

**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.

**ORDER ON PLAINTIFF'S RENEWED MOTION TO RULE ON OBJECTION
TO NON-PARTY DOCUMENT SUBPOENA**

This case came before the Court on Plaintiff's Renewed Motion to Rule on Objection to Non-Party Document Subpoena, this Court's Order to Show Cause of June 15, 2023, and the Response to said Order to Show Cause. Upon consideration of the Renewed Motion and the Response to June 25, 2023 Order to Show Cause and the *in camera* review of the materials provided under seal, the Court hereby finds as follows:

The Parties are back before the Court for an *in camera* review of materials related to drawing maps for the 2022 redistricting cycle. This time, Plaintiff's have noticed that they intend to subpoena the records of Mr. Adam Foltz. Counsel for Defendant Secretary Byrd, the Executive Office of the Governor, and Adam Foltz has asserted (without evidence of the actual contractual arrangements) that "the Executive Office of the Governor, working through the Secretary, hired outside counsel for both the Executive Office and the Secretary; outside counsel then retained redistricting

consultants, including Mr. Foltz.” Resp. at 2. However, the Secretary’s position is partially contradicted by the testimony of Mr. James Kelly that “[t]he office contracted for – our office was the – had the **contracts** for our outside counsel and **map-drawer**, outside counsel, and consultants.” (emphasis added). *Id.* at Attach. D, p. 169, lines 18-20.

In this case, Defendant Secretary Byrd, Non-Parties the Executive Office of the Governor and Adam Foltz (“Objectors”) have submitted responsive materials for *in camera* review based on claims of attorney-client communication and attorney work product privileges. The materials consisted of two (2) three-inch (3”) binders and one thumb drive containing 360 MB of material. 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). The Objectors gave non-affidavit based background information as to the names and positions within the organizations of individuals named in the documents. Counsel for Objectors also provided a cover letter laying out the process of producing 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.

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 Objectors' attorneys and the client that disclose public records are not protected by the privilege. Similarly, the person must be consulted as a lawyer. *See, e.g. Skorman v. Hovnanian of Florida, Inc.*, 382 So. 2d 1376, 1378 (Fla. 4th DCA 1980) ("where a lawyer is engaged to advise a person as to business matters as opposed to legal matters, or when he is employed to act simply as an agent to perform some non-legal activity for a client the authorities uniformly hold there is no privilege"); *See also, Burrow v. Forjas Taurus S.A.*, 334 F. Supp. 3d 1222 (S.D. Fla. 2018) ("As the proponent of the privilege, Defendants must show, irrespective of whether one or more lawyers sent or received the communication, that the communication was confidential and that the primary purpose of the communication was to relay, request or transmit **legal advice.**" (emphasis added)).

In this case, the overwhelming majority of the documents presented to the Court for *in camera* review are related to drawing maps for the redistricting process. Similarly, there are instructions on obtaining splits and

data based on map designs. Whereas Objectors may conclude that litigation is likely to follow redistricting, such a supposition does not mean that everything related to map drawing for redistricting is legal work. By that logic, a trucking company may hire an attorney to subcontract all of its fleet maintenance. For in this litigious society, it is foreseeable that some trucks will get into collisions and be sued. Due to the attorney performing the maintenance hiring, by the Objectors' logic, all maintenance records for the entire trucking fleet would be shielded from discovery. The law does not support the Objectors' position that they may claim a privilege and avoid discovery by hiring outside counsel to perform map drawing during redistricting.

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 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 (2022 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).

Mr. Foltz's status as a contractor does not shield him from the Public Records Act. In fact, Chapter 119.0701(2), Florida Statutes requires Mr. Foltz to keep and maintain public records required by the agency to perform the service. Thus, the mapmaking work of Mr. Foltz falls into the category of a public record for which no protection applies.

Relief: Objections Sustained

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

EOG Prod_000089224 - EOG Prod_000089257

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 item:

EOG Prod_000170243: Objection sustained as to the second sentence of the Jan 10, 2022 8:29:31 AM text and Objectors may redact that sentence from the document. As to the rest of EOG Prod_000170243, the objection is

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

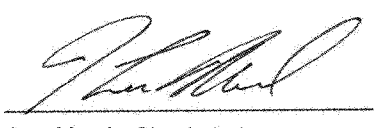
Relief: Objections Overruled

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:

All items not identified above. The Court will note that EOG Prod_000055237 indicates answers are being provided based on an attorney's questions. However, Objectors have not met their burden of showing the questions related to legal advice and not the non-legal activity of map drawing. Similarly, the email string of EOG Prod_000030809 indicates an opinion an attorney has regarding a map. Once again, Objectors have failed to meet their burden to show the opinion was one related to legal advice vice map drawing.

For the foregoing reasons, the Motion to Rule on Objection to Non-Party Document Subpoena is **GRANTED in part and DENIED in part**. Objectors shall produce those items (with authorized redactions) sought in the subpoena for which this Court has not ordered protection **within 5 days** from the date of this order.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this Thursday, June 29, 2023.

2022-CA-000666 06/29/2023 06:13:37

Lee Marsh, Circuit Judge
37-2022-CA-000666 06/29/2023 06:13:37 PM

Copies furnished to:
All Counsel of Record