

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

IN THE MATTER OF THE APPLICATION OF
THE NEW YORK STATE COMMISSION ON
JUDICIAL CONDUCT,

Petitioner,

For an order Pursuant to CPLR 2308 compelling
compliance with a subpoena

DECISION/ORDER/JUDGMENT

Index No.: 8115-22

-against-

GREGORY PEIREZ, ESQ. and SHAWN SMITH, ESQ.,

Respondents.

(Supreme Court, Albany County, Special Term)

APPEARANCES: Robert H. Tembeckjian, Esq.
New York State Commission on Judicial Conduct
Empire State Plaza
Corning Tower, Suite 2301
Albany, NY 12223

Michelle A. Storm, Esq.
Monaco Cooper Lamme & Carr PLLC
1881 Western Avenue, Suite 200
Albany, NY 12203

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Before the Court is the application of Petitioner New York State Commission on Judicial Conduct (“Commission”) for an Order and Judgment pursuant to CPLR §§ 2308 (b) and 411 directing Respondents to appear at the Commission’s office to give testimony under oath and to produce copies of all emails in their possession for the period June 20 to July 1, 2022 between certain specified email accounts. Petitioner asserts, via such application, that such electronic records are reasonably related to the Commission's investigation into complaints against a Judge of the

Unified Court System alleging that he, *inter alia*, “...engaged in inappropriate email correspondence” (Tembeckjian Affirmation, ¶4). Petitioner asserts that it has served subpoenas for the above-referenced electronic communications on the Respondents and were subsequently informed (by letter of October 19, 2022) by Counsel for the Respondents that they did not intend to comply with the subpoena.

Petitioner has also applied for Sealing of the within record as well as the ability to submit *ex parte in camera* documentation to the Court regarding the basis of the referenced investigation and subpoenas. In so applying, the Commission references the confidentiality provisions of Judiciary Law §45 as well as caselaw supporting the proposition that such submission of evidence in support of subpoena authority in a confidential investigation is appropriate. The Commission also references 22 NYCRR §216.1, setting forth the ability of the Court to seal its records upon a written showing of good cause. The application for Sealing of the Order to Show Cause and its supporting papers was preliminarily granted by the Court in the executed Order to Show Cause.

The *ex parte in camera* documentation submitted includes a filed Complaint that constitutes a portion of the underlying basis for the investigation. Submitted along with such documentation is the Affirmation of the Administrator of the Commission which, *inter alia*, discusses aspects of the Commission’s investigation.

Respondents oppose the application and have brought a cross motion to quash the referenced subpoenas on the grounds that such subpoenas improperly fail to provide any subject matter for the investigation. With the exception of such demand, Respondents do not appear to take issue with the application for confidentiality (Storm Affirmation, ¶21), submission of *in camera ex parte*

information, and sealing. Further, Respondents assert that they “...do not contest that the petitioners are engaged in a meaningful investigation...” (Storm Affirmation, ¶25).

The Commission is an independent agency charged with protect[ing] the integrity of the judiciary, preserv[ing] and enhanc[ing] the public's confidence in its courts, and ensuring qualified judges serve as part of our judicial system. It is constitutionally authorized to receive, initiate, investigate and hear complaints of judicial misconduct and has exclusive jurisdiction over such complaints. . . . We have recognized that the Commission must be free to conduct . . . investigation[s], and that the effectiveness of its inquiries necessarily requires the free flow of information to the Commission. (*Matter of NYS Commission on Judicial Conduct v Rubenstein*, 23 NY 3d 570, 578 [2014][internal quotations and citations omitted]).

The Court of Appeals has held that “... a motion to quash or to compel compliance raises only the issues of the authority of the investigating body and whether the inquiry falls within the scope of that authority” (*Nicholson v. State Com. on Judicial Conduct*, 50 NY2d 597, 610 [1980] [internal citations omitted]), and, to sustain investigatory subpoenas, “...the commission need only make a preliminary showing that the information sought is reasonably related to a proper subject of inquiry” (*Id.* at 611). Pursuant to NY Const., art. VI, §22 (a), the commission “may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office...and conduct, on or off the bench, prejudicial to the administration of justice ...”. In *Nicholson*, the Court considered multiple challenges to a Commission-issued subpoena for testimony and records regarding a complaint concerning solicitation of members of the Bar for a fund raising event. Among those challenges were assertions regarding a claimed violation of the Petitioner's First Amendment associational rights.

Here, as referenced above, the Respondents’ opposition and cross-motion to quash are premised upon a claim that the subpoenas are invalid “..in that [they do] not provide any subject matter at issue for this investigation and therefore [are] nothing more than a fishing expedition and

further improperly prevent respondents from proper preparation for testimony sought” (Storm Affirmation, ¶3), and, later, “..respondents are calling into question the validity of the subpoena in that it fails to limit the demand to subject matters at issue in the investigation (¶4). In so arguing, respondents cite to Judiciary Law §42(1) (regarding, in pertinent part, Commission authority to subpoena and compel the attendance of witnesses and require production of documents that it deems relevant or material to an investigation) and §43(2) (regarding Referee appointment and powers to conduct a Hearing, which is not the circumstance herein) as well as, *inter alia*, 22 NYCRR §7000.6(i)(2) and Judiciary Law § 44(4), each of which also reference Hearing process and evidence and therefore appear inapplicable at this investigatory phase. Respondents have asserted no privilege or First Amendment bars to the production of such identified information.

In *New York State Com. on Judicial Conduct v Doe*, 61 NY 2d 56 (1984)¹, the Court held, *inter alia*, that, while the statutory provisions cited by the Respondents serve, as argued, to prevent “...unlimited and general inquisition into affairs of persons within its jurisdiction solely on the prospect of possible violations of law being discovered...”, the Commission does possess broad subpoena power and subpoenas, to be sustained, require only “...a preliminary showing that the information sought is reasonably related to a proper subject of inquiry” (*Id.* at 60) and that such subpoena power must be “within bounds circumscribed by a reasonable relation to the subject matter under investigation” (*Id.* at 61). In so discussing, the Court clearly embraced the need to prevent unfettered fishing expeditions while recognizing the need for the Commission to have broad authority to conduct investigations into complaints of misconduct. The Court held that the

¹ *Doe* involved the Commission’s issuance of a subpoena during the investigatory phase of a matter.

Commission, in the course of a good faith investigation, need not “...tailor its request for information to relate precisely to specific allegations contained in the complaints.” (*Id.* at 61), as to hold otherwise would sharply curtail the Commission’s investigatory capabilities thus rendering it ineffective in the discharge of its statutory responsibilities.

Here, the Commission has limited the subpoena solely by date and type of communication; that is, the contested subpoenas (in addition to the testimony of respondents) require the production of, in pertinent part:

“Copies of all emails between smithlaw9@[REDACTED] and [REDACTED] from June 20, 2022 to the present” and “Copies of all emails between gpeirez@[REDACTED] and [REDACTED] from June 20, 2022 to the present”

In addition, as referenced above, the Commission has stated on this motion to compel compliance that the investigation involves, *inter alia*, “inappropriate email correspondence”.

In response to the Opposition/Cross Motion, the Commission asserts that the subpoenas are targeted to emails generated during a specific period of time and between specific parties, and are accordingly do not evidence or constitute an unfettered fishing expedition. The Commission references the aforementioned *in camera* submission as setting forth an adequate basis to meet the low bar set for the issuance by the Commission of an investigatory subpoena as set forth in *Doe* and *Nicholson*.

The Respondents have raised no direct objection to the *in camera ex parte* nature of the submission and accordingly, such submission is accepted and relied upon herein. Such process was utilized in *Nicholson v State Com. on Judicial Conduct*, 67 AD2d 649 (1st Dept. 1979). As stated in a later appeal on such matter, *Nicholson v State Com. On Judicial Conduct*, 72 AD2d 48 (1st Dept.

1979), the Commission was required therein to demonstrate an extant complaint and that the items demanded were relevant to a legitimate investigation. Those standards have been met on the within *in camera ex parte* submission; the area of inquiry, that being the emails between the parties during the referenced period, falls within the Commission's jurisdiction.

On reviewing such information, the Court finds sufficient nexus between the submitted information regarding the basis for the investigation and the subpoenaed information to satisfy the *Nicholson* standard at this stage of the proceedings. While the all encompassing nature of the subpoenaed electronic information would, generally, be considered overbroad, the targeted (by narrow date range and identified party) nature of the subpoenas, along with the submitted information and the nature of the inquiry (that being, as asserted, *inter alia*, alleged inappropriate email communications) are such that the subpoenas are not improper under these circumstances. An "inappropriate email communication" can take place in the context of any subject matter, and the narrowing of the subpoena to include only "inappropriate" communications as defined/identified by Respondents would render such investigations ineffective at best, while a further description of the basis for the subpoena would violate the statutory confidentiality provisions regarding such investigations. Further, Respondents, who are in possession of any subpoenaed information have asserted no privilege in the instant opposition/cross motion.

With regard to the Respondents' claim that they are entitled to notice of the subject matter of the investigation, Petitioners assert that, pursuant to both the Judiciary Law and case law, they are bound to refrain from sharing such information. Judiciary Law Section §45(1) states:

1. Except as hereinafter provided, all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the commission shall be confidential and shall not be made available to any person

except pursuant to section forty-four of this article. The commission and its designated staff personnel shall have access to confidential material in the performance of their powers and duties. If the judge who is the subject of a complaint so requests in writing, copies of the complaint, the transcripts of hearings by the commission thereon, if any, and the dispositive action of the commission with respect to the complaint, such copies with any reference to the identity of any person who did not participate at any such hearing suitably deleted therefrom, except the subject judge or complainant, shall be made available for inspection and copying to the public, or to any person, agency or body designated by such judge.

Respondents assert that the Judge who is the subject of the investigation has not waived this confidentiality (Tembeckjian Affirmation, ¶20).

Again, Respondents take no issue with the *ex parte in camera* nature of the submission, but require further information regarding the subject of the complaint, both pursuant to 22 NYCRR §7000.6(e), (which, as this is not a Hearing, is not applicable herein) and on the grounds that, as the subpoena requests all emails during the specified times and among the specified parties, and does not in any way limit the subject of the emails to any subject of an identified complaint, the subpoena is overbroad and should be quashed or, at a minimum, limited. Respondents argue that it is incumbent upon Petitioner to respond to this challenge with a demonstration of relevancy (of the material/testimony sought) to the subject matter of the investigation (an argument already dismissed above). Respondents do not quarrel with the requirement that the respondents have a duty to maintain confidentiality. They argue, however, that, having subpoenaed the respondents to be heard on the subject matter of the investigation, the Petitioner cannot now assert that it cannot disclose such subject matter prior to the testimony because it is confidential.

In effect, it appears to the Court that Respondents are asserting both that the subpoenas are deficient for failure to state a subject matter as well as for being a classic “fishing expedition”, as the Commission has not identified a subject matter.

The Court finds that the date, manner of communications and party limitations set on the subpoenas as further elucidated by the position of the Commission in support of the instant motion, that is, that the investigation regards complaints that a judge of the Unified Court System engaged in inappropriate email correspondence (Tembeckjian Affirmation, ¶4), are sufficient to provide notice of the substance of the investigation to the subpoenaed parties. Further, as held above, in light of the Affirmations of Mr. Tembeckjian and accompanying documentation, the Court also finds that the Commission has met their low burden of showing that the information sought is reasonably related to a proper subject of inquiry.

While the Court of Appeals has held in *Nicholson* that Sealing is not mandated by Statute, and accordingly that the Appellate Division erred in finding that the statutory confidentiality of the Commission's proceedings could not serve to require Sealing of judicial proceedings, the Court did note therein that in an appropriate case a court may draw on its power to seal its own records. Here, there is no objection from the Respondents to the requested sealing of the record as requested by Petitioner. Nevertheless, the case as presented herein does not demonstrate to the Court any particular deviation from the general facts in *Nicholson* which led to the Court of Appeals' pronouncement on motions for Sealing of Commission matters brought before Court such as the one herein. In light of the permanent nature of any determination by the Court to deny the request for Sealing, however, and the failure of the parties to fully address this issue, the Court will direct further letter-submissions solely on such issue from the parties to be served and filed (again, under Seal) within ten (10) days of the date of the within Decision and Order.

Otherwise, the Court has considered the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider.

The Court, by separate order issued herewith, is sealing this Decision/Order/Judgment at this time, and is retaining all papers filed in this matter for further decision with respect to the sealing of the record.

Therefore, it is hereby

ORDERED and ADJUDGED that the petitioner's application is granted to the extent that respondents are directed to appear at the Commission's office at Corning Tower, Suite 2301, Empire State Plaza, Albany, New York, on a date set by the Commission not less than 10 days from the date of this Decision and Order, to give testimony under oath and to produce copies of all emails in their possession for the period June 20 to July 1, 2022 between "gpeirez@[REDACTED]" and [REDACTED] and between "smithlaw9@[REDACTED]" and [REDACTED] and it is further

ORDERED that respondents' cross-motion to quash is in all respects denied; and it is further

ORDERED that the parties are directed submit further letter-submissions, solely on notice, on the issue of whether the entire record should be sealed, to be served and filed (again, under Seal) within ten (10) days of the date of the within Decision and Order; and it is further

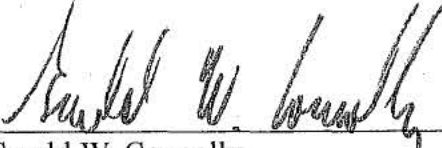
ORDERED that this Decision/Order/Judgment is sealed pursuant to that certain separate Sealing Order issued herewith and the Court is retaining all papers filed in this matter for further decision with respect to the sealing of the record and all papers filed in this matter remain sealed pending further order of this Court.

This Memorandum constitutes the Decision/Order/Judgment of the Court. This original Decision/Order/Judgment is being returned to the attorney for the Petitioner. A copy of the Decision/Order/Judgment is being delivered to the Albany County Clerk's Office, under seal,

pursuant to the Sealing Order. The underlying papers are being retained by the Court for further submissions concerning the sealing of the record. **The signing of this Decision/Order/Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry or notice of entry the Albany County Clerk.**

SO ORDERED and ADJUDGED.
ENTER.

Dated: January 3, 2023
Albany, New York


Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. Order to Show Cause and Petition to Compel Compliance and Seal this Record dated October 24, 2022; Verified Petition dated October 21, 2022; Affirmation in Support of Order to Show Cause of Robert H. Tembeckjian, dated October 21, 2022, with Exhibits 1-6 annexed thereto; Ex Parte In Camera Affirmation in Support of Motion to Compel of Robert H. Tembeckjian, dated October 21, 2022, with Exhibits A-E annexed thereto;
2. Notice of Cross-Motion dated November 8, 2022; Attorney Affirmation of Michelle A. Storm, dated November 8, 2022; Attorney Affirmation of Shawn Smith, Esq., dated November 8, 2022
3. Affirmation in Reply of Robert H. Tembeckjian dated November 12, 2022; Attorney Affirmation of Shruti Joshi, dated November 14, 2022; and Affidavit of Ryan Fitzpatrick, sworn to November 14, 2022.