

**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\_7176<sup>1</sup>, 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

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<sup>1</sup> 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

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  


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