

BEFORE THE NEW MEXICO OFFICE OF SUPERINTENDENT OF INSURANCE

IN THE MATTER OF
 GOSPEL LIGHT MENNONITE
 CHURCH MEDICAL AID PLAN,
 DBA LIBERTY HEALTHSHARE,

Respondent.

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Docket No. [2021-0085](#)

**THE OFFICE OF SUPERINTENDENT OF INSURANCE'S MOTION TO QUASH
 THE RESPONDENTS' SUBPOENA TO SUPERINTENDENT OF INSURANCE**

COMES NOW the Office of Superintendent of Insurance ("OSI"), through counsel of record, hereby moves the Hearing Officer to enter an order prohibiting the Respondents from subpoenaing the Superintendent of Insurance, Mr. Russell Toal ("Superintendent"), to testify in the above captioned matter. In support of this motion, the OSI states the following:

BACKGROUND

1. Gospel Light Mennonite Church Medical Aid Plan, Inc., dba Liberty HealthShare, (collectively, "Liberty") represents itself as a health care sharing ministry ("HCSM") exempt from insurance regulation. Regardless of its status as a legitimate health care sharing ministry within the meaning of the federal Patient Protection and Affordable Care Act, New Mexico has not adopted a "safe harbor law" applicable to health care sharing ministries and their participants that explicitly exempts ministries or their participants from the New Mexico Insurance Code, Chapter 59A NMSA 1978.

2. The State of New Mexico requires any person transacting insurance business in New Mexico to hold a valid certificate of authority. NMSA 1978, § 59A-5-10. The offering, marketing, sale, and all activities relating to health benefits coverage constitute transacting insurance business.

3. Liberty does not hold a Certificate of Authority in the State of New Mexico yet it markets its healthcare sharing product to New Mexico residents and have sold healthcare sharing memberships to New Mexico residents. The functional elements of Liberty's health benefits are identical to those of a "mainstream" health insurance plan.

4. The Superintendent made certain Preliminary Conclusions after determining he had probable cause to believe that Liberty's actions or inactions constitute violations of the Insurance Code or other applicable laws that are subject to enforcement by the Superintendent. Accordingly, on November 23, 2021, the Superintendent issued Liberty an Order to Cease and Desist and an Order to Show Cause.

5. In accordance with NMSA 1978 § 59A-4-15 of the Insurance Code, Liberty requested an administrative hearing. NMSA 1978 § 59A-4-17 of the Insurance Code provides that administration hearings shall be held in accordance with the applicable provisions of Sections 12-8-10 through 12-8-13 and Section 12-8-15 NMSA 1978 of the Administrative Procedures Act.

6. By Order dated December 20, 2021, the Superintendent designated Richard B. Word as Hearing Officer to preside over the matter and to take actions necessary and convenient within the limits of his authority and consistent with applicable procedural rules. By agreement of the parties, a hearing on this matter commenced on March 8, 2022. The hearing was recessed on that same day. On July 27, 2022, a status conference was conducted which at its conclusion the recommencement of the evidentiary hearing was set for September 14, 2022, at 9:00 A.M.

7. On September 7, 2022, the Respondents submitted an application requesting the Hearing Officer issue a subpoena to the Superintendent to appear and provide testimony at the continued evidentiary hearing:

ARGUMENT

The ability to invoke executive privilege is “essential to discharge of highly important executive responsibilities” and has long been recognized by the U.S. Supreme Court as to the federal executive branch and by various states as to their respective executives. *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C 1966), *aff’d sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967); *see also, e.g., United States v. Reynolds*, 345 U.S. 1, 6 n.9 (1953) (recognizing executive’s power to withhold documents as an “executive power which is protected in the constitutional system of separation of power”); *State ex rel. Dann v. Taft*, 853 N.E.2d 263, 265 (Ohio 2006) (“Some form of executive privilege has long been accorded the executive branch by state courts as a matter of the common law of evidence, including courts in Alabama, Alaska, Arizona, California, Colorado, Maryland, New Jersey, New York, Pennsylvania, Vermont, and Wisconsin”).

Similar to these other states, the New Mexico Supreme Court, have recognized an executive communications privilege. *See State ex rel. Attorney Gen. v. First Judicial Dist. Court*, 1981-NMSC-053, ¶ 17, 96 N.M. 254, 629 P.2d 330. This privilege is rooted in the constitutional separation of powers principles and is specific to the head of an executive branch. As recognized by the New Mexico State Supreme Court:

Inherent in the successful functioning of an independent executive is the valid need for protection of communications between its members. The purposes of the executive privilege are to safeguard the decision-making process of the government by fostering candid expression of recommendations and advice and to protect this process from disclosure. Executive personnel who fear or expect public dissemination of their remarks

may temper their comments because of their concern for their own personal interests, safety, or reputation.

First Judicial Dist. Court, 1981-NMSC-053, ¶ 17.

The Court subsequently reaffirmed the “outlining of executive privilege” in *Estate of Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 39, 139 N.M. 671, 137 P.3d 611. Then again, in *Republican Party of NM v. NM Taxation & Revenue Dep’t*, 2012-NMSC-026, ¶ 43, 283 P.3d 853, the Supreme Court unequivocally stated that “jurisprudence supports a limited form of executive privilege derived from the constitution. This privilege is similar in origin, purpose, and scope to the presidential communications privilege recognized by the federal courts and the executive communications privilege recognized by some other state high courts.” The Court went on to clarify that “executive privilege in New Mexico can only apply to ‘communications,’ because the privilege exists solely to protect the executive’s ‘access to candid advice.’” *Id* at ¶ 44.

Mr. Toal is the Superintendent of Insurance, a constitutionally-created officer with the responsibility to regulate insurance. *See* N.M. Const. Art. XI, § 20. Similar to the Attorney General, as a member of the of the executive, the Superintendent enjoys the right to claim executive privilege. By notice dated September 9, 2022, the Superintendent has properly invoked the claim of executive privilege. *See e.g., First Judicial Dist. Court*, 1981-NMSC-053, ¶ 22.

13.1.5.21 NMAC provides in part as follows:

Any request for issuance of subpoenas in matters subject to these rules shall be guided by Rule 45 of the rules of civil procedure for the district courts in New Mexico [...] The party requesting the subpoena shall prepare a proposed subpoena, submit the proposed subpoena to each other party and to the hearings officer for approval, and shall timely and reasonably serve the subpoena on the person or entity subject to the subpoena. Unless

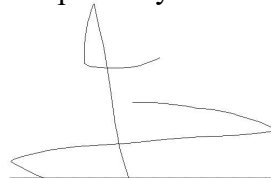
good cause is shown for a shorter period, a subpoena shall provide at least 10 days-notice before compelled attendance at a hearing or deposition...”

Rule 1-045 (3)(a) NMRA provides in part that “[o]n timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance and (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies.

On September 7, 2022, the Respondents submitted an application requesting the Hearing Officer issue a subpoena to the Superintendent to appear and provide testimony at the continued evidentiary hearing scheduled for September 14, 2022. The Respondents make no showing of good cause why period of less than 10 days is necessary. Moreover, in addition to being untimely, Respondents’ subpoena seeks disclosure of communications protected by executive privilege.

WHEREFORE, for the foregoing reasons, OSI requests respectfully that the Hearing Officer grant the instant Motion quash the subpoena as untimely and to the extent is calls for communications related to the Superintendent’s deliberation and decision-making.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 9th day of September 2022, I filed the foregoing *Motion to Quash* through the OSI's eDocket filing system, which caused all parties entitled to notice in this case to be served electronically, as more fully reflected on the notice of electronic filing.

BY:  _____