

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 18-CI-379  
- AND -  
CIVIL ACTION NO. 18-CI-414

COMMONWEALTH OF KENTUCKY  
*ex rel.* ANDY BESHEAR, ATTORNEY GENERAL, *et al.*

PLAINTIFFS

v.

MATTHEW G. BEVIN, in his official capacity  
as Governor of the Commonwealth of Kentucky, *et al.*

DEFENDANTS

**NOTICE**

Please take notice that, pursuant to the Local Rules, this Motion for a Protective Order will be heard on Monday, May 7, 2018, at 9:00 a.m., or as soon thereafter as counsel may be heard, in Franklin Circuit Court, Division I, 222 Saint Clair Street, Frankfort, KY 40601.

**ATTORNEY GENERAL'S MOTION FOR PROTECTIVE ORDER**

Comes the Plaintiff, Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General, through counsel and pursuant to CR 26.03, and hereby moves the Court to enter a Protective Order that the improper discovery sought by Defendant Matthew G. Bevin, Governor, from the Office of the Attorney General not be had.

This Court should enter an Order protecting the Office of the Attorney General from the unjustified and inappropriate discovery that Governor Bevin seeks in this matter of purely legal questions. Counsel for the Governor served the Notice of Deposition, attached hereto as Exhibit A, upon counsel for the Office of the Attorney General on April 30, 2018. In the notice, the Governor seeks to depose counsel for the Attorney General regarding the undisputed facts the Attorney General alleges in his Complaint in this action. A deposition of a representative of the Office of the Attorney General could serve no other purpose than to obtain the mental

impressions, conclusions, opinions, or legal theories of an attorney for a party – the Plaintiff, the Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General – concerning this litigation. The only representatives from the Office of the Attorney General who have knowledge of the allegations the Attorney General asserts within the Complaint, are attorneys within the Office of the Attorney General, including Deputy Attorney General Brown, who verified the Complaint. Therefore, the Court should enter an Order to protect the Office of the Attorney General from such inappropriate discovery pursuant to CR 26.03.

The Attorney General states as follows in support of his Motion:

**MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER**

1. On April 30, 2018, counsel for the Defendant, Matthew G. Bevin, Governor, served upon counsel for the Office of the Attorney General, via e-mail, a Notice of Deposition for May 11, 2018 at 3:00 p.m. at 700 Capitol Avenue, Room 110, which is the Office of General Counsel for the Governor. Counsel commanded that the Attorney General designate a representative who can testify about the allegations that Deputy Attorney General J. Michael Brown verified in the Complaint in this action. The Notice of Deposition arrived via e-mail to counsel for the Office of the Attorney General, to counsel for Plaintiffs the Kentucky Education Association (“KEA”) and the Kentucky State Lodge Fraternal Order of Police (“FOP”), to counsel for Defendants, Board of Trustees of the Teachers’ Retirement System, Board of Trustees of the Kentucky Retirement Systems, Senate President Bertram John Stivers, and Speaker Pro Tempore of the House of Representatives David W. Osborne. The Attorney General timely filed this motion on May 1, 2018.

2. Deputy Attorney General J. Michael Brown represents the Commonwealth as counsel in this action.

3. CR 26.02(1) states:

*Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter...*

(Emphasis added).

4. CR 26.02(3)(a) provides:

(3) Trial preparation: materials.

(a) Subject to the provisions of paragraph (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, ***the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.***

(Emphasis added).

5. As this Court recognized on the record on April 19, 2018, this action involves exclusively legal issues that warrant expedited review. No disputed factual issues exist. During that same hearing, counsel for the Governor expressly stated that he did not want to take the testimony of Deputy Attorney General Brown necessarily, but that he may want to take testimony from the KEA and FOP “just to pin down some facts,” or words to that effect. The Court stated that it would not preclude the possibility of some limited discovery, but that it would be difficult for the Court to conceive of any facts that may be in dispute that would give rise to discovery.

6. The next day, April 20, 2018, the Court entered an Order setting the action on a course to expedited resolution, beginning with the Plaintiffs' merits brief due on May 2, 2018 and ending with oral argument on June 7, 2018. Now – 11 days after the parties' initial appearance before the Court and 10 days after the Court's scheduling, and two days before the Plaintiffs' brief is due – counsel for the Governor served its Notice of Deposition. While counsel for the Governor previously requested that counsel for KEA and FOP provide witnesses for depositions via e-mail, it did not request the same of counsel for the Attorney General.

7. The Governor seeks to depose representatives for the Attorney General, which can only lead to the discovery of the mental impressions, conclusions, opinions, or legal theories of the attorneys representing the Attorney General in this litigation, as such counsel prepares for the final hearing on the merits in this action. Such information is absolutely privileged and is not reasonably calculated to lead to the discovery of admissible evidence. Thus, the discovery is impermissible under CR 26.02.

8. The factual information supporting the Complaint is available in the record and is also publicly available. This information speaks for itself. Counsel for the Governor may obtain the factual information supporting the Complaint from the record or other public sources.

9. With his notice, the Governor again seeks to delay resolution of the important questions of law in this action. The discovery the Governor seeks is improper. *See Carpenter v. Wells*, 358 S.W.2d 524 (Ky. 1962); CR 26.02(1), (3). This Court should protect counsel for the Attorney General from such unjustified and inappropriate discovery, and prevent further delay of a decision on the merits.

WHEREFORE, the Plaintiff, Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General, moves this Court for a Protective Order pursuant to CR 26.03 to protect the Office of the Attorney General from the unjustified and improper discovery the Governor seeks.

Respectfully Submitted,

ANDY BESHEAR  
ATTORNEY GENERAL

By: /s/ La Tasha Buckner  
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*Counsel for Plaintiff Commonwealth of  
 Kentucky, ex rel. Andy Beshear,  
 Attorney General*

**CERTIFICATE OF SERVICE**

I hereby certify I electronically filed the foregoing Motion for a Protective Order via the Court's electronic filing system on May 1, 2018, causing all counsel of record to be served electronically.

/s/ La Tasha Buckner  
 La Tasha Buckner

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
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PLAINTIFFS

V.

MATTHEW G. BEVIN, in his official capacity  
as Governor of the Commonwealth of Kentucky, *et al.*

DEFENDANTS

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**NOTICE OF DEPOSITION**

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Under CR 30.02(6), please take notice that undersigned counsel will take the deposition of Plaintiff Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General (the "Attorney General") at 700 Capital Avenue, Room 110, Frankfort, Kentucky 40601 on May 11, 2018 at 3:00 p.m. EDT. The deposition will be taken before a notary public, and the testimony will be recorded stenographically and by video to be used for all purposes permitted by the Kentucky Rules of Civil Procedure and the Kentucky Rules of Evidence.

The Attorney General shall designate a representative or representatives who can testify about the allegations that Deputy Attorney General J. Michael Brown verified in the Verified Complaint filed in this action.

Submitted by,



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*Counsel for Governor Bevin*

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**ORDER**

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This matter is before the Court on the motion of the Plaintiff, the Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General, by and through counsel, for a Protective Order pursuant to CR 26.03. The Court, having considered the Motion and being otherwise sufficiently advised, finds that the discovery sought by the Defendant, Governor Matthew G. Bevin, is inappropriate in that it seeks the mental impressions, conclusions, opinions, or legal theories of an attorney for a party – the Plaintiff, the Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General Kentucky – concerning this litigation, and is not reasonably calculated to lead to the discovery of admissible evidence, **GRANTS** the Attorney General’s Motion for Protective Order.

Wherefore, **IT IS ORDERED AND ADJUDGED** that, pursuant to CR 26.03, until further Order of this Court discovery shall not be sought by or served upon the Office of the Attorney General.

SO ORDERED, this \_\_\_\_ of May, 2018.



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Judge Phillip J. Shepherd  
Franklin Circuit Court, Division I

Tendered by:

*/s/ La Tasha Buckner*

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Andy Beshear  
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La Tasha Buckner  
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Andy Beshear, Attorney General*