

Hearing Date: To Be Determined by The Court:

STATE OF RHODE ISLAND
 PROVIDENCE, S.C

SUPERIOR COURT

RICHARD SOUTHWELL, et. al

Plaintiffs,

vs.

DANIEL J. MCKEE, in his official capacity
 as the Governor of the State of Rhode Island, et al.

Defendants.

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C.A. No. PC-2021-05915

**STATE’S MEMORANDUM IN SUPPORT OF ITS
 MOTION FOR A PROTECTIVE ORDER**

Plaintiffs seek to depose Dr. James McDonald, Dr. Philip Chan, and Jaime Comella (collectively the “State Deponents”) pursuant to an order of this Court and on July 1, 2022 amended the original notice to include video recording. *See* Amended Notice of Deposition and Remote Videographer Recording at Exhibit 1. The State respects this Court’s order for depositions and only asks, due to the nature of the evidence likely requested by Plaintiffs during the deposition, that the video and audio recordings and resulting transcripts of the depositions be protected by this Court from dissemination to the public until the Court hears and renders a decision on objections raised during the depositions. Attempts to resolve this issue without Court intervention have been unsuccessful.

I. INTRODUCTION

Pursuant to Super. R. Civ. P. 26(c), a party may move the Court to make “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression” and the Court may issue such an order upon a showing of “good cause.” As the State expects Plaintiffs to seek privileged information during the depositions of the State Deponents, and that counsel for the State will need to object, the dissemination of the videos, audio, and transcripts will serve no purpose to promote the litigation, but would be designed to “annoy, embarrass, or oppress” the public servants who participate in the depositions.

II. ARGUMENT

1. The State Anticipates that Plaintiffs Will Seek Privileged Information.

Plaintiffs’ June 2, 2022 motion for discovery informs this Court of the information likely sought by Plaintiffs during the depositions of the State Deponents. Plaintiffs will likely seek information pertaining to a “K-12 Working Group,” meetings between the Rhode Island Department of Health and the Governor’s Office, and the decision-making processes related to masking in schools in general. *See* June 2, 2022 Motion, *generally*.

Depending on the specific question asked, Plaintiffs may attempt to seek privileged information. Namely, the information may be protected under the deliberative process privilege.¹ The deliberative process privilege protects

¹ It would be premature for the defendants to argue the applicability of the deliberative process privilege at this point and prior to questions posed. However, given the reasons given by the Plaintiffs for seeking these depositions, we note for the Court the likelihood that questions will be posed that will require the State to invoke that privilege and will prompt objections and instructions not to answer by the Attorney General.

communications that are part of the decision-making process of a governmental agency. See *Woodland Manor III Associates, L.P. v. Keeney*, 1995 WL 941473 (R.I. Super. August 31, 1995) (noting that the deliberative process privilege focuses on advisory opinions, recommendations, and deliberations constituting a part of a process by which governmental decisions and policies are formulated). The deliberative process privilege is a necessary privilege to allow government officials to work for the interest of the public candidly with each other, prior to an official determination.

The privilege “rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a **potential item of discovery and front page news**, and its object is to enhance the quality of agency decisions ... by protecting open and frank discussion among those who make them within the government.” *American Trucking Associations, Inc. v. Alviti*, 496 F.Supp.3d 699, 714 (D.R.I. 2020) (quoting *Dep’t of Interior v. Kalmath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001) (emphasis added)). To qualify for the privilege, the information must be “(1) predecisional, that is antecedent to the adoption of agency policy, and (2) deliberative, that is, actually related to the process by which policies are formulated.” *Id.* at 715 (quoting *Texaco Puerto Rico, Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995)).

To protect this well-established privilege, counsel for the State Deponents may need to object to a particular question and instruct the deponent not to answer. It is also possible that Plaintiffs may seek to disseminate the records of the deposition

among non-litigants, and for use to publicly humiliate, harass, annoy, or embarrass the deponent. *See, e.g.*, “Transcripts of Southwell vs. McKee Hearings,” <https://www.andrewbostom.org/2022/06/transcripts-of-southwell-vs-mckee-hearings-9-30-21-10-1-21-10-5-21-10-6-21-10-13-21-10-14-21-10-19-21-and-11-3-21/>, (last visited July 6, 2022), “Judge Lanphear, Your Misguided Decision Upheld RIDOH Covid-19 Lysenkoism, Victimizing Rhode Island Schoolchildren, Part 1,” <https://www.andrewbostom.org/2022/06/transcripts-of-southwell-vs-mckee-hearings-9-30-21-10-1-21-10-5-21-10-6-21-10-13-21-10-14-21-10-19-21-and-11-3-21/>, (last visited July 6, 2022), “Why is RIDOH Concealing Data on Primary Pediatric Covid-19 Hospitalizations?” <https://www.andrewbostom.org/2022/06/why-is-ridoh-concealing-data-on-primary-pediatric-covid-19-hospitalizations/> (last visited July 6, 2022) (Specifically stating: “**Legal discovery with deposition of RIDOH officials soon shared with all Rhode Islanders**, further open court legal hearings, as well as public investigative state legislature hearings, should proceed immediately.”) (emphasis added).

2. There is Good Cause to Prevent the Parties from Publicly Disseminating the Deposition Materials.

Although the Rhode Island Supreme Court has yet to define “good cause” under R.I. Super. R. Civ. P. 26(c), the Court has looked to the federal courts for guidance in interpreting a substantively similar rule. *Estate of Chen v. Lingting Ye*, 208 A.3d 1168, 1173 (R.I. 2019). “Good cause” requires a factual demonstration of **potential harm**, not on conclusory statements.” *Id.* (quoting *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986)). The court should balance the competing interests between a right

to discover relevant and non-privileged information that may be pertinent to the case, and the harm that may otherwise be caused. *Estate of Chen* at 1175. The potential harm to the deponents and public is twofold: first in the harm to the public that misuse of these out-of-context deposition segments could present, and second, the nature of the medium of the deposition enhances that harm. In this case, there is no correlating harm to the Plaintiffs as they will still be able to conduct discovery.

First, our nation is still coping with the fallout of a global pandemic. *See* “COVID DATA TRACKER WEEKLY REVIEW,” U.S. Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> (last visited July 6, 2022) (As of July 6, 2022, there are an average of 255 daily deaths in the United States attributable to Covid-19). Maintaining the public trust and between the public and health officials is vital to positive health outcomes. *See* “Trust in the U.S. Government and Its Health Agencies in the Time of Covid-19, Geisterfer-Black, Niemi, Neier, and Rodwin, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiMv3W1OT4AhUTj4kEHXxFDloQFnoECCsQAQ&url=https%3A%2F%2Fwww.mdpi.com%2F2673-3986%2F3%2F2%2F12%2Fpdf&usg=AOvVaw06ZqPRxkq6ssWs4R3sr4SY> (accessed July 6, 2022) (noting that public trust in institutions during a global pandemic is essential in influencing adherence to a pandemic response). Disseminating these videos, out of context, without the benefit of understanding the

specifics of the legal process or the claims asserted, can fracture that trust. For this reason, dissemination of the videographic deposition should be prevented.

Second, the presence of potential harm is more likely to exist due to the specific medium sought to be withheld from public view—a video. *See Low v. Trump University, LLC*, 2016 WL 4098195, *5 (S.D. Cal. Aug. 2, 2016). “Courts have expressed caution about the release of litigation documents in audio or video form, which are ‘subject to a higher degree of potential abuse’ than written transcripts.” *Low* at *5 (quoting *Felling v. Knight*, 2001 WL 1782360, at *3 (S.D. Ind. Dec. 21, 2001)), *see also Barket v. Clark*, 2013 WL 647507 (D. Nev. Feb. 21, 2013) (good cause existed for the court to issue a protective order preventing dissemination of the video deposition of defendants when as it would likely only serve to add fuel to the dispute between the parties and could undermine the witness exclusionary rule).

The concerns about the dissemination of litigation materials by the Plaintiffs or their proffered expert Dr. Bostom, is not based upon pure conjecture, but rather is based on a pattern of behavior. For example, Dr. Bostom released the transcripts of the Preliminary Injunction Hearing on his website. *See* Dr. Bostom’s websites linked *supra*. Further, Dr. Bostom drafted an open letter to the Court concerning the Court’s decision on the Preliminary Injunction Hearing. *Id.* He also released Dr. McDonald’s home address, where until a few weeks ago he resided with his family and released the personal cell phone number of another public employee (a non-State Deponent). *See generally* www.andrewbostom.org (last accessed July 6, 2022).²

² Plaintiffs’ counsel has made clear that Dr. Bostom intends to attend all depositions of State Deponents.

Finally, in the balance of harms, Plaintiffs will not suffer from this restriction as it will still allow Plaintiffs to engage thoroughly in discovery.

III. CONCLUSION

The State does not seek to limit discovery, merely the use of video and audio records for personal means, not related to the litigation. For that reason, the State asks that this Court issuing a protective order, barring public dissemination of the deposition records of the State Deponents.

By:

DEFENDANTS,

Daniel J. McKee, in his official capacity
as the Governor of the State of Rhode
Island, Dr. James McDonald, in his
official capacity as Acting Director of
the Rhode Island Department of
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 7th day of July, 2022, I electronically filed the within document through the electronic filing system. The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Etie-Lee Z. Schaub

CERTIFICATE OF GOOD FAITH

Pursuant to Rule 26(c) of the Superior Court Rules of Civil Procedure, I certify that the Attorney of Record for the State has, in good faith, conferred or attempted to confer with opposing counsel to resolve the dispute without court action.

/s/ Etie-Lee Z. Schaub