

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISIONS

In re:

CITY OF DETROIT, MICHIGAN

Case No. 13-53846-SWR  
Chapter 9  
Hon. Steven W. Rhodes

Debtor.

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**STATE OF MICHIGAN'S MOTION FOR PROTECTIVE ORDER PURSUANT TO  
FEDERAL RULE OF CIVIL PROCEDURE 26(c)(1)(D)**

The State of Michigan, through its undersigned counsel, requests entry of an order that limits inquiry relating to emergency manager candidates. Specifically, the State requests that the Court order that the State is not required to disclose the names of emergency manager candidates or provide information that would reveal the identities of those persons. For its motion, the State of Michigan states as follows:

1. International Union, UAW ("UAW") and the Flowers Plaintiffs served discovery subpoenas for documents and testimony on Governor Snyder, Treasurer Andrew Dillon, and the State of Michigan under Fed.R.Civ.P. 30(b)(6); and The Michigan Council 25 of the American Federation of State, County & Municipal Employees, AFL-CIO and Sub-Chapter 98, City of Detroit Retirees (collectively, "ASFCME") served deposition subpoenas including on Governor Snyder, Treasurer Dillon, Transformation Manager Richard Baird, related staff and other State employees and officials. The depositions of Governor Snyder, Treasurer Dillon, Transformation Manager Baird and the 30(b)(6) deponent (the "State Deponents") pursuant to these subpoenas are scheduled for October 9 and 10, 2013

2. The State anticipates that the State Deponents may be asked to identify individuals other than Kevyn Orr who were actively considered for the position of emergency manager for the City of Detroit.

3. Each of the individuals, other than Mr. Orr, who were actively considered for the position were given assurances by the Governor's office that their identities would remain confidential.

4. Disclosure of the names of emergency manager candidates would not only violate their privacy and the assurances of confidentiality made to them but might also be damaging to certain of the individuals in their current positions because their current employers are not aware that these candidates had expressed an interest in the position. Further, certain of the individuals are elected officials whose re-electability could be affected by disclosure of their identities.

5. The State has resisted other efforts to compel disclosure of the names of emergency manager candidates. On June 12, 2013, the Ingham County Circuit Court ordered Mr. Baird and the State to disclose the names of the emergency manager candidates in a lawsuit brought by Robert Davis. On June 20, 2013, the Michigan Court of Appeals issued two orders reversing the Circuit Court's orders. *Robert Davis v. Local Emergency Financial Assistance Loan Board, Court of Appeals, State of Michigan, Order, Docket Nos. 316710 and 316711, LC No. 13-000281-NZ* (copies attached as Exhibit 1). The Court of Appeals' decisions were based on relevancy and the deliberative process privilege.

6. Relative to the subject subpoenas, the State has waived the deliberative process privilege for purposes of the depositions of Governor Snyder, Mr. Dillon and Mr. Baird.<sup>1</sup>

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<sup>1</sup> The State did not waive the executive privilege which differs in its scope from the deliberative process privilege. The deliberative process privilege protects communications among government officials (*see* Exhibit 1) and is narrower in scope than the executive privilege. The

However, the State believes that the names of specific candidates are not relevant to issues relating to the eligibility of the City of Detroit to be a debtor in a chapter 9 proceeding, nor will such disclosure lead to admissible evidence.

7. The State is willing to provide generic background information on the individuals who were actively considered for the emergency manager position that would not include details that would identify specific individuals. The State is also prepared to provide the names and detailed information about the individuals to this Court for *in camera* review to enable the Court to determine the relevancy of the names. However, the State requests that the Court limit the parties from inquiring as to the identities of emergency manager candidates and order that the State is not required to disclose the names of emergency manager candidates or provide information that would reveal the identities of those persons.

**BASIS FOR RELIEF**

8. Fed.R.Civ.P. 26(b)(1) provides:

(b) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of person who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

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executive privilege covers not only deliberative communications but also, as here, certain types of information. The executive privilege is based upon separation of powers principles and in concept has been recognized by the Michigan Supreme Court. *See in re 1976 PA 267*, 400 Mich. 660 (1977); *Federated Publications v. Michigan State University Board of Trustees*, 460 Mich. 75 (1999). The State believes the executive privilege is applicable here.

9. Fed.R.Civ.P. 26(c)(1), provides, in relevant part:

(c) Protective Orders

(1) In General. \* \* \* The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

\* \* \*

(D) forbidding inquiry into certain matters, or limited the scope of disclosure or discovery to certain matters[.]

10. The Michigan Court of Appeals held in *Robert Davis* that the plaintiff had failed to show that the disclosure of the emergency manager candidates' names was relevant to establishing violations of the Open Meetings Act. *See*, Exhibit 1. Likewise, in this case, the disclosure of the identities of the emergency manager candidates is not relevant to whether the City of Detroit is eligible to be a debtor under chapter 9, nor will such disclosure lead to the discovery of admissible evidence. As stated above, the State is willing to provide information on these individuals relating to their respective qualifications and respective backgrounds, but the names of the individuals are not relevant to the issue of the City's eligibility.

11. "Good cause" under Rule 26(c) requires specific facts showing "clearly defined and serious injury" will result from the discovery sought. *Nix v. Sword*, 11 Fed.Appx. 498, 501 (6<sup>th</sup> Cir. 2001) quoting *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987).

12. In this case, good cause exists for issuance of a protective order ordering that the State is not required to disclose the identities of the emergency manager candidates because clearly defined injury could result to those candidates. Specifically, certain of the individuals are currently employed and their respective employers are not aware that that these individuals were being considered for the position. Disclosure of these individuals' identities could cause

embarrassment and repercussions from their current employers. Further, certain of the individuals are elected officials whose re-electability could be negatively impacted by disclosure of their identities.

13. Further, disclosure of the names of the emergency manager candidates will adversely affect the State's ability to consider qualified candidates in the future because those candidates may be concerned about the State's ability to keep their identities confidential.

14. The parties have agreed to certain time limits for the depositions of the State Deponents. In lieu of objecting to questions relating to the identifies of the emergency manager candidates at the depositions, the State filed this motion so that the Court can determine whether to limit the parties' inquiry into this matter before the depositions take place so as not to delay the progress of the depositions that dealing with objections could potentially cause.

15. Concurrence in the motion was sought without success and attempts have been made by the State, ASFCME and the UAW to resolve the issues without success to date.

WHEREFORE, the State of Michigan requests that the Court enter an order, substantially in the form attached hereto.

Dated: October 4, 2013

Respectfully submitted,

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Court of Appeals, State of Michigan

ORDER

Robert Davis v Local Emergency Financial Assistance Loan Board  
William C. Whitbeck  
Presiding Judge

Docket No. 316710 Patrick M. Meter

LC No. 13-000281-NZ Michael J. Kelly  
Judges

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Pursuant to MCR 7.205(D)(2), in lieu of granting the application for leave to appeal, the Court orders that the circuit court's June 12, 2013 order compelling Richard Baird to disclose the names of the candidates for the emergency financial manager position is REVERSED. Our Court rules "permit[ ] the discovery of any matter that is not privileged and that is relevant to the pending case." *Alberto v Toyota Motor Corp*, 289 Mich App 328, 336; 796 NW2d 490 (2010), citing MCR 2.302(B)(1). Plaintiff fails to show that the disclosure of the candidates' names is relevant to establishing violations of the Open Meetings Act. *MRE 401; Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 668; 819 NW2d 28 (2011). While evidence that affects the credibility of witnesses is usually relevant, *People v McKinney*, 410 Mich 413, 418; 301 NW2d 824 (1981), the trial court's ruling foreclosed any inquiries that might reflect on Baird's credibility.

This order is given immediate effect pursuant to MCR 7.215(F)(2).

The stay that this Court issued in its June 14, 2013 order is hereby lifted. We do not retain jurisdiction.

A true copy entered and certified by Angela P. DiSessa, Acting Chief Clerk, on



JUN 20 2013

Date

Angela P. DiSessa  
Acting Chief Clerk

**Court of Appeals, State of Michigan**

**ORDER**

Robert Davis v Local Emergency Financial Assistance Loan Board

William C. Whitbeck  
Presiding Judge

Docket No. 316711

Patrick M. Meter

LC No. 13-000281-NZ

Michael J. Kelly  
Judges

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Pursuant to MCR 7.205(D)(2), in lieu of granting the application for leave to appeal, the Court orders that the circuit court's June 12, 2013 order compelling Richard Baird to disclose the names of the candidates for the emergency financial manager position is REVERSED, for the reasons stated in this Court's order in Docket No. 316710.

The Court further orders that the circuit court's June 12, 2013 order denying the governor's and Emergency Manager Kevin Orr's motion to quash subpoenas is REVERSED. The deliberative process privilege "allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Truel v City of Dearborn*, 291 Mich App 125, 135; 804 NW2d 744 (2010). The requested material is both predecisional and deliberative, and its disclosure "would inevitably reveal the government's deliberations." *Id.* at 136. The record does not reflect a sufficient need for the information to overcome the privilege in this case.

Pursuant to MCR 7.205(D)(2), it is further ORDERED that:

1. Within 7 days of the issuance of this Order, plaintiff-appellee Robert T. Davis (Davis) shall file his second amended complaint and the trial court shall accept that filing without the need for further action, notwithstanding the provisions of MCR 2.118(A)(2).
2. Within 14 days of the issuance of this Order, the parties shall meet and confer, whether in person or by telephone, as to a stipulated statement of facts concerning this matter. See MCR 2.116(A).
  - (a) If the parties agree as to such a stipulated statement of facts, they shall file such stipulated statement of facts within such 14 day period with the trial court.
  - (b) If the parties are unable to agree as to such a stipulated statement of facts, they shall file a notice of such inability with the trial court and the provisions of paragraphs 3 and 4 of this Order shall then apply.
3. Within 7 days of the filing of a stipulated statement of facts or notice of inability to agree upon such a stipulated statement of facts, as applicable:

(a) The defendants-appellants the Local Emergency Financial Assistance board, the Governor, and the State Treasurer (collectively, the State) or any of them may file an answer to such complaint pursuant to MCR 2.108(A).

(b) In lieu of filing an answer, the State may file a motion for summary disposition and supporting affidavits and brief pursuant to MCR 2.116.

(c) If the parties have been unable to agree as to a stipulated statement of facts under paragraph 2 of this Order, the State shall file a proposed statement of facts as an exhibit to the answer or motion for summary disposition.

4. Within 7 days of the filings in paragraph 3 of this Order:

(a) If the State has chosen to file an answer and if the parties have been unable to agree as to a stipulated statement of facts under paragraph 2 of this Order, Davis shall file his proposed statement of facts.

(b) If the State has chosen to file a motion for summary disposition in lieu of an answer pursuant to MCR 2.116, Davis shall file his reply to such motion with supporting affidavits, brief, and, if the parties have been unable to agree as to a stipulated statement of facts under paragraph 2 of this Order, a proposed statement of facts as an exhibit to his reply or supporting brief.

5. If the State files a motion for summary disposition:

(a) The trial court shall hear such motion within 21 days of the filings in paragraph 4 of this Order.

(b) The trial court shall issue its written opinion and order, with findings of fact annotated to the record, and conclusions of law within 21 days of the hearing upon such motion, with a

(c) Any appeals of such opinion and order shall be filed with this Court within the time limits set out in MCR 7.204 or 7.205, as appropriate.

6. If no motion for summary disposition is filed:

(a) The matter shall be tried to the bench in the ordinary fashion but on an expedited basis so that such trial shall be completed within 42 days of the filings in paragraph 4.

(b) The trial court shall issue its written opinion and order, with findings of fact annotated to the record and conclusions of law, within 21 days of the completion of the trial.

(c) Any appeals of such opinion and order shall be filed with this Court within the time limits set out in MCR 7.204 or 7.205, as appropriate.

7. The trial court may hold a scheduling conference or conferences pursuant to MCR 2.401 on its own initiative or at the request of a party. The trial court may deal with discovery issues in such conference or conferences, but discovery shall in all events be concluded before the date for the



State's filing of an answer or motion for summary disposition pursuant to paragraph 3 of this Order. The trial court's scheduling order shall comply strictly with the provisions of this Order.

This order is given immediate effect pursuant to MCR 7.215(F)(2).

The stay that this Court issued in its June 14, 2013 order is hereby lifted. We do not retain jurisdiction. However, all appeals filed with this Court in this matter subsequent to the date of the filing of this Order but prior to any appeals pursuant to paragraphs 5 and 6 shall be submitted to this panel. Any appeals pursuant to paragraphs 5 and 6 shall be handled by this Court in the normal rotation but on an expedited basis.

A true copy entered and certified by Angela P. DiSessa, Acting Chief Clerk, on



JUN 20 2013

Date

*Angela P. DiSessa*  
Acting Chief Clerk

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISIONS

In re:

CITY OF DETROIT, MICHIGAN

Case No. 13-53846-SWR  
Chapter 9  
Hon. Steven W. Rhodes

Debtor.

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**PROTECTIVE ORDER**

This matter comes before the Court upon the State of Michigan Motion for Protective Order Pursuant to Federal Rule of Civil Procedure 26(c)(1)(D) (the “Motion”); and the Court being fully advised in the premises:

**IT IS ORDERED** that:

1. The Motion is GRANTED.
2. Parties participating in the depositions of the State Deponents (as defined in the Motion) must limit inquiries relating to emergency manager candidates. Specifically, the State Deponents are not required to disclose the names of emergency manager candidates or provide information that would reveal the identities of those persons.