

ENTERED

April 19, 2023

Nathan Ochsner, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**TERRY PETTEWAY, *et al.*,

Plaintiffs.

V.

GALVESTON COUNTY, *et. al.*,

Defendants.

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CIVIL ACTION NO. 3:22-cv-00057

ORDER

The parties' most recent discovery dispute presents the following question: should Commissioner Stephen Holmes be required to comply with a Rule 45 subpoena served upon him by defense counsel on March 24, 2023? *See* Dkt. 137. Discovery in this case closes on April 21, 2023. *See* Dkt. 66. "Rule 45 subpoenas . . . are generally used to obtain documents from non-parties." *Thomas v. IEM, Inc.*, No. 06-cv-886-B-M2, 2008 WL 695230, at *2 (M.D. La. Mar. 12, 2008). "A 'party' to litigation is '[o]ne by or against whom a lawsuit is brought.'" *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (quoting Black's Law Dictionary 1154 (8th ed.2004)). Although Commissioner Holmes is one of four members of a governmental body that is a defendant in this litigation (the Galveston County Commissioners Court), Commissioner Holmes is not himself named as a defendant in either his individual or official capacity. Thus, Commissioner Holmes is not a party to this litigation. Accordingly, Rule 45 is the appropriate discovery procedure for obtaining relevant documents from Commissioner Holmes.

Although Commissioner Holmes only accepted service of the Rule 45 subpoena on March 24, 2023, defense counsel asked him "to search [his] personal devices/email for responsive information on October 11, 2022 and October 22, 2022." Dkt. 139 at 2. So, Commissioner Holmes has had ample time to conduct

such a search. To the extent the subpoena seeks the production of privileged or protected information, or creates an undue burden, I am happy to address those issues, should they arise. *See Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004) (discussing the four factors a court must consider in deciding whether to quash a Rule 45 subpoena). Right now, however, the only question before me is whether the Rule 45 subpoena is proper, and I find that it is. I want to be crystal clear about one thing though: whether Commissioner Holmes should be responding to discovery requests pursuant to Rule 34 or Rule 45 is a tempest in a teapot. Commissioner Holmes unquestionably possesses information relevant to this case, and he has unquestionably known that since this litigation began. All parties should be in possession of that information as we move toward the dispositive motion phase of this litigation. *See Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”).

SIGNED this 19th day of April 2023.



ANDREW M. EDISON
UNITED STATES MAGISTRATE JUDGE