

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

BLACK VOTERS MATTER CAPACITY
BUILDING INSTITUTE, INC., *et al.*,

Plaintiffs,

Case No. 2022-CA-000666

v.

CORD BYRD, in his official capacity as
Florida Secretary of State, *et al.*,

Defendants.

**SUPPLEMENTAL ORDER ON GOVERNOR AND J. ALEX KELLY'S MOTION
TO QUASH & FOR PROTECTION FROM SUBPOENAS DUCES TECUM
FOR DEPOSITION AFTER *IN CAMERA* REVIEW**

This case came before the Court on its Order on Governor and J. Alex Kelly's Motion to Quash & for Protection from Subpoenas Duces Tecum for Deposition of October 27, 2022, Non-Parties Executive Office of the Governor and J. Alex Kelly's November 28, 2022 Joint Stipulation, and the Executive Office of the Governor and J. Alex Kelly's Notice of Compliance of December 8, 2022. Upon consideration of the Order and the *in camera* review of the materials provided under seal, the Court hereby finds as follows:

In this case, Non-Parties the Executive Office of the Governor and J. Alex Kelly ("Movants") have submitted responsive materials for *in camera* review based on claims of legislative, attorney-client communication, and attorney work product privileges. The materials consisted of six (6) three-inch (3") binders and one thumb drive containing 6.25 GB of material. The materials are best grouped into the following three categories: 1) emails and

communications, 2) Adam Foltz's redistricting documents, and 3) physical copies of redistricting materials. The materials will be filed separately by the Court, **under seal**. As a threshold matter, the burden of establishing that a communication is protected by the privilege is upon the party asserting it. *Nemours Found. v. Arroyo*, 262 So. 3d 208, 211 (Fla. 5th DCA 2018). Thus, Movants also submitted, as allowed by this Court's order, the affidavit of an individual who assisted in the gathering of the materials made available for review. That affidavit gave background information as to the names and positions within the organizations of individuals named in the documents. Counsel for Movants also provided a cover letter and other cover documents laying out the process of producing the materials as there was a slight variance from the Court's order based on the most efficient presentation of the materials. The Court has reviewed the materials for the requested privileges and, for the reasons discussed below, will overrule the objections to many of the materials, sustaining some of the objections as to others.

Legislative Privilege

In this Court's order on Movants' Motion, the Court protected as privileged "information internal to the Governor's Office that is not already *public record* (e.g., the thoughts or opinions of staff or those of the Governor.)" Order on Governor and J. Alex Kelly's Mot. to Quash & for Protection from Subpoenas Duces Tecum for Dep. of October 27, 2022, at 9 (emphasis added). Accordingly, as to communications within the Executive Office of the Governor of information that is releasable under Chapter 119,

Florida Statutes, no Legislative Privilege applies. As an example, in EOG_007142-EOG_7176¹, the General Counsel sends an email to the Chief of Staff that attaches three public documents that were either filed in court or transmitted to the Florida Legislature. Accordingly, no Legislative Privilege would apply.

Attorney-Client Privilege

In *City of North Miami v. Miami Herald Publishing Co.*, 468 So. 2d 218 (Fla. 1985), the Florida Supreme Court recognized a limited right to the protection of communications between public-entity clients and their attorneys. However, those protections were limited by the open records laws of Chapter 119, Florida Statutes. *Id.* at 220. See also, *Hill v. Prudential Ins. Co. of Am.*, 701 So. 2d 1218 (Fla. 1st DCA 1997). Therefore, communications between Movants' attorneys and the client that disclose public records are not protected by the privilege. For example, in EOG_25184 - EOG_25195, counsel sent an email with a copy of a dismissal filed in court removing the Governor from a suit. Such email is a public record and not subject to an exception. See § 119.071(1)(d)1., Fla. Stat. (2022). Accordingly, no attorney-client privilege exists in such documents.

Attorney Work Product Privilege

In *City of North Miami*, 468 So. 2d at 220, the Florida Supreme Court also recognized the limited attorney work product protection of public

¹ In its submission, Movants have Bates stamped the pages from EOG_1 to EOG_27324 (although some summaries submitted by counsel indicate pages EOG_27325 and EOG_27326. Similarly, Movants did not submit any pages numbered EOG_26293 – EOG_26298. Where files exist in their native format only, Movants have placed a “Native Document Placeholder” page in the binder which is Bates stamped. The Court appreciates the organization with which counsel has presented the information to expedite the Court’s review.

records noted in Chapter 119.071(1)(d)1., Florida Statutes. Professor Charles Ehrhardt analyzes the application of the attorney work product privilege in Florida as it relates to the State of Florida in his seminal work, Charles W. Ehrhardt, Florida Evidence § 502.9, at 515-16 (2021 ed.). As he notes,

The work product doctrine is not generally available to protect materials in the files of lawyers employed by lawyers of the State of Florida because the Public Records Act applies to these records...The exemption only protects records that reflect a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency...Public records assembled in anticipation of litigation that do not contain the opinions, mental impressions or legal conclusions of the attorney are not protected by the public record exemption. These records may be discovered by the opposing party without any predicate showing. *Id.*

Equally important in the discussion of the privilege is the definition of a public record contained in Chapter 119.011(12), Florida Statutes:

all documents, papers, letters, **maps**, books, tapes, photographs, films, sound recordings, **data processing software**, or other material, **regardless of the physical form, characteristics, or means of transmission**, made or received pursuant to law or ordinance or **in connection with the transaction of official business by any agency**. *Id.* (emphasis added).

Thus, the numerous native datafiles provided by Mr. Adam Foltz fall into the category of a public record for which no protection applies. One example where the transmission of a public document may be privileged can be seen in EOG_817 - EOG_896. In those pages, one attorney for Movants emails another attorney for Movants reported court opinions. Despite the fact the opinions themselves are public records, there is no way to separate the thoughts of the attorney as to which case may be important from the

transmission of the otherwise public documents. Accordingly, the privilege prevails.

Relief: Objections Sustained

Based on the above findings, the Court has reviewed the materials and shall **sustain the objections** (and thereby GRANT the protective order) as to the following items:

EOG_1 - EOG_12

EOG_116 - EOG_117

EOG_157 - EOG_165

EOG_236 - EOG_801

EOG_803 - EOG_805

EOG_807 - EOG_809

EOG_817 - EOG_935

EOG_941 - EOG_943

EOG_6606 - EOG_6928

EOG_6931 - EOG_6962

EOG_6966 - EOG_6973

EOG_7006

EOG_7010 - EOG_7118

EOG_7119 - EOG_7128 (as highlighted; the non-highlighted portions are thereby ordered produced in accordance with the subpoena)

EOG_7129 - EOG_7141

EOG_7177 - EOG_7182

EOG_7196 - EOG_7208

EOG_7397 - EOG_7493

EOG_18807 - EOG_18889

EOG_18892 - EOG_18912

EOG_18916 - EOG_18995

EOG_19023 - EOG_19049

EOG_19051 - EOG_19077

EOG_19079 - EOG_19197

EOG_19334 - EOG_19471

EOG_19522 - EOG_19525

EOG_25205 - EOG_25438

EOG_25500 - EOG_25950

EOG_26106 - EOG_26165

EOG_26169 - EOG_26170

EOG_26302

EOG_26344

EOG_26376 - EOG_26396

EOG_26407 - EOG_26427

EOG_26445 - EOG_26614

EOG_26712 - EOG_26723

EOG_26933 - EOG_26955

EOG_26995 - EOG_27003

EOG_27006 - EOG_27121

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EOG_27182 - EOG_27189

EOG_27320

Relief: Objections Overruled

Based on the above findings, the Court has reviewed the materials and shall **overrule the objections** (and thereby order production in accordance with the subpoena) as to the following items:

EOG_13 - EOG_109

EOG_111 - EOG_112

EOG_114 - EOG_115

EOG_118 - EOG_156

EOG_166 - EOG_235

EOG_814 - EOG_816

EOG_937 - EOG_940

EOG_944 - EOG_946

EOG_948 - EOG_6605

EOG_6929 - EOG_6930

EOG_6963 - EOG_6965

EOG_6974 - EOG_7005

EOG_7007 - EOG_7009

EOG_7142 - EOG_7176

EOG_7183 - EOG_7195

EOG_7209 - EOG_7396

EOG_7494 - EOG_18806

EOG_18890 - EOG_18891

EOG_18913 - EOG_18915

EOG_18996 - EOG_19021

EOG_19199 - EOG_19333

EOG_19472 - EOG_19521

EOG_19526 - EOG_25204

EOG_25439 - EOG_25499

EOG_25951 - EOG_26105

EOG_26166 - EOG_26168

EOG_26171 - EOG_26210

EOG_26212 - EOG_26292

EOG_26299 - EOG_26300: Only one of the parties in the conversation is identified. As such, Movants have failed to show this is not a public record.

EOG_26305 - EOG_26343

EOG_26345 - EOG_26373

EOG_26397 - EOG_26406

EOG_26428 - EOG_26444

EOG_26615 - EOG_26711

EOG_26724 - EOG_26858

EOG_26860 - EOG_26932

EOG_26957 - EOG_26994

EOG_27004 - EOG_27005

EOG_27122 - EOG_27181

EOG_27190 - EOG_27319

EOG_27321 - EOG_27324

All Documents Contained in "Adam Foltz's Redistricting Documents Folder"

Relief: Redactions

Based on the above findings, the Court has reviewed the materials and shall **sustain the objections in part** and **overrule the objections in part** as to the following items:

EOG_110: Objection sustained as to "Here's" to "file." and Movants may redact that portion from the document. As to the rest of EOG_110, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_113: Objection sustained as to "Relevant" to "purposes." and Movants may redact that portion from the document. As to the rest of EOG_113, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_802: Objection sustained as to phrase before the hyperlinks and Movants may redact that portion from the document. As to the rest of EOG_802, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_806: Objection sustained as to phrase before the hyperlinks and Movants may redact that portion from the document. As to the rest of

EOG_806, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_810: Objection sustained as to last eight (8) lines of text and Movants may redact that portion from the document. As to the rest of EOG_810, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_811: Objection sustained as to last eight (8) lines of text and Movants may redact that portion from the document. As to the rest of EOG_811, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_812-813: Objection sustained as to last eight (8) lines of text and Movants may redact that portion from the document. As to the rest of EOG_812-813, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_936: Objection sustained as to "This is" to "as well." and Movants may redact that portion from the document. As to the rest of EOG_936, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_947: Objection sustained as to the one line of text above "Begin forwarded message:" and Movants may redact that portion from the document. As to the rest of EOG_947, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_19022: Objection sustained as to “Our current” to [date] and Movants may redact that portion from the document. As to the rest of EOG_19198, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_19050: Objection sustained as to “Our current” to [date] and Movants may redact that portion from the document. As to the rest of EOG_19198, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_19078: Objection sustained as to “Our current” to [date] and Movants may redact that portion from the document. As to the rest of EOG_19198, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_19198: Objection sustained as to “Our current” to [date] and Movants may redact that portion from the document. As to the rest of EOG_19198, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_26211: Objection sustained as to the second sentence and Movants may redact that portion from the document. As to the rest of EOG_26211, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_26301: Objection sustained as to the first text bubble and Movants may redact that portion from the document. As to the rest of

EOG_26301, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_26303 - EOG_26304: Objection sustained as to the handwritten notes and Movants may redact that portion from the document. As to the rest of EOG_26303 - EOG_26304, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.


EOG_26374 - EOG_26375: Objection sustained as to the handwritten notes and Movants may redact that portion from the document. As to the rest of EOG_26374 - EOG_26375, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_26859: Objection sustained as to the handwritten notations at the top of the page and Movants may redact that portion from the document. As to the rest of EOG_26859, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

EOG_26956: Objection sustained as to the handwritten notes and Movants may redact that portion from the document. As to the rest of EOG_26956, the objection is overruled, and the redacted document shall be produced in accordance with the subpoena.

For the foregoing reasons, the Motion To Quash & For Protection From Subpoenas Duces Tecum For Deposition is **GRANTED in part and DENIED in part.** Movants shall produce those items (with authorized redactions) sought in the subpoena for which this Court has not ordered protection **within 30 days** from the date of this order.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this
Thursday, December 15, 2022.

2022-CA-000666 12/15/2022 10:23:09 AM


Lee Marsh, Circuit Judge

37-2022-CA-000666 12/15/2022 10:23:09 AM

J. LEE MARSH
CIRCUIT JUDGE

Copies furnished to:
All Counsel of Record

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