UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MUSLIM COMMUNITY
ASSOCIATION OF ANN ARBOR,

Plaintiff,

Civil Action No. 12-cv-10803
Honorable Patrick J. Duggan
Magistrate Judge David R. Grand

v.

PITTSFIELD TOWNSHIP, *et al.*,

Defendants.
_____/

ORDER GRANTING NON-PARTY ZABA DAVIS' MOTION TO QUASH AND FOR PROTECTIVE ORDER [89]

Before the Court is Non-Party Zaba Davis' ("Davis") Motion to Quash and for Protective Order, filed on April 15, 2014. (Doc. #89). Defendant Muslim Community Association of Ann Arbor, d/b/a Michigan Islamic Academy, filed a response to this motion on May 2, 2014 (Doc. #94), and Davis filed a reply on May 9, 2014. (Doc. #101).[1] An Order of Reference was entered on April 16, 2014, referring this motion to the undersigned for determination. (Doc. #90). The Court dispenses with oral argument on this motion pursuant to E.D. Mich. L.R. 7.1(f).

I. Background

Plaintiff Muslim Community Association of Ann Arbor is a non-profit corporation that does business as the Michigan Islamic Academy, an Islamic school offering secular and non-

[1] MCA's response brief was filed under seal, and it has refused Ms. Davis' request for unredacted copies of any sealed materials. The Court has reviewed the redacted documents supplied under seal and is perplexed and troubled that they were filed in that manner. However, because the Court is granting Davis' instant motion the issue of her access to such materials is moot. The Court also notes that no other party has raised a concern about the sealed materials.

secular curricula.[2] Apparently in 2010, the MCA sought to establish a new school building in the greater Ann Arbor community. *Id.* at 5-6. The proposed location for the new school fell within the zoning jurisdiction of Defendant Pittsfield Township. The Pittsfield Township Board of Trustees ("Board") is the body with ultimate authority to approve or deny zoning requests in that township. *Id.* at 14. However, the first step in the process is to go through the Pittsfield Township Planning Commission ("Planning Commission"), which screens zoning proposals and makes recommendations upon them.

In 2010, MCA began the process of purchasing property and seeking approval from Pittsfield Township to build a new school. *Id.* at 8. MCA contends that significant alterations to the original proposed site plan were effectuated in order to assuage concerns raised by the Planning Commission, and that traffic impact studies indicated that the school would not dramatically disrupt nearby roadways and intersections. *Id.* at 10. MCA further argues that it was subjected to an unusually onerous screening process. The Defendants disagree.

During public hearings about the proposed construction taking place during 2011, some citizens voiced concerns that the plan would lead to decreased property values and an increase in congestion. *Id.* at 11. Ultimately, the Planning Commission recommended to the Board that MCA's petition be denied on the grounds that it could lead to issues of traffic, noise, and visual screening. *Id.* at 13. The Board of Trustees unanimously adopted that recommendation on October 26, 2011, thus denying the construction petition. On February 22, 2012, MCA filed suit against Pittsfield Township and its Board of Trustees, alleging that the rejection of its petition to build a school was motivated, at least in part, by animus against the Islamic faith, and thus violated its due process rights. *Id.*

[2] For ease, the Court will simply refer to the Plaintiff and its d/b/a as the "MCA".

On April 1, 2014, MCA issued two subpoenas to non-party Zaba Davis, a community member who allegedly spoke out against the site plan.[3] (Doc. #89 at Ex. A, B). One subpoena commanded Davis to produce certain documents by April 16, 2014, while the other commanded her to appear for a deposition on April 17, 2014. (*Id.*) Specifically, the subpoena for production of documents required Davis to produce:

> A complete copy of any and all documents and correspondences (including the email header showing the sender, all recipients, date and time of such email), and all other communications with (1) Pittsfield Township or any representative of Pittsfield Township, including members of the Planning Department, Planning Commission and Board of Trustees, regarding the proposed Michigan Islamic Academy project (MIA); (2) Planning Commissioners Deborah Williams and Michael Yi regarding MIA; (3) neighboring residents regarding MIA. Include copies of all documents, correspondences, leaflets, petitions or other material or information on any medium created or distributed encouraging (1) neighboring residents to oppose MIA and to attend hearings before Pittsfield Township, and (2) Pittsfield Township representatives to oppose MIA.

(*Id.* at Ex. B).[4]

On April 15, 2014, Davis filed a motion to quash the subpoenas, arguing that they were not properly served on her, and that, substantively, the subpoenas represent an attempt to harass her for exercising her First Amendment right to express her views in opposition to the school's construction. (Doc. #89). In response, MCA argues that Deborah Williams, a member of the Planning Commission, testified at her deposition that Davis had been "enlisted by Commissioner Williams to cultivate [] opposition" to the proposed school, and that it "believes that the persons

[3] As discussed below, Davis contests the method of service of the subpoenas, claiming that they were shoved in her door on April 1, 2014. (Doc. #89 at 6).

[4] According to an affidavit of Davis' counsel, MCA also served identical subpoenas duces tecum on other individual neighbors of Davis. (Doc. #101 at Ex. 1, ¶ 2). Davis argues that although MCA apparently has abandoned its efforts to obtain documents from these other individuals, the mere fact that identical subpoenas were served on them suggests that the one directed to her was not narrowly tailored or "benign." (*Id.* at 4, fn. 2).

who distributed Commissioner Williams' leaflets purposefully avoided the homes of Muslim families, possibly at the behest of Commissioner Williams." (Doc. #94 at 9).[5] Thus, MCA asserts, Davis may have information establishing or suggesting that Commissioner Williams voted to recommend denial of MCA's petition for discriminatory reasons. MCA claims that it "is not interested in Ms. Davis. Rather, [it] is interested in the information she likely possesses about the efforts of and intentions behind Commissioner Williams' unprecedented, undisclosed, and successful campaign against Plaintiff's rezoning application." (*Id.* at 11).

II. Legal Standard

The overall scope of allowable discovery is generally quite broad. "Unless otherwise limited by a 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." Fed. R. Civ. P. 26(b)(1). Rule 45 of the Federal Rules of Civil Procedure authorizes a party to serve a subpoena on a non-party, and it is clear that such subpoenas are part of the "discovery" process contemplated by Rule 26. *McGuire v. Warner*, 2009 WL 2370738, at *1 (E.D. Mich. Jul. 29, 2009) (citing cases). Of course, the reach of discovery is not without restriction. Rule 26 provides, "the court must limit the frequency or extent of discovery otherwise allowed by these rules … if it determines that… the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(C). Similarly, Rule 45 provides that, on a timely motion, "the court for the district where compliance is required must quash or modify a subpoena that: (i)

[5] However, Williams actually testified that Davis had said that she (Davis) would distribute a communication that Williams had written, but that Williams was unaware what, if anything, Davis did in that regard. (Doc. #97 at 38). Williams also specifically testified, contrary to MCA's unsupported "belief," that she and Davis did not coordinate efforts to distribute the communication. (*Id.* at 39). Similarly, Davis has averred that she did not take action at Williams' behest, and did not "skip" any Muslim homes when she distributed petitions. (Doc. #101 at Ex. 2).

fails to allow a reasonable time to comply; (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c); (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(i-iv).

In passing on such a motion to quash, the Court must "weigh the likely relevance of the requested material to the investigation against the burden…of producing the material." *E.E.O.C. v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994). Courts have declined to enforce subpoenas that do not strike the proper balance. *See United States v. Gammo*, 428 F. Supp. 2d 705, 708 (E.D. Mich. 2006) (quoting *United States v. Theodore*, 479 F.2d 749, 754 (4th Cir.1973)) ("where it appears that the purpose of the summons is 'a rambling exploration' of a third party's files, it will not be enforced.").

The "nonparty seeking to quash a subpoena bears the burden of demonstrating that the discovery sought should not be permitted." *Great Lakes Transp. Holding, LLC v. Yellow Cab Serv. Corp. of Florida, Inc.*, 11-50655, 2011 WL 2533653 (E.D. Mich. June 27, 2011) (quoting *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 09–50630, 2009 WL 2351769, at *1 (E.D. Mich. Jul. 28, 2009)). For the reasons discussed below, the Court finds that Davis has met her burden.

III. Analysis

A. Service of Subpoenas

Davis first argues that she was not properly served with the subpoenas at issue, as "[j]amming subpoenas in a door of an unoccupied residence does not constitute effective service." (Doc. #89 at 11). In response, MCA asserts that Ms. Davis was properly served: it asserts that it initially attempted to serve subpoenas on Davis via First Class Mail and that, only

when her attorneys objected to this method (and refused to accept service on her behalf), did it hire a process server "to go to Ms. Davis' home, attempt to personally serve her, and then leave the subpoena in her door." (Doc. #94 at 12). MCA further asserts that "Rule 45 requires 'delivering a copy [of the subpoena] to the named person," and states that this has been done twice – once by mail, and once by leaving a copy at Davis' home. (*Id.* at 12-13).

Fed. R. Civ. P. 45(b)(1) provides that, "Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law." The issue, then, is whether Rule 45(b)(1)'s provision that a subpoena be "delivered" to the named person requires that the subpoena be *personally* served. Some courts have required personal service for a subpoena. *See, e.g., Benford v. American Broadcasting Co., Inc*., 98 F.R.D. 40 (D.Md. 1983); *In re: Johnson & Johnson*, 59 F.R.D. 174 (D.Del. 1973).

Other courts have allowed some degree of flexibility in accomplishing proper service, including by the use of certified mail, if the manner can be reasonably assumed to ensure receipt of the subpoena. *See Halawani v. Wolfenbarger*, No. 07–15483, 2008 WL 5188813, at *4 (E.D. Mich. Dec. 10, 2008) ("nothing in the language of Rule 45 suggests that in-hand, personal service is required to effectuate "delivery," or that service by certified mail is forbidden."); *Franklin v. State Farm Fire & Cas. Co.*, 09-10947, 2009 WL 3152993 (E.D. Mich. Sept. 30, 2009) ("The growing number of cases that have determined that Rule 45 does not require personal service have permitted service by certified mail").

These decisions are grounded in the fact that Rule 45 does not explicitly state that subpoenas must be delivered by physically presenting it to the recipient. At the same time, some courts have qualified this flexibility by allowing it only after the serving party has "diligently

attempted to effectuate personal service." *Franklin v. State Farm Fire & Cas. Co.*, 2009 WL 3152993, at *1–2 (E.D. Mich. Sept. 30, 2009). As a result, courts have found inadequate subpoena service attempts when the requesting party failed to make adequate efforts to personally serve a subpoena. *OceanFirst Bank v. Hartford Fire Ins. Co.*, 794 F. Supp. 2d 752, 755 (E.D. Mich. 2011) (holding that because requesting party provided no reliable evidence that the subpoena was sent to the recipient's real address, there was not diligent effort likely to result in actual delivery).

In this case, MCA asserts that it attempted to serve Davis in several ways before leaving copies of the subpoenas at her residence. MCA asserts that it relied on First Class Mail initially, then sought to serve Davis through her attorneys, and finally hired a process server to go to Davis' residence in an attempt to serve her in person. (Doc. #94 at 12-13). Given that MCA attempted to serve Davis on at least three separate occasions, using three separate methods, it would seem to meet the diligence requirement. However, even assuming that service was accomplished, the Court finds that the subpoenas should be quashed on other grounds for the reasons discussed below.

B. Relevance and Undue Burden of Subpoenas

Davis argues that the subpoenas seek irrelevant information and are unduly burdensome to comply with. She claims her role was that of a private citizen expressing her views and signing a petition, not one of a government official with authority to cast a vote on MCA's application. (Doc. #89 at 7). Davis points to the document subpoena's breadth, as it requests all documents and correspondence between her and a wide range of entities and persons, including her neighbors. Lastly, Davis argues that failing to quash the subpoena would have a chilling effect on the exercise of free speech.

As noted above, "courts have incorporated relevance as a factor when determining motions to quash a subpoena." *AFMS LLC v. United Parcel Serv. Co.*, 2012 WL 3112000 (S.D. Cal. July 30, 2012). And, this Court agrees that nonparty subpoenas ought to "require a stronger showing of relevance than for simple party discovery." *Stamy v. Packer*, 138 F.R.D. 412, 419 (D.N.J. 1990). Here, Davis has the better argument as to the subpoenas' relevancy and burden; the subpoenas seek her private correspondence with her neighbors, as well as any correspondence she had with Pittsfield Township and its representatives (most notably its Planning Commission and Board members) regarding MCA and its proposed school. (Doc. #89 at Ex. B). But Davis, as a private citizen, had no formal role whatsoever to play in either the Planning Commission's recommendation or the Board's ultimate vote.

In her brief, Davis asserts that "Judge Duggan [in a prior opinion unrelated opinion] was quite explicit: the information that that Plaintiff seeks here regarding any alleged actions of Deborah Williams (let alone any actions related to Davis or her neighbors) is <u>not</u> relevant to Plaintiff's claims." (Emphasis in original). Doc. #101 at 3-4. That assertion goes a bit too far – Judge Duggan merely stated that he was "somewhat troubled" by MCA's focus on the Planning Commission, which does not have ultimate authority to deny or approve zoning applications. (Doc. #58 at 26 n.9). Judge Duggan's order does not mention Deborah Williams, nor does it contain a blanket statement barring any investigation into her actions. Thus, the order does not necessarily dictate the instant motion's resolution.

Nevertheless, Davis has shown that the logical nexus between herself and the alleged injury is far too removed for the type of invasive discovery requested of her. The Board of Trustees has the legal authority to approve or deny the zoning petition, and is merely *advised* by the Planning Commission. Williams, who is not even a defendant in this action, is but a single

member of the Planning Commission. Davis has no affiliation with either the Board or the Planning Commission, and is merely a private citizen who, at most is alleged to have distributed materials which resulted in increased public opposition to MCA's application.[6] For this reason alone, the subpoenas directed to Davis must be quashed.

C. First Amendment Issues

The subpoenas directed to Davis should also be quashed as an undue burden on her First Amendment rights. Courts have a long history of vigorously protecting a wide range of First Amendment activities, including anonymous identities, membership rolls, and associational affiliations. *See, e.g., Highfields Capital Mgmt., L.P. v. Doe, 385 F. Supp. 2d 969 (N.D. Cal. 2005); Britt v. Superior Court*, 574 P.2d 766 (1978); *NAACP v. Alabama*, 357 U.S. 449 (1958). And there can be no question that the activity Davis is alleged to have engaged in (which MCA is not claiming was unlawful) is protected by the First Amendment. As the United States Supreme Court explained in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (internal citations omitted):

> This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open."

Under these indelible principles it is clear that permitting third-party discovery into a private citizen's lawful actions on a matter of public debate would clearly cause her and other individuals to be hesitant about becoming involved in the political process. Indeed protecting

[6] And, as noted above, *supra* at 3-4, fn. 5, MCA's proffer as to the nature and extent of her involvement is extremely flimsy. Clearly, Williams' testimony suggests she and Davis were not working closely together, and MCA makes no allegation that Davis or Williams bribed or otherwise coerced any person into voicing opposition to MCA's application. Indeed, MCA states that it does not suspect Davis engaged in any wrongdoing. (Doc. #95 at 6).

against such a chilling effect is one of the First Amendment's very purposes. *See, e.g.*, *Australia/Eastern U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807, 810 (D.D.C. 1982) ("[T]here is no doubt that the overwhelming weight of authority is to the effect that forced disclosure of first amendment activities creates a chilling effect which must be balanced against the interests in obtaining the information.").

MCA contends that its sole interest in deposing Davis stems from a genuine belief that she has what it believes to be relevant information, and not from any personal malice against her for her public opposition to the school. (Doc. #94 at 9). This argument fails for a few reasons. First, as discussed above, the Court finds unpersuasive MCA's relevance argument. Second, for the reasons noted in the preceding paragraphs, to the extent information possessed by Davis is relevant, that relevance is far outweighed by the chilling effect that allowing the subpoenas would have on speech, not only for Davis, but for all others who wish to be involved in public discourse on matters of public concern.

Thus, at least on the record before the Court as to Davis' limited activities which were at least twice removed from the ultimate decisionmakers, the Court concludes that any interest that would be served by requiring her to produce any of the requested materials[7] is outweighed by the infringement on her First Amendment rights that would result from such compulsion.

IV. Conclusion

Having fully considered Davis' alleged involvement in the matter (including the fact that her communications have no bearing on whether the Board itself acted with a discriminatory intent), the need to protect Davis' First Amendment rights, and the availability of other evidence,

[7] The Court also notes that many of the questions put to Williams during her deposition focused on emails exchanged between she and Davis that the MCA already possesses. And, to the extent the subpoenas seek correspondence between Davis and other Township officials, the MCA has other avenues of obtaining those materials.

the Court finds that Davis has shown that the subpoenas impose an undue burden on her. Accordingly, her motion to quash the subpoenas and for a protective order (Doc. #89) will be granted.[8]

Accordingly, **IT IS ORDERED** that Non-Party Zaba Davis' Motion to Quash and for Protective Order [89] is **GRANTED**. Davis need not take any further action with respect to the subpoenas which MCA directed to her. **IT IS FURTHER ORDERED** that, consistent with the terms outlined in footnote 8 above, Davis may pursue recovery of the fees and costs she reasonably incurred in connection with the instant motion

Dated: July 2, 2014
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE TO THE PARTIES REGARDING OBJECTIONS

The parties' attention is drawn to Fed. R. Civ. P. 72(a), which provides a period of fourteen (14) days from the date of receipt of a copy of this order within which to file objections for consideration by the district judge under 28 U.S. C. §636(b)(1).

[8] Davis requests reimbursement of the fees and costs she incurred in filing her instant motion pursuant to Rule 37(a)(5)(A), which provides, in pertinent part:

> If the motion [for protective order] is granted … the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.

Accordingly, within 30 days of the date of this Order (or if objections are filed which are overruled, within 30 days thereafter), counsel for Davis and the MCA shall meet and confer to discuss an appropriate amount of such fees and costs to be paid to her by the MCA. In the event no agreement is reached, Davis may, within that same timeframe, submit a properly-supported petition to the Court for her reasonable fees and costs. MCA may have 14 days after the filing of any such petition to file a response thereto.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record via email addresses the Court has on file.

s/Eddrey O. Butts
EDDREY O. BUTTS
Case Manager

Dated: July 2, 2014