



JUDGE AMY R. SMITH
DANE COUNTY CIRCUIT COURT, BRANCH 4
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DATE: 7/3/15
TO: Atty Lennington - (608) 267 2779
Atty Westerberg - (608) 310 3561
Atty McGillivray - (608) 310 3561
FROM: John Ly
Circuit Court, Branch 4

TOTAL PAGES INCLUDING THIS PAGE: 10

If you did not receive all of/or have any problems or questions on this fax, please call:

John or Colleen at 266-4351

COMMENTS: Please call me if you require a hardcopy. Thanks.

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 4

COUNTY OF DANE

FILED *[Signature]*

JUL - 3 2015

DANE COUNTY CIRCUIT COURT

**FREEDOM FROM RELIGION FOUNDATION, INC.,
and PATRICK ELLIOT,**

Plaintiffs,

v.

Case No. 14-CV-3429

**WISCONSIN OFFICE OF THE
COMMISSIONER OF INSURANCE,
and THEODORE NICKEL,
in his official capacity as
COMMISSIONER OF INSURANCE,
Defendants.**

**DECISION AFTER COURT'S *IN CAMERA* INSPECTION,
AND SCHEDULING ORDER**

The Court received and reviewed *in camera* documents submitted to it on May 29, 2015 by Defendants in accordance with the Court's order. Based on its review, the Court issues this Decision, and sets the matter for further proceedings.

BACKGROUND

Plaintiffs filed their Complaint under the Wisconsin Open Records Law on December 17, 2014. Complaint at p. 1. In its Complaint, Plaintiffs claim that they filed open records requests with Defendants in the summer of 2014. Plaintiffs received 16 pages of documents in response on August 27, 2014, as well as a letter from the Office of the Commissioner of Insurance ("OCI") Chief Legal Counsel Mollie Zito. Complaint at Exhibit D and C. Attorney Zito states that "OCI has withheld privileged documents as permitted under ss. 19.35(1) and 19.85(1)(g),

Wis. Stat., and based upon the balancing test.” Attorney Zito’s letter also provides additional support for withholding undisclosed documents, summarized below.

Plaintiffs specifically identify in their Complaint only one document they claim was improperly withheld: a July 24, 2014 email string, which Plaintiffs received from another source on November 24, 2014 and which was attached to their Complaint as Exhibit G. No other specific documents are identified as improperly withheld in the Complaint, although Plaintiffs generally allege that they infer other documents may have been improperly withheld. Complaint at para. 23.

In its May 21, 2015 Decision on Defendants’ Motion for Judgment on the Pleadings, or in the Alternative, Motion for Protective Order, and Order for *In Camera* Inspection (“May 21, 2015 Decision”), the Court dismissed a number of Plaintiffs’ claims and ordered Defendants to produce for *in camera* inspection any records withheld from Plaintiffs, including a copy of the July 24, 2014 email string in Defendants’ possession. Defendants provided documents for the Court’s *in camera* inspection on May 29, 2015.

The Court has inspected these documents, and issues this Decision. The Court also sets the matter for hearing to address remaining issues.

DISCUSSION

July 24, 2014 email string

As footnoted on page 3 of the May 21, 2015 Decision, the Court has compared Defendants' July 24, 2014 email string with that already in Plaintiffs' possession since November 24, 2014, attached to Plaintiffs' Complaint as Exhibit G. The Court FINDS that the two documents are substantively identical. The Court notes that the precise formatting of the email string is ever so slightly different, likely due to how the document was accessed and/or printed. The Court attaches the July 24, 2014 email string received for *in camera* inspection to this Decision.

Withheld documents

The Court has also reviewed documents submitted for *in camera* inspection which Defendants intentionally withheld from Plaintiffs, for which reasons were provided in Attorney Zito's August 27, 2014 letter. Complaint at Exhibit C. Attorney Zito stated that withheld documents were privileged by virtue of attorney-client privilege and attorney work product privilege, and based upon the balancing test. She offered statutory and case law citations in her response. She provided specific public policy reasons to withhold the documents. She articulated, under the balancing test, that the need for confidentiality as to legal advice and attorney work product outweighed the public's interest in disclosing withheld documents.

The Court FINDS that Attorney Zito's response provided specific reasons for OCI's withholding undisclosed records, she more than sufficiently supported

her reasons with case and statutory citations, and she provided sufficient specificity as to the public policy reasons to withhold these records.

The Court has reviewed the intentionally withheld documents Defendants submitted for *in camera* review. The Court FINDS that these documents are clearly privileged. The documents in their entirety are subject to attorney client privilege and/or attorney work product privilege, both of which were properly invoked by way Attorney Zito's letter, and are therefore not subject to disclosure. In applying the balancing test, the Court further FINDS AND CONCLUDES that OCI's interests in maintaining confidential attorney communications regarding legal matters, and maintaining confidentiality of attorney work product, substantially outweigh the public's interest in disclosure of these documents.

The Court therefore concludes that the documents which OCI withheld and were the subject of Attorney Zito's August 27, 2014 letter were appropriately withheld, and OCI provided specific reasons for not disclosing them.

Defendants will draft and file any additional Order necessary to effectuate the intent of this Decision.

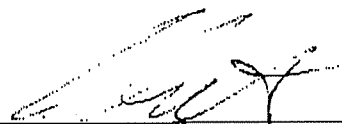
SCHEDULING ORDER

The Court sets this matter for hearing on August 6, 2015 at 2:00 p.m. to address remaining issues, including Plaintiffs' motion seeking clarification filed on June 3.

The Court alerts the parties to its review of a portion of its May 21, 2015 Decision, and concludes that further discussion may be in order. As discussed with the parties and in the May 21, 2015 Decision, an unusual feature of Plaintiffs' claims against Defendants is a mandamus claim for a document already in Plaintiffs' possession. The Court dismissed this particular claim for the reasons stated in its May 21, 2015 Decision. The Court will invite additional input from the parties on this issue at the upcoming hearing.

SO ORDERED. Dated this 3rd day of July, 2015.

BY THE COURT:



Hon. Amy R. Smith
Circuit Court Judge, Branch 4

C (via FAX): Attorney Daniel Lennington
Attorney Christa Westerberg
Attorney Pamela McGillivray

Wieske, JP - OCI

From: Patrick, Laurel - GOV
Sent: Thursday, July 24, 2014 1:01 PM
To: Wieske, JP - OCI
Subject: RE: Quick chat

Thanks!

*Laurel Patrick | Press Secretary
Office of Governor Scott Walker
(o) 608-267-7303*



From: Wieske, JP - OCI
Sent: Thursday, July 24, 2014 1:01 PM
To: Patrick, Laurel - GOV
Subject: RE: Quick chat

It is incorrect to say the administration is no longer enforcing the state's contraception coverage. The contraceptive mandate is still in place. Only in very rare circumstances when there are religious objections is it not, in which case federal rules and the Supreme Court decision preempt state law.

J.P. Wieske, FLMI
Legislative Liaison & Public Information Officer
Office of the Commissioner of Insurance
jp.wieske@wisconsin.gov
(608) 266-2493

From: Patrick, Laurel - GOV
Sent: Thursday, July 24, 2014 12:54 PM
To: Wieske, JP - OCI
Subject: RE: Quick chat

It is incorrect to say the administration is no longer enforcing the state's contraception coverage. The contraceptive mandate is still in place. Only in very rare circumstances when there are religious objections is it not, in which case the Supreme Court decision becomes law.

*Laurel Patrick | Press Secretary
Office of Governor Scott Walker
(o) 608-267-7303*



From: Wieske, JP - OCI
Sent: Thursday, July 24, 2014 12:51 PM
To: Patrick, Laurel - GOV
Subject: RE: Quick chat

Now works

J.P. Wieske, FLMI
Legislative Liaison & Public Information Officer
Office of the Commissioner of Insurance
jp.wieske@wisconsin.gov
(608) 266-2493

From: Patrick, Laurel - GOV
Sent: Thursday, July 24, 2014 12:46 PM
To: Wieske, JP - OCI
Subject: Quick chat

Hi JP,

I'm stepping into a meeting at 1, but could you shoot me an email when you have time to chat? I'll step out and give you a call.

*Laurel Patrick | Press Secretary
Office of Governor Scott Walker
(o) 608-267-7303*



Wieske, JP - OCI

From: Wieske, JP - OCI
Sent: Thursday, July 24, 2014 5:06 PM
To: Webster, Jocelyn - GOV; Werwie, Cullen J - DOA
Subject: Fwd: Contraceptive coverage

JP Wieske
JP.wieske@wisconsin.gov
608-266-2493

Begin forwarded message:

From: Jason Stein <jstein@jrn.com>
Date: July 24, 2014 at 5:00:05 PM CDT
To: "Wieske, JP - OCI" <JP.Wieske@wisconsin.gov>, Dana Ferguson <dferguson@jrn.com>
Cc: "dhaynes@jrn.com" <dhaynes@jrn.com>
Subject: Re: Contraceptive coverage

JP,

Thanks for your note. We are in the process of reporting a story that would make clear the alternate procedure for employees in these cases to receive contraceptive coverage.

In the case of your other objections, I would note that the story laid out the narrow grounds of the pre-emption as you see it and its source. Nowhere does the story say enforcement of the state law was being dropped entirely. In fact, it goes out of its way to state the opposite. Let me know if you have other concerns.

On Thu, Jul 24, 2014 at 4:50 PM, Wieske, JP - OCI <JP.Wieske@wisconsin.gov> wrote:

Jason

I want to express my dismay with the inaccurate stories posted Monday and Wednesday on jonline.com. The posted story claimed that Wisconsin was not enforcing the state contraceptive mandate. This is not true, but it also misleads consumers into believing that they would not have access to insurance coverage for contraceptives. It is important to note that the federal rules ONLY apply narrowly to employers who assert the religious exemption and there has been no change in OCI policy since we began reviewing Affordable Care Act policies last year.

What I specifically explained was that essentially nothing has changed relative to Wisconsin's contraceptive mandate from the Hobby Lobby decision except the scope of the religious exemption. Under federal rules, insurers are required to issue policies without contraceptive coverage to employers who assert a religious exemption. Insurers are also required to issue a no-

Jul. 3. 2015 12:15PM

No. 1778 P. 10

cost (to employer or employee) contraceptive only plan to the employees of those asserting a religious exemption. In order for our insurers to comply with the federal requirements under the Affordable Care Act, Wisconsin was required to review these separate insurance policies.

In short, our law was preempted by federal law but employees at religious firms continue to receive contraceptive coverage through the required separate contraceptive-only insurance policy.

The details in any news story need to be complete and accurate. Unfortunately, the story posted on your website and printed in your paper was neither.

Sincerely

JP

J.P. Wieske, FLMI

Legislative Liaison & Public Information Officer

Office of the Commissioner of Insurance

jp.wieske@wisconsin.gov

[\(608\) 266-2493](tel:(608)266-2493)

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Jason Stein | State Capitol reporter

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