

**STATE OF MICHIGAN**

**IN THE 3<sup>rd</sup> CIRCUIT COURT FOR THE COUNTY OF WAYNE**

THE STATE OF MICHIGAN,  
Plaintiff

Case No. 14-152  
FC Hon. Qiana  
Lillard

v.

THEODORE PAUL WAFER,  
Defendant.

MACK L. CARPENTER

KYM WORTHY (P38875) Wayne  
County Prosecutor 1441 Saint  
Antoine Street Frank Murphy Hall  
of Justice Detroit, MI 48226 (313)  
224-5777

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**DEFENDANT’S MOTION IN LIMINE TO PROHIBIT DISCOVERY SUBPOENAS  
ISSUED BY THE PROSECUTION WITHOUT JUDICIAL AUTHORIZATION OR  
NOTICE TO DEFENSE COUNSEL**

Defendant, Theodore Paul Wafer, by and through his undersigned attorneys, moves this

Honorable Court to grant Defendant’s Motion In Limine To Prohibit Discovery Subpoenas  
Issued By The Prosecution Without Judicial Authorization Or Notice To Defense Counsel, and  
states in support:

**The Prosecutor’s Unlawful Discovery Actions**

1. On November 15, 2012, Theodore Paul Wafer was charged with three criminal felony counts in case No. 14-000152-01-FC ~~Exhibit A (Register of Actions); see also Exhibit B (Prosecutor’s Press Release).~~
2. A preliminary examination was held before the District Court on December 18- 19, 2013, resulting in Mr. Wafer being bound over on all charges.
3. On or about January 4, 2014, Mr. Wafer received a letter from his employer, Wayne County Airport Authority, notifying Mr. Wafer that the employer received a subpoena from the Prosecution

ordering production of: “Entire employment file for Theodore Wafer, DOB 02/08/1959.” See Exhibit. C (Prosecutor’s Subpoena).

4. The prosecution’s subpoena was dated 12/17/2013, and ordered the records be produced on Friday, December 27, 2013, 8:30 A.M. at the Wayne County Prosecutor’s Office. Exhibit C.

5. Mr. Wafer’s employer complied with the Prosecution’s demands.

6. MCR 6.201 governs discovery in criminal cases, and does not permit the Prosecution to engage in discovery which is not specifically allowed by this court rule, unless a Court, pursuant to MCR 6.201(I), finds good cause exists to modify the requirements and prohibitions of the rule.

7. Here the Prosecutor has engaged in illicit discovery without Court authorization or oversight, in which at least one improper subpoena was served on Mr. Wafer’s employer demanding documents be delivered solely and directly to the prosecution, and to which that employer complied. See Exhibit C.

8. MCR 2.506 applies generally in criminal cases. *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 381, n.1; 617 NW2d 310 (2000) (citing MCR 6.001(D), while emphasizing that *discovery* in criminal cases is governed by MCR 6.201). Further, the *Investigation of Riots* decision specifically notes that: “Subpoenas under MCR 2.506 were approved by the district court.” *Investigation of Riots*, 463 Mich at 312.

9. Even if MCR 2.506 is a proper vehicle for issuing subpoenas under these circumstances: “MCR 2.506 provides a court may command a party or witness by subpoena to appear, testify and produce records, documents, and other tangible things in open court. MCR 2.506 is not a tool for discovery.” *People v Ring*, unpublished per curiam decision of the Michigan Court of Appeals, issued Sept 15, 2011 (Docket No. 298074) (quoting *In re Subpoenas to News Media Petitioners*, 459 Mich 1241; 593 NW2d 558 (1999)). Exhibit D. at p. 5.

10. Also, as amended December 1, 1998, MCR 2.506(A)(5) explicitly states a subpoena may be issued only in accordance with MCR 2.506, 2.305, 2.621(c), 9.112(D), 9.115(I)(1), or

9.212, and all but MCR 2.506—and arguably it too—are inapplicable to the proceedings in this matter.<sup>1</sup>

11. A valid subpoena issued under MCR 2.506 is returnable in Court for a hearing or trial;

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MCR 2.305 governs “Subpoena for Taking Deposition,” MCR 2.621(c) involves “Proceedings Supplementary to Judgment,” and the Chapter 9 rules all involve subpoenas related to “Professional Disciplinary Proceedings.”

the subpoena issued by the Prosecutor here was returnable to her office, not to any Court. See Exhibit C.

12. The only reason Defendant ever received notice of this subpoena was because of his employer's letter notifying him of its compliance.
13. The prosecutor failed to provide notice of the subpoena to defense counsel in violation of the court rules MCR 2.310: "After service of the notice on the opposing party, the party seeking discovery may cause a subpoena to issue, in the manner provided for by MCR 2.506, directing the deponent to appear at the time and place set for examination and be examined." 2 Mich. Ct. Rules Prac., Text ¶ 2305.2 (5th ed.);
14. The notice requirement for opposing counsel is mandatory so opposing counsel can file a motion to quash the subpoena if so desired. See *In re Forfeiture of \$1,159,420*, 194 Mich App 134, at 141-142 (1992).
15. Defense counsel never received a copy of the subpoena prior to it being served on the Wayne County Airport Authority and Mr. Wafer's entire employment file was disclosed to the prosecutor without any notice to the defense.
16. The Prosecutor has clearly engaged in the illicit issuance of subpoena duces tecum in the absence of an order of any Court, as is required under MCR 6.201(I).
17. Such subpoenas duces tecum are invalid, not having been issued pursuant to law, especially in a criminal case in which felony charges were already filed prior to issuing the unauthorized subpoena.

**The Prosecution Had Appropriate Avenues To Secure Such Subpoenas, But These Required Judicial Authorization And Were Entirely Bypassed**

18. While a mechanism exists under MCL 767A.1 et seq, Michigan's *Investigative Subpoena Act*, to petition a district or circuit court for an Investigative Subpoena. However, investigative subpoenas are issued prior to a person being criminally charged. Also, such petitions must be in writing and receive judicial authorization; thus clearly

evidencing that the Legislature mandates judicial oversight and permission for such actions.

19. The Prosecutor made no such petition for a proper Investigative Subpoena.

20. Under MCL 767A.2(d), a proper Investigative Subpoena petition requires the Prosecutor, inter alia, to submit:

A brief statement of the facts establishing the basis for the prosecuting attorney's belief that the testimony of the person or examination of the records, documents, or physical evidence is relevant to the investigation of a felony described in the petition.

21. A properly authorized Investigative subpoena likewise requires, inter alia, a judge determine the requested records are relevant to investigate the commission of a felony described in the petition. MCL 767A.3.

22. Obviously no such judicial determination was ever made here.

23. Properly requested and authorized Investigative Subpoenas also require additional safeguards and notice requirements, including that the subpoena contain a statement that the person may object to the investigative subpoena or file reasons for not complying with the investigative subpoena by filing a written statement of objection or noncompliance with the prosecuting attorney on or before the date scheduled for the questioning or the production of the records, documents, or physical evidence. See, e.g., MCL 767A.4.

24. The Prosecutor's subpoena provided no such notice and was not an investigative subpoena as the issuance of the subpoena came after Mr. Wafer was criminally charged.

25. By failing to comply with the Court rules and proper mechanisms through which authority to issue a valid subpoena could be obtained, the Prosecution has engaged in grievous misconduct.

26. This non-compliance is all the more troubling because the Legislature passed heightened protections to the employment information demanded by the Prosecution under the Bullard-Plawecki Employee Right To Know Act, MCL 423.501 et seq.

27. The Prosecution's actions render the oversight and judicial authorization for subpoenas mandated by the *Investigative Subpoena Act* and requisite Court Rules wholly irrelevant. These actions are an affront to privacy and due process, especially in a criminal case where serious felony charges have already been filed against the defendant.

28. Such discovery violations are taken very seriously as subpoena power can be easily abused. *In Grievance Administrator v Michael L. Stefani*, Case No. 09-47-6A, an attorney subpoenaed SkyTel for copies of text messages without serving a copy on opposing counsel and requesting the documents be served at his office rather than the court for an in camera inspection. Said attorney was suspended from practice of law for thirty days.

29. It is unclear why the prosecutor even wanted a copy of Mr. Wafer's employment file or if she intends to use any of the material she improperly subpoenaed at trial. There were no acts of aggression, no dishonesty or any write-ups for racism or improper comments to fellow employees by Mr. Wafer. However, personal information such as his salary, his certificates of

services and other private matters were made public to the prosecutor.

**SUMMARY AND RELIEF REQUESTED**

WHEREFORE, for the foregoing reasons, Defendant respectfully requests this Honorable Court grant its grant Motion In Limine To Prohibit Discovery Subpoenas Issued By The Prosecution Without Judicial Authorization Or Notice To Defense Counsel, by ordering the Prosecution to immediately cease issuing subpoenas in violation of discovery rules and without proper Court approval or notice to the Defense, to prohibit the prosecutor from using any information at trial that she received from the improper subpoena and grant any and all other relief which the Court deems just and proper under these circumstances.

Respectfully submitted:

Dated:  
3/24/14

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CHERYL CARPENTER Attorney for  
Defendant

**Proof of Service**

On March 24, 2014, a copy of this document was hand delivered to the Wayne County Prosecutor's Office, Attn: Danielle Hagaman-Clark, 1441 St Antoine, Detroit, MI 48226.

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\_ CHERYL CARPENTER  
Attorney for Defendant