



**IN THE CIRCUIT COURT OF
 TUSCALOOSA COUNTY, ALABAMA**

**SOUTHERN POVERTY LAW
 CENTER,**

Plaintiff,

v.

RON ABERNATHY, in his
 official capacity as Custodian of the
 Records of the Tuscaloosa County Jail,

Defendant.

Civil Action No. CV-_____

OPEN RECORDS ACT COMPLAINT

Plaintiff Southern Poverty Law Center (“SPLC”) brings this action for equitable relief against Defendant Ron Abernathy, in his official capacity as Sheriff of Tuscaloosa County (“Sheriff”) and as the custodian of the records of the Tuscaloosa County Jail (“Jail”), to compel the Sheriff to comply with the Alabama Open Records Act, *see* Ala. Code §§ 36-12-40–41, and disclose the public writings requested by Plaintiff nearly four months ago. Plaintiff states the following in support of its claim:

I. PRELIMINARY STATEMENT

1. Tuscaloosa County, along with the rest of Alabama, is in the midst of a public health crisis unparalleled in modern times. According to the Alabama Department of Public Health (“ADPH”), more than 228,000 Alabamians have been

infected with COVID-19 since March 2020, with over 12,000 confirmed cases in Tuscaloosa County alone.¹

2. Since March 2020, thousands of Alabamians have died,² and cases in Alabama continue to rise: experts predict that nearly two hundred more Alabamians will die *each week* as we move into winter.³ Those who survive the disease are vulnerable to a lengthy—and ever-expanding—list of long-term complications.⁴

3. As Governor Kay Ivey noted early in March 2020, “the conditions of jails inherently heighten the possibility of COVID-19 transmission.”⁵ Close quarters in crowded jails where people housed in dorms or pods are unable to properly socially distance from each other, in which staff come in and go home to their

¹ See Ala. Dep’t of Pub. Health, *COVID-19 in Alabama*, Ala. Dep’t of Pub. Health, Division of Infectious Diseases & Outbreaks, <https://dph1.adph.state.al.us/covid-19/> (last updated Nov. 20, 2020, 4:16 PM).

² *Id.*

³ See, e.g., Ctrs. for Disease Control & Prevention, *CDC COVID Data Tracker: United States Forecasting*, https://covid.cdc.gov/covid-data-tracker/#forecasting_weeklydeaths (last visited Nov. 20, 2020); Ctrs. for Disease Control & Prevention, *Update: 2020-11-09 1* (2020), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/pdf/Consolidated-Forecasts-Incident-Cumulative-Deaths-2020-11-09.pdf>.

⁴ See, e.g., Lawrence Specker, *Research into mysterious ‘Long COVID’ symptoms picking up steam*, AL.com (Nov. 15, 2020), <https://www.al.com/news/2020/11/research-into-mysterious-long-covid-symptoms-picking-up-steam.html>; Byron Khalil, *Alabamians experiencing long-term side effects of COVID-19*, ABC3340 News (Sept. 10, 2020), <https://abc3340.com/news/local/alabamians-experiencing-long-term-side-effects-of-covid-19>.

⁵ Office of Alabama Governor Kay Ivey, *Fourth Supplemental State of Emergency: Coronavirus (COVID-19)* (March 26, 2020), <https://governor.alabama.gov/newsroom/2020/03/fourth-supplemental-state-of-emergency-coronavirus-covid-19/>.

families each day, and where new arrestees cycle in and out daily, create a perfect storm for COVID-19 to spread.⁶

4. “[T]he rate of coronavirus cases in federal and state prisons is more than four times the national rate.”⁷

5. The Alabama Department of Corrections (“ADOC”) publicly reports how many people working or incarcerated in its facilities are tested, infected, and deceased.⁸ ADOC has recorded nearly 1,400 COVID-19 cases⁹ across 34 detention facilities in Alabama, resulting in at least 34 deaths.¹⁰ The mortality rate in Alabama prisons is 2.8 times higher than that of the general Alabama population.¹¹

⁶ See, e.g., Megan Wallace, et al., Ctrs. for Disease Control & Prevention, *COVID-19 in Correctional and Detention Facilities—United States, February–April 2020* (May 15, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm>; Liesl M. Hagan, et al., Ctrs. for Disease Control & Prevention, *Mass Testing for SARS-CoV-2 in 16 Prisons and Jails—Six Jurisdictions, United States, April–May 2020* (Aug. 21, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6933a3.htm>; Cid Standifer & Frances Stead Sellers, *Prisons and jails have become a ‘public health threat’ during the pandemic, advocates say*, *The Washington Post* (Nov. 11, 2020), https://www.washingtonpost.com/national/coronavirus-outbreaks-prisons/2020/11/11/b8c3a90c-d8d6-11ea-930e-d88518c57dcc_story.html.

⁷ Standifer & Sellers, *supra*, at note 6.

⁸ Ala. Dep’t of Corr., Office of Pub. Affairs, *ADOC COVID-19 Preparedness Update*, <http://www.doc.alabama.gov/covid19news> (last updated Nov. 16, 2020).

⁹ *Id.*

¹⁰ Ctrs. for Disease Control & Prevention, *CDC COVID Data Tracker: Confirmed COVID-19 Cases and Deaths in US Correctional and Detention Facilities by State*, <https://covid.cdc.gov/covid-data-tracker/#correctional-facilities> (last visited Nov. 20, 2020).

¹¹ As of November 17, 2020, the overall death rate in Alabama was 1.49%, according to ADPH statistics, *see supra* note 1; the death rate for persons incarcerated in Alabama prisons was 4.2%, according to ADOC, *see supra* note 8.

6. Defendant reported in a news briefing on May 22, 2020, that a COVID-19 outbreak had occurred in the Jail infecting at least 21 prisoners and one staff member.¹²

7. Several other Alabama jails have reported COVID-19 outbreaks.¹³

8. Public education about potential superspreading sites such as the Jail is an essential means of stopping community spread of COVID-19.

9. As a public interest organization founded in Alabama and committed to fighting for low-income and vulnerable Alabamians for nearly 50 years, SPLC is committed to ensuring the public health and safety of our communities in Alabama.

10. In furtherance of SPLC's mission, SPLC sent Defendant a request seeking information critical to the health and safety of Tuscaloosa residents and Alabamians, including updates to the information on COVID-19 cases in the Jail that Defendant had already reported to the public in May 2020.

¹² See Kevin Reynolds, *Tuscaloosa County Sheriff talks about inmates testing positive for COVID-19*, WBRC (May 22, 2020), <https://www.wbrc.com/2020/05/22/tuscaloosa-county-sheriff-talks-about-inmates-testing-positive-covid-/>; Sarah Whites-Koditschek, *Tuscaloosa sees surge as coronavirus outbreaks hit nursing home, jail, psych ward*, AL.com (May 30, 2020), <https://www.al.com/news/2020/05/tuscaloosa-sees-surge-as-coronavirus-outbreaks-hit-nursing-home-jail-psych-ward.html>.

¹³ See, e.g., John Sharp, *Mobile Metro Jail is now COVID-19 free, sheriff says*, AL.com (June 24, 2020), <https://www.al.com/crime/2020/06/mobile-metro-jail-is-now-covid-19-free-sheriff-says.html>; Jeremy Coumbes, *COVID Outbreak Confirmed at Morgan County Jail*, WLDS News (Nov. 5, 2020), <https://wlds.com/covid-outbreak-confirmed-at-morgan-county-jail/>.

11. The Sheriff did not respond to the request or numerous follow-up attempts to obtain this information.

12. This lawsuit is a response to Defendant's deliberate withholding of vital public health information and his obligation under the Alabama Open Records Act to respond and produce the requested records.

II. JURISDICTION AND VENUE

13. This is a civil action arising under the laws of the State of Alabama. *See* Ala. Code. § 36-12-40.

14. This Court has jurisdiction pursuant to Ala. Code §§ 12-11-31(1), 12-11-33(1).

15. Venue is proper in this Court because Sheriff Abernathy resides in his official capacity in Tuscaloosa County. *See* Ala. Code § 6-3-2(b)(3).

III. PARTIES

16. Plaintiff SPLC is a domestic non-profit, non-partisan organization incorporated in Montgomery County, Alabama, in 1971.

17. Defendant Ron Abernathy is the Sheriff of Tuscaloosa County, Alabama. In his official capacity as Sheriff, he operates and controls the Tuscaloosa County Jail, located at 1600 26th Avenue, Tuscaloosa, Alabama. Sheriff Abernathy is the custodian of the records that Plaintiff seeks pertaining to the Jail. Sheriff

Abernathy resides in his official capacity in Tuscaloosa County, and all equitable relief sought by Plaintiff will occur in Tuscaloosa County.

IV. STATEMENT OF FACTS

A. Plaintiff's Records Request

18. Plaintiff sent Defendant a public records request on July 31, 2020, via electronic mail. A true and correct copy of the email and records request is attached hereto as Exhibit A (hereinafter "Records Request").

19. Pursuant to Ala. Code § 36-12-40, Plaintiff requested records regarding the effects of the COVID-19 health crisis on the people working or incarcerated in the Jail. Plaintiff requested both confirmation of receipt of the request and also the following records by August 14, 2020:

1. All records concerning the number of persons—either housed in the Tuscaloosa County Jail ("Jail") or employed by the Tuscaloosa County Sheriff's Department ("Sheriff's Department")—who have been tested for COVID-19.
2. All records concerning the number of persons—either housed in the Jail or employed by the Sheriff's Department—who have tested positive for COVID-19.
3. All communications and records concerning housing or cell assignment changes that have been made or are being considered in order to prevent the further spread of COVID-19 in the Jail and other facilities operated by the Sheriff.

20. Plaintiff's Records Request specifically did *not* request individualized, protected health information, but instead requested aggregate data regarding COVID-19 tests and positive diagnoses.

21. Defendant did not respond to the request by August 14, 2020.

22. Plaintiff sent follow-up emails to Defendant on August 5, 2020¹⁴ (hereinafter "First Follow-Up"); August 20, 2020¹⁵ (hereinafter "Second Follow-Up"); and September 10, 2020¹⁶ (hereinafter "Third Follow-Up").

23. In the Second Follow-Up email, Plaintiff included Robert Spence, attorney for Tuscaloosa County, and noted that Defendant had not confirmed receipt of the request or responded to the request in any manner. *See* Ex. C.

24. On September 11, 2020, in response to Plaintiff's Third Follow-Up email, County Attorney Spence responded:

The Sheriff has retained separate counsel. I have forwarded your email (as well as the previous one) to the Sheriff. He has informed me that they are preparing a response.

A true and correct copy of this email is attached hereto as Exhibit E.

¹⁴ A true and correct copy is attached hereto as Exhibit B. This email included a typo: instead of saying "I have *not* received confirmation," the email said "I have received confirmation." As the other exhibits clearly indicate, however, there was no confirmation sent or received.

¹⁵ A true and correct copy is attached hereto as Exhibit C.

¹⁶ A true and correct copy is attached hereto as Exhibit D.

25. Receiving no response from Defendant or his “separate counsel” following County Attorney Spence’s email, Plaintiff sent a final follow-up email to Defendant on September 24, 2020, attached hereto as Exhibit F (hereinafter “Final Follow-Up”). Plaintiff underscored the urgency of the Records Request to Defendant, stating that, upon information and belief, an outbreak of COVID-19 had occurred in the Jail. *See* Ex. F.

26. Defendant has not responded to the Records Request or to the subsequent follow-up emails, in any manner, as of the filing of this Complaint.

27. Plaintiff has made numerous efforts to resolve this issue without litigation.

B. The Public Nature of the Records

28. As Sheriff of Tuscaloosa County, Defendant is the custodian of the Jail and therefore the records sought by Plaintiff. *See* Ala. Code § 14-6-1.

29. The records sought by Plaintiff are those “reasonably necessary to record the business and activities required to be done or carried on” by the Defendant in fulfilling his duties as Sheriff of Tuscaloosa County and under Alabama law, *see Stone v. Consolidated Pub. Co.*, 404 So.2d 678, 681 (Ala. 1981):

- a. As Sheriff, Defendant is required to “provide to prisoners at the expense of the county, . . . [n]ecessary medicine and medical attention to those

prisoners who are sick or injured, when they are unable to provide them for themselves.” Ala. Code § 14-6-19.

- b. As custodian of the Tuscaloosa Jail, Defendant has a legal obligation to keep the jail “in a clean and sanitary condition . . . and shall exercise every precaution to prevent the spread of disease among the inmates.” Ala. Code § 14-6-95.
- c. As the custodian of the Tuscaloosa Jail, Defendant has a legal obligation to monitor the housing assignment of “any person affected with any infectious, contagious or communicable disease” and to immediately clean the place of confinement upon removal of such person. Ala. Code § 14-6-96.

30. Because COVID-19 has been designated as an “Immediate, Urgent Disease/Condition”¹⁷ by ADPH, *all* positive tests for COVID-19—including positive tests for people who work at or are incarcerated in Defendant’s Jail—must be reported to the State or County Health Officer within 24 hours, *see* Ala. Admin Code 420-4-1-.04(5).

31. Defendant previously released public information regarding the May 2020 outbreak that is similar to the information sought by Plaintiff in the Records

¹⁷ *See* Ala. Dep’t Pub. Health, *DETECT Notifiable Diseases*, <https://www.alabamapublichealth.gov/infectiousdiseases/detect.html> (last updated Sept. 10, 2020).

Request.¹⁸ Since the May 2020 outbreak, Defendant has released little information regarding testing numbers or related COVID procedures to the public. Defendant also has not released information about how employees of the Jail are tested and what policies, if any, are in place to prevent spread from staff into the community.¹⁹

32. Current information about COVID-19 testing, confirmed diagnoses, and housing policies in the Jail is in the public interest as COVID-19 cases rise in Tuscaloosa County²⁰ and as conditions in the Jail change:

- a. Though the Jail's capacity is 542 people,²¹ on information and belief, its population was 739 people as of November 19, 2020.
- b. On information and belief, an outbreak of 100 or more persons in the Jail occurred in September 2020. There are no public reports regarding this outbreak or the steps taken to limit the risk to the people working or incarcerated within the jail, or the public at large.

¹⁸ See *supra* note 12. Defendant specifically discussed the number of people who had tested positive and housing policies he implemented at the Jail to address COVID-19.

¹⁹ Policies specifically related to staff are important to prevent community spread of COVID-19: in a study of a jail in Illinois, the CDC found that staff had “higher than expected percentage of staff members with COVID-19,” which may be attributable to “staff members returning to their household and community after each work shift.” Uzay Kirbiyik, et al., Ctrs. for Disease Control & Prevention, *Network Characteristics and Visualization of COVID-19 Outbreak in a Large Detention Facility in the United States — Cook County, Illinois, 2020* (Nov. 6, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6944a3.htm?s_cid=mm6944a3_w.

²⁰ See *supra* note 3.

²¹ Stephanie Taylor, *County jail population often tops 600 inmates*, TuscaloosaNews.com (May 31, 2008), <https://www.tuscaloosaneews.com/article/20080531/News/606111316>.

- c. Information about the presence of an outbreak of COVID-19 amongst those employed at, or incarcerated in, the Jail will allow members of the public, Jail staff, and incarcerated people to better protect themselves.

V. CLAIM FOR RELIEF

First Claim: Violation of the Alabama Open Records Act

33. The allegations set forth in the foregoing paragraphs are incorporated herein by reference.

34. The Alabama Open Records Act gives “[e]very citizen . . . a right to inspect and take a copy of any public writing of this state.” Ala. Code § 36-12-40.

35. Defendant is the custodian of the records sought by Plaintiff. *See* Ala. Code § 14-6-1.

36. The records sought by Plaintiff, as described in Exhibit A, are public writings within the meaning of Ala. Code § 36-12-40.

37. The records sought by Plaintiff are not exempt from disclosure and Defendant has no legal basis to refuse to disclose the requested records.

38. Plaintiff has given Defendant sufficient time to respond to the Records Request.

39. Defendant has refused to answer the Records Request in any manner and has not raised any exemptions or defenses to production of the requested records.

40. Disclosure of the records sought by Plaintiff is in the public interest.

41. In failing to produce the records Defendant has violated, and continues to violate, Ala. Code § 36-12-40 and Plaintiff's statutory rights thereunder.

VI. PRAYER FOR RELIEF

Wherefore, Plaintiff prays that this Honorable Court grant the following relief:

- a. Assume jurisdiction over this action;
- b. A declaration that the requested records are public writings subject to disclosure under the Alabama Open Records Act, Ala. Code § 36-12-40;
- c. A declaration that disclosure of the requested records serves the public interest;
- d. A declaration that Defendant is required to produce the records requested by Plaintiff under Ala. Code § 36-12-40;
- e. A preliminary and permanent injunction ordering Defendant to produce the requested records to Plaintiff without further delay, pursuant to Ala. Code § 36-12-40;
- f. A preliminary and permanent injunction ordering Defendant to waive all fees associated with Plaintiff's request and produce the records by mail or email;

- g. Award Plaintiff its costs and reasonable attorneys' fees; and
- h. Grant Plaintiff such other relief as the Court deems just and proper.

Respectfully submitted this 23rd day of November, 2020.

/s/ Alexandra Jordan

Alexandra Jordan (ASB-4640-X00X)

Micah West (ASB-1842-J82F)

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