STATE OF RHODE ISLAND SUPERIOR COURT
WASHINGTON, SC.

TOWN OF SOUTH KINGSTOWN by and through the SOUTH KINGSTOWN TOWN COUNCIL and the SOUTH KINGSTOWN SCHOOL COMMITTEE, Petitioners	:	
V.	:	C.A. No.: WM-2021-0259
BRAD DUFAULT, Respondent	:	

PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

In late April of 2021, the Rhode Island AFL-CIO circulated a mailer in support of a local school bond referendum that was addressed to students in the South Kingstown public schools, the vast majority of whom are minors. The mailer raised a concern among parents and among South Kingstown elected officials, including the School Committee and the Town Council, that student names and addresses were improperly disclosed to a third party. The School Committee, pursuant to Sec. 4820(B) of the Town Charter, is authorized to "determine and control all policies affecting the administration, maintenance and operation of the public schools." The Town Council, pursuant to Sec. 3131 of the Town Charter, is the body authorized "to make any investigation relating to town affairs," and may issue subpoenas as part of such an investigation. Accordingly, the School Committee and the Council cooperatively initiated an investigation into this issue.[1] The overriding

[1] While the investigation was pending, a vote on the bond referendum occurred and the referendum failed. This in no way moots the investigation, however, as the investigation is intended to assist the Town in better securing the privacy of local students, and the ultimate outcome of the bond referendum is irrelevant to that issue.

purpose of the investigation is to identify how the student information was released so that the Town can take measures to ensure that such a release doesn't happen again.

The pertinent details of the initial investigation are outlined in the verified complaint filed in this matter. Ultimately, the Town determined that Brad Dufault of Checkmate Consulting, LLC, was responsible for circulating the mailer and, therefore, has information about how the student names and addresses were released. Mr. Dufault is refusing to provide that information to the Town. The Council subpoenaed Mr. Dufault to testify about that information, but Mr. Dufault is refusing to comply with the subpoena. Accordingly, Petitioners have no alternative but to seek an order from this Honorable Court compelling Mr. Dufault to comply with the subpoena.

Argument

Petitioners will first briefly discuss the student privacy concerns raised by the release of the student information in this case. Petitioners will next discuss the authority of the Council to issue subpoenas under Rhode Island law. Third, Petitioners will discuss the broad scope of legislative subpoenas such as the one at issue in this case. Finally, Petitioners will discuss how the facts of this case meet the elements for injunctive relief and should be accelerated pursuant to Rule 57 of the Superior Court Rules of Civil Procedure.

I. The Town has a duty under state and federal law to protect the privacy of its public-school students by keeping information about them confidential.

The primary federal law regarding privacy of student records is the Family Educational Rights and Privacy Act (FERPA), codified as 20 U.S.C. § 1232g. The FERPA requires local educational institutions to implement policies to protect student privacy as a condition of receiving federal education aid. The FERPA has been described as taking "a carrot-and-stick approach: the carrot is federal funding; the stick is the termination of such funding to any educational institution

'which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein) of students without the written consent of their parents.'" Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 68 (1st Cir. 2002) (quoting 20 U.S.C. § 1232g(b)(1)). The FERPA, § 1232g(b)(2), generally provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records" without the written consent of the parent.

Rhode Island law incorporates the requirements of the FERPA and applies it to local school districts. Specifically, G.L. 1956 § 16-71-3(a)(7) provides, "The parent, legal guardian, or eligible student, shall have the following enumerated rights . . . The right to have their [educational] records kept confidential and not released to any other individual, agency or organization without prior written consent of the parent, legal guardian or eligible student, except to the extent that the release of the records is authorized by the provisions of 20 U.S.C. § 1232g or other applicable law or court process." Both state and federal law allows the release of some student information "that would not generally be considered harmful or an invasion of privacy if disclosed." See 34 CFR § 99.3. But such disclosure is only allowed pursuant to a procedure set forth in federal regulation, whereby notice is provided to the parents of minor students and parents have the option to opt-out of the disclosure. See 34 CFR § 99.37.

Given these state and federal requirements obligating the Town to keep student information private, it is disturbing that the information at issue here would end up in the hands of Mr. Dufault, with no paper trail or public record of how he obtained it. The Town has an obligation to investigate this matter to determine whether the Town is adequately fulfilling its obligations under state and federal law to ensure that the privacy of Town students is protected. If the Town is not

fulfilling its statutory obligations, then the Town has an obligation to take corrective action. The Town has exhausted other avenues of investigation by making inquiry of the School Department and the AFL-CIO. By process of elimination, Mr. Dufault has the information that the Town needs to complete its investigation, and he should not be allowed to stymie the investigation by simply refusing to comply with the Council's subpoena.

II. State law authorizes the Council to issue a subpoena requiring Mr. Dufault to testify.

There are two sources of Rhode Island law that authorizes the Council to issue subpoenas. First, Sec. 3131 of the Town Charter, in setting forth the Council's investigatory powers, provides that the Council "may subpoena witnesses, administer oaths or affirmations, and compel the production of books, records, papers, and other evidence." The South Kingstown Town Charter has been ratified by the General Assembly, most recently in 2007 by P.L. 2007, ch. 9. Therefore, the Charter "take[s] precedence over inconsistent provisions of general state law." Foster Glocester Reg'l Sch. Bldg. Comm. v. Sette, 996 A.2d 1120, 1125 (R.I. 2010).

Second, since 1909, see G.L. 1909, ch. 292, § 6, state law has authorized local municipal councils to issue subpoenas through a statute currently enacted as G.L. 1956 § 45-5-14. The statute provides, in pertinent part, "Every town council . . . may, by their presiding officers, issue subpoenas to witnesses to testify in any matter pending before them, may administer oaths to these witnesses, [and] may compel their attendance." Our Supreme Court had the opportunity to interpret this statute in Donatelli Bldg. Co. v. Cranston Loan Co., 140 A.2d 705 (R.I. 1958). In that case, a committee of the Cranston City Council issued subpoenas "for the purpose of acquiring information relating to the construction of schools." Id. at 706. To obtain information from certain contractors working on the schools, the "committee subpoenaed certain officers of the complainant companies, who under protest attended several hearings and gave certain information to the

committee." Id. When the Court was presented with the question of whether the Council committee had the authority to issue subpoenas requiring those witnesses to come testify before it, the Court answered unequivocally in the affirmative. "As we construe that statute, it expressly vests the committee with the power to issue subpoenas *ad testificandum* and complainants' contentions to the contrary are without merit." Id. at 707.[2]

Based on state statute, Town Charter, and the Donatelli case, it is abundantly clear that the Town Council has the authority to issue a subpoena to Mr. Dufault requiring him to testify in this matter. Any "contentions to the contrary are without merit." Id.

III. Legislative bodies have very broad powers to issue legislative subpoenas.

There is not a wealth of case law in Rhode Island on the permissible scope of subpoenas, like the one at issue in this case, that are issued by legislative bodies for the purpose of investigating matters of public concern. But reference to the broad scope of legislative subpoenas issued on the federal level provides an instructive analogy.

There is no clause in the U.S. Constitution that authorizes Congress to issue subpoenas. Even so, the United States Supreme Court has observed, "[I]ssuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975). This is because a "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." Id. (quoting McGrain v. Daugherty, 273 U.S. 135, 175 (1927)).

[2] The Court in Donatelli held that § 45-5-14 doesn't authorize a council to obtain documents through a subpoena *duces tecum*. That holding does not apply to this case, however, as the South Kingstown Town Council is currently only seeking to subpoena Mr. Dufault to testify and is not seeking the production of documents. Further, if documents are needed as part of the investigation, the South Kingstown Town Council has authority to subpoena documents pursuant to Sec. 3131 of its Town Charter.

If "the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed." Id. at 504–05.

Because of the wide range of potential measures that a legislative body may take, a legislative body's "power to investigate is necessarily broad." Id. at 504, fn. 15. The only limit is that the subpoena must be "intended to gather information about a subject on which legislation may be had." Id. at 508. Here, there is no question that the subpoena issued to Mr. Dufault was intended for that purpose. As discussed above, the Town has an obligation under both state and federal law to safeguard the privacy of its public-school students. The privacy of these students was invaded when, somehow, a list or database of the names and addresses of all the students in the South Kingstown school system apparently wound up in Mr. Dufault's possession. The Town needs an explanation from Mr. Dufault as to how he obtained this information, to determine what measures need to be taken to ensure such an invasion of privacy does not occur again.

Even within the permissibly broad scope of a legislative subpoena, Mr. Dufault still retains whatever rights he may have against divulging privileged information. "[R]ecipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation . . . [and] retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications." Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032 (2020). However, the proper way for Mr. Dufault to assert those rights is by attending the Council hearing and raising an objection or asserting a claim of privilege "on a question-by-question basis," in response to a particular question being asked. See Tona, Inc. v. Evans, 590 A.2d 873, 876 (R.I. 1991) (defendant

in civil case does not get a blanket immunity from deposition even when there is a related criminal matter pending).

Mr. Dufault simply has no right to ignore a subpoena clearly authorized by Charter and statute. It is a "fundamental maxim that the public . . . has a right to every man's evidence." United States v. Bryan, 339 U.S. 323, 331 (1950); State v. Almonte, 644 A.2d 295, 300 (R.I. 1994). For these reasons, the Town respectfully requests that this Honorable Court order Mr. Dufault to comply with the subpoena issued by the South Kingstown Town Council in this matter.

IV. This matter calls for injunctive relief and acceleration pursuant to Rule 57.

Petitioners in this case satisfy the four elements for issuance of injunctive relief.[3] First, Petitioners are threatened by "irreparable harm" because "any legal remedy would be inadequate." See Rhode Island Turnpike & Bridge Auth. v. Cohen, 433 A.2d 179, 182 (R.I. 1981). In this case, there is no legal remedy that would require Mr. Dufault to comply with this lawful subpoena, absent an injunction from this Honorable Court compelling him to do so.

Second, Petitioners can demonstrate that they have a "likelihood of success on the merits," which requires them to show that they "will probably succeed on the merits of [their] claim." In re State Employees' Unions, 587 A.2d 919, 925 (R.I. 1991). Given the compelling privacy issues at stake here, as discussed above, state statute, Town Charter, and case law all strongly support the proposition that Mr. Dufault must comply with the subpoena.

[3] In order to satisfy those four elements, Petitioners must demonstrate they "(1) [have] a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) [have] the balance of the equities, including the possible hardships to each party and to the public interest, tip in [their] favor, and (4) [have] shown that the issuance of a preliminary injunction will preserve the status quo." DiDonato v. Kennedy, 822 A.2d 179, 181 (R.I. 2003) (quoting Iggy's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705 (R.I.1999)).

Third, weighing "the costs and benefits of enforcement to the parties" calls for issuance of an injunction. See Cullen v. Tarini, 15 A.3d 968, 982 (R.I. 2011). A balancing of the equities only calls for non-issuance of an injunction when it will "disproportionately harm the defendant with little benefit to the plaintiff." Id. Here, Mr. Dufault will suffer no harm if he is required to testify before the Council, as he would still retain the right to assert privilege for any particular question (if one is applicable), while also providing any nonprivileged information he may have.

Fourth, in issuing an injunction, the Court must "prevent the doing of any acts whereby the rights in question may be irreparably injured or endangered." See Coolbeth v. Berberian, 313 A.2d 656, 659 (R.I. 1974). Here, Mr. Dufault would suffer no legally cognizable injury by complying with the subpoena because "the public . . . has a right to every man's evidence." United States v. Bryan, 339 U.S. 323, 331 (1950). Alternatively, the Town, the School Committee, the Council, and the public will be irreparably injured if an injunction is not issued, as there would be no recourse for compelling compliance with a validly issued subpoena on a matter of pressing public concern.

Finally, in addition to injunctive relief, Petitioners seek a declaration pursuant to G.L. 1956 § 9-30-1, *et seq*., that Mr. Dufault is legally required to comply with the subpoena issued by the Council. Rule 57 of the Superior Court Rules of Civil Procedure provides, "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." This provision of Rule 57 is intended "to enable the court to accelerate the action in order to minimize the danger of avoidable loss and the unnecessary accrual of damages and to afford one threatened with liability an early adjudication." State Farm Ins. Co. v. Faella, No. CIV. A. KC 02-0096, 2002 WL 1804080, at *1 (R.I. Super. July 26, 2002).

Here, the South Kingstown School Committee and the Town Council are cooperatively investigating a breach of student privacy to determine appropriate measures to ensure such a breach does not reoccur in the future. Mr. Dufault has information highly relevant to how that breach may have occurred. Any interest he has in avoiding the subpoena is greatly outweighed by the privacy interest of the students of the Town of South Kingstown. If Mr. Dufault is allowed to delay the Town from the addressing this issue, it could potentially lead to further breaches of privacy and a loss of federal school funding. Accordingly, Petitioners respectfully request that this matter be accelerated pursuant to Rule 57 in order to prevent Mr. Dufault's obstruction of the Town's investigation and to allow the Town to redress any student privacy issues that may exist as quickly as possible.

Conclusion

Here, the South Kingstown Town Council issued a legitimate subpoena that is authorized by both state statute and Town Charter, in a manner consistent with case law. The purpose of the subpoena is of the utmost importance to the Town, as it is part of an urgent investigation into the protection of local student privacy. The results of this investigation will likely lead to measures being taken that help the Town meet its state and federal obligations to better protect student privacy. The subpoena served on Mr. Dufault is the key to this investigation, as he is the only person (of whom the Town is aware) who has direct knowledge of how the student privacy breach associated with the AFL-CIO mailer occurred.

Mr. Dufault has flatly refused to comply with the subpoena. He hasn't pointed to a case or a statute that suggests the subpoena is invalid. He hasn't given a legal reason why he may be immune from legal process. He hasn't appeared before the Council to object to any particular question or assert a claim of privilege. He hasn't filed a court action seeking to quash the subpoena

for any reason. Instead, when faced with the commands of the law, he simply answered "no." His answer is unacceptable. No one, not even Mr. Dufault, is above the law. He has no right to obstruct the lawful investigation of the Town or refuse to comply with lawfully issued compulsory process. The only redress available to the Town is in this Honorable Court. Accordingly, the Petitioners respectfully requests that this Court issue an order declaring that Mr. Dufault must comply with the Council's subpoena and an injunction requiring him to do so.

Town of South Kingstown
and South Kingstown Town Council,
By and through their attorneys,

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Certification

I, the undersigned, certify that this motion was served through the Odyssey file & serve system on June 4, 2021, and was also served upon the following counsel for Defendant via email:

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/s/ Peter Skwirz

S:\South Kingstown\School Committee\FERPA issue - release of student information\Complaint to enforce subpoena\Memo in support of declaratory and injunctive relief d3 redlined.docx