BUTLER COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

ERIN GABBARD et al. *Plaintiffs-Relator*, v. MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al. *Defendants-Respondents,*	Case No. CV 2018-09-2028 Judge Charles L. Pater OPPOSITION TO MOTION TO QUASH AND FOR PROTECTIVE ORDER

PLAINTIFFS' OPPOSITION TO DEFENDANTS' EMERGENCY MOTION TO QUASH SUBPOENAS AND FOR PROTECTIVE ORDER

The plaintiffs, through undersigned counsel, hereby oppose the defendants' emergency motion to quash subpoenas for John/Jane Does Nos. 1-10 and for a protective order. The defendants' motion should be DENIED for the reasons that follow.

INTRODUCTION

The defendants' motion rests on a false premise: that, by being deposed in this matter, the identities of persons who are authorized by the Board to carry a concealed weapon while on duty at school will become a matter of public knowledge, thereby putting their safety at risk. That is not the case. Though the defendants' motion glosses over it, the plaintiffs have agreed to an extremely stringent confidentiality order in this case, as was requested by the defendants. *See* Confidentiality Agreement (attached as Exhibit A). Under that agreement, most of the discovery in this case, including the identities of any authorized school staff, their positions, and responsibilities, is for attorneys' eyes only. It is not shared with the plaintiffs themselves, or with any member of the public. This clearly includes the transcripts of any depositions, which, so long as defendants designate them confidential, may not and will not be disclosed unless and until the Court orders

otherwise. The undersigned plaintiffs' counsel have repeatedly reiterated our intent to comply with and understanding of the protective order in correspondence with defense counsel. Def's Ex. I; *see also* Def's Ex. D ¶ 5 (affidavit of counsel Brody Conover discussing protections). Despite our repeated requests for an explanation as to why the Confidentiality Agreement does not adequately address their concerns, the defendants have not demonstrated (or even attempted to explain) why this precaution is insufficient to protect the safety of the deponents. *See* Def's Ex. I. And for that reason alone, the defendants' motions should be denied.

These depositions, with the defendants' consent, were scheduled to occur today and tomorrow. *See* Def's Ex. E at 3–4; Def's Ex. D ¶ 4 (explaining that Conover indicated "the District would be willing to proceed with two of the depositions in-person"). It was not until two days ago that the defendants changed their position and indicated that two of the authorized personnel would not appear for the depositions. Def's Ex. D ¶ 6; Def's Ex. I. This last-minute motion should be denied. And if the depositions do not occur as scheduled, the defendants should be required to cover the cost of the depositions in the future.

ARGUMENT

The defendants assert several reasons for quashing the subpoenas of school staff who are authorized to carry arms while on duty at school, and for needing a protective order. None has merit. Requiring these persons to appear for a deposition, subject to the Confidentiality Agreement already executed between the parties, is not an undue burden and does not require public disclosure of protected information.

1. Security. *First*, the defendants assert that these depositions will endanger the security of the deponents. But their argument is premised on the fact that the identities of the deponents will become public. That is not so. For instance, the defendants claim that the deponents fear "that they will become targets of harassment, protests, and violence by those who disagree with the

Board's decision to arm staff members." But the discovery in this case—including these depositions—is being conducted under a strict confidentiality agreement between the parties. *See* Confidentiality Agreement, Ex. A. The only persons who can be made aware of their identities are the attorneys for the plaintiffs. Not the plaintiffs themselves. Not members of the public. Not the media. Not anyone but the attorneys. And under the terms of the parties' confidentiality agreement, the transcripts of the depositions may be kept confidential or released only with redactions. Thus, the identities of the deponents can be kept from public disclosure.

The defendants failed to explain why this confidentiality agreement is insufficient to protect the safety of the deponents. Indeed, the defendants emphasize that all the school personnel who are aware of the authorized persons' identities are similarly under a confidentiality agreement. *See* Mot. at 9; Def's Ex. M (Aff. of Lisa Tuttle-Huff) at ¶ 7. But the defendants do not explain why a similar confidentiality agreement with respect to the plaintiffs' counsel is insufficient. That is because there is no reason.

Moreover, to the extent that the defendants were concerned about the location of the depositions, or that the plaintiffs or members of the public may be aware of the location, that concern is unfounded. As counsel for the plaintiffs assured the defendants' counsel, we were and are willing to depose the authorized persons at any location that the defendants chose. And we agreed that we would not make the plaintiffs themselves or any other members of the public aware of any such location that the defendants might designate. The defendants refused. *See* Affidavit of Rachel Bloomekatz (attached as Exhibit B).[1]

[1] The defendants further contend that the depositions must be quashed, and that the deponents cannot appear in person, because "the Board promised each authorized individual that their identity would be kept confidential." Mot. at 9. It is unclear how this promise can obviate the legal requirement to appear for a duly issued subpoena.

2. Relevance. The defendants further contend that the authorized persons' "identities, biographical information, and positions within the District" are not relevant to the matter at hand. As an initial matter, the plaintiffs agree that the names of the authorized personnel are not relevant to the legal issue in this case. However, as we explained to the defendants' counsel, asking the names of the deponents was necessary for them to be put under oath, and swear to the testimony in their deposition. *See* Def's Ex. I. Moreover, it is critical for impeachment, if necessary, in the future, including at any potential trial. If the plaintiffs' counsel cannot know who made what statement, it would be difficult, if not impossible, to impeach those statements if necessary during the merits phase of the case. Given that the names will be known only by the attorneys and can be kept under seal or redacted from any deposition transcript, it is not an undue burden to ask that these individuals be identified for their depositions.

Moreover, the defendants are wrong that the authorized persons' "positions within the District" is irrelevant to the case. Mot. at 11. It is instead at the heart of the defendants' defense. The plaintiffs' central argument is that any school employee who is authorized to carry a firearm while on duty is subject to the peace officer training requirement of R.C. 109.78. The defendants' response is that, because these persons are not "security personnel," they are not subject to this training requirement. *See* Defendants' Opp. to Plaintiffs' Motion for Preliminary Injunction, at 2, 9. Accordingly, what position the authorized persons hold, the nature of their job duties, and what security roles they are expected to perform is at the heart of this case and cannot be taken off the table or put off limits through an application for a protective order. Again, any of this information would only be disclosed to counsel, can be redacted from a deposition transcript, and not be made available to the public. And, at any rate, the defendants' concern about answering some particular questions cannot excuse their failure to appear entirely for the deposition.

Because of the centrality of this information to the merits of the case, it is unreasonable to expect that the plaintiffs conduct all of these depositions telephonically. Nothing in the rules of discovery and no case cited by defendant's affords a defendant or a witness a right to insist on telephonic depositions. The plaintiffs should be assured that they have latitude to question the deponents regarding their view of their job responsibilities without interference or coaching from counsel that it often difficult to detect over the phone. Moreover, as experienced counsel recognize, telephonic depositions are infrequently as productive for being able to understand the witness, given that body language, nonverbal cues, and other conduct is impossible to detect over the phone.

CONCLUSION

For these reasons, the plaintiffs respectfully request that the Court deny the defendants' motion to quash subpoenas and for a protective order. If the defendants are not able to produce these persons as scheduled for their depositions today and tomorrow per the agreed-to schedule, the defendants should bear the cost of depositing them in the near future.

Respectfully submitted,

/s/ Rachel Bloomekatz
RACHEL BLOOMEKATZ (Ohio Bar No. 91376)
GUPTA WESSLER PLLC
1148 Neil Avenue
Columbus, Ohio 43201
Phone: (202) 888-1741 | Fax: (202) 888-7792
rachel@guptawessler.com

ALLA LEFKOWITZ*
JAMES MILLER*
EVERYTOWN FOR GUN SAFETY SUPPORT FUND
132 E. 43rd Street, # 657
New York, NY 10017

*Admitted *pro hac vice*

Attorneys for Plaintiffs-Relators

January 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2019, a copy of the foregoing opposition to the motion for partial dismissal was served via email on the following:

Alexander L. Ewing
Frost Brown Todd LLC
9277 Centre Pointe Drive, Suite 300
West Chester, OH 45069
513.870.8213
513.870.0999 (fax)
aewing@fbtlaw.com

___/s/ Rachel S. Bloomekatz_____
Attorney for Plaintiffs

EXHIBIT A

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

ERIN GABBARD, et al.,	:	**Case No.: CV 2018 09 2028**
Plaintiffs / Relator,	:	**Judge Charles L. Pater**
v.	:	
MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,	:	**CONFIDENTIALITY AGREEMENT**
Defendants / Respondents.	:	

WHEREAS, Plaintiffs brought the instant action seeking declaratory and injunctive relief with respect to the Defendants' policy of arming certain school personnel, and seeking a writ of mandamus to compel the release of certain public records related to the Defendants' policy of arming certain school personnel as part of its emergency management plan under the Ohio Public Records Act;

WHEREAS, during discovery in this case, Defendants will likely be required to produce documents, answer interrogatories, and provide testimony and other information that is the object of Relator's petition for mandamus;

WHEREAS, Defendants contend that certain of these documents, interrogatory responses, and testimony are not subject to disclosure under the Ohio Public Records Act and may contain information whose public disclosure would compromise the safety of students, staff, and others on the property of Madison Local School District and compromise the school emergency management plan of the District ("Security Information"); and

WHEREAS, Plaintiffs do not concede—and in fact believe there are grounds to contest—Defendants' assertion of security concerns as to certain documents, interrogatory responses, and testimony that are subject to discovery in this action, and further contest Defendants' assertion that certain of these documents are exempt from disclosure under the Ohio Public Records Act;

WHEREAS, the parties wish to permit discovery without delay, and without waiving, mooting, or shifting any burden with respect to any party's claims or defenses on Relator's petition for mandamus;

NOW THEREFORE, upon agreement and consent by and between Plaintiffs, Defendants and other parties subscribing hereto, it is hereby agreed that:

1. If a party hereto ("Producing Party") believes that any written, recorded or graphic material, tangible items or any other form of documentary information, including any created, maintained or stored electronic data, that it produces in this action pursuant to pretrial discovery, court order or agreement of the parties contains Security Information, the Producing Party may designate such information as Protected Information either by placing or stamping the words "Confidential" or "Highly Confidential" prominently on the document or by any other written means that clearly and unequivocally notifies the parties that the information is subject to this Confidentiality Agreement.

2. Documents designated as Protected Information and all writings, including court papers, which quote from or summarize all or a portion of such documents shall be subject to the provisions of this Agreement and shall be used solely for the prosecution or defense of this action alone, including any appeals. Upon the designation of any document as Protected Information, all copies of such document then or at any time thereafter in the possession or control of any party hereto, obtained through pretrial discovery or by court order or agreement of the parties, shall be subject to the provisions of this Agreement, provided however, that nothing contained herein shall restrict the rights of any party hereto with respect to any information developed or obtained lawfully and independently of discovery in this case, regardless of whether such information is also obtained through discovery.

3. Documents designated as "Highly Confidential" in accordance with this Agreement, and information derived only from such documents, shall be disclosed only to:

a. legal counsel to any party hereto;

b. the legal, clerical, paralegal staff or other staff of such legal counsel relevant to the prosecution or defense of this proceeding alone;

c. any person retained as an expert by a party for the purposes of this litigation, provided that that person has agreed to be bound by the Confidentiality Agreement by executing a copy of the Non-Disclosure Agreement appended as Exhibit A;

d. any person noticed or called to testify as a witness at a deposition, hearing, mediation, trial, or other proceeding in the above-captioned action, provided that the person has agreed to be bound by the Confidentiality Agreement by executing a copy of the Non-Disclosure Agreement appended as Exhibit A;

e. any person(s) that a document designated as Protected Information indicates was an author, addressee, source, or recipient of the document;

f. any person(s) to whom the Producing Party agrees in writing that disclosure may be made;

g. court reporters in this case; and

h. the Court, Court personnel, or jurors.

A Producing Party which designates information as "Highly Confidential" represents that it has good cause to seek the extraordinary remedy of blocking access to certain responsive information to the named parties in the case, as well as the general public.

4. Documents designated as "Confidential" in accordance with this Agreement, and information derived only from such documents, shall be disclosed only to:

a. persons listed in paragraph 3(a) through (h), above; and

b. the parties (and in particular, individual Plaintiffs).

5. Each party hereto agrees that when filing with the Court any papers (including, without limitation, motions, briefs, exhibits, affidavits, memoranda, interrogatory answers, or depositions) that disclose Protected Information, such papers shall be filed under seal pursuant to the Rules of Civil Procedure, the Rules of Superintendence, and the Court's local rules. All such material so filed shall be released only upon further order of the Court, or agreement of the parties. The filing of documents under seal in accordance with this paragraph shall not constitute a waiver, admission, or concession with respect to either (a) the propriety of the designation of the underlying document(s) as Protected Information, or (b) whether any exemption to disclosure under the Ohio Public Records Act applies to the underlying document(s). Nothing in this paragraph shall prohibit counsel from sharing Court filings with their clients, provided that Highly Confidential information is redacted or removed.

6. If a party wishes to designate a portion of the transcript of a pretrial deposition as Protected Information, counsel shall, either on the record at the deposition or in writing within ten (10) business days after receipt of the transcript thereof, notify all counsel of record that the identified portions of the transcript reflecting such information shall be designated "Highly Confidential" or `"Confidential" and be subject to the provisions of this Agreement.

7. As to any witness or other person to whom Protected Information is disclosed pursuant to paragraph 3 above, counsel making the disclosure shall retain the original signed Exhibit A. Counsel shall use their best efforts to extrajudicially resolve any requests to disclose Protected Information pursuant to paragraph (3)(f), and consent shall not be unreasonably withheld. In the event of an impasse, a hearing with the Court may be requested. Disclosure may then be made only on such terms as the Court may order.

8. If any court, arbitration tribunal or administrative or government agency requests, demands, subpoenas, or orders producing of material designated as Protected Information, before turning over the material, to the extent practicable without disobeying a lawful order or demand,

such party shall promptly (not more than 48 hours after receipt of such request, demand, subpoena or order) notify the Producing Party of the pendency of such request, demand, subpoena, or order, and afford a reasonable opportunity for the Producing Party to oppose the request, demand, subpoena or order.

9. A receiving party may challenge a Producing Party's designation at any time, by providing written notice of the objection to the Producing Party. This challenge may seek the re-designation of "Highly Confidential" material as "Confidential," or may seek the removal of any "Confidential" designation. The Producing Party will have seven (7) business days to respond in writing. The parties shall confer in good faith in an effort to resolve the objection within ten (10) days of the producing party's written response. If the dispute cannot be resolved, the receiving party may seek appropriate relief from this Court, including an order that the document or information should not be treated as "Highly Confidential" and/or "Confidential," or that specified provisions of this Confidentiality Agreement shall not apply to the documents or information. Any documents in dispute shall be treated as originally designated pending resolution by the Court.

10. The failure of any party to challenge, to timely challenge, or to move the Court with respect to, the designation of any document or information as "Highly Confidential" or "Confidential" shall in no way be construed as an admission or acknowledgement that the document or information is properly designated. Nor shall such a failure waive, moot, or shift any burden with respect to any party's claims or defenses concerning Relator's petition for mandamus, including whether the document or information is subject to disclosure under the Ohio Public Records Act. Neither party will argue in any subsequent motion or proceeding that such a failure constitutes any waiver, admission, or concession by the other party with respect to the propriety of any designation under this Confidentiality Agreement or the applicability of any exemption to the Ohio Public Records Act.

11. Within thirty (30) days after final termination of this case, including any appeals, counsel for the Parties Hereto shall (a) return to designating counsel or destroy all documents designated as Protected Information, except for attorney's work product and (b) certify in writing to counsel for other parties hereto that he or she has complied with the provisions of this paragraph. These requirements shall not apply to any document that the Court orders disclosed under the Ohio Public Records Act, pursuant to Relator's petition for mandamus.

12. The Parties will not disclose Protected Information at a public hearing before this Court except as required by law or by order of the Court, or with consent of the Producing Party. If counsel for a party wishes to disclose Protected Information at a hearing of record before this Court, that counsel shall notify the Court and counsel for the Producing Party before making such disclosure. Counsel shall use their best efforts to extrajudicially resolve any requests to use Protected Information as contemplated by this paragraph. If counsel cannot resolve the request extrajudicially, the Producing Party may thereupon seek appropriate relief from the Court.

13. Inadvertent production of any Protected Information, without it being designated as such, shall not be deemed a waiver of any subsequent claim that the information at issue is Protected Information and subject to this Agreement. If a party hereto inadvertently produces Protected Information without designating it as such, it may only be disclosed without regard to this Agreement until the receiving party hereto is notified of the error, after which time it shall be treated as then designated.

14. Any party hereto may at any time seek any modification of this Agreement, and nothing contained herein shall in any way constrain such party.

15. In connection with this litigation, if a party or non-party (the "Disclosing Party") inadvertently discloses information subject to a good-faith claim of attorney-client privilege or work product protection ("Inadvertently Disclosed Information"), such disclosure shall not constitute or be deemed a waiver or forfeiture of any claim of privilege or work product protection

with respect to the Inadvertently Disclosed Information or its related subject matter, in this litigation or any other court or legal proceeding.

16. A Producing Party may, at any time, demand that a receiving party return, destroy, or otherwise sequester a document containing Inadvertently Disclosed Information. The demand shall be made in writing and shall identify the document to be returned or destroyed by Bates number(s) whenever possible. Upon notice of a claim of inadvertent disclosure, the receiving party shall, within seven (7) business days, return, destroy, delete, or otherwise sequester all copies of the Inadvertently Disclosed Information, and provide a certification from counsel that all such information has been returned, destroyed, deleted, or sequestered. Until the Court rules on the privileged or protected status of the information, the receiving party shall not use, disclose, or disseminate the information in any way (including, but not limited to using the information at depositions or trial), and must take reasonable steps to retrieve the information if it was disseminated by the receiving party prior to such notification.

17. Within fourteen (14) business days of the notification that such Inadvertently Disclosed Information has been returned, destroyed, deleted, or sequestered, the Producing Party shall produce a privilege log with respect to the Inadvertently Disclosed Information. After receipt of the Producing Party's privilege log and a good-faith effort to meet and confer, a receiving party may file with the Court a motion to compel production of the document(s) clawed-back pursuant to Paragraph 15. The motion shall be filed under seal and shall not assert as a ground for entering such an order the fact or circumstances of the inadvertent production.

18. No portion of this Confidentiality Agreement is intended to be, shall be construed to be, or may be argued to be a waiver, admission, or concession by any party, or a finding by the Court, with respect to any claim(s) or defense(s) concerning Relator's petition for mandamus to compel the release of public records under the Ohio Public Records Act. Neither party will argue in any subsequent motion or proceeding that any aspect or portion of the parties' Confidentiality

Agreement constitutes any waiver, admission, or concession by the other party, or a finding by the Court, with respect to the applicability of any exemption to the Ohio Public Records Act to any document.

AGREED:

Dated: December 17, 2018

Rachel Bloomekatz
Gupta Wessler PLLC
1148 Neil Avenue
Columbus, Ohio 43201
rachel@guptawessler.com

Attorneys for Plaintiffs/Relator, State ex rel. Erin Gabbard, et al.

Thomas B. Allen (0063956)
W. Joseph Scholler (0072764)
Alexander L. Ewing (0083934)
FROST BROWN TODD LLC
9277 Centre Pointe Drive, Suite 300
West Chester, Ohio 45069
Phone: (513) 870-8200
Fax: (513) 870-0999
tallen@fbtlaw.com
jscholler@fbtlaw.com
aewing@fbtlaw.com

Attorneys for Defendants-Respondents, Madison Local School District Board of Education, et al.

EXHIBIT A

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

ERIN GABBARD, et al.,	:	**Case No.: CV 2018 09 2028**
	:	
Plaintiffs / Relator,	:	
	:	**Judge Charles L. Pater**
v.	:	
	:	
MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,	:	**NON-DISCLOSURE AGREEMENT**
	:	
	:	
Defendants / Respondents.	:	

NON-DISCLOSURE AGREEMENT

I, _____, do solemnly swear that I am fully familiar with the terms of the Confidentiality Agreement in this action, and hereby agree to comply with and be bound by the terms and conditions of said Agreement unless and until modified by further Order of this Court, and that at the conclusion of the litigation I will return, or certify the destruction of, all discovery information to the Party or attorney from whom I received it. I hereby consent to the jurisdiction of said Court for purposes of enforcing this Agreement.

Executed On: _____ _____

(Date) (Signature)

0115422.0711061 4823-5850-1754v3

EXHIBIT B

BUTLER COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

ERIN GABBARD, et al., *Plaintiffs/Relator*, v. MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et. al *Defendants/Respondents,*	Case No. CV 2018 09 2028 Judge Charles L. Pater AFFIDAVIT OF ATTORNEY RACHEL BLOOMEKATZ IN OPPOSITION TO MOTION TO DEFENDANTS' MOTION TO QUASH SUBPOENAS AND FOR PROTECTIVE ORDER

State of Ohio)
:ss
County of Butler)

I, RACHEL BLOOMEKATZ, having been first duly sworn upon oath, depose and say:

1. I am an attorney for the plaintiffs-relator in this case, principal of the law firm Gupta Wessler PLLC, and a member in good standing of the bar of the State of Ohio. I submit this affidavit in opposition to defendants' motion to quash subpoenas and for a protective order.

2. Attached as Exhibit A to Plaintiffs' opposition is a true and accurate copy of the Confidentiality Agreement executed by the parties in this case.

3. On January 9, 2019, Plaintiffs' counsel—Alla Lefkowitz, Jed Miller, and myself—had a telephone conversation with counsel for Defendants Alexander Ewing and Brodi Conover. Plaintiffs' counsel offered to conduct in-person depositions for the subpoenaed John/Jane Does (Madison employees authorized by the Board to carry a concealed weapon in a school safety zone) in any location that Defendants' counsel chose. Plaintiffs' counsel also represented that they had not informed their clients that they would be deposing these employees authorized to carry concealed weapons and that they would not tell their clients or any other person that the depositions were being conducted or the location where the depositions would be taking place.

DATED this ___ day of January, 2019

_____
RACHEL BLOOMEKATZ

SUBSCRIBED AND SWORN TO before me this ___ day of January, 2019.

_____
Notary Public for the State of Ohio