to evade his responsibility for producing documents because the Receiver may be able to obtain some of them publically places

an immediate undue burden on the Receiver and will confuse further proceedings in this case.

CONCLUSION

For all of the foregoing reasons, the Respondent's motion to compel discovery from the Attorney General should be granted.

Respondent,
The Receivership Estate
By its Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 17th day of November, 2017, I filed and served the foregoing document through the electronic filing system on the following users of record:

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The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Max Wistow

Exhibit 1

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November 17, 2017

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Re: *St. Joseph Health Services of Rhode Island, Inc. vs. St. Josephs Health Services of Rhode Island Retirement Plan, PC-2017-3856*

Dear Attorney Partington:

In response to your letter of November 16, 2017, per your request that we make written confirmation, we confirm our agreement at the meeting on November 15, 2017 to drop Request No. 2 without prejudice to later requests.

Very truly yours,

Max Wistow

MW/srs