

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA STATE CONFERENCE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE
(NAACP), as an organization and representative
of its members; *et al.*;

Plaintiffs,

v.

CASE NO. 4:07CV-402-SPM/WCS

KURT S. BROWNING, in his official capacity as
Secretary of State for the State of Florida,

Defendant.

**SECRETARY OF STATE'S RESPONSE TO
PLAINTIFFS' MOTION FOR ENTRY OF PROTECTIVE ORDER**

Defendant Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida, files this response to Plaintiffs' Motion for Entry of Protective Order (the "Motion") (doc. 24).

INTRODUCTION

The need for a protective order in this case arose from a concern that certain information Plaintiffs seek to discover—for example, driver's license and Social Security numbers—is confidential and exempt from disclosure under Florida's public record laws. The only dispute concerns the scope of the order proposed by Plaintiffs. Plaintiffs' proposed order, by permitting any person to designate virtually any document confidential, extends confidentiality far beyond the specific privacy interests that call for protection. The Secretary does not oppose the entry of a focused protective order directly tailored to protect

the confidentiality of information exempt from the public record provisions of Article I, Section 24(a) of the Florida Constitution and Chapter 119 of the Florida Statutes.

ANALYSIS

Courts have historically recognized a “general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 & n.7 (1978). The First Amendment and Federal Rule of Civil Procedure 26(c) accordingly require a party seeking the confidentiality of discovery materials to show “good cause,” *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310 (11th Cir. 2001), and a “district court must articulate its reasons for granting a protective order sufficient for appellate review,” *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355 (11th Cir. 1987).

“Good cause,” though “difficult to define in absolute terms, . . . generally signifies a sound basis or legitimate need to take judicial action.” *Id.* at 356. The Eleventh Circuit has considered four factors to determine whether good cause exists: (1) the severity and likelihood of the perceived harm; (2) the precision with which the order is drawn; (3) the availability of a less onerous alternative; and (4) the duration of the order. *Id.* An “umbrella” protective order, which allows the producing party to designate documents confidential, is warranted where (1) the complexity of the litigation renders a document-by-document review of discovery materials impracticable; and (2) the parties consent to the order. *Id.* at 357.

The only reason advanced either by Plaintiffs or the Secretary for the entry of a protective order in this case is the exemption of certain information which Plaintiffs seek

from disclosure under Florida's public record laws. Section 97.0585(1), Florida Statutes, provides, for example, that "[t]he social security number, driver's license number, and Florida identification number of a voter registration applicant" is "confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution and may be used only for purposes of voter registration." Likewise, "[t]he signature of a voter registration applicant or a voter may not be copied and is exempt for that purpose from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution." § 97.0585(2), Fla. Stat. The privacy protections afforded by Florida law to voter registration applicants reflect a well reasoned policy that counsels in favor of confidentiality in this case.

Plaintiffs' proposed protective order is unnecessarily broad and is not precisely drawn to protect the privacy interests of voter registration applicants. Rather, it would permit any party or nonparty "producing documents in connection with this Proceeding [to] designate such documents as 'Confidential'" *See* Doc. 24-2 at 3. Any document that "refers to confidential personal information of Florida residents" would, under Plaintiffs' proposed order, be subject to a designation of confidentiality. Whether a document contains "confidential personal information" would, presumably, be determined by the producing party. As a result, Plaintiffs' proposed "umbrella" order would extend confidentiality not only to information exempt from disclosure under Florida's public record laws, but also to virtually any document produced in this action.

Plaintiffs have not articulated any basis of good cause for the extended confidentiality they seek. Indeed, at this stage, there is no "sound basis or legitimate need" for a confidentiality order protecting documents other than those exempt from

disclosure under Florida's public record laws. *In re Alexander Grant & Co. Litigation*, 820 F.2d at 356. Good cause, as the Eleventh Circuit has noted, requires the Court to consider, among other factors, the "the precision with which the order is drawn." *Id.* Here, the order might be drawn with exact precision, protecting the confidentiality of information that is confidential and exempt from the public record provisions of Article I, Section 24(a) of the Florida Constitution and Chapter 119 of the Florida Statutes. There is simply no good cause to go further and envelop potentially all discovery in secrecy.

The order proposed by Plaintiffs also fails the Eleventh Circuit's test for an "umbrella" protective order allowing the producing party in good faith to designate documents confidential. The Eleventh Circuit has upheld orders of such breadth "in complex litigation where document-by-document review of discovery materials would be [im]practicable." *See id.* at 354, 357 (approving an umbrella order as to "discovery materials compiled in a series of complex securities actions consolidated for discovery purposes"); *see also McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 92 (11th Cir. 1989) (approving an umbrella order where the "case involve[d] allegations of violations of federal security laws and RICO and discovery . . . delved into the financial affairs of 139 plaintiffs"). Here, Plaintiffs have not alleged that a document-by-document review of discovery materials is impracticable, and the Secretary continues to rely on Plaintiffs' assurance that "Plaintiffs do not seek overly broad or burdensome discovery." Doc. 9 at 7.¹ Because the volume of discovery in this case does not preclude document-

¹ In addition, the Eleventh Circuit, in upholding umbrella protective orders, has required that "the parties consent to the order." *In re Alexander Grant & Co. Litigation*, 820 F.2d at 357. Needless to say, this requirement is not satisfied here.

by-document review, an umbrella protective order is not warranted.

CONCLUSION

The privacy interest at stake here is narrow and easily defined. Information which the Florida Legislature has exempted from public disclosure should not be made public circuitously through the discovery process. This Court should secure the confidentiality of such information by an appropriately tailored protective order. There is no good cause, however, to go beyond this specific privacy interest and cover virtually all documents produced in this case with confidentiality. Accordingly, the Court should enter an order providing for the confidentiality of information that is exempt from the public record provisions of Article I, Section 24(a) of the Florida Constitution and Chapter 119 of the Florida Statutes.

Respectfully submitted,

/s/ Andy Bardos

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CERTIFICATE OF SERVICE

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