



IN THE MATTER OF:
ANITA KELLY
Circuit Judge, Fifteenth Judicial Circuit

ORDER

This Court has received filings from Judge Kelly and the Alabama Department of Human Resources ("DHR") regarding their dispute over request no. 28 of the subpoena duces tecum Judge Kelly had issued to DHR. Request no. 28 states:

"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)."

Rule 26, Ala. R. Civ. P., generally permits broad discovery 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). Rule 26(b)(1), Ala. R. Civ. P., states:

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including ... the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

As the entity seeking a protective order from Judge Kelly's request for discovery, DHR

"'must either show good cause why the objected-to deposition or production of documents would be unduly burdensome or expensive, oppressive, embarrassing or annoying, or that the subject matter sought to be discovered is privileged.'"

Ex parte Scott, 414 So. 2d 939, 941 (Ala. 1982) (quoting Assured Investors Life Ins. Co. v. National Union Assocs., Inc., 362 So. 2d 228, 231 (Ala. 1978), overruled on other grounds, Ex parte Norfolk S. Ry. Co., 897 So. 2d 290 (Ala. 2004)).

DHR argues that request no. 28 is overly broad and irrelevant to the complaint against Judge Kelly. DHR asserts that Montgomery County DHR currently has almost 150 employees who are assigned to multiple areas including Adult Protective Services, Child Protective Services, Food Assistance, Child Support, Adoption, Foster Care, Family Assistance, and Family

Services, and DHR contends that many of its employees who left DHR during the relevant time period had nothing to do with or knowledge of any matter relevant to the events underlying the complaint in this case.

DHR argues further that request no. 28 inherently involves an attempt by Judge Kelly to discover confidential information. According to DHR, its records are confidential, and its employees (and former employees) "cannot under law discuss juvenile cases without a court order or testifying directly in a court proceeding that is protected as in juvenile court." (DHR's response dated December 29, 2017, p. 4.) DHR also asserts that any discussion with former employees about DHR matters would involve information that, DHR contends, is protected by various privileges. Finally, DHR asserts that Judge Kelly will be able to obtain from other sources the information she seeks from DHR regarding the identity of and contact information for former DHR employees who may have knowledge about the matters giving rise to the complaint in this case.

Judge Kelly argues that request no. 28 is not overbroad and that a list of former DHR employees would likely lead to discoverable facts on several issues such as matters included

in the complaint in this case and DHR's actions in those particular matters as well as defenses asserted by Judge Kelly in this case. Judge Kelly further asserts that she is not required to seek discoverable information elsewhere if DHR in fact has it.

This Court is of the opinion that Judge Kelly is entitled to a list or documents from DHR that provide the name, last known address, and the position held at DHR for any employee whose employment with DHR ended during the time period January 1, 2012, through the present and who, to DHR's knowledge, worked on or had any involvement with any matter in which Judge Kelly was involved. Accordingly, DHR is hereby **ORDERED** to provide, at Judge Kelly's expense, this information to Judge Kelly within 21 days of this order.¹

'The filings before the Court indicate that DHR has in its files a form entitled "Form 11" that is provided by the Alabama State Personnel Board and that DHR is required to complete for each employee who leaves DHR. Thus, it appears that DHR has the relevant information available in its files.

As to any concerns over the confidentiality of the information on Form 11, those concerns should be addressed in the proposed protective order that this Court is requiring Judge Kelly and DHR to jointly submit. Further, as to DHR's contention that Ala. Act No. 2009-759 requires individuals to consent before their information on "Form 11" may be released, Act No. 2009-759 does not require consent if the information is provided, as is the case here, "pursuant to an administrative or judicial subpoena or order."

This Court is cognizant of the very real concerns DHR has about matters of privilege and confidentiality. Accordingly, this Court further **ORDERS** that, before contacting any individual who previously worked for or was employed by Montgomery County DHR, Judge Kelly must give at least 48 hours' notice to DHR of her intention to do so. This Court further **ORDERS** that DHR has the right to have an attorney or another representative present, either in person or via phone or videoconference, during any questioning of any individual whom Judge Kelly contacts as a result of this order.

Finally, it is **ORDERED** that Judge Kelly and DHR are to jointly submit, by **noon on January 23, 2018**, a proposed protective order that will address the confidentiality concerns of DHR as to any former DHR employee whom Judge Kelly contacts as a result of this order. In the event Judge Kelly and DHR are not able to agree on a protective order, they each shall submit a proposed protective order to the Court by **5:00 p.m. on January 23, 2018**, and DHR shall appear at the previously scheduled pretrial hearing on **January 25, 2018, at 10:00 a.m.** in the conference room of the Alabama Court of Criminal Appeals, 300 Dexter Avenue, Montgomery, Alabama, to

address any issues not resolved by an agreed-upon protective order.

ORDERED this 12th day of January, 2018.



J. MICHAEL JOINER
CHIEF JUDGE
COURT OF THE JUDICIARY