

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ANCHORAGE MUNICIPAL ASSEMBLY,)
and CHRISTOPHER CONSTANT, in his)
official capacity as Chair of the Anchorage)
Assembly,)

Plaintiffs,)

v.)

ANNE HELZER, in her official capacity as)
the Anchorage Municipal Attorney,)

Defendant.)

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Clerk of the Trial Courts

) Case No. 3AN-24- 05979 CI

**EX PARTE MOTION FOR ORDER TO SHOW CAUSE AND
TO ENFORCE SUBPOENA**

All public officials, especially attorneys, are expected to comply with the law.

When a municipal official is subpoenaed by the Assembly, compliance with that subpoena is not voluntary and the recipient may not dictate the terms of their compliance.¹ There is a clear legal process for objecting to an Assembly subpoena, and that process is available to any subpoena recipient.²

¹ See AMC 2.30.085.

² See Exhibit 1 (AO No. 2023-133 (to be codified at AMC 2.30.085C) (“A person who seeks to quash or limit a subpoena issued pursuant to this section may file an action against the assembly in superior court.”)). All Exhibits referenced in this Motion are attached to the Anchorage Assembly’s Complaint to Enforce Subpoena Issued by the Anchorage Municipal Assembly, filed concurrently.

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Here, the Defendant Anne Helzer received a valid subpoena from the Anchorage Assembly on April 16, 2024 (the “Subpoena”).³ Ms. Helzer understood the terms of the Subpoena,⁴ and it should have come as no surprise following months of repeated requests by Assembly members for the documents described in the Subpoena.⁵ Although Ms. Helzer was afforded additional time to comply with the Subpoena,⁶ she did not “seek to quash or limit” the Subpoena. Instead, Ms. Helzer insisted that she would only comply with the Subpoena at a time of her choosing.⁷

As of this filing, Ms. Helzer has not complied with the Subpoena. That willful action constitutes contempt and should be addressed by this Court as expeditiously as possible. A proposed order to show cause, or alternatively requiring Ms. Helzer to comply immediately with the Subpoena, accompanies this motion.

ARGUMENT

The Anchorage Municipal Code (“AMC”) authorizes the Assembly to enforce a subpoena through “proceedings for contempt in the same manner as in the case of

³ See Exhibit 7.

⁴ See Exhibit 8 at 2.

⁵ See Exhibit 3 at 5-6.

⁶ Exhibit 8 at 1.

⁷ *Id.*

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disobedience to the requirements of a subpoena issued by the court.”⁸ Failure to comply with a lawful subpoena is deemed a contempt of court.⁹

Under Alaska Rule of Civil Procedure 90(b), an order for contempt requires four elements:

(1) the existence of a valid order directing the contemnor to do or refrain from doing something and the court’s jurisdiction to enter that order; (2) the contemnor’s notice of the order within sufficient time to comply with it; and in most cases, (3) the contemnor’s ability to comply with the order; and (4) the contemnor’s willful failure to comply with the order.^[10]

Because each of the four elements are satisfied here, this Court should order Ms. Helzer to show cause why she should not be punished for the contempt of failing to comply with the Subpoena. Alternatively, if Ms. Helzer complies with the Subpoena by Friday, April 26, 2024 at 12 noon, the Assembly will stipulate that no show-cause hearing is necessary.

I. The Assembly Issued a Valid Subpoena to Produce Documents.

On April 16, 2024, pursuant to AR No. 2024-103, Assembly Chair Christopher Constant, on behalf of the Assembly, issued the Subpoena to Ms. Helzer to produce documents related to the implementation of the 1991 Fish and Wildlife Agreement

⁸ AMC 2.30.085B.

⁹ Alaska R. Civ. P. 45(f).

¹⁰ *Hartland v. Hartland*, 777 P.2d 636, 647 (Alaska 1989) (quoting *L.A.M. v. State*, 547 P.2d 827, 831 (Alaska 1976)).

and the Municipality's water rights and access to Eklutna Lake,¹¹ which were public matters being considered by the Assembly.¹²

The Assembly is the co-equal legislative branch of the Municipality of Anchorage. As part of the Municipality, the Assembly has a legitimate and compelling interest in providing legislative oversight of municipal agencies and utilities.¹³ In particular, the Assembly has a responsibility to Anchorage residents to ensure that any agreements that purport to legally bind municipal agencies or commit municipal resources are in the public interest.¹⁴ In carrying out its duties, the Assembly is entitled to subpoena documents and to seek the advice of the Assembly Counsel, including outside legal counsel. Under AMC 2.20.065, the Assembly

¹¹ See AMC 2.30.085B.

¹² Exhibit 3 at 2; see, e.g., Joe Cadotte, "Litigation Authorized by Assembly Related to Environmental Impact Program for Hydroelectric Project," *Alaska's News Source* (Feb. 23, 2024); Emily Goodykoontz, "Anchorage Assembly Approves Legal Action Over Eklutna Dam Mitigation," *Anchorage Daily News* (Feb. 24, 2024); Jeremy Hsieh, "Anchorage Assembly Seeks 2-Year Extension on Eklutna Lake Fish and Wildlife Plan Process," *Alaska Public Media* (Feb. 6, 2024).

¹³ See Exhibit 3 at 2.

¹⁴ See Emily Goodykoontz & Alex DeMarban, "What's Behind the Fight Over the Eklutna River," *Anchorage Daily News* (Apr. 18, 2024) ("[T]he Assembly earlier this year learned that the Bronson administration signed a deal with the utilities last October that will govern Anchorage's drinking water rights for 25 years. The agreement, a 'binding term sheet,' was based on the utilities' plan to tap into the city's water supply. It would go into effect if the governor approves the Fish and Wildlife program, city officials have said.").

Counsel is entitled to “full, free and unrestricted access” to all public records and “all activities of the municipal government and its various departments.”

Thus, the Assembly had a legitimate interest in reviewing the requested documents and the Subpoena was validly issued.

II. Ms. Helzer Had Notice and Sufficient Time to Comply with the Subpoena.

The Subpoena was served via email to Ms. Helzer on April 16, 2024, and a response was demanded by the next day, April 17 at 5 p.m. Nevertheless, Ms. Helzer had ample time to comply with the Subpoena.

First, Ms. Helzer acknowledged receiving the Subpoena on April 17 at 2:30 p.m., and demonstrated a clear understanding of exactly what documents were described in the Subpoena.¹⁵ There was no need for Ms. Helzer to search for or locate, or conduct a scope review, for any potentially unknown documents prior to complying with the Subpoena. All that was required was for her to send the clearly-identifiable, “readily accessible” documents to the Assembly Counsel via email.¹⁶

Second, Ms. Helzer was on reasonable notice since at least March 27 that the documents would be subpoenaed. On March 27, the Assembly passed and approved AR No. 2024-103, a resolution authorizing the use of “subpoenas to compel testimony and document production related to the 1991 Fish and Wildlife Agreement (Eklutna

¹⁵ See Exhibit 8.

¹⁶ Exhibit 8 at 1.

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Hydropower Project) or water rights to Eklutna Lake.” That resolution was adopted in the context of the Assembly’s requests for the documents described in the Subpoena. On March 27, the Assembly subpoenaed the same documents from Municipal Manager Kent Kohlhase and AWWU General Manager Mark Corsentino. The Subpoena should not have come as a surprise. Ms. Helzer had ample time to seek judicial review to limit or quash the Subpoena if she believed that was appropriate.

Third, Ms. Helzer has known since at least the Assembly meeting on February 2, 2024—over two months ago—that the Assembly has repeatedly requested access to and copies of the documents described in the Subpoena. Thus, Ms. Helzer had sufficient time to consult with her clients (municipal agencies and utilities) and any affected third parties regarding her ability to produce the documents to the Assembly.

III. Ms. Helzer Had the Ability to Comply with the Subpoena.

The Municipal Code provides a clear option for any Assembly subpoena recipient to challenge the subpoena’s scope: “A person who seeks to quash or limit a subpoena issued pursuant to this section may file an action against the assembly in superior court.”¹⁷ Ms. Helzer did not file an action to limit or quash the subpoena, and she should not be permitted to raise those arguments challenging the scope of the

¹⁷ Exhibit 1 at 1 (AMC 2.30.085C).

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Subpoena for the first time in this enforcement action.¹⁸ Regardless, there is no valid legal reason why Ms. Helzer could not have complied with the Subpoena.

A. No Privileges Prohibit the Assembly from Reviewing the Documents.

The Municipal Manager and AWWU General Manager have previously invoked attorney-client privilege over the documents described in the Subpoena. However, the attorney-client privilege does not prevent Ms. Helzer’s compliance with the Subpoena. Ms. Helzer has already shared the documents with the Assembly in executive session and with an individual Assembly member, Assembly Counsel, and the Assembly’s outside legal counsel. The attorney-client privilege covers the Municipality of Anchorage as a whole, including the Assembly. Thus, because the Assembly is part of the Municipality (the “client”), the Assembly is authorized to review the documents, even if they would otherwise be protected by the attorney-client privilege.

B. The “Common Interest Agreement” Does Not Prohibit Production of the Documents to the Assembly.

In her April 17 response email, Ms. Helzer noted that the documents described in the Subpoena may be “contractually confidential documents.” On information and

¹⁸ Allowing subpoena recipients to defy subpoenas and wait for an enforcement action to challenge the validity and scope of the subpoena eviscerates the intent of AMC 2.30.085C and creates a perverse incentive for recipients to defy the Assembly. It is inequitable to allow Ms. Helzer to raise arguments here that could have and should have been raised in an action to limit or quash the Subpoena.

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belief, the Common Interest Agreement (which is a document that is described in the Subpoena) creates a contractual obligation for the Municipality to keep certain “common interest” materials confidential. But because the Assembly is part of the Municipality, the Common Interest Agreement would not prohibit the Assembly from reviewing any confidential documents, including the Common Interest Agreement itself. The stated purpose of the Subpoena is for the Assembly to determine—with the independent advice of the Assembly’s legal counsel—whether certain documents described in the Subpoena are covered by the Common Interest Agreement or whether those documents, including the Binding Term Sheet, should be made public.¹⁹

Finally, during the April 9, 2024 Assembly meeting, Ms. Helzer suggested that she would only produce the documents described in the Subpoena if each Assembly member signed an additional confidentiality agreement. However, the Municipal Attorney has no authority to require Assembly members to sign such an additional confidentiality agreement. The Assembly is a co-equal branch of the Municipality; allowing the Municipal Attorney to dictate the terms in which the Assembly may view municipal agreements or documents clearly violates the doctrine of separation of powers.

¹⁹ See *Anchorage School District v. Anchorage Daily News*, 779 P.2d 1191, 1193 (Alaska 1991) (“[A] public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential. Under Alaska law, a confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes.”).

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Importantly, no other Municipal officer or employee has been required to sign an additional confidentiality agreement prior to possessing or viewing the documents described in the Subpoena. Ms. Helzer cannot cite any authority to require the Assembly (or its legal counsel) to sign an additional confidentiality agreement when other Municipal officers and employees are not subject to the same requirement.

IV. Ms. Helzer’s Failure to Comply with the Subpoena Was Willful.

The Assembly does not accuse the Municipal Attorney of willful malfeasance lightly, but in this case, there is no question that Ms. Helzer understood the terms of the Subpoena and made an intentional decision not to comply. Ms. Helzer is an attorney and must “act with reasonable diligence and promptness in representing”²⁰ the Municipality. If Ms. Helzer believed the Assembly’s request for compliance by April 22 was unreasonable, she could have, and should have, filed a motion pursuant to AMC 2.30.085C in this court. Simply putting off complying with the Subpoena until her preferred response time was not an option authorized by law.

RELIEF REQUESTED

Normally, a person who is held in contempt of court is subject to punishment, such as fines or imprisonment. Here, the Assembly does not seek to punish Ms. Helzer for her contempt, but instead require immediate compliance with the Subpoena. It is within this Court’s discretion to issue the appropriate relief, and the public interest

²⁰ Alaska R. Prof. Conduct 1.3.

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favors a speedy resolution to this issue. A proposed order setting a show-cause hearing pursuant to Rule 90(b) is attached. The proposed order provides that if Ms. Helzer complies with the Subpoena by Friday, April 26, 2024, at 12 noon (Alaska Time), the show-cause hearing will be automatically vacated. The Assembly believes that Ms. Helzer will comply with this Court's instructions in good faith.

CONCLUSION

For the foregoing reasons, this Court should conclude that Ms. Helzer is in contempt by willfully refusing to comply with the Subpoena to produce documents. The appropriate relief at this stage is for this Court to enter an order directing Ms. Helzer to show cause why she should not be punished for the contempt.

DATED: April 24, 2024.

LANDYE BENNETT BLUMSTEIN LLP

/s/ Andrew Erickson

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(PROPOSED) ORDER TO SHOW CAUSE

This matter comes before the Court on the Plaintiff's *Ex Parte* Motion for Order to Show Cause and to Enforce Subpoena, filed pursuant to Alaska Rule of Civil Procedure 90(b) and Anchorage Municipal Code 2.30.085. This Court has considered the Motion, Complaint, and accompanying Affidavits and Exhibits, and finds that the Plaintiffs have made a proper showing that the Defendant Anne Helzer has not complied with a valid subpoena for production of documents.

It is therefore ORDERED that the Defendant shall appear and show cause on the ____ day of _____, 2024 at _____ am / pm in Courtroom ____.

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The show-cause hearing may be automatically vacated if the Defendant complies with the Subpoena by Friday, April 26, 2024 at 12 noon. The Parties are directed to file a Joint Notice of Compliance if that condition is satisfied.

IT IS SO ORDERED.

DATED this _____ day of _____, 2024, at Anchorage, Alaska.

Superior Court Judge

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