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03-CV-2023-900512.00

Judge: JIMMY B POOL

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ENVIRONMENTAL DEFENSE ALLIANCE V. ALABAMA DEPT OF ENVIRONMENTAL MGMT E
03-CV-2023-900512.00

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03-CV-2023-900512.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ENVIRONMENTAL DEFENSE ALLIANCE, Plaintiff, V. ALABAMA DEPT OF ENVIRONMENTAL MGMT, LANCE R. LEFLEUR, DIRECTOR, Defendants.	)	Case No.: CV-2023-900512.00

AMENDED FINAL ORDER

The preceding FINAL ORDER is set aside and the following entered:

This matter comes before the Court on the Petition for Review of Agency Declaratory Ruling filed with the Court by Petitioner Environmental Defense Alliance (hereinafter, "the Alliance") on April 21, 2023 (Doc. 2). Having considered the Petition, the Brief in Response to Petition for Review filed by Respondents Alabama Department of Environmental Management and Lance R. LeFeur, Director of the Alabama Department of Environmental Management (hereinafter, collectively referred to as "ADEM") on August 21, 2023 (Doc. 13), the Petitioner's Reply Brief in Support of Petition for Review filed by the Alliance on August 26, 2023 (Doc. 15), the certified administrative record provided to the Court by ADEM on April 26, 2023, and the arguments of counsel at a hearing on September 26, 2023, the Court concludes that ADEM's Declaratory Ruling dated February 23, 2023 is due to be set aside because the substantial rights of the Alliance have been prejudiced and it is in violation of statutory provisions, in excess of the statutory authority of the agency, in violation of a pertinent agency rule, or affected by other error of law.

In accordance with the requirements of Ala. Code 1975 § 41-22-20(l), the Court sets out in writing, the following reasons for its decision.

I. Background Summary

The administrative record in this matter shows as follows:

Members of the Alliance, and members of the not-for-profit membership corporations that are themselves members of the Alliance, consume fish and shellfish from waters of the State. (R. 008). These fish and shellfish can become contaminated by ingesting toxic pollutants in contaminated waters and the Alliance members can be contaminated by consuming contaminated fish. (R. 008). The Alliance undertook efforts to persuade ADEM to adopt more restrictive criteria for the presence of toxic pollutants in waters of the State to

protect human health, including a petition for rulemaking, which were unsuccessful. (R. 010-012).

Discouraged by ADEM's lack of urgency, the Alliance submitted a request to ADEM on September 14, 2022 to inspect and copy the following writings and records created subsequent to September 15, 2019 "pursuant to the Open Records Law, Ala. Code 1975 §§ 36-12-40 and -41, and ADEM Admin. Code r. 335-1-1-.06(1)":

> (a) draft and final preliminary analyses or discussions of, or preliminary opinions or recommendations for, possible actions to be taken by the Department concerning the development, proposal or adoption of new or revised water quality criteria for toxic pollutants which have or have not been shared between Department officials or between Department officials and any entity or person outside of the Department;
>
> (b) draft versions of administrative rules intended to establish new or revised water quality criteria for toxic pollutants;
>
> (c) draft and final memoranda and correspondence, records of telephone conversations and meetings, and electronic mail messages between Department officials, or between Department officials and any other entity or person outside of the Department, concerning the development, proposal or adoption of new or revised water quality criteria for toxic pollutants.

(R. 023-025). The Alliance claims that "[t]hese requested writings and records are likely to provide [the Alliance] with additional information concerning [ADEM's] rationale for its failure to adopt new or revised water quality criteria for toxic pollutants in Alabama waters that may assist [the Alliance] in its efforts to secure the adoption of new or revised water quality criteria for toxic pollutants in Alabama waters through rulemaking by Environmental Management Commission of [ADEM] or by [the] U.S. Environmental Protection Agency." (R. 013-014).

On November 21, 2022, ADEM responded to the Alliance's request to inspect and copy writings and records by providing thirteen final writings or records of communications between ADEM officials, U.S. Environmental Protection Agency officials, and private individuals or entities, and a reference to other final writings and records contained in ADEM's publicly accessible e-File system which ADEM regards as public writings or records. ADEM expressly withheld from disclosure an unspecified number of "internal emails" that it considers to be "deliberative" without further description, characterization, or explanation. (R. 026-033).

On January 6, 2023, the Alliance mailed a verified Petition for Declaratory Ruling to ADEM pursuant to Ala. Code 1975 § 41-22-11(a) and ADEM Admin. Code r. 335-1-1-.04(1). (R. 001-021). The Petition was received by ADEM on January 9, 2023. (R. 022). The Petition presented the following question for a declaratory ruling by ADEM:

> Whether the Department may deny a request to inspect and copy "public writings" pursuant to Ala. Code 1975 §§ 36-12-40 and -12-41 or "official records" pursuant to ADEM Admin. Code r. 335-1-1-.06 on the basis that the "public writings" or "official records" are exempt from disclosure because they are "internal emails" that are "deliberative?"

(R. 005).

On February 23, 2023, ADEM's Director Lance R. LeFleur issued a Declaratory Ruling stating as follows:

> Yes. The right to copy public writings is not without exception. *Stone v. Consolidated Pub. Co.*, 404 So. 2d 678, 681 (Ala. 1981). In *Stone*, the court applied the "rule of reason" to § 36-12-40 and held that "[r]ecorded information received by a public officer in confidence, . . . and records the disclosure of which would be detrimental to the best interests of the public are some of the areas which may not be subject to public disclosure." *Id.* Later, the legislature amended this statute to exclude "records the disclosure of which would otherwise be detrimental to the best interests of the public." Act 2004-487, Ala. Code §§ 36-12-40.
>
> In another context, the U.S. Supreme Court has noted the "policy of protecting the decision-making processes of government agencies." *NLRB. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (U.S. 1975) (cleaned up.) The *Sears* court explained that the point of this policy is this: "the frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public; and that the decisions and policies formulated would be the poorer as a result." *Id.* (citing S. Rept. No. 813, 89th Congress, 1st Sess., p. 9.) The Court further noted that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances to the detriment of the decision making process. 421 US. at 151 (cleaned up.)
>
> The same concerns are present here, so the "rule of reason" should apply. Well-reasoned decisions depend on robust debate and frank discussions and deliberations. Making public those discussions would chill those discussions and diminish the quality of agency decisions and policies, to the detriment of the public.

(R. 037-038). ADEM's Declaratory Ruling does not assert that internal ADEM emails containing deliberative communications are subject to a deliberative process privilege, an executive privilege, or any other evidentiary privilege. In addition, ADEM's Declaratory Ruling does not address the requirements for disclosure of "official records" in ADEM Admin. Code r. 335-1-1-.06. Rather, ADEM asserts only that internal emails that are deliberative are exempt from disclosure under the Open Records Act exemptions established by the Court in Stone v. Consolidated Publishing Co., 404 So. 2d 678, 681 (Ala. 1981) for "[r]ecorded information received by a public officer in confidence" and for "records the disclosure of which would be detrimental to the best interests of the public." ADEM correctly notes in the Declaratory Ruling that the Open Records Act was amended by Ala. Act No. 2004-487 (approved May 17, 2004) to expressly exempt from disclosure under the Open Records Act "records the disclosure of which would otherwise be detrimental to the best interests of the public." (R. 037).

On March 23, 2023, the Alliance filed a Notice of Appeal and Cost Bond with ADEM by certified mail (R. 039-047) and on April 21, 2023, the Alliance filed with this Court the Petition for Review of Agency Declaratory Ruling which is the subject of this action. (Doc. 2).

II. Standard of Review

Declaratory rulings of administrative agencies subject to the Alabama Administrative Procedure Act are subject to judicial review in the manner provided in Ala. Code 1975 § 41-22-20 for the review of decisions in contested cases. Ala. Code 1975 § 41-22-11(b). An agency's failure to issue a declaratory ruling on the merits within 45 days of the request for such ruling constitutes a denial of the request as well as a denial of the merits of the request and is also subject to judicial review in the same manner. Id.

Ala. Code 1975 § 41-22-20(k) provides:

> Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) In violation of any pertinent agency rule;
>
> (4) Made upon unlawful procedure;
>
> (5) Affected by other error of law;
>
> (6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

E.g., State Personnel Bd. v. Wallace, 659 So. 2d 683, 686 (Ala. Civ. App. 1995) (per curiam); Torbert v. Ala. Dep't of Pub. Health, 224 So. 3d 598, 599 (Ala. 2016).

Unless the court affirms the decision of the agency, the court shall set out in writing, which writing shall become a part of the record, the reasons for its decision. Ala. Code 1975 § 41-22-20(l). See Ala. Medicaid Agency v. Marshall, 228 So. 3d 1001, 1002 (Ala. Civ. App. 2013); Ala. State Pers. Bd. v. Hancock, 93 So. 3d 143, 144-45 (Ala. Civ. App. 2012).

III. Reasons for Decision

A. Open Records Act Exemption – "recorded information received by a public officer in confidence"

In its February 23, 2023 Declaratory Ruling, ADEM determined that all internal emails are "recorded information received by a public officer in confidence" and may be withheld from public disclosure under the Open Records Act pursuant to the exemption adopted in Stone. Neither ADEM's Declaratory Ruling (R. 041-042) nor ADEM's Brief in Response to Petition for Review (Doc. 13) contains any argument or authorities supporting the application of this exemption to internal emails that are deliberative. The Alliance's Petition for Review of Agency Declaratory Ruling (Doc. 2) contains argument and cites authorities suggesting that this exemption is not applicable to internal emails that are deliberative.

There is a presumption in favor of disclosure of public writings and records expressed in the language of Ala. Code 1975 § 36-12-40. Health Care Auth. for Baptist Health v. Cent. Ala. Radiation Oncology, LLC, 292 So. 3d 623, 633 (Ala. 2019); Chambers v. Birmingham News Co., 552 So. 2d 854, 856 (Ala. 1989). Because there is a presumption in favor of disclosure, the party refusing disclosure has the burden of proving that the writings or records sought are within an exemption and warrant nondisclosure of them. Baptist Health, 292 So. 3d at 633; Chambers, 552 So. 2d at 856-57; Tenn. Valley Printing Co. v. Health Care Auth., 61 So. 3d 1027, 1030 (Ala. 2010); Allen v. Barksdale, 32 So. 3d 1264, 1270 (Ala. 2009); Water Works & Sewer Bd. v. Consol. Publ'g, Inc., 892 So. 2d 859, 866 (Ala. 2004); Birmingham News Co. v. Muse, 638 So. 2d 853, 860 (Ala. 1994) (per curiam); Holland v. Eads, 614 So. 2d 1012, 1015 (Ala. 1993); Blankenship v. Hoover, 590 So. 2d 245, 248 (Ala. 1991); Ex parte CUNA Mutual Ins. Society, 507 So. 2d 1328, 1329 (Ala. 1987); Ex parte McMahan, 507 So. 2d 492, 493 (Ala. 1987); Schillaci v. Gentry, 228 So. 3d 1016, 1023 (Ala. Civ. App. 2017).

In Baptist Health, 292 So. 3d at 634, Baptist Health sought to prevent public disclosure of portions of its Board meeting minutes under a claim that they were confidential and exempt from disclosure under the Stone exemption to the Open Records Act. The Court rejected Baptist Health's argument explaining that "the exception for confidentiality concerns 'information received by a public officer in confidence.' . . .. Baptist Health never alleged that the redacted information was received in confidence; it merely asserted that it believed the information was confidential." Id. at 633-34 (underscoring in original). In the present case, ADEM has offered nothing that indicates that all internal emails that are deliberative are received by public officers in confidence. Thus, ADEM has not demonstrated that the exemption has application to all internal emails that are deliberative.

In Chambers, the Shelby County Commission sought to prevent public disclosure of applications received for a County position on the ground that they were received in confidence. 292 So. 3d at 855. The trial

court declined to hold that the applications were exempt from disclosure, noting that the applicants did not request that their applications be kept confidential nor request that the fact that they applied or submitted a resumé be kept confidential; the position announcement did not mention confidentiality; and no promise of confidentiality was apparently made to the applicants. The trial court held that none of the applications are confidential and the Alabama Supreme Court affirmed. Id. at 857. The Court noted that an exemption should not come into play merely because of some perceived necessity on the part of a public official or established office policy. Id. at 856.

In the present case, ADEM has not demonstrated that internal emails that are deliberative bear any indicia of having been "received in confidence." It appears that ADEM is asserting the exemption because of a perceived necessity to protect written deliberative communications from disclosure to the public or because non-disclosure of written deliberative communications is established office policy. Exemptions should not be used "as an avenue for public officials to pick and choose what they believe the public should be made aware of. Baptist Health, 292 So. 3d at 634 (quoting Chambers, 552 So. 2d at 857).

The Court concludes that the Stone exemption for "recorded information received by a public officer in confidence" has no application to internal emails that are deliberative. In any case, ADEM has not met its burden of proving that all internal emails that are deliberative are "recorded information received by a public officer in confidence" and warrant nondisclosure. Accordingly, ADEM's Declaratory Ruling holding that internal emails that are deliberative are exempt from disclosure because they are "recorded information received by a public officer in confidence" is in violation of the Open Records Act as interpreted by Stone, is in excess of ADEM's authority under the Open Records Act, or affected by ADEM's erroneous interpretation of the Open Records Act.

B. Open Records Act Exemption – "records the disclosure of which would otherwise be detrimental to the best interests of the public"

In its February 23, 2023 Declaratory Ruling, ADEM determined that internal emails that are deliberative are exempt from disclosure under the Open Records Act pursuant to Stone and Ala. Code 1975 § 36-12-40 (as amended by Ala. Act No. 2004-487 (approved May 17, 2004)) because they are "records the disclosure of which would be detrimental to the best interests of the public."[1]

There is no express exemption in the Open Records Act for records containing deliberative communications. In addition, Stone does not expressly recognize an exemption from disclosure for records containing deliberative communications under the Open Records Act.

Citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (U.S. 1975), ADEM asserts that the disclosure

of internal emails containing deliberative communications would be detrimental to the best interests of the public because it will chill frank discussions of legal and policy matters among ADEM officials in the future. NLRB is inapposite for three reasons. First, NLRB addressed a statutory exemption in the Freedom of Information Act. 5 U.S.C. § 552(b)(5). The Open Records Act has no exemption comparable to this statutory exemption. See Graham v. Ala. State Employees Ass'n, 991 So. 2d 710, 720 (Ala. Civ. App. 2007) ("In this case, we are dealing with statutes that do not include the same language found in the FOIA."). Second, the exemption discussed in NLRB was for records recognized as privileged under federal law, including records subject to the common law "deliberative process privilege." The Alabama Supreme Court abrogated common law privileges in Ala. R. Evid. 501 (effective Jan. 1, 1996). Finally, the *ratio decidendi* of NLRB is that disclosure of deliberative communications will chill future discussions among agency personnel and diminish the quality of agency decisions and policies. The Alabama Supreme Court rejected this rationale for withholding records from public disclosure under the Open Records Act in Allen v. Barksdale, 32 So. 3d 1264 (Ala. 2009).

In Barksdale, the Commissioner of the Department of Corrections ("DOC") testified that "no incident reports generated by employees of DOC are made available to the public." Id. at 1270. He further testified that it was DOC's policy not to release any incident reports. Id. Among the reasons offered by the Commissioner for this policy was that investigations would be compromised if all incident reports are subject to the Open Records Act because:

> "[t]here would also be a chilling effect on the investigative process by the correctional officers and the I & I division if they believed every incident report would be subject to public access under the Open Records Act. The investigative process would possibly not be as accurate or extensive as it is presently. Officers would not pursue leads with vigor as they do now. Also, officers would be less likely to fully and completely report an incident or the security measures they took to remedy an incident or breach in security. This would impact how a supervisor monitors the trends within his/her institution."

Id. at 1273 (quoting Commissioner's brief, pp. 26-27).

The Alabama Supreme Court rejected this basis for withholding documents from public disclosure, saying "we find it hard to believe that a corrections officer would neglect his or her job because the public would have access to certain records reflecting actions of the officer as a government employee." Id. at 1274. Thus, the Supreme Court has rejected the very argument presented by ADEM for why the disclosure of internal emails that are deliberative would be detrimental to the best interests of the public.

The statutory exemption for "records the disclosure of which would otherwise be detrimental to the best

interests of the public" in Ala. Code 1975 § 36-12-40 must be strictly construed and must be applied only where the public interest will clearly be adversely affected, when weighed against the public policy considerations suggesting disclosure. Baptist Health, 292 So. 3d at 633. See Chambers, 552 So. 2d at 856. These questions, of course, are factual in nature and are for the trial judge to resolve. Baptist Health, 292 So. 3d at 633. See Chambers, 552 So. 2d at 856. "When a legitimate argument for nondisclosure is made, a factual determination as to which documents should be disclosed and which should not should ordinarily be made in the first instance by the trial court." Birmingham News Co. v. Muse, 638 So. 2d at 855. The exemption "should not come into play merely because of some perceived necessity on the part of a public official or established office policy." Chambers, 552 So. 2d at 856. The exemption was "not intended, nor shall [it] be used, as an avenue for public officials to pick and choose what they believe the public should be made aware of." Baptist Health, 292 So. 3d at 634; Chambers, 552 So. 2d at 857.

In its Declaratory Ruling, ADEM asserts that the disclosure of all internal emails that are deliberative would be detrimental to the best interests of the public. Such a conclusion would functionally create a new exemption – not authorized by the Open Records Act or Stone – for records containing deliberative communications. Moreover, such a conclusion would eliminate the balancing of interests intended by the exemption whereby the detriment to interests of the public is weighed against the public policy considerations suggesting disclosure. This balancing must be performed by the Court in the first instance.

In accordance with the decision of the Alabama Supreme Court in Barksdale, this Court concludes that ADEM's claim that the public disclosure of internal emails that are deliberative will chill frank discussions of policy or law matters among ADEM officials is not a sufficient basis to invoke the statutory exemption for "records the disclosure of which would be detrimental to the best interests of the public." Accordingly, ADEM's Declaratory Ruling holding otherwise is in violation of the Open Records Act, in excess of ADEM's authority under the Open Records Act, or affected by ADEM's erroneous interpretation of the Open Records Act.

C. ADEM Admin. Code r. 335-1-1-.06

ADEM's Declaratory Ruling fails to address the Alliance's Petition for Declaratory Ruling as it pertains to the record disclosure requirements of ADEM Admin. Code r. 335-1-1-.06. In accordance with Ala. Code 1975 § 41-22-11(b), such failure is deemed to be a denial of the petition and denial on the merits.

ADEM Admin. Code r. 335-1-1-.06(1) states that "[e]xcept as provided herein, . . . the official records of

the Department shall be available to the public for inspection." In the absence of a definition of the term "official records" provided in the rule, the language used in an administrative regulation should be given its natural, plain, ordinary, and commonly understood meaning. Burton v. Hawkins, 364 So. 3d 962, 975 (Ala. 2022); Black Warrior Riverkeeper, Inc. v. Ala. Dep't of Envtl. Mgmt., No. 2200609, 2022 Ala. Civ. App. LEXIS 17, at *12, 2022 WL 497466, at *___ (Ala. Civ. App. Feb. 18, 2022); Ex parte Wilbanks Health Care Servs., 986 So. 2d 422, 427 (Ala. 2007).

As used in r. 335-1-1-.06(1), the word "record" is a noun which means "something that records: such as . . . an official document that records the acts of a public body or officer." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/record (accessed Sep. 27, 2023). See The American Heritage Dictionary of the English Language, Fifth Edition, https://ahdictionary.com/word/search.html?q=record (accessed Sep. 27, 2023) ("An account, as of information or facts, set down especially in writing as a means of preserving knowledge"). As used in r. 335-1-1-.06(1), the word "official" is an adjective to describe "records." It means "of or relating to an office, position, or trust." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/official (accessed Sep. 27, 2023). See The American Heritage Dictionary of the English Language, Fifth Edition, https://ahdictionary.com/word/search.html?q=official (accessed Sep. 27, 2023) ("[o]f or relating to an office or a post of authority"). Thus, the natural, plain, ordinary, and commonly understood meaning of the term "official records" in ADEM Admin. Code r. 335-1-1-.06(1) is writings or documents that record the acts of a public officer relating to the administration of his or her office. This meaning of "official records" is plain and not ambiguous or subject to interpretation. "'[W]here an agency prescribes rules and regulations for the orderly accomplishment of its statutory duties, its officials must vigorously comply with those requirements . . . ..' This principle prevents agencies from skirting their own regulations by the use of crabbed, *ad hoc* definitions of regulation terms." Ex parte Wilbanks Health Care Servs., 986 So. 2d 422, 427 (Ala. 2007) (quoting Hand v. State Dep't of Human Res., 548 So. 2d 171, 173 (Ala. Civ. App. 1988), aff'd, 548 So. 2d 176 (Ala. 1988)). Accordingly, internal ADEM emails, including those that are deliberative, are writings or documents that record the acts of a public officer relating to the administration of his or her office, i.e., "official records" under ADEM Admin. Code r. 335-1-1-.06(1).

In 1981, the Stone Court defined the term "public writing" in Ala. Code 1975 § 36-12-40 as "such a

record as is reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities can be known by our citizens." Id. at 681. Rule 335-1-1-.06 was adopted by ADEM in 1988, and amended by ADEM in 2004 and 2006,2 long after the Alabama Supreme Court defined the term "public writing" in Ala. Code 1975 § 36-12-40. Stone, 404 So. 2d at 681. ADEM could have written or amended rule 335-1-1-.06 to require disclosure of "public writings as defined in Ala. Code 1975 § 36-12-40 and interpreted by the Alabama Supreme Court," but it did not. Instead, ADEM chose a different approach to the availability of "official records." ADEM cannot circumvent the plain and unambiguous meaning of ADEM Admin. Code r. 335-1-1-.06 by adopting an inconsistent interpretation. See Torbert v. Ala. Dep't of Pub. Health, 224 So. 3d 598, 602 (Ala. 2016) (agency could have adopted regulations specifically defining terms, but instead attempted to circumvent the regulations by using an unreasonable definition).

ADEM Admin. Code r. 335-1-1-.06(2) provides for express exceptions to the availability of "official records" of ADEM for public inspection. Those exceptions are limited to "sales figures or methods, processes, or production unique to such person, or [which would] otherwise tend to affect adversely the competitive position of such person by revealing trade secrets." "Under the principle expressio unius est exclusio alterius, the express inclusion of one exception implies the exclusion of others." Ivey v. Estate of Ivey, 261 So. 3d 198, 212 (Ala. 2017). Accord, White-Spunner Constr., Inc. v. Constr. Completion Co., LLC, 103 So. 3d 781, 792 (Ala. 2012); Sustainable Forests, LLC v. Ala. Dep't of Revenue, 80 So. 3d 270, 273 (Ala. Civ. App. 2011). As previously mentioned, rule 335-1-1-.06 was adopted in 1988, and amended in 2004 and 2006, long after the Alabama Supreme Court identified "records the disclosure of which would be detrimental to the best interests of the public" as an exemption from the disclosure requirements of Ala. Code 1975 § 36-12-40, Stone, 404 So. 2d at 681 (citing State v. Alarid, 90 N.M. 790, 568 P.2d 1236 (1977), overruled in part, Republican Party v. N.M. Taxation & Revenue Dep't, 283 P.3d 853, 860 (N.M. 2012)), and amended once after Ala. Act No. 2004-487 (approved May 17, 2004 and now codified at Ala. Code 1975 § 36-12-40) created an exemption from the disclosure requirements of the Open Records Act for "records the disclosure of which would otherwise be detrimental to the best interests of the public." ADEM could have written or amended rule 335-1-1-.06(2) to include an exception for "official records the disclosure of which would be detrimental to the best interests of the public," but it did not. Enlarging the exceptions to disclosure of "official records" in r. 335-1-1-.06(2) by interpretation would be unlawful

rulemaking. See Hartford Healthcare, Inc. v. Williams, 751 So. 2d 16, 22 (Ala. Civ. App. 1999) ("[w]hen an administrative agency substantially changes its interpretation of its regulation and the new interpretation 'substantially affects the legal rights of, or procedures available to, the public or any segment thereof,' the administrative agency is bound to comply with formal AAPA rulemaking procedures"); Ala. Code 1975 § 41-22-4(b) (no agency rule shall be valid or effective against any person or party nor may it be invoked by the agency for any purpose until the agency has given all notices required by Section 41-22-5); Ala. Code 1975 § 41-22-5(d) (no rule is valid unless adopted in substantial compliance with the notice and comment requirements of Ala. Code 1975 § 41-22-5). Thus, ADEM may not enlarge the exceptions in r. 335-1-1-.06(2) by interpretation to include deliberative records or "official records the disclosure of which would be detrimental to the best interests of the public."

The Court also may not interpret rule 335-1-1-.06 to create more exceptions to the rule than are included in the rule. To do so would ignore the plain language of the rule, usurp the statutory authority of ADEM to amend its administrative rules, and violate the required separation of powers between the judicial and executive branches of government. Art. III, § 42(c), Ala. Const. 2022. Accordingly, the Court cannot enlarge the exceptions in r. 335-1-1-.06(2) to include the exceptions to the Open Records Act adopted by the Alabama Supreme Court in Stone or adopted by the Legislature in Ala. Act No. 2004-487.

The use of the word "shall" in an administrative rule such as r. 335-1-1-.06 is considered presumptively mandatory. Kids' Klub, Inc. v. State Dep't of Human Res., 874 So. 2d 1075, 1097 (Ala. Civ. App. 2003) (per curiam). "[W]here an agency prescribes rules and regulations for the orderly accomplishment of its statutory duties, its officials must vigorously comply with those requirements; regulations are regarded as having the force of law and, therefore, become a part of the statutes authorizing them." Ex parte Wilbanks Health Care Servs., 986 So. 2d 422, 427 (Ala. 2007) (quoting Hand v. State Dep't of Human Res., 548 So. 2d 171, 173 (Ala. Civ. App. 1988), aff'd, 548 So. 2d 176 (Ala. 1988)); ABC Coke v. GASP, 233 So. 3d 999, 1008 (Ala. Civ. App. 2016) (same). The Director of ADEM has a mandatory duty under r. 335-1-1-.06 to make "official records" of ADEM available to the public for inspection without regard to whether they are deliberative or whether they might be exempt from disclosure under the Open Records Act.

Accordingly, ADEM's Declaratory Ruling that internal emails that are deliberative are exempt from disclosure under ADEM Admin. Code r. 335-1-1-.06 is in violation of ADEM Admin. Code r. 335-1-1-.06 or

affected by an erroneous interpretation of ADEM Admin. Code r. 335-1-1-.06.

D. State Statute or Supreme Court rule creating privilege for internal emails containing deliberative communications

Although ADEM's Declaratory Ruling does not assert the applicability of any governmental privilege, including deliberative process or executive privilege, as a basis for its ruling that internal emails that are deliberative are exempt from disclosure, ADEM's Brief in Response to Petition for Review discusses privileges and asserts that they remain viable in Alabama. (Doc. 13 at pp. 7-10).

Notwithstanding cases decided in the Alabama appellate courts before 1996,3 after the January 1, 1996 effective date of the Alabama Rules of Evidence, the only governmental privileges that remain viable in Alabama are those "created by the Constitution or statutes of this State or rules promulgated by the Supreme Court of Alabama." Rule 508(b), Ala. R. Evid. *See* Rule 501, Ala. R. Evid. (no privileges are recognized unless they are provided by the Constitution, statute of the State or by rules promulgated by the Supreme Court of Alabama). No statute of the State and no rule of the Supreme Court of Alabama creates a privilege that protects recorded deliberative communications of a government agency or department from public disclosure.

Accordingly, to the extent that ADEM's Declaratory Ruling is based on a common law or governmental privilege that has been abrogated by Ala. R. Evid. 501 or 508(b), it is affected by an erroneous conclusion of law.

E. Constitutional Executive Communications Privilege

Alabama Constitution 2022 does not expressly provide for an executive privilege to withhold records from disclosure to parties in litigation or to the public. "While the Alabama constitution contains no express provision granting an executive privilege, it would be within the power of the courts to imply such a privilege from the separation of powers principle. See United States v. Nixon, 418 U.S. 683 (1974); N.D.R.Evid. 508(b) explanatory note." Advisory Committee Notes to Rule 508(b), Ala. R. Evid.

In United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090 (1974), the Court recognized the existence of a "presidential communications privilege" that affords protection to "communications between high Government officials and those who advise and assist them in the performance of their manifold duties; . . .." Id. at 705, 94 S. Ct. at 3106. This "presidential communications privilege" extends to communications that have been authored, or solicited and received by the President or his immediate advisors in the Office of the President because the President exercises powers granted by Article II of the U.S. Constitution which cannot be impaired by courts established under Article III of the U.S. Constitution. Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108, 1123

(D.C. Cir. 2004). Thus, the privilege is "rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. at 708, 94 S. Ct. at 3107-08. However, the privilege does not extend to communications between officials in executive branch agencies. Judicial Watch, Inc., 365 F.3d at 1123.

In Republican Party v. New Mexico Taxation & Revenue Department, 283 P.3d 853 (N.M. 2012), an individual requested certain documents from the Motor Vehicles Division of the Taxation and Revenue Department under the New Mexico Inspection of Public Records Act. The Division and custodian of Division records produced many responsive records, however some contained redactions based on an assertion of executive privilege and other grounds. The district court concluded that the executive privilege was properly invoked and the Court of Appeals affirmed saying that the "deliberative process privilege" shielded the requested documents from disclosure. Id. at 857. The New Mexico Supreme Court granted certiorari and rejected the Court of Appeals adoption of the "deliberative process privilege," reasoning that it was a common law privilege not recognized under the constitution or rules of evidence. Id. (citing State ex rel. Atty. Gen. v. First Judicial Dist. Court, 629 P.2d 330 (N.M. 1981)).4 The Court then examined the boundaries of executive privilege under the separation of powers provision of the New Mexico constitution.

The Court first concluded that executive privilege applies only to the Governor's communications relating to his constitutionally mandated duties, not to other executive branch agencies or officials. The Court explained:

> First, executive privilege in New Mexico can only apply to "communications," because the privilege exists solely to protect the executive's "access to candid advice," In re Sealed Case, 121 F.3d [729,] at 745 [D.C. Cir. 1997], not to keep all information related to the executive beyond the reach of the public. Cf. Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec., 592 F. Supp. 2d 111, 118-19 (D. D.C. 2009) ("[T]he presidential communications privilege, as its name and the Circuit's opinions suggest, extends only to communications."). * * * We agree that the privilege can only extend to documents that are communicative in nature.
>
> More specifically, in light of the privilege's central purpose of "fostering candid expression of recommendations and advice" to the Governor, [State ex rel. Att'y Gen. v.] First Judicial [Dist. Court, 96 N.M. [254,] 258, 629 P.2d [330,] 334 [(1981)], the privilege is "limited to materials connected to [the chief executive's] decisionmaking, as opposed to other executive branch decisionmaking," In re Sealed Case, 121 F.3d at 745, and "should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the [chief executive]." Id. at 752. Furthermore, because the privilege derives its force and legitimacy from the constitution, the communications at issue must relate to the Governor's constitutionally-mandated duties. Cf. id. at 748 (identifying "the President's Article II powers and responsibilities as the constitutional basis of the presidential communications privilege" (citing [United States v.] Nixon, 418 U.S. [683,] 705 & n.16 [(1974)]); Judicial Watch[, Inc. v. Dep't of Justice], 365 F.3d [1108] at 1115 [(D.C. Cir. 2004)] (concluding that "the presidential communications privilege is rooted in the President's need for

> confidentiality in the communications of his office in order to effectively and faithfully carry out his Article II duties," and noting that both Judicial Watch and In re Sealed Case involved a claim of privilege over documents relating to "a non-delegable duty of the President under Article II, Section 2 of the Constitution" (internal quotation marks and citation omitted)).
>
> We see no basis for sanctioning an executive communications privilege broader than the privilege afforded to the President of the United States. See [State ex rel] Dann [v. Taft], 848 N.E.2d [472] at 490 [(Ohio 2006)] (Pfeifer, J., dissenting). In New Mexico, then, to be eligible for protection from disclosure by operation of the executive communications privilege, the documents at issue must concern the Governor's decisionmaking in the realm of his or her core duties.

Id. at 868-69.

The Court next concluded that the executive privilege covers only communications that have been authored, or solicited and received, by either the Governor or an "immediate adviser." The Court explained:

> Second, our executive privilege does not cover all communications in furtherance of gubernatorial decisionmaking, but is limited to those communications to or from individuals in very close organizational and functional proximity to the Governor. In In re Sealed Case, the D.C. Circuit approved a "limited extension of the privilege beyond the President to his immediate advisers." 121 F.3d at 749. While not deciding exactly "how far down the chain of command the presidential communication privilege extends," id. at 749-50, the court limited the privilege to communications authored or received by the President's closest advisers, "who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." Id. at 752. The court explained that "[o]nly communications at that level are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers." Id. We find persuasive the analysis from In re Sealed Case that the executive (here, the Governor) need not have personally authored, or solicited and received, a document in order for the privilege to apply. To be subject to the privilege, however, the document in question must have been authored, or solicited and received, by either the Governor or an "immediate adviser," Judicial Watch, 365 F.3d at 1115, with "broad and significant responsibility" for assisting the Governor with his or her decisionmaking. In re Sealed Case, 121 F.3d at 752.

Id. at 869.

Finally, the Court concluded that only the Governor can assert the executive privilege. The Court explained:

> Third, the privilege, rooted as it is in separation of powers, is not available to the entire executive branch, as Respondents originally argued, but instead reserved to the constitutionally-designated head of the executive branch—the Governor. See Dann, 848 N.E.2d at 485-86 ("[A] governor must formally assert the privilege by declaring that he or she has reviewed the requested materials and concluded that the materials meet the criteria of the privilege, i.e., that they constitute a communication either to or from him [or her] and were made for the purpose of fostering informed and sound gubernatorial deliberations, policymaking and decisionmaking." (footnote omitted)); cf. Blumenthal v. Drudge, 186 F.R.D. 236, 242 (D. D.C. 1999) ("The President alone possesses [the] authority" to invoke executive privilege.); but cf. Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479, 522 (S.D. N.Y. 2010) (permitting executive agency to invoke presidential communications privilege on behalf of unnamed "senior presidential advisers"). The D.C. Circuit has noted that "[t]he issue of whether a President must personally invoke the privilege remains an open question." Judicial Watch, 365 F.3d at 1114. We hold, however, that while the privilege can extend to communications authored by close advisers, the privilege's

> constitutional foundation requires limiting its invocation to the Governor. As we do not recognize a common law deliberative process privilege, cabinet agencies that are simply under the ultimate control of the Governor may not assert a privilege to protect internal memoranda, contrary to the Court of Appeals' determination that the MVD could do so because it "is a cabinet department in the executive branch." Republican Party [of N.M. v. N.M. Dep't of Revenue], 242 P.3d 444, 453 (N.M. Ct. App. 2010)].

Id. at 869-70. See, e.g., Freedom Found. v. Gregoire, 310 P.3d 1252 (Wash. 2013) (Governor may assert executive communications privilege to prevent disclosure of deliberative communications under State Public Records Act); State ex rel. Dann v. Taft, 848 N.E.2d 472 (Ohio 2006) (same).

Although the Governor of Alabama (and perhaps other constitutional officers) may assert a constitutional executive communications privilege to prevent the disclosure of his or her deliberative communications, ADEM and its Director may not do so because they are nowhere mentioned in Alabama Constitution 2022 and are not prescribed any duties thereunder.

Accordingly, to the extent that ADEM's Declaratory Ruling is based on a constitutional executive communications privilege, it is affected by an erroneous conclusion of law.

IV. Decision

For the reasons stated herein, the Court finds that ADEM's February 23, 2023 Declaratory Ruling is due to be set aside because it prejudices the substantial rights of the Alliance to inspect and copy internal emails of ADEM that are deliberative under Ala. Code 1975 § 36-12-40 and ADEM Admin. Code r. 335-1-1-.06 and is in violation of the Open Records Act, in excess of ADEM's authority under the Open Records Act, in violation of ADEM Admin. Code r. 335-1-1-.06, and affected by an erroneous interpretation of the Open Records Act and ADEM Admin. Code r. 335-1-1-.06.

Accordingly, ADEM's February 23, 2023 Declaratory Ruling is hereby **SET ASIDE**, provided however, that this Order is stayed pending the filing of a timely notice of appeal and during such appeal.

1 The statutory exemption for "records the disclosure of which would otherwise be detrimental to the best interests of the public" supersedes the similarly worded exemption established by Stone under the judicial "rule of reason" policy. See Water Works and Sewer Bd. of Talladega v. Consolidated Publishing, Inc., 892 So. 2d 859, 865-66 (Ala. 2004) ("'absent legislative action' as to a particular class of records, we will continue to apply a rule of reason"). Once the legislature enacts language addressing a particular class of records that was included among the classes of records identified in Stone as exempt under the judicial "rule of reason" policy, the judicial exemption ceases to govern. See Republican Party v. N.M. Taxation & Revenue Dep't, 283 P.3d 853, 860 (N.M. 2012) (Legislature's enumeration of specific exception to Inspection of Public Records Act obviated need for application of "rule of reason").

2 See history notes to ADEM Admin. Code r. 335-1-1-.06 at https://adem.alabama.gov/alEnviroRegLaws/files/Division1.pdf and history notes to Ala. Admin. Code r. 335-1-1-.06 at http://www.alabamaadministrativecode.state.al.us/docs/adem/335-1-1.pdf.

3 Assured Investors Life Ins. Co. v. Nat'l Union Assoc., 362 So. 2d 228 (Ala. 1978), overruled on other grounds, Ex parte Norfolk S. Ry. Co., 897 So. 2d 290 (Ala. 2004); LaMonte v. Pers. Bd. of Jefferson County, 581 So. 2d 866, 867 (Ala. Civ. App. 1991); and Sierra Club v. Alabama Envtl. Mgmt. Comm'n, 627 So. 2d 923 (Ala. Civ. App. 1992), rev'd on other grounds sub nom., Ex parte Alabama Dep't of Envtl. Mgmt., 627 So. 2d 927 (Ala. 1993). To the extent that these cases were based on privileges developed under common law, they are no longer controlling because common law privileges were abrogated on January 1, 1996 by the adoption of Ala. R. Evid 501.

The two later cases of W.A.A. v. Board of Dental Examiners of Alabama, 180 So. 3d 25, 30 (Ala. Civ. App. 2015) and Ex parte Cooper, No. SC-2023-0056, 2023 Ala. LEXIS 102, at *6 n.3, 2023 WL 5492465, at *__ n.3 (Ala. Aug. 25, 2023) did not confirm the continued viability of executive privilege. In the former case, the appellate court directed the trial court to determine "whether those matters are subject to a valid claim of executive, deliberative-process . . . privilege." In the latter case, the Court's mention of executive privilege was mere dictum because Cooper's claim of executive privilege in defense of a discovery order issued by the trial court became moot when the Court dismissed the case on jurisdictional grounds.

4 Many other courts, both state and federal, have concluded that the deliberative process privilege is a common law privilege. See Pet. for Review of Agency Declaratory Ruling (Doc. 2) at pp. 22 n.18 and 23-24. See also Russell L. Weaver & James T. R. Jones, The Deliberative Process Privilege, 54 Mo. L. Rev. 279, 283-290 (1989) (explaining the common law origin and development of the "deliberate process privilege").

DONE this 11th day of October, 2023.

/s/ JIMMY B POOL
CIRCUIT JUDGE