

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 18-CVS-014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

Representative David R. LEWIS, in
his official capacity as Senior Chairman of the
House Select Committee on Redistricting, et
al.,

Defendants.

**LEGISLATIVE DEFENDANTS'
OPPOSITION
TO PLAINTIFFS' MOTION TO
COMPLY WITH SUBPOENA AND
MOTION FOR EXTENSION OF
CONFIDENTIAL DESIGNATION OF
THE HOFELLER FILES**

Plaintiffs' request for leave to comply with the third party subpoena *duces tecum* requesting documents from Common Cause should be denied. Under the Court's July 12th order, all Hofeller files were designated Confidential and "[n]o party may disseminate any of the Hofeller files to third parties without further order by this Court." The Court's September 5, 2019 order extends that deadline until 11:59 P.M. on September 17, 2019. Plaintiffs' request for leave to comply with the third party subpoena issued to Common Cause is nothing more than an attempt to circumvent that order and disrupt principles of client confidentiality that are the bedrock of our legal system.

ARGUMENT

This Court has not yet had the opportunity to rule on the matters of confidentiality and privilege of the Hofeller documents as briefing on these issues is not complete. Plaintiffs have yet to submit responses to filings by Legislative Defendants, Geographic Strategies, the RNC, or Neuces County, and none of those parties have had the opportunity to review Plaintiffs' responses, and reply in turn. Further, allowing Plaintiffs to comply with this subpoena disrupts the rights of

other parties in the *Holmes v. Moore* litigation, some of whom are also parties in this case, who have 10 days from service to object to the subpoena under North Carolina Rule of Civil Procedure 45(c)(3). Counsel for Legislative Defendants understands that date to be September 20th, and that Legislative Defendants will likely have privilege objections to this subpoena.

Furthermore, Common Cause and their attorneys have no standing to produce documents that do not belong to them, as the documents sought in the subpoena actually belong to the third parties who are asserting attorney client privilege or work product immunity. *See Crossmun v. Trustees of Fayetteville Tech. Cmty. Coll.*, No. COA 18-1054, 2019 WL 3558754 at *10 (N.C. Ct. App. Aug. 6, 2019) quoting *In re Miller*, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003) (“The attorney-client privilege belongs solely to the client. Critically, it is the client’s alone to waive, for it is not the privilege of the court or any third party.”).

Much of the information sought belongs to the same defendants in this case as in the *Holmes* case. As such, Plaintiffs should be seeking these documents through document requests or subpoenas to Legislative Defendants, who are also in possession of these materials, and should be allowed the opportunity to conduct a privilege review, and assert any applicable privileges. *See Crossmun*, 2019 WL, 3558754 at *11 (holding that the trial court erred by ordering the “delivery of responsive documents to Plaintiffs without allowing Defendants an opportunity to review them for privilege.”) This subpoena is nothing more than an attempt circumvent the discovery process in *Holmes*, by requesting documents from a third party who cannot assert privilege protections on behalf of Legislative Defendants.

Lastly, the subpoena issued to Common Cause by Plaintiffs in the *Holmes* litigation is over broad to the extent it requests a forensic examination of all of Dr. Hofeller’s devices, thus giving the *Holmes* Plaintiffs’ access to information that is both privileged, but also entirely irrelevant to

their lawsuit. The *Holmes* Plaintiffs have provided no grounds for why a forensic examination of all of these devices is necessary. Nevertheless, should the *Holmes* Plaintiffs serve a subpoena on Legislative Defendants, Legislative Defendants have no objection to producing the documents, not devices, requested on pages four and five of the subpoena, assuming any exist, and are not privileged or protected by the work product doctrine.

Should the court allow the production of Legislative Defendants' privileged and confidential information, Legislative Defendants' rights will be substantially impacted. *See Crossmun*, 2019 WL 3558754 at *6. *See also K2 Asia Ventures v. Torta*, 215 N.C. App. 443, 446, 717 S.E.2d 1, 4 (2011) (holding that an order requiring production over a party's objections on attorney-client privilege and work-product immunity grounds affected a substantial right subject to immediate appeal.) In the event the court enters such an order, Legislative Defendants respectfully ask that this Court stay the order to allow for an appeal as has been permitted in previous cases where the production of privileged documents was at issue. *See, e.g., Dickson v. Rucho*, 336 N.C. 332, 339, 737 S.E.2d 362, 369 (2013).

CONCLUSION

Plaintiffs request to effectively circumvent this Court's order prohibiting further dissemination of the Hofeller documents, regardless of what well-established legal protections apply to them, should be denied. Counsel for Plaintiffs in this case have filed these documents in other cases which has led to their publication in the media. Given the well-established history regarding the improper publication of the Hofeller files, Legislative Defendants respectfully request that this Court schedule a hearing on this matter after all briefing regarding access to the files is complete, and extend the "CONFIDENTIAL" designation on all Hofeller files until such a time as the hearing can be conducted and the Court can rule on this matter.

This the 13th day of September, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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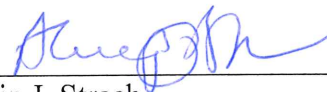
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*Counsel for Common and the Individual
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This 13th day of September, 2019.

By: 
Phillip J. Strach

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR
CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON
REDISTRICTING, et al.,

Defendants.

**[PROPOSED] ORDER ON
MOTION FOR EXTENSION
OF CONFIDENTIAL
DESIGNATION OF THE
HOFELER FILES**

The Court, having considered Legislative Defendants' Motion for Extension of Confidential Designation of the Hofeller files, hereby GRANTS the motion. The Court hereby extends the date on which the "CONFIDENTIAL" designation on all Hofeller files will expire until such a time as the Court orders otherwise, after the rights of all parties have been heard and adjudicated. All other terms of the Court's July 12, 2019 Order remain in effect.

So ORDERED this ____ day of September, 2019.

The Honorable Paul C. Ridgeway
Superior Court Judge

The Honorable Joseph N. Crosswhite
Superior Court Judge

The Honorable Alma L. Hinton
Superior Court Judge