

IN THE ALABAMA COURT OF THE JUDICIARY

IN THE MATTER OF:	)	
ANITA KELLY	)	Court of the Judiciary
Circuit Judge,	)	Case No.: 50
15 <sup>th</sup> Judicial Circuit	)	



**JUDGE ANITA KELLY’S RESPONSE IN OPPOSITION TO “MOTION TO QUASH BY NON-PARTY ALABAMA DEPARTMENT OF HUMAN RESOURCES FOR PROTECTIVE ORDER AND COMPENSATION” [sic] AS TO REQUEST NO. 28 (IDENTIFICATION AND LOCATION OF FORMER EMPLOYEES)**

**I. Introduction**

On November 21, 2017, in response to a civil subpoena duces tecum served on behalf of Judge Kelly, non-party Alabama Department of Human Resources (ADHR) filed on behalf of itself and the Montgomery County Department of Human Resources (MCDHR) a “Motion to Quash by Non-Party Alabama Department of Human Resources for Protective Order and Compensation.”<sup>1</sup> Notwithstanding Court-ordered efforts to “work together to attempt to resolve the issues raised in DHR’s motion,”<sup>2</sup> Order entered December 1, 2017, at 1, DHR and Judge Kelly were unable to resolve their dispute relating to request number 28 of Judge Kelly’s subpoena duces tecum.

More specifically, request number 28 seeks information regarding the identity of and contact information for former employees of Montgomery County DHR, i.e., persons “who resigned or transferred, were terminated, or were involuntarily transferred from their

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<sup>1</sup> For purposes of this response, and because ADHR filed its motion to quash on behalf of both entities, we will refer to ADHR and MCDHR collectively as “DHR.”

<sup>2</sup> Counsel for the DHR entities had filed the motion to quash without first trying to “resolve the subject matter of the discovery motion through correspondence or discussions with opposing counsel,” contrary to the requirements of Ala.R.Civ.P. 26(c).

employment with the Montgomery County DHR at any time from January 1, 2012 through the present.”<sup>3</sup> DHR’s objections to request number 28 are meritless and due to be rejected.

## II. Response to DHR’s objections

### 1. DHR’s general objections do not preserve the objections nor apply to request no. 28

In the introductory section of DHR’s motion to quash, *see* Motion to Quash, at 2-5, before DHR’s assertions of objections to individual document requests (beginning at page 6), DHR asserts several general objections to the document subpoena as a whole, to the extent that any of the requested information may be covered by various Alabama Code provisions said to make certain DHR records confidential by law, attorney-client privilege, intra-governmental executive privilege, or work product doctrine. DHR did not assert any of these objections with respect to any of the information requested in request number 28 specifically.

Judge Kelly does not see any colorable basis for DHR to claim that any of these privileges or restrictions on discovery could apply to any of the requested information at issue – the identity, last DHR position, and current or last-known contact information of former employees of Montgomery County DHR. In the event DHR attempts to argue any of these grounds with respect to request number 28, DHR’s general objections fail to preserve, and

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<sup>3</sup> Request number 28 reads in its entirety as follows:

28. As to any and all persons who resigned or transferred, were terminated, or were involuntarily transferred from their employment with the Montgomery County DHR at any time from January 1, 2012 through the present, produce a list of all such persons, identifying for each such person their name, last position with the Montgomery County DHR, current employer (if known), and last known address and telephone number(s); or alternatively, produce documents sufficient to identify all such persons, including for each such person their name, last position with the Montgomery County DHR, current employer (if known), and last known address and telephone number(s).

instead result in waiver of, those objections. *E.g., Ex parte Dorsey Trailers*, 397 So.2d at 104; *Heller*, 303 F.R.D. at 482-83 (specifically including objections based on various privileges).

Even if DHR had not waived any claim based on privilege that it might assert to information requested in item 28, as the objecting party DHR bears the burden of establishing the applicability of each such privilege or restriction on discovery as to each item allegedly covered. *E.g., Ex parte Alfa Mutual Insurance Co.*, 631 So.2d 858, 860 (Ala. 1993); *Swain v. Terry*, 454 So.2d 948, 953 (Ala. 1984); *accord, e.g., Allendale Mutual Insurance Co. v. Bull Data System, Inc.*, 145 F.R.D. 84, 86 (N.D.Ill. 1992); *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 643 (S.D.N.Y. 1991); *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 300 (E.D.Pa. 1980). DHR has not made any such showing as to *any* document or information it may have withheld from Judge Kelly<sup>4</sup>, much less any document or information requested by item 28. In the absence of any such showing, any actual or colorable assertions of privilege or work product protection necessarily fails.

2. DHR's specific objections to no. 28 are groundless

DHR asserts objections to request number 28 claiming lack of “relevance and materiality”; the request should be directed to the State of Alabama Personnel Department as “the official custodian of records”; the “information requested ... is overly broad”; and “any

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<sup>4</sup> If DHR actually withheld any documents or information based on a claim of privilege or work product protection, the Rules dictate that such a claim “shall be made expressly.” Ala. R. Civ. P. 26(b)(5); *see also, e.g., Dorsey Trailers*, 397 So.2d at 104 (objections must be specific). DHR has not identified any specific document responsive to request number 28 (or any document responsive to any other request) as withheld based on privilege. Indeed, after DHR filed its motion to quash, undersigned counsel requested DHR provide a privilege log as to any documents withheld, pursuant to Ala.R.Civ.P. 26(b)(6)(A), to assist counsel in responding to DHR’s motion. *See* attached Exhibit 1. DHR refused, citing the pending motion to quash. *See* attached Exhibit 2. DHR to date has not produced a privilege log identifying any documents that it may have withheld based on any privilege.

employees whose records are sought should have an individual right to object to any sensitive information being released.” Motion to Quash, at 10. All of these objections are baseless and should not bar Judge Kelly’s discovery of relevant information.

a. The information sought is relevant and DHR has not shown otherwise.

Rule 26 generally permits “very broad” discovery in any type of case, *e.g.*, *Ex parte Dorsey Trailers, Inc.*, 397 So.2d 98, 102 (Ala. 1981), and is “construed broadly to allow parties to obtain information needed in the preparation of their case.” *Ex parte Clarke*, 582 So.2d 1064, 1067 (Ala. 1991). As a general matter, “[d]iscovery should be permitted if there is any likelihood that the information sought will aid the party seeking discovery in the pursuit of his claim or defense.” *E.g.*, *Ex parte Wal-Mart Stores*, 682 So.2d 65, 67 (Ala. 1996) (quotation omitted). It is axiomatic that “discovery is not limited to matters that would be admissible as evidence in the trial of the lawsuit,” *id.*, but instead encompasses information that “appears reasonably calculated to lead to the discovery of admissible evidence.” Ala. R. Civ. P. 26(b)(1); *accord, e.g.*, *Clarke*, 582 So.2d at 1067.

As the objecting party, DHR “must show specifically how” the production request “is not relevant.” *E.g.*, *McLeod, Alexander, Powel & Appfel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5<sup>th</sup> Cir. 1990). And, where (as here) the requested discovery is facially relevant to the subject matter of the action, the objecting party – here again, DHR – bears the burden of demonstrating the discovery “is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.” *E.g.*, *Waddell & Reed Financial, Inc. v. Torchmark Corp.*, 222 F.R.D. 450, 454 (D.Kan. 2004); *accord, e.g.*, *SEC v. Brady*, 238 F.R.D. 429, 437 (N.D.Tex. 2006).

The information sought is clearly relevant to the subject matter of this action, and likely to lead to the discovery of admissible evidence. More to the point, DHR cannot show sufficient – if any – potential harm from disclosure, or that the information is of such marginal relevance, as to warrant denying Judge Kelly discovery of such information.

As noted above, request number 28 seeks information regarding the identity of and contact information for former employees of Montgomery County DHR, i.e., persons “who resigned or transferred, were terminated, or were involuntarily transferred from their employment with the Montgomery County DHR at any time from January 1, 2012 through the present.” Rule 26(b)(1) expressly provides for discovery of “the identity and location of persons having knowledge of any discoverable matter.” Ala.R.Civ.P. 26(b)(1); *accord, e.g., Ex parte Dorsey Trailers*, 397 So.2d at 106.

Although the Judicial Inquiry Commission (JIC) filed the formal charges in this matter, DHR is a major complainant in, and from all appearances the driving force behind, JIC’s investigation that led to JIC’s filing of the formal charges. Apart from the individual verified complaint relating to a single domestic relations matter that apparently opened JIC’s investigation that ballooned and grew like kudzu into the formal COJ charges – a complaint that is not included in those formal charges – all or nearly all of the investigation of which Judge Kelly was aware before JIC filed its complaint in this Court consisted of matters about which DHR complained to JIC or which DHR brought to JIC’s attention.

More specifically, the single appellate opinion that JIC cited in its September 12, 2016 letter to Judge Kelly as triggering JIC’s inquiry into a possible pattern-and-practice of delays on the part of Judge Kelly, was a DHR appeal in a dependency case in Judge Kelly’s court. All of

the mandamus or appellate proceedings referenced in the COJ complaint filed by JIC involved dependency cases in Judge Kelly's court and were initiated by DHR.

Furthermore, as best as Judge Kelly's counsel can determine, DHR has sent JIC at least seven (7) letters or memoranda, at least five (5) of which were sent during the scope of JIC's investigation here, in which DHR raised complaints about Judge Kelly's handling of cases in which DHR was a party – each one (as acknowledged by DHR general counsel Sharon Ficquette during her deposition in this action) with the intent or hope that JIC would investigate DHR's claims and take action against Judge Kelly. DHR's complaint memoranda to JIC – all of which were not verified or sworn -- included but were not limited to (a) a 14-page laundry list of complaints (with 115 pages of supporting documents) to JIC about Judge Kelly dated November 30, 2016, *see* Ex. E to Brief in Support of Judge Kelly's Motion to Dismiss; (b) an earlier, August 1, 2014 complaint letter to JIC, which DHR appears to have recycled, slightly updated, and expanded into the November 30, 2016 letter, Ex. G to Brief in Support of Judge Kelly's Motion to Dismiss; and (c) a March 17, 2017 memorandum with information on 2 more mandamus petitions (and over 100 pages of supporting materials) DHR had filed a week earlier in cases assigned to Judge Kelly.<sup>5</sup> Ex. J to Brief in Support of Judge Kelly's Motion to Dismiss.

Indeed, from all appearances to Judge Kelly, DHR's November 30, 2016 "laundry list" complaint memorandum -- which identified approximately 20 "matters," involving more than 35 children and approximately 50 individual cases – really jump-started or at minimum abruptly accelerated JIC's pattern-and-practice investigation. Nearly all of DHR's unsworn complaints

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<sup>5</sup> In addition, DHR counsel and Judge Kelly's counsel have identified letters or memoranda to JIC from DHR's general counsel Sharon Ficquette dated December 19, 2014; December 7, 2016; January 5, 2017; and January 12, 2017. Based on our review, all 7 of these letters or memoranda set out complaints by DHR against Judge Kelly for JIC's review and investigation.

related to delays in juvenile dependency cases, especially petitions to terminate parental rights (“TPRs”). By comparison with the COJ complaint, DHR’s unsworn complaint memos accounted for nearly the entire first half of the COJ complaint, as well as (probably) the just-recently-dismissed Charge 6 relating to loss of juvenile treatment program funds.

Based on considerable circumstantial evidence, Judge Kelly has asserted in her answer that DHR – as the principal complainant in the JIC investigation – singled her out for complaints to JIC based on impermissible reasons; and that JIC has selectively prosecuted her. Answer and Defenses (filed Sept. 15, 2017), at 1-2, 8-10. Judge Kelly likewise has specifically asserted selective enforcement as a defense. *Id.* at 38-39. In fact, DHR’s general counsel Sharon Ficquette admitted in her recent (December 12) deposition that DHR provided information, i.e., made complaints, to JIC to try to get Judge Kelly removed from hearing any of DHR’s cases -- including by Judge Kelly’s removal from the bench if that is the only way DHR can obtain that result.

As to the information requested in request 28, it is reasonably likely – if not probable – that (a) a list (or documents sufficient to create a list) of persons who left the employment of the Montgomery County DHR office since the beginning of 2012, coupled with identification of (b) their former DHR position (to help identify their possible involvement or role in matters included in or relevant to JIC’s formal complaint or Judge Kelly’s defenses) and (c) their current contact information (i.e., current employer if known, and person’s last known address and telephone number(s), for Judge Kelly’s counsel to find their present whereabouts), would lead counsel to persons with knowledge of discoverable facts in numerous areas. These areas include but are not limited to the circumstances surrounding or relating to (i) matters included in JIC’s formal charges, (ii) decisions regarding actions taken by DHR in those particular matters, (iii) the

decision(s) of DHR to complain about Judge Kelly to JIC, (iv) the genesis and creation of DHR's complaint letters about Judge Kelly to JIC, (v) the motivation of DHR to complain about Judge Kelly to JIC, and (vi) whether any stated motivation on the part of DHR (including but not limited to its general counsel) is pretextual.

Evidence or discoverable knowledge in all or any of these areas would be relevant to Judge Kelly's response to individual matters or to one or more of her affirmative defenses. Accordingly, a discovery request tailored to identify and locate persons with such discoverable knowledge likewise seeks relevant and plainly discoverable information. More to the point, even if DHR could show any legitimate evidence of potential harm from disclosure, DHR cannot show the relevance of the requested information is so "marginal" as to deny discovery to Judge Kelly. *E.g., Waddell & Reed Financial, Inc.*, 222 F.R.D. at 454.

- b. DHR has not shown and cannot show that request number 28 is overly broad, or that production in compliance with it would be unduly burdensome.

In support of its objection that request number 28 is "overly broad," DHR merely repeats that the request "seeks information as to any employee that has resigned, involuntarily transferred, current employer of said employees etc." [sic]; and otherwise asserts only that "Montgomery County DHR administers many programs and has nearly 150 employees." Motion to Quash, at 10. These assertions fail to establish that the request is overly broad or that production of the requested information would be unduly burdensome, as required to justify any restriction on Judge Kelly's discovery of this information.

To obtain relief from an allegedly overbroad discovery request, DHR as the objecting party bears the burden of showing *how* that request is overly broad. *E.g., Ex parte John Alden Life Ins. Co.*, 999 So.2d 476, 485 (Ala. 2008) (burden on objecting party to show that the requested discovery is oppressive or overly burdensome); *Ex parte Marsh & McLennan, Inc.*,

404 So.2d 654, 655 (Ala. 1981); *McLeod*, 894 F.2d at 1485; *Schaap v. Executive Industries, Inc.*, 130 F.R.D. 384, 387 (N.D.Ill. 1990); *Roesberg*, 85 F.R.D. at 296-97; *see also, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5<sup>th</sup> Cir. 2004) (subpoena duces tecum). This requires DHR to show how the request is overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden, time, or expense involved in responding. *E.g., Heller v. City of Dallas*, 303 F.R.D. 466, 490 (N.D.Tex. 2014); *Waddell & Reed Financial*, 222 F.R.D. at 454. Absent such a showing, Defendants' overbreadth and undue burden objections too are due to be rejected.

Even if DHR's conclusory assertions were somehow deemed sufficient to carry its initial burden, *e.g., McLeod*, 894 F.2d at 1485, request number 28 is not overly broad (or broad at all); and compliance with it would not be so onerous as to justify either a bar or even a restriction on Judge Kelly's discovery of that information. As shown above, the requested information is directly relevant not only to the subject matter of this action, but also to specific cases in the formal charges alleged by JIC in the COJ complaint, as well as Judge Kelly's affirmative defenses. Judge Kelly has legitimate need for the information, no access to it herself (including her counsel), and a logical source for obtaining the information in DHR.

The substance of the request is narrow and particularly described: identification of former employees, their last DHR position, and their current or last-known contact information (current employer, address, and phone number(s)). The geographic scope is likewise narrow and tailored, *i.e.*, limited to former employees in the Montgomery County DHR – the group of former employees most likely to have knowledge of the dependency (and other) DHR cases assigned to Judge Kelly (as a Montgomery County judge), DHR's complaints concerning those cases, and any surrounding circumstances. The request likewise is properly limited in its temporal scope

(January 1, 2012 through present): the formal charges in the COJ complaint against Judge Kelly cover roughly the period of 2013 through 2016, but many of the cases at issue were pending and relevant events occurred well before 2013 – leading us to extend the request by one year earlier, to attempt to identify persons who are likely to have some relevant knowledge and who left DHR’s employ within a short time before the earlier events alleged in the COJ complaint. *See, e.g., Wiwa*, 392 F.3d at 818.

In filing its motion to quash, DHR was required to support its overbreadth and implicit undue burden objections as to request number 28 with a specific showing how that request is overly broad and/or unduly burdensome to comply with, coupled with evidence demonstrating the nature and extent of that burden. *E.g., McLeod*, 894 F.2d at 1485; *Heller*, 303 F.R.D. at 490; *Waddell & Reed Financial*, 222 F.R.D. at 454. DHR’s failure to do so amounts to waiver and requires rejection of their overbreadth and undue burden objections. *E.g., id.*

Even if DHR had attempted to do so, or were allowed to do so now in what amounts to its reply brief, the fact that its response might be deemed burdensome or expensive, or as interfering with or intruding on DHR’s normal operations, does not justify refusing otherwise appropriate discovery to Judge Kelly under request number 28. *E.g., Roesberg*, 85 F.R.D. at 297; *In re Folding Carton Antitrust Litigation*, 83 F.R.D. 251, 255 (N.D.Ill. 1978). In short, DHR has not tried to, and cannot, meet its burdens necessary to bar or limit discovery under request number 28 as overly broad or unduly burdensome.

c. DHR has the requested information and a duty to disclose it. Judge Kelly is not required to seek it elsewhere.

DHR objects that it is not the “official custodian of records” and that the request should be directed to the State of Alabama Personnel Department instead. Motion to Quash, at 10. But, DHR counsel has acknowledged to undersigned counsel that (i) the requested information

typically can be found in a standardized State form (Form 11) that shows an employee's separation from state service; (ii) DHR completes the Form 11 relating to each such employee, forwards the completed form to State Personnel, and keeps a copy of the completed form for DHR records; and (iii) DHR retains those records (and thus the requested information) as part of files it maintains relating to the former individual employees.<sup>6</sup>

DHR has not cited any authority defining "official custodian of records"; designating the State Personnel Department as "official custodian of records" with respect to the requested information (which, per DHR counsel, DHR admittedly has in its possession, custody, or control); requiring any request for such information be made to the State Personnel Department, as the purported "official custodian of records" *only*; or, especially, *prohibiting* Judge Kelly from requesting and obtaining the information at issue from DHR.

DHR's objection on this point, if sustained, would require Judge Kelly to start from scratch, issue a new subpoena and potentially run the same gauntlet (i.e., request, objections and/or motion to quash, conference regarding objections, and response or motion to compel) with another State agency, and seek the same documents and information – even though obtainable from DHR itself -- from the State Personnel Department.

But, DHR has a duty to produce all requested discoverable information available to it, i.e., in its possession, custody, or control. *E.g., Ex parte Dorsey Trailers*, 397 So.2d at 104. And, the claim that the requested discovery may be obtained from the public record or another source, or even is already in the requesting party's possession, does not bar otherwise appropriate

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<sup>6</sup> Indeed, if Judge Kelly's counsel understands correctly, the information that Judge Kelly requested and DHR would require us to obtain from State Personnel is information (or is mostly information) that DHR provided to State Personnel (in the form of the completed Form 11's) in the first instance.

discovery from the responding entity, here DHR. *E.g., id.* at 107 (information allegedly already in requesting party's possession); *Fort Washington Resources, Inc. v. Tannen*, 153 F.R.D. 78, 79 (E.D.Pa. 1994) (information in requesting party's possession or obtainable from another source); *Petruska v. Johns-Manville*, 83 F.R.D. 32, 35 (E.D.Pa. 1979) ("not usually a ground for objection that the information is equally available to the interrogator or is a matter of public record")(quoting 8 Wright & Miller, Fed. Prac. & Proc.: Civil 2d §2014, at 111).

DHR's transparent effort to avoid searching for and producing discoverable information in its own possession, and to shift the burden to Judge Kelly to start from scratch and jump through all the same hoops necessary to seek the same information from another State agency – when it can be obtained from DHR --, should be rejected.

- d. The information sought is not sensitive information. Even if it were, DHR cannot justify a ban or other significant restriction, such as an individual objection to release, on Judge Kelly's discovery of the requested information.

The authorities cited by DHR – a single Alabama Supreme Court case and a single non-binding Attorney General's opinion, *see* Motion to Quash, at 10 – do not support either that (i) the information sought, i.e., the names of former employees, their current employer (if known), and their last known address and telephone number(s), is protected from disclosure, or that (ii) the individual former employees must be given notice and an opportunity to object before the requested information may be disclosed in the context of civil discovery.

As a threshold matter, the sole case and single attorney General's opinion cited by DHR address disclosure to the public under the Open Records Act, not disclosure to litigants in a civil action under the Alabama Rules of Civil Procedure (as adopted pursuant to Rule 10 of the Rules of this Court). DHR's authorities accordingly are not applicable here. Furthermore, the requested information is not particularly sensitive (name, employer, address and phone), and not

generally deemed confidential; or at most any individual privacy interests are deemed minimal.<sup>7</sup>  
*E.g., Doyon v. Rite Aid Corp.*, 279 F.R.D. 43, 49 (D.Maine 2011).

Given the express discoverability of the identity and location of potential witnesses, e.g., Ala.R.Civ.P. 26(b)(1), it is not unusual for courts to order disclosure of names and contact information for potential parties or witnesses. *See, e.g., Ex parte Dorsey Trailers*, 397 So.2d at 106 (discoverability of names and addresses of witnesses to incident made the basis of complaint); *Doyon*, 279 F.R.D. at 47 (contact information of putative class members); *Putnam v. Eli Lilly and Co.*, 508 F.Supp.2d 812, 814-15 (C.D.Cal. 2007) (names, addresses, and telephone numbers of potential class members); *see also, e.g., John Alden Life Ins. Co.*, 999 So.2d at 485 (“This Court on several occasions has permitted the discovery of the name of non-party customers in other fraud cases.”). Indeed, courts often require disclosure of personnel records and similar documents containing personal information more sensitive than simply names and contact information when relevant and thus otherwise discoverable. *See, e.g., Coughlin v. Lee*, 946 F.2d 1152, 1159 and n. 27 (5<sup>th</sup> Cir. 1991)(collecting Title VII cases, where plaintiffs must demonstrate pretext, in which “courts have customarily allowed a wide discovery of personnel files”).

As shown in the discussion of the relevance of the information sought by request number 28, Judge Kelly has a legitimate need for the information, *see, e.g., Doyon*, 279 F.R.D. at 49 (noting plaintiffs’ need for the requested information); and she lacks access to the information herself. And, DHR is a logical source to identify its former employees in the Montgomery County DHR office since January 1, 2012; each former employee’s last position in that office;

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<sup>7</sup> Judge Kelly is *not* seeking, e.g., persons’ Social Security numbers, personal financial information, or confidential medical information.

and each individual's current or last known contact information.<sup>8</sup> Even if DHR could show any legitimate privacy interest any of these former employees might have in his or her name, DHR job title, and current contact information, that interest would *not* bar disclosure to Judge Kelly.<sup>9</sup>

### Conclusion

For all the foregoing reasons, all of DHR's objections to production of the documents and information sought by request number 28 are without merit and due to be denied.

WHEREFORE, PREMISES CONSIDERED, Judge Kelly respectfully requests that this Court deny DHR's motion to quash as to request number 28 of her subpoena duces tecum; and enter an order requiring ADHR and MDHR to produce the requested documents and information within ten (10) days of the date of entry of the order.

Respectfully submitted this 21<sup>st</sup> day of December, 2017.

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<sup>8</sup> Moreover, it is much more effective (i.e., more efficient and capturing much more complete information) for Judge Kelly to obtain the requested information by a document subpoena to DHR as an entity than by taking the deposition of 1 or more DHR representatives, the only other available method of discovery from a non-party.

<sup>9</sup> Indeed, even assuming that DHR were to meet its burden of showing good cause, *e.g.*, Ala.R.Civ.P. 26(c), DHR could obtain at most an appropriate protective order limiting dissemination of the information (e.g., similar to the consent protective orders already entered in this action) – not a ban on disclosure. *E.g.*, *Doyon*, 279 F.R.D. at 49-50; *Putnam*, 508 F.Supp.2d at 814-15.

/s/ Mark Englehart  
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**Attorneys for Judge Anita Kelly**

**Certificate of Service**

I hereby certify that a copy of the foregoing has been FILED electronically with the Court of the Judiciary and a copy of the same emailed and/or hand delivered to the person(s) shown below on this 21<sup>st</sup> day of December, 2017, as follows:

Mr. Billy C. Bedsole – Chairman  
Mrs. Jenny Garrett – Executive Director  
Rosa H. Davis, Esq.  
William A. Gunter V, Esq.  
Judicial Inquiry Commission  
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November 27, 2017

**BY E-MAIL (sharon.ficquette@dhr.alabama.gov and Felicia.brooks@dhr.alabama.gov )  
AND FAX TRANSMISSION (242-0689)**

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RE: *In re: Anita Kelly*  
Court of the Judiciary Case No. 50  
Subpoena duces tecum to Alabama DHR

Dear Counsel:

We have received non-party Alabama Department of Human Resources' motion to quash, for protective order, and for compensation regarding Judge Anita Kelly's subpoena duces tecum to DHR for the production of documents and electronically stored information. As part of its motion to quash or for protective order, DHR has asserted objections to the document requests on the grounds, among others, that the requests seek production of documents subject to the attorney-client privilege, attorney work product doctrine, intra-governmental executive privilege, confidential informer privilege, and/or various statutory confidentiality privileges applicable to different types of information maintained by DHR.

Pursuant to Ala.R.Civ.P. 26(b)(6)(A) and Rule 10 of the Rules of Procedure of the Court of the Judiciary, Judge Kelly formally requests that DHR produce a privilege log regarding each document or other item of information withheld that describes sufficiently for each document or other item of information the specific privilege(s) said to be applicable, and the nature of the documents, communications, or things not produced, as to enable Judge Kelly to contest DHR's claims of privilege. As to communications or documents relating to communications, that should include (but not be limited to), for example, the names of the parties to the communications, the date of the communication, and the subject(s) of the communication.

Because the Court-imposed discovery schedule and trial setting significantly limit the time available to us to obtain and/or engage in motion practice (if necessary) to obtain, and then review, the requested information, we request that you provide this privilege log within ten (10) days from the date of this letter (i.e., by December 7, 2017), instead of the

Exhibit 1

Sharon E. Ficquette, Esq. and Felicia M. Brooks, Esq.  
RE: *In re: Anita Kelly*  
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twenty-one (21) days provided for in Rule 26(b)(6)(A). If DHR will not agree to provide the requested privilege log within ten (10) days from the date of this letter, please let us know immediately, so we may seek appropriate relief from the Court.

Also, if DHR is willing to discuss production without need for motion practice of any of the disputed documents or information that it has objected to producing, perhaps subject to conditions such as, e.g., Judge Kelly and counsel agreeing to a protective order that preserves the confidentiality of the requested information, please call me at 782-5258 or otherwise contact me at your earliest possible opportunity.

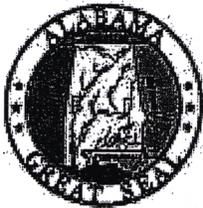
Please do not hesitate to contact me if you have any questions or if there are any problems with this request. Thank you in advance for your anticipated prompt cooperation in this matter.

Sincerely,



Mark Englehart  
One of counsel for Judge Anita L. Kelly

Cc: All by e-mail:  
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Kay Ivey  
Governor

**State of Alabama**  
**Department of Human Resources**

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Nancy T. Buckner  
Commissioner

**VIA ELECTRONIC MAIL and FIRST CLASS MAIL**

December 4, 2017

Mark Englehart  
Englehart Law Offices  
9457 Alysbury Place  
Montgomery, AL 36117-6005

**RE: In re: Anita Kelly**  
**Court of the Judiciary Case No. 50**  
**Subpoena duces tecum to Non-party - Alabama DHR**

Dear Mr. Englehart:

You have submitted a request regarding the production of a privilege log concerning each document or other item of information withheld that describes sufficiently for each document or other item of information the specific privilege(s) said to be applicable, the nature of the documents, communications, or things not produced. The Department does object to producing a privilege log given the Department's pending motion before the Court of the Judiciary regarding the documents. Additionally, the Department's pending motion seeks a ruling on the breadth, materiality, and relevance of your discovery request.

Of most importance is that the complaint consisting of the charges in part relate to matters concerning juvenile cases. Any communications about confidential juvenile cases among agency attorneys with agency staff are protected by the attorney client privilege. Any work as relates to each case by an agency attorney would inherently entail the attorney work product. Developing a privilege log that entails communications of any nature regarding the cases that concern your client from 2012 to the present is overly burdensome and not essential.

Letter to Englehart

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December 4, 2017

The Department submitted that information to the Alabama Court of Judiciary. Moreover, information related to many of your requests can be obtained from the Alabama Office of Courts.

We have just received an order from the Court for the parties to confer. Please advise if you can meet me at my office tomorrow or another time this week. We also need to discuss recent deposition notices.

Best regards,

A handwritten signature in black ink, appearing to read 'Felicia M. Brooks', written in a cursive style.

Felicia M. Brooks

Deputy Attorney General

cc: Via email:

H. Lewis Gillis, Esq.

Kristen J. Gillis, Esq.

Rosa H. Davis, Esq.

William Gunter, V., Esq.