

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ROBERT L. BREUDER,)	
)	
Plaintiff,)	
)	
v.)	
)	
BOARD OF TRUSTEES OF)	
COMMUNITY COLLEGE DISTRICT NO.)	Court No. 15 cv 9323
502, DUPAGE COUNTY, ILLINOIS, an)	
Illinois body politic and corporate,)	Honorable Andrea R. Wood
KATHY HAMILTON in her official and)	
individual capacity, DEANNE)	Magistrate Judge Jeffrey Cummings
MAZZOCHI in her official and individual)	
capacity, FRANK NAPOLITANO in his)	
official and individual capacity, and)	
CHARLES BERNSTEIN in his official and)	
Individual capacity,)	
)	
Defendants.)	

**NON-PARTY SUBPOENA RESPONDENT, KORY ATKINSON’S RESPONSE TO
DEFENDANT BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT
NO. 502, DUPAGE COUNTY, ILLINOIS’S MOTION TO CLAW BACK
PRIVILEGED DOCUMENTS**

NOW COMES, Kory Atkinson, Non-Party Subpoena Respondent, by and through his attorneys, PETERSON, JOHNSON & MURRAY CHICAGO, LLC, and for his Response to Defendant Board of Trustees of Community College District No. 502, DuPage County, Illinois’s (hereinafter “College”) Motion To Claw Back Privileged Documents, and states as follows:

Introduction

The College has attempted to cast Kory Atkinson as an obstructionist. To support its aspersions and impugn his integrity, the College claims that the claimed privileged documents in question were *inadvertently* produced to him. However, such proclamations strain the bounds of credulity. The fact of the matter is that the documents in question were intentionally provided to

Mr. Atkinson via email. The memo in question was sent directly to Mr. Atkinson on September 5, 2015. Thus, it is disingenuous to assert that the memo, or any of the documents for that matter, were inadvertently provided to Mr. Atkinson.

Setting aside that characterization, Mr. Atkinson has always maintained that he will adhere to any court order as to the issue of the deletion/destruction of these documents. However, the undersigned and Mr. Atkinson are aware of ongoing discovery disputes and as such, Mr. Atkinson does not want to be put in the position of destroying documents at the heart of ongoing motion practice. The undersigned even suggested that the documents central to this motion could be reviewed by the Court *in camera*. Mr. Atkinson, nor the undersigned have disseminated the documents that are the subject of this motion. For the reasons below, Mr. Atkinson would ask that the College's Motion be denied.

Argument

The College asserts that the most analogous Although Federal Rule of Civil Procedure is 26(b)(5)(B). (Motion, p. 3, Doc. No. 394). This Rule states,

(B) *Information Produced*. **If information produced in discovery** is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. **After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved;** must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Fed. R. Civ. Proc. 26(b)(5)(B) (Emphasis added).

Further, there is a Protective Order entered in this matter (Doc. No. 179). Paragraph 17(b) relates to the production of the protected and privileged documents. Although Mr. Atkinson is not

a party to this lawsuit and did not receive the documents from Defendant College during discovery in this matter, thus, the process outlined in the Protective Order is not truly applicable.

Here, the College is seeking an order to compel a non-party to return documents that were not produced in this matter by any party, that were, in part, intentionally sent to him on September 5, 2015, and have been in the possession of the College's attorneys' possession for approximately one year. (Ex. 1, Declaration of Kory Atkinson). Further, there is an ongoing dispute between parties to this litigation that centers around the very documents the College is asking a non-party to destroy. It cannot be overstated, the documents sought to be clawed back were intentionally, not inadvertently produced in this matter. For the College to argue "[t]he disclosure of this privileged memo to Atkinson was clearly inadvertent" is without merit. (Doc. No. 394, p. 5). An email, with the attached memo, was sent to Mr. Atkinson on September 5, 2015. These two documents were provided to Defendant College's counsel by January 30, 2020. It was not until September 2020 that the College raised any issues with these documents. Counsel for Mr. Atkinson responded to the College's request for the destruction of the documents on September 18, 2020. (Ex. 2, 9/18/2020 Ltr. to Mr. Porter). The approximately three months later, counsel for the College sent a correspondence on Friday, December 11, 2020 indicating that the College was going to file a motion to compel unless Mr. Atkinson destroyed the documents by December 16, 2020. (Ex. 3, December 11, 2020 email from Mr. Porter with attached correspondence). Thereafter the undersigned exchanged emails with Attorney Porter in an attempt to resolve the issue and let the court review the documents *in camera*. (Ex. 4, December 18, 2020 email chain with Mr. Porter). In that email chain, the undersigned noted,

After reviewing the docket, I understand that there is significant litigation regarding assertion of privilege. In order to protect my client from any claims that he improperly destroyed documents from a public entity that are the subject of pending litigation, I would ask that the court review the documents *in camera* and determine

which documents or portions of the documents are privileged. The documents will not be distributed or destroyed pending the ruling on the asserted privileges.

See, Ex. 4, December 18, 2020 email chain with Mr. Porter, 10:26 a.m. email.

The College is attempting to “put the genie back in the bottle” after documents were intentionally sent to him by third parties prior to any litigation. The memo in question was sent to Mr. Atkinson on September 5, 2015 and this lawsuit was filed on October 21, 2015. Whether former Trustee McGuire was a whistleblower and perceived improper conduct was afoot, documents were most certainly sent to Mr. Atkinson, a non-party, intentionally. Although the Federal Rule of Civil Procedure 26(b)(5)(B) is largely inapplicable. First, Mr. Atkinson is not a party to this lawsuit. Second, the documents were not inadvertently produced to Mr. Atkinson during discovery. Third, the College’s efforts to retrieve the documents that have been produced by Mr. Atkinson for approximately one year cannot be characterized as prompt or diligent. Fourth, there is an ongoing dispute amongst the attorneys of record regarding the documents. The College’s Counsel is asking Mr. Atkinson to destroy and encourage the spoliation of documents that are the subject of litigation disputes. This reality was stressed to the College’s counsel to no avail. Nonetheless, the undersign believed and still believes that to protect Mr. Atkinson’s interests, this Court should review the documents *in camera* to determine if the documents are privileged, and if so, what are the corrective measures that should be taken. It is known that Plaintiff Breuder is challenging the assertion of privilege by the College, but Mr. Atkinson is not taking any position on the ongoing discovery dispute between parties. The purpose of this response is to clarify the record and to ensure that this Court has a clear record of how and when Mr. Atkinson came into possession of the records that he produced in this litigation pursuant to a subpoena.

WHEREFORE, Kory Atkinson, respectfully requests that this Court enter an order deny the Motion to Claw back Privileged Document filed by Board of Trustees of Community College District 502, DuPage County, Illinois, or in the alternative, review the documents *in camera* to determine the documents that should be destroyed and/or deleted, award Mr. Atkinson fees associated with the defense of this motion, and for any other relief that this Court deems necessary and just.

Respectfully submitted,

By: s/Dominick L. Lanzito
Attorney for Kory Atkinson

Dominick L. Lanzito (ARDC 6277856)
PETERSON, JOHNSON & MURRAY - CHICAGO, LLC.
200 West Adams Street, Suite 2125
Chicago, IL 60606
P: (312) 782-7150
F: (312) 896-9318
dlanzito@pjmchicago.com

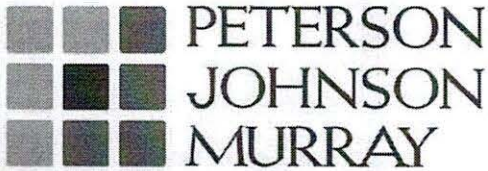
6. The memo which the Board seeks to clawback was produced in my January 30, 2020 production and the legal invoices at issue were contained in my January 27, 2020 production. This memo was attached as a pdf file to an email received by me on September 5, 2015 from then-Trustee Dianne McGuire's personal email. I was the only recipient on this particular email and the text in the body of the email included my name.
7. The memo was bates stamped KAA026980 - KAA026985. The email, to which the memo was attached, was bates stamped KAA026307.
8. I have not disclosed the documents that are the subject of this declaration, nor did I obtain them as part of discovery in this lawsuit.

FURTHER DECLARANT SAYETH NAUGHT.

Executed on the 4 day of January 2021.



Kory Atkinson



Dominick L. Lanzito
dlanzito@pjmchicago.com

September 18, 2020

Sent via email to aporter@sppplaw.com

Andrew C. Porter
Salvatore Prescott Porter & Porter, PLLC
1010 Davis Street
Evanston, IL 60201

**Re: Breuder v. Board of Trustees of Community College District No. 502,
DuPage County, Illinois, et al., 15 CV 9323 (N.D. Ill., Eastern Division)**

Dear Mr. Porter:

This letter is in response to your letter dated September 7, 2020 and your additional requests for clarification of my client's response to your client's subpoena, your request to destroy documents, and request to further detail the scope and nature of his attorney-client relationship with Dr. Breuder. I am taken aback that it has taken over nine months to request a "meet and confer" about the nature of his attorney-client relationship with Dr. Breuder.

First and foremost, my client has produced the engagement letter during his response to the subpoena. Second, Plaintiff was to provide a privilege log regarding communications that were protected attorney-client communications, which I believe Plaintiff's counsel did in fact provide. Third, only Dr. Breuder can assert or waive any attorney-client communication privilege, so until we receive written confirmation from Dr. Breuder and or his attorney or a court order, my client will not provide the requested affidavit. I would be remiss if I did not note the continuing harassment of my client by Defendants in this matter. He has already been designated as a witness who will be deposed, so the purpose of ongoing solicitation of information from him beyond the bounds of the subpoena and continued correspondence is clear – harass anyone who may be favorable to Plaintiff. Such harassment is improper and will not be tolerated.

As for the documents that you believe have deletions or fail to have attachments missing, below is a summary of those documents:

KAA 01209 - The attachments are bates numbered KAA 001210-1214; KAA 001215-1222; and KAA 001223-1276.

KAA 001423 & 001427 - The referenced "draft complaints" are privileged. Please see the previously produced privilege log regarding KAA 026042, 26692-93; and 26681-82.

PETERSON, JOHNSON & MURRAY CHICAGO, LLC
Attorneys at Law

200 W. Adams St. Suite 2125 Chicago, Illinois 60606 P: 312.782.7150 F: 312.896.9318 www.pjmchicago.com

EXHIBIT

2

KAA 006026; KAA 006030; KAA 006031; KAA 006032; KAA 006035; KAA 006066; KAA 006076; KAA 006078; KAA 006080; and KAA 006084 – All of these documents have been redacted pursuant to attorney-client privilege. These redactions were done in coordination with Plaintiff's assertion of privilege, the only person who could waive the privilege. The requested documents were identified in Plaintiff's Privilege Log.

KAA 025567 - "This document references a board meeting agenda, but I have seen no production of the board meeting agenda referenced here. Please provide the referenced document or documents." This document number does not reference a meeting agenda, so please let me know if you have identified the wrong document.

As for the documents you believe my client should not possess to, below is a summary of those documents;

KAA 3497 – KAA 4328 - These are all of the email communications sent to my client's personal email address, while he was a trustee of the college, as the COD Board of Trustees did not have COD email addresses assigned to them at that time.

KAA 20909 - This is a score sheet for the attorney RFQ responses in 2015.

KAA 23100 – KAA 23133 - Rathje & Woodward legal services invoices and accompanying COD payment authorization forms (July 2015).

KAA 23134 – KAA 23184 - Rathje & Woodward legal services invoices (June 2015).

KAA 23185 – KAA 23207 - Rathje & Woodward legal services invoices (May 2015).

KAA 24240 – 24242 - Schuyler Roche & Crisham legal services invoices (Aug. 2015)

KAA 24272 – Draft COD Board Policy (5-180)

KAA 24413 – 24415 - Rathje & Woodward legal services invoices and accompanying COD payment authorization forms (April 2015).

KAA 24416 – 24449 - Rathje & Woodward legal services invoices and accompanying COD payment authorization forms (July 2015).

KAA 24450 – 24500 - Rathje & Woodward legal services invoices and accompanying COD payment authorization forms (June 2015).

KAA 24501 – 24523 - Rathje & Woodward legal services invoices and accompanying COD payment authorization forms (May 2015).

KAA 25917 – Draft COD Board Policy (5-180).

KAA 25923 – KAA 25925 - Rathje & Woodward legal services invoices and accompanying COD payment authorization forms (April 2015).

KAA 25926 – 25959 - Rathje & Woodward legal services invoices and accompanying COD payment authorization forms (July 2015).

KAA 25960 – 26010 - Rathje & Woodward legal services invoices and accompanying COD payment authorization forms (June 2015).

KAA 26011 – 26033 - Rathje & Woodward legal services invoices and accompanying COD payment authorization forms (May 2015).

KAA 26980 – 26985 - Memo from Schuyler Roche Crisham to COD Board of Trustees “Dr. Robert Breuder - Executive Summary” dated August 19, 2015. It is marked Attorney-Client and Work Product Privilege.

First and foremost, all of the documents were either in his possession at the time he was a Trustee or were provided to him from the individuals set forth in the corresponding emails. Thus, there was no improper action by my client in obtaining them. To the extent that purportedly privileged documents were disseminated by COD officials to my client, I do not believe that he is under any legal obligation to destroy the emails without a court order and he will not be doing so. As for the invoices for legal services and the payment authorization, those are public records, which would be subject to FOIA in their entirety and similarly will not be destroyed or deleted by my client.

Should the harassment of my client continue, in order to delay a ruling on the merits, my client will seek all of his costs incurred, including the associated attorney’s fees. Please refer all other inquiries on this issue to Dr. Breuder’s counsel of record in this matter. If you have any questions or concerns, please feel free to contact me at my office.

Very truly yours,

s/Dominick L. Lanzito

Dominick L. Lanzito

Karen McNally

Subject: FW: Breuder vs Board of Trustees of Community College District No. 502 - 9.18.20 Correspondence
Attachments: Breuder- 9-18-20 Ltr. to A. Porter.pdf

From: Andrew Porter <aporter@sppplaw.com>
Sent: Friday, December 11, 2020 2:20 PM
To: Dominick Lanzito <dlanzito@pimchicago.com>
Subject: FW: Breuder vs Board of Trustees of Community College District No. 502 - 9.18.20 Correspondence

Mr. Lanzito,

We are going to file a motion to compel you to destroy or return the following documents on or before Wednesday, December 16, unless you voluntarily comply with our continued requests to clawback those documents:

KAA 3497 – KAA 4328 - These are all of the email communications sent to my client's personal email address, while he was a trustee of the college, as the COD Board of Trustees did not have COD email addresses assigned to them at that time.
KAA 20909 - This is a score sheet for the attorney RFQ responses in 2015.
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KAA 26980 – 26985 - Memo from Schuyler Roche Crisham to COD Board of Trustees "Dr. Robert Breuder - Executive Summary" dated August 19, 2015. It is marked Attorney-Client and Work Product Privilege.

Please advise. Thank you.

Andrew

Andrew C. Porter

Salvatore Prescott Porter & Porter, PLLC

P: (312) 283-5711

F: (312) 724-8353

www.sppplaw.com

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Dominick Lanzito

From: Andrew Porter <aporter@sppplaw.com>
Sent: Friday, December 18, 2020 10:38 AM
To: Dominick Lanzito
Cc: Suzie Notton
Subject: Re: Breuder vs Board of Trustees of Community College District No. 502 - 9.18.20 Correspondence

Thanks,

We will get the motion on file today.

Andrew

Andrew C. Porter

Salvatore Prescott Porter & Porter, PLLC

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From: Dominick Lanzito <dlanzito@pjmchicago.com>
Date: Friday, December 18, 2020 at 10:36 AM
To: Andrew Porter <aporter@sppplaw.com>
Cc: Suzie Notton <notton@sppplaw.com>
Subject: RE: Breuder vs Board of Trustees of Community College District No. 502 - 9.18.20 Correspondence

Andrew,

The documents were produced by my client pursuant to your subpoena request. I have not distributed any of the documents, nor has my client, other than complying with your subpoena in this matter. After reviewing the docket, I understand that there is significant litigation regarding assertion of privilege. In order to protect my client from any claims that he improperly destroyed documents from a public entity that are the subject of pending litigation, I would ask that the court review the documents *in camera* and determine which documents or portions of the documents are privileged. The documents will not be distributed or destroyed pending the ruling on the asserted privileges.

My client produced these documents over a year ago and has certain destroyed documents as previously requested; however, the arbitrarily short demand for the destruction of the documents after they have been in your possession for over a year is unwarranted. I would reassert the positions outlined in my September 18, 2020 correspondence. As I noted then, my client will comply with any court ordered destruction or deletion of public records.

Best regards,



Dominick L. Lanzito
Peterson, Johnson & Murray Chicago, LLC
200 West Adams St., Suite 2125
Chicago, IL 60606
Direct: (312) 724-8035
T (312) 782-7150
F (312) 896-9318
E dlanzito@pjmchicago.com



From: Andrew Porter <aporter@sppplaw.com>
Sent: Friday, December 18, 2020 10:12 AM
To: Dominick Lanzito <dlanzito@pjmchicago.com>
Cc: Suzie Notton <notton@sppplaw.com>
Subject: Re: Breuder vs Board of Trustees of Community College District No. 502 - 9.18.20 Correspondence

Dominick,

Thanks for the note. We were preparing to file a motion last night and were putting some final exhibits together. I don't understand why you need until next week. This is a pretty simple ask – 1) will you agree to clawback the itemized documents; and 2) will you identify who (if anyone) you've shared these documents with. If we don't hear from you by end of day today, we will get this on file.

Regards,

Andrew

Andrew C. Porter
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From: Dominick Lanzito <dlanzito@pjmchicago.com>
Date: Friday, December 18, 2020 at 8:01 AM
To: Andrew Porter <aporter@sppplaw.com>
Subject: RE: Breuder vs Board of Trustees of Community College District No. 502 - 9.18.20 Correspondence

Mr. Porter,

Sorry for the delay, but I will have a written response to you next week so that we can resolve the issue in your letter.

Best regards,

Dominick L. Lanzito
Peterson, Johnson & Murray Chicago, LLC
200 West Adams St., Suite 2125
Chicago, IL 60606
Direct: (312) 724-8035
T (312) 782-7150
F (312) 896-9318
E dlanzito@pjmchicago.com



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Sent: Friday, December 11, 2020 2:20 PM
To: Dominick Lanzito <dlanzito@pjmchicago.com>
Subject: FW: Breuder vs Board of Trustees of Community College District No. 502 - 9.18.20 Correspondence

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KAA 24450 – 24500 - Rathje & Woodward legal services invoices and accompanying COD payment authorization forms (June 2015).

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KAA 25923 – KAA 25925 - Rathje & Woodward legal services invoices and accompanying COD payment authorization forms (April 2015).

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KAA 26980 – 26985 - Memo from Schuyler Roche Crisham to COD Board of Trustees "Dr. Robert Breuder - Executive Summary" dated August 19, 2015. It is marked Attorney-Client and Work Product Privilege.

Please advise. Thank you.

Andrew

Andrew C. Porter

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