

MEMORANDUM IN SUPPORT

On January 21, 2016, 2015, counsel for Plaintiff issued a subpoena to “Representative, OPERS”. The subpoena requests that the Representative appear personally before this Court on January 26, 2016, for purposes of providing testimony and to provide the following:

1. Please produce for inspection and copying a computation of David A. Bentkowski’s (DOB**/**/****; SSN ***-**-****) current OPERS retirement benefits and the options available to him when he retires assuming no further participation of OPERS.
2. Please produce for inspection and copying a computation of the same David A. Bentkowski’s projected retirement benefits from OPERS assuming he worked at the Ohio Lottery Commission for one, two, three, four and five years beyond November 12, 2013 at the same pay rate as he earned from the Ohio Lottery Commission when he was discharged on November 12, 2013.

First and foremost, OPERS has attempted to cooperate with Plaintiff’s counsel. The Subpoena was received by the OPERS Legal Department on January 21, 2016. Undersigned counsel contacted the office of Plaintiff’s counsel on January 21, 2015, regarding the testimony and information that was being sought. A representative of plaintiff’s counsel did not return the phone call until 9:30 a.m. on January 26, 2016. It is also important to note that the Plaintiff is the OPERS member in this case. Plaintiff’s counsel has made no attempt to request any information regarding the account of Plaintiff David A. Bentkowski prior to the eve of trial. See *Alpha Benefits Agency v. King Ins. Agency, Inc.* (Eighth App. Dist. 1999) 134 Ohio App.3d 673, 686. (Order to quash subpoena appropriate when subpoena served two days before trial and no effort

to obtain requested documents at earlier time.) In addition, OPERS does not possess documents that provide the computations that Plaintiff seeks.

As an initial matter, it must be stated that absent a release from the Plaintiff, no testimony can be elicited regarding the OPERS account. The information and materials in a member's file are both confidential and privileged. R.C. 145.27 provides in relevant part:

- (A) (1) As used in this division, "personal history record" means information maintained by the public employees retirement board on an individual who is a member, former member, contributor, former contributor, retirant, or beneficiary that includes the address, telephone number, social security number, record of contributions, correspondence with the public employees retirement system, or other information the board determines to be confidential.
- (2) The records of the board shall be open to public inspection and may be made available in printed or electronic format, except that the following shall be excluded, except with the written authorization of the individual concerned:
 - (a) The individual's statement of previous service and other information as provided for in section 145.16 of the Revised Code;
 - (b) The amount of a monthly allowance or benefit paid to the individual;
 - (c) The individual's personal history record.
- (B) All medical reports and recommendations required by this chapter are privileged, except as follows:
 - (1) Copies of medical reports or recommendations shall be made available to the personal physician, attorney, or authorized agent of the individual concerned upon written release from the individual or the individual's agent, or when necessary for the proper administration of the fund, to the board assigned physician.
 - (2) Documentation required by section 2929.193 of the Revised Code shall be provided to a court holding a hearing under that section.
- (C) Any person who is a member or contributor of the system shall be furnished with a statement of the amount to the credit of the individual's account upon written request. The board is not required to answer more than one such request of a person in any one year. The board may issue annual statements of accounts to members and contributors.
- (D) Notwithstanding the exceptions to public inspection in division (A)(2) of this section, the board may furnish the following information:
 - (1) If a member, former member, contributor, former contributor, or retirant is subject to an order issued under section 2907.15 of the Revised Code or an order issued under division (A) or (B) of section 2929.192 of

the Revised Code or is convicted of or pleads guilty to a violation of section 2921.41 of the Revised Code, on written request of a prosecutor as defined in section 2935.01 of the Revised Code, the board shall furnish to the prosecutor the information requested from the individual's personal history record.

(2) Pursuant to a court or administrative order issued pursuant to Chapter 3119., 3121., 3123., or 3125. of the Revised Code, the board shall furnish to a court or child support enforcement agency the information required under that section.

(3) At the written request of any person, the board shall provide to the person a list of the names and addresses of members, former members, contributors, former contributors, retirants, or beneficiaries. The costs of compiling, copying, and mailing the list shall be paid by such person.

The Revised Code operates to make the information and materials confidential and their release is prohibited. *See Lindsay v. Dwyer*, 108 Ohio App.3d 462, 466-467, 670 N.E.2d 1375,1377-1378 (1996). Moreover, the information and documents identified are privileged and not subject to subpoena or discovery. *See State ex rel. Shelton v. Firemen and Policemen's Death Benefit Fund*, 125 Ohio App.3d 559, 567, 709 N.E.2d 182, 187 (1997). (“We believe that R.C. 742.41(B) establishes a privilege pertaining to the personal information of persons who are members of, or receive benefits from, the Fund. This privilege can only be waived by the person concerned, in writing. Absent such a waiver, or unless one of the exceptions in R.C. 742.41(E) applies, the Fund should not disclose the information.”) (Construing language virtually identical to R.C. ¶145.27.)

Pursuant to Civil Rule 45(C)(3), a “court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following: (b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies”.

Moreover, serving Subpoenas that seek testimony explaining OPERS member benefits and rights in a speculative future time is inappropriate for three reasons.

First, it is settled that testimony regarding the interpretation of a statute is impermissible, “as the interpretation of law is within the sole province of the court.” *Wagenheim v. Alexander Grant & Co.* (10th Dist. 1983), 19 Ohio App.3d 7, 19; *see also, Early v. Toledo Blade* (6th Dist. 1998), 130 Ohio App.3d 302, 319 (expert not permitted to give interpretation of law “as that is within the sole province of the court.”); *Nicholson v. Turner/Cargile* (10th Dist. 1995), 107 Ohio App.3d 797, 809 (expert testimony not admissible to interpret statutory terms); *State v. Walsh* (10th Dist. 1979), 66 Ohio App.2d 85, 100 (same). Retirement benefits are based upon statutory provisions. See, for example, R.C. 145.33 Allowance upon age and service retirement. An OPERS representative should not be compelled to provide testimony about an interpretation of the statutes relevant to OPERS.

Second, under the deliberative process privilege, a litigant cannot “probe the mental processes and motives of the individual decision-maker, rather than to question the objective legal validity of the institutional decision.” *Kent Corp. v. NLRB*, 530 F.2d 612, 620 (5th Cir. 1976); *see also Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena* (D.D.C. 1966), 40 F.R.D. 318 (the privilege “forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others”). Deliberative privilege is a long standing privilege which focuses on recommendations and deliberations comprising the process whereby decisions and policies are formulated. *See National Labor Relations Board v. Sears, Roebuck & Co.* (1975), 421 U.S. 132, 150. Ohio has recognized this privilege in the context of decisions made by administrative boards and commissions. *T.*

Marzetti Co. v. Doyle (1987), 37 Ohio App.3d 25, 29; *see also Talbut v. City of Perrysburg* (1991), 72 Ohio App.3d 475, 480.

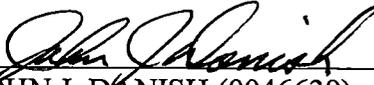
Third, it would be an undue burden to force an OPERS representative to appear personally and testify in order to explain statutes that are readily available to counsel. OPERS has a small number of employees relative to the hundreds of thousands of individuals who are either members or recipients of benefits. The loss of employees to a day or afternoon of testimony to provide duplicative information regarding the statutory rights and benefits of OPERS members is a hardship borne not only by OPERS but by every OPERS member.

Pursuant to Civil Rule 45(C)(3), a “court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following: ... “(d) Subjects a person to undue burden.”

For the reasons set forth above, OPERS first requests that the Court quash the subpoena directed to the Ohio Public Employees Retirement System.

Respectfully submitted,

MICHAEL DeWINE (0009181)
Ohio Attorney General



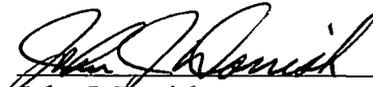
JOHN J. DANISH (0046639)
Assistant Attorney General
30 East Broad Street, 15th Floor
Columbus, Ohio 43215-3428
(614) 728-2647
(614) 866-5442 Facsimile
john.danish@ohioattorneygeneral.gov
*Counsel for Ohio Public Employees
Retirement System*

CERTIFICATE OF SERVICE

I certify that, on January 26, 2016, a copy of the foregoing was served via both email and regular mail on the following:

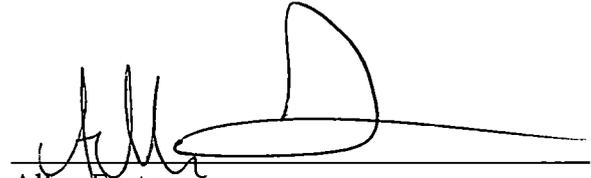
Brent L. English
Law Offices of Brent L. English
The 820 Building
820 W. Superior Avenue, 9th Floor
Cleveland, Ohio 44113-1818
benglish@englishlaw.com
Counsel for Plaintiff

Randall Knutti
Ohio Attorney General's Office
150 East Gay Street, 25th Floor
Columbus, Ohio 43215
Randall.knutti@ohioattorneygeneral.gov
Counsel for Ohio Lottery Commission



John J. Danish
Assistant Attorney General

FURTHER AFFIANT SAYETH NAUGHT.


Allen Foster

Sworn to and subscribed in my presence this 26th day of January, 2016.



LAUREN NICHOLSON GRESH
ATTORNEY AT LAW
Notary Public, State of Ohio
My Commission Has No Expiration
Section 147.03 R.C.


Notary Public



COURT OF CLAIMS OF OHIO

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614. 387.9800 or 1.800.824.8263
www.cco.state.oh.us

Subpoena

RECEIVED
LEGAL

David A. Bentkowski

Plaintiff

JAN 21 2016

v.

Case Number: 2014-00651

Ohio Lottery Commission

Defendant

Judge: Patrick M. McGrath

To: Representative, OPERS

277 East Town Street

Columbus, Ohio 43215

YOU ARE HEREBY COMMANDED TO:

- Attend and give testimony at a (trial) (hearing) (deposition) on the date, time and at the place specified below.
- Attend to testify and produce documents and/or tangible things at a (trial) (hearing) (deposition) on the date, time and at the place specified below.
- Produce and permit inspection and copying, on the date and at the time and place specified below, of any designated documents that are in your possession custody or control.
- Produce and permit inspection and copying, testing or sampling, on the date and at the time and place specified below, of any tangible things that are in your possession, custody or control.
- Permit entry upon the following described land or other property, for the purposes described in civil 34(a)(3), on the date and at the time and place specified below.

Description of land or other premises:

DATE: 01/26/16 TIME: 1:00 p.m. PLACE: Court of Claims of Ohio, The Ohio
Judicial Center, 65 South Front Street,
Third Floor, Columbus, Ohio 43215

DESCRIPTION OF ITEMS TO BE PRODUCED:

SEE EXHIBIT A

THE STATE OF OHIO

County, ss

To the Sheriff of _____ County, Ohio, Greetings:

YOU ARE HEREBY COMMANDED TO SUBPOENA THE ABOVE NAMED PERSON.

WITNESS MY HAND AND SEAL OF SAID COURT THIS _____ DAY OF _____, 20____,

CLERK OF THE COURT OF CLAIMS OF OHIO.

BY: _____
Assistant Clerk

REQUESTING PARTY INFORMATION:

NAME: Brent L. English, Esq.
(ATTORNEY FOR:) David A. Bentkowski
TELEPHONE NUMBER 216-781-9917

NOTE: READ ALL INFORMATION ON THIS SUBPOENA.

Civil Rule 45 (C) Protection of persons subject to subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

(2) (a) A person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing or trial.

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii),(iii),(iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production. If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production. An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded.

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

(a) Fails to allow reasonable time to comply;

(b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;

(c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;

(d) Subjects a person to undue burden.

(4) Before filing a motion pursuant to division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.

(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.

Civil Rule 45 (D) Duties in responding to subpoena.

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labelled to correspond with the categories in the subpoena. A person producing documents pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials under Civ. R.26(B)(3) or (4), 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.

Civil Rule 45 (E) Sanctions.

Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. A subpoenaed person or that person's attorney who frivolously resists discovery under this rule may be required by the court to pay the reasonable expenses, including reasonable attorney's fees, of the party seeking the discovery. The court from which a subpoena was issued may impose upon a party or attorney in breach of the duty imposed by division (C)(1) of this rule an appropriate sanction, which may include, but is not limited to, lost earnings and reasonable attorney's fees.

RETURN OF SERVICE

I RECEIVED THIS SUBPOENA ON _____, AND SERVED THE PARTY
NAMED ON THE REVERSE

HEREOF BY _____ ON _____

I WAS UNABLE TO COMPLETE SERVICE FOR THE FOLLOWING REASON:

Sheriff's Fees

Service _____

Signature of serving party

Mileage _____

Copy _____

Circle one:

Deputy Sheriff

Attorney

Total _____

Process Server

Deputy Clerk

Other _____

DUCES TECUM

1. Please produce for inspection and copying a computation of David A. Bentkowski's (DOB 12/23/1971; _____) current OPERS retirement benefits and the options available to him when he retires assuming no further participation of OPERS.
2. Please produce for inspection and copying a computation of the same David A. Bentkowski's projected retirement benefits from OPERS assuming he worked at the Ohio Lottery Commission for one, two, three, four and five years beyond November 12, 2013 at the same pay rate as he earned from the Ohio Lottery Commission when he was discharged on November 12, 2013.

