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OF OHIO

**IN THE COURT OF CLAIMS OF OHIO**

2015 FEB 25 PM 3:14

**TRANSAMERICA BUILDING  
CO., INC.** :

**Plaintiff,** :

**v.** :

**OHIO SCHOOL FACILITIES  
COMMISSION** :

**Defendant.** :

**Case No. 2013-00349**

**Referee Samuel Wampler**

**OHIO SCHOOL FACILITIES COMMISSION'S MEMORANDUM IN OPPOSITION  
TO PLAINTIFF'S MOTION TO COMPEL**

**I. INTRODUCTION**

Now comes Defendant, Ohio School Facilities Commission, and respectfully requests that this Court deny Plaintiff's motion to compel discovery. Defendant similarly requests that Plaintiff's motion for costs, attorneys' fees, and sanctions be denied.

This litigation over the construction to build the Ohio State School for the Blind/School for the Deaf dormitories ("Project") has a long and wide-ranging history. Prior to filing suit in 2013, Defendant OSFC ("Defendant," or "OSFC") responded to numerous public records requests of Plaintiff Transamerica. Additionally, the Construction Manager Lend Lease and Project Architect SHP were both subpoenaed prior to litigation. Prior to those parties becoming third-party defendants in this case, OSFC facilitated production of more than 44,000 and 25,000 pages of documents from each, respectively. OSFC, itself, to date has provided more than 21,000 pages of discovery. In a project of this scope, with hundreds of thousands of documents exchanged between multiple parties, Defendant OSFC has worked diligently to meet its discovery obligations and will continue to do so.

**ON COMPUTER**

## II. ARGUMENT

### A. Defendant Has Responded to Plaintiff's Document Request

Plaintiff requests the production of four items in its Motion to Compel:

- 1) Signed, posted sets of drawings;
- 2) As-built drawings;
- 3) Occupancy Permits; and
- 4) Emails of Ohio School for the Blind and Deaf Building Maintenance Superintendent Chris Simonson. (Plaintiff's Motion to Compel, p. 2).

Defendant did respond to Plaintiff's request for documents a number of months ago, however it appears that now Plaintiff is not satisfied with the response. Plaintiff argues for the first time in its Motion to Compel that it does not accept the response OSFC previously provided on October 2, 2014 (attached as Exhibit A), because that response came through an email from a paralegal with download instructions and was not in the form of a pleading (*Id.* p. 6). To this point, Plaintiff had not referenced dissatisfaction with receiving secure download instructions from a paralegal.

However, when Plaintiff requested the same information on January 26, 2015, it made no mention that it would only accept a response in the form of a pleading. Further, Plaintiff previously accepted email responses from OSFC in a non-pleading format, and from a paralegal. (See emails dated 4/24/14, 4/28/14 and 5/9/14 attached as Exhibit B). In fact, the electronic posting and downloading apparatus used to provide documents to Plaintiff seemed to satisfy Plaintiff up to that point. Defendant simply was not aware that Plaintiff decided it would no longer accept rolling responses to its Request for Production of Documents unless they were in pleading format. Defendant OSFC assumed the response from October 2, 2014 had been lost in the shuffle of more than 21,000 pages of documents it has already produced in discovery, which is why OSFC replied to the renewed request in the same manner.

Next, to the extent that Plaintiff accepts the emails sent to it on October 2, 2014, and January 27, 2015, as responses to its Request for Production of Documents, Plaintiff appears to take issue with the content of the response. Plaintiff argues that OSFC should already have these documents in its possession, or at the very least, should be able to provide these documents from its agents – who are now being sued for indemnification in this case. After embarking on numerous searches for the documents requested by Plaintiff (most of which Defendant was able to secure and produce), as previously communicated to Plaintiff, Defendant is not able to locate the remainder of them in its custody; nor is OSFC currently in a position to gather these documents from third party defendant Lend Lease. Plaintiff knew or should have known in October that OSFC’s position was that it could not provide these documents, yet it waited over three months – until after OSFC filed its third party complaint against Lend Lease and SHP – to file a motion to compel with this Court.

### **B. Occupancy Permits**

Third-Party Defendant Lend Lease is responsible for keeping records of the Project on behalf of Defendant OSFC. *See, e.g.* Third-Party Complaint of OSFC at Ex. B, ¶s 2.7.5 and 9.3. Plaintiff knows this, yet continues to request documents from Defendant that are in the possession of Third-Party Defendant Lend Lease. Defendant OSFC has stated numerous times, albeit through a paralegal, that it was not in possession of the occupancy permits. In that those documents would appropriately be in the Project’s official file, OSFC referred, and would still refer, Plaintiff to direct this request for those documents to Lend Lease.<sup>1</sup> Now that Lend Lease

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<sup>1</sup> Prior to filing a third-party complaint against Lend Lease, Defendant requested contribution from Lend Lease at the mediation. As such, Lend Lease has not been eager to provide Defendant with any additional documents beyond what it has previously provided through subpoena and through Plaintiff’s onsite document review at Lend Lease’s Columbus office.

has been made a party to this action, Plaintiff could simply make a discovery request to Lend Lease. If Plaintiff is concerned that the discovery deadline has passed, it should request an extension of the deadline, which is wholly reasonable given that Lend Lease, and now Berardi Partners, have been added to the case. Defendant would not oppose such a request.

In short, these documents should exist. However, Plaintiff needs to request these documents from the correct party. Lend Lease may have been charged with keeping the records for the Project, and Defendant OSFC may have the contractual right to these documents. Even so, that doesn't mean that Lend Lease will necessarily provide OSFC those documents upon request, especially in a situation where OSFC has filed a third-party claim for indemnification against Lend Lease. For this reason, Plaintiff needs to request those documents directly from Lend Lease, now a party to this action.

### **C. Posted Set of Drawings**

With respect to posted sets of drawings, Plaintiff states in its Motion to Compel that it has received one posted set of drawings from a public records request, but these posted drawings are not signed. (Motion at p. 16). Plaintiff relies on the testimony of Lend Lease's Project Superintendent Jim Smith to conclude that these drawings are not the most current, updated set of drawings that were posted in Lend Lease's trailer, because Mr. Smith testified that such drawings – located *in Lend Lease's trailers* – would have been signed by the contractors. (Smith Depo, p. 44).

Plaintiff does not dispute that posted drawings existed in the Lend Lease trailer. (*Id.* ¶ 16) However, because OSFC is not able to produce signed posted drawings (which may not even exist), Plaintiff argues that OSFC should not be allowed to mention that posted drawings ever existed. However, as stated numerous times in Defendant's responses to Plaintiff, Defendant

OSFC is not in possession of any “signed” posted drawings. Defendant OSFC gave Plaintiff the posted drawings it did have. Since it was Lend Lease’s employee that stated Lend Lease had such “signed” drawings *in the Lend Lease trailer*, Defendant thought it prudent that Transamerica should request these documents from Lend Lease, if they do exist in the form requested.<sup>2</sup>

#### **D. As-Built Drawings**

Likewise, Defendant OSFC is not in possession of the as-built drawings for the Project. As has been communicated numerous times to Plaintiff, these drawings should also be in the possession of Lend Lease.

#### **E. Chris Simonson Emails**

Chris Simonson is a maintenance worker at the Deaf & Blind School Campus. Defendant OSFC has provided Plaintiff all Chris Simonson emails that were sent to Mr. Simonson or received from Mr. Simonson, by any OSFC employee, or that were copied to any OSFC employee. Nevertheless, Defendant has passed this request along numerous times for all of Mr. Simonson’s emails related to the Project. However, this request is being made to an organization that is not a direct party to the litigation, and it is being made by an intermediary who is not requesting the documents on its own behalf. As such, Defendant recommended that Plaintiff subpoena the party directly to obtain the documents. In the spirit of cooperation though, Defendant continues to work with counsel for the Ohio School for the Blind and Deaf to obtain these documents, and expects to be able to produce them shortly.

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<sup>2</sup> It is possible that in his deposition Mr. Smith was mistaken as to the signing of those drawings.

### III. CONCLUSION

For the above stated reasons, Defendant OSFC requests that Plaintiff's Motion to Compel be denied. Defendant has responded to Plaintiff's discovery requests, albeit not the way that Plaintiff would have liked. Plaintiff could have easily just subpoenaed – or now that Lend Lease is a party – requested through discovery the occupancy permits and the as-built drawings. Defendant OSFC does not have a “signed” set of the posted drawings, and has doubts that such a document exists, at least in the form that is alleged. The Simonson emails will be provided to Plaintiff post haste. Plaintiff is making much ado about its failure to request documents from the proper parties.

Defendant OSFC also requests that the Court deny Plaintiff attorney fees and any other ancillary relief being requested by Plaintiff.

Respectfully submitted,

MIKE DeWINE  
Ohio Attorney General



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[jerry.kasai@ohioattorneygeneral.gov](mailto:jerry.kasai@ohioattorneygeneral.gov)

*Attorneys for Defendant OSFC*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Opposition to Plaintiff's Motion to Compel was sent by email and regular U.S. mail, postage prepaid, this 25th day of February 2015 to:

Donald W. Gregory  
Michael Madigan  
Kegler Brown Hill & Ritter  
65 East State Street, 18<sup>th</sup> Floor  
Columbus, OH 43215  
[dgregory@keglerbrown.com](mailto:dgregory@keglerbrown.com)  
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JERRY KASAI (0019905)  
Assistant Attorney General (0013476)

**Margie Welsheimer**



**From:** Margie Welsheimer  
**Sent:** Thursday, October 02, 2014 1:41 PM  
**To:** mmadigan@keglerbrown.com; dgregory@keglerbrown.com; ttackett@keglerbrown.com  
**Cc:** Jerry K. Kasai; William C. Becker; Craig Barclay  
**Subject:** TA v. OSFC, Document Production OSFC007091-007235

**You have received 1 secure file from [marjorie.welsheimer@ohioattorneygeneral.gov](mailto:marjorie.welsheimer@ohioattorneygeneral.gov).**  
Use the secure link below to download.

Mike:

Bill is out of the office this week, and he asked that I provide an update with respect to your June 26, 2014 correspondence, in which you asked about the following items

- Response to TA's first Request for Interrogatories. Sent under separate email earlier today.
- LL Staffing/Implementation Plan See six excel spreadsheets provided with these responses, produced in their native format and identified as "OSFC007091-OSFC007096"
- Latest Project Budget Please see excel spreadsheets and PDF documents provided with these responses. Excel spreadsheets have been produced in their native format where possible. All responsive budget documents are included in the Bates ranges "OSFC007097-OSFC007103."
- Privilege Log, including those of Rob Grinch. Previously produced.
- Remaining Core Meeting Minutes  
I have checked our production, and I have checked Lend Lease's Prolog file which I was granted access to, and we have asked both Matt Westerman and Madison Dowlen to look for the dates in question, and we have not been able to locate them. OSFC and the AG's Office have stopped searching.
- Andy Englehart Material:
  - a. Construction Claims Please see document Bates-stamped OSFC007105-007116 and provided with these responses.
  - b. Scheduling and Estimating Please see document Bates-stamped OSFC007105-007116 and provided with these responses.
  - c. General Construction Topics
    - i. "How to Avoid a Failing Grade on your School Construction Project", Please see document Bates-stamped OSFC007117-007164 and provided with these responses.
- Excel spreadsheet that Andy used to replicate TransAmerica's job cost report. See attached excel spreadsheet provided in native format and identified as "OSFC007183."

With respect to the items listed below, OSFC is not able to provide these documents. Subpoenas should be issued to the respective document custodians.

- LL "Posted Changes" Plans kept in its Trailer Please subpoena Lend Lease for these documents.
- Project As-Builts For Dormitory Portion Please subpoena Lend Lease for these documents.
- All e-mails of Chris Simonson Please subpoena the Ohio School for the Blind/Deaf for these documents.

- All certificate of occupancy permits issued for the Project including any temporary certificates. Please subpoena Lend Lease for these documents.

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**Margie Welsheimer**

**From:** Margie Welsheimer  
**Sent:** Thursday, April 24, 2014 2:30 PM  
**To:** mmadigan@keglerbrown.com; dgregory@keglerbrown.com; ttackett@keglerbrown.com  
**Cc:** William C. Becker; Craig Barclay; Jerry K. Kasai  
**Subject:** RE: Rob Grinch Emails  
**Attachments:** BLL CM Agreement No. 1 (8-31-07).pdf; BLL CM First Amendint to Interim Agmt (1-14-09).pdf; BLL CM Interim Agmt No. 2 No. 2 (2-2-09).pdf; SHP Email (Punch list).pdf; SHP Email 3-10-14.pdf

Mike:

Bill forwarded your email to me. I am attaching to this correspondence documents responsive to the items listed below. They are Bates-stamped OSFC-006983 – OSFC-007083.

- All amendments to the Lend Lease Agreement
- All requests for additional compensation made by SHP. If you recall, in Predovich's deposition, he indicated that he had provided the OSFC at least two submissions for additional A/E services, with the latest being this past fall. As I understood it, these services are attributable to additional punchlist time and SHP's costs to address the TA claim.

Thanks,



*Margie Welsheimer*

Paralegal – Court of Claims Defense Section  
Office of Ohio Attorney General Mike DeWine  
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Fax number: 866-757-7680  
[margie.w@ohioattorneygeneral.gov](mailto:margie.w@ohioattorneygeneral.gov)

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**From:** Madigan, Michael [mailto:MMadigan@keglerbrown.com]  
**Sent:** Wednesday, April 23, 2014 04:56 PM  
**To:** William C. Becker  
**Cc:** Gregory, Don <DGregory@keglerbrown.com>  
**Subject:** RE: Rob Grinch Emails

Bill:

I've been extremely patient waiting for the state to produce the additional documents relating to SHP's request for additional compensation. As you can see, I made that specific request 7 weeks ago.

We really need them for Dowlen's deposition coming up on Monday.

Please provide those documents along with the others that I have noted below, including the Simonson emails.

Mike

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**From:** Madigan, Michael  
**Sent:** Friday, April 04, 2014 8:34 AM  
**To:** 'William C. Becker'  
**Cc:** Gregory, Don  
**Subject:** Rob Grinch Emails

Bill:

We really need the Rob Grinch's emails as his deposition is scheduled for April 14<sup>th</sup>. We have previously requested these in our first request for production of documents back on August 13, 2013. I again followed up on February, 2014 noting Rob's emails along with a number of other outstanding items.

Below, I have compiled a list of outstanding discovery, which doesn't include my recent discovery issued last week.

- All amendments to the Lend Lease Agreement
- All requests for additional compensation made by SHP. If you recall, in Predovich's deposition, he indicated that he had provided the OSFC at least two submissions for additional A/E services, with the latest being this past fall. As I understood it, these services are attributable to additional punchlist time and SHP's costs to address the TA claim.
- Chris Simonson emails.
- Certificate of Occupancy for the dormitories, including any temporary certificates.
- We also need full access to LL's Prolog cite as I further described in my January email.

Thanks

Mike

Michael J. Madigan  
Kegler, Brown, Hill & Ritter  
65 E. State Street, Suite 1800  
Columbus, OH 43215  
(614) 462-5478  
(614) 464-2634 (Fax)

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## Margie Welsheimer

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**From:** Margie Welsheimer  
**Sent:** Monday, April 28, 2014 5:22 PM  
**To:** mmadigan@keglerbrown.com; dgregory@keglerbrown.com  
**Cc:** ttackett@keglerbrown.com  
**Subject:** TA v. OSFC LL Amendment 3  
**Attachments:** OSFC007084-007090.pdf

Attached please find the third amendment to the agreement for CM services, Bates-stamped OSFC 007084-007090, as requested.



*Margie Welsheimer*

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## Margie Welsheimer

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**From:** Margie Welsheimer  
**Sent:** Friday, May 09, 2014 4:18 PM  
**To:** mmadigan@keglerbrown.com; ttackett@keglerbrown.com;  
dgregory@keglerbrown.com  
**Cc:** Jerry K. Kasai; William C. Becker  
**Subject:** Grinch Subpoena Docs

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Mike:

Below is a link to documents responsive to the Robert Grinch subpoena, Bates-stamped OSFC-Grinch-013620-Subpoena through OSFC-Grinch-013792-Subpoena. Additional oversized documents are being copied by a vendor, and will be produced to you shortly.

Any documents responsive to TransAmerica's Third Request for Production of Documents to the OSFC have previously been provided to TransAmerica counsel on 4/4/14, and are Bates stamped OSFC-Grinch-013564-013591.

Please contact me if you experience any trouble with this transmission.

Thank you,

Margie Welsheimer  
644-9356

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