IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FAIR FIGHT ACTION, INC., *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *et al.*,

Defendants.

CIVIL ACTION FILE

NO. 1:18-CV-5391-SCJ

ORDER

This matter appears before the Court on Plaintiffs' Motion to Compel (Doc. No. [262]), filed with permission of the Court.

I. BACKGROUND

On March 6, 2020, Plaintiffs filed a Motion to Compel, in which they ask the Court to order Defendants to search the private email accounts of any person whom Defendants know to have used a personal email account for Secretary of State business to determine if those accounts contain any documents that are responsive to Plaintiffs' Requests for Production. Doc. No. [262], p. 1. In subsequent briefing, Plaintiffs limited their request to six custodians:

(1) Governor Kemp, (2) Secretary Raffensperger, (3) David Dove, (4) Ryan Germany, (5) Chris Harvey, and (6) Jordan Fuchs. Doc. No. [283], p. 6.

The impetus for Plaintiffs' motion was the February 25, 2020 release of a memorandum of the United States House of Representatives, Committee on Oversight and Reform ("House Oversight Committee") concerning voter suppression in minority communities. Doc. Nos. [255-1]; [283], p. 1. Plaintiffs assert that the memorandum shows that documents were produced to the House Oversight Committee, "apparently by the Kemp for Governor campaign," that Plaintiffs have not received in the context of their discovery requests in the case *sub judice*. Doc. No. [262-1], p. 3.[1]

The three documents at issue are described as follows:

(1) a February 17, 2017 email from former Secretary of State (now Governor) Brian Kemp—using a private email service (a Gmail account)—to (presumably) Kansas Secretary of State, Kris Kobach. Doc. Nos. [255-1], p. 8; [255-5], p. 1. Then-Secretary Kemp was asked to email a substitute resolution to be

[1] By way of background, Plaintiffs state as part of its investigation, the House Oversight Committee sent requests for documents to both Governor Kemp and Secretary Raffensperger. Doc. No. [255], p. 2. Plaintiffs included copies of the letter requests to Governor Kemp and Secretary Raffensperger in the record at Doc. Nos. [255-2] and [255-3].

introduced to the National Association of Secretaries of State that called upon President Trump to establish a "voter fraud taskforce to root out fraud where it exists in some states and recommend legislation and best practices to ensure voter fraud never occurs again in a national election." Doc. Nos. [255-5]; [262-1], p. 5.

(2) a September 23, 2017 email chain which began when then-Secretary of State Kemp forwarded (from his Gmail account) a September 23, 2017, article from *The Atlanta Journal-Constitution* with the headline "Georgia resets rules on voter challenges after a town got it wrong." Doc. No. [255-6]. In forwarding the article, Kemp wrote in the subject line: "Good work, this story is so complex folks will not make it all the way through it." Id. Kemp then sent the email to the Gmail account of David Dove, who at the time was his Chief of Staff and General Counsel in the Secretary of State's Office, with copies to Tim Fleming (at his Gmail account), who at the time was a Deputy Secretary of State, and to Ryan Germany (at his Gmail account), who at the time was an assistant general counsel in the Secretary of State's Office. Doc. Nos. [255-6]; [262-1], p. 3. He also sent this

email to someone named Ryan Mahoney at a "kempforgovernor.com" email address and Jared Thomas at a Gmail address. Doc. No. [255-6].[2]

(3) an October 2017 email chain that begins with a mass campaign email from Stacey Evans, who at the time, was running in the Democratic gubernatorial primary against Stacey Abrams. Doc. Nos. [255-9]; [262-1], p. 4. Ms. Evans' email focused on the Secretary of State's cancellation of the voter registrations of 591,500 voters. Doc. No. [255-9], p. 2. David Dove received a copy of this email at his Gmail account. Id. As described by Plaintiffs, "Mr. Dove, with no comment other than what are apparently 'laughing so hard they are crying' emojis, forwards the email to Kemp at his kempforgovernor email and to Tim Fleming and Ryan Germany at their [Gmail] accounts. Kemp responded with another emoji which, although admittedly not perfectly clear, appears to be a vomiting emoji." Doc. No. [255], p. 5.

Plaintiffs assert~~s~~ that these three documents constitute evidence that some of the Secretary of State employees (including former Secretary of State, now

[2] Plaintiffs note that other documents on the same issue (concerning the reporter's attempt to fact-check *The Atlanta Journal Constitution* article via correspondence with David Dove at his official state email address) have been produced as part of Defendants' production. Doc. Nos. [255-7]; [255-8].

Governor Kemp) used personal email accounts to communicate with each other about official state business concerning issues directly relevant to Plaintiffs' claims in this case, including voter disenfranchisement and suppression. Doc. Nos. [262], p. 1; [262-1], p. 6.[3] Plaintiffs state that they have reason to believe the emails appended to the House Oversight Committee memorandum "are reflective of additional responsive emails in the personal email accounts." Doc. No. [283], p. 10.[4] Plaintiffs state that Defendants have refused to search the personal email accounts of the six custodians. Doc. No. [262-1], p. 7.

Defendants filed a response brief in opposition to the pending Motion to Compel on March 20, 2020. Doc. No. [273]. Plaintiffs filed a reply brief on March 27, 2020. Doc. No. [283]. This matter is now ripe for review.

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[3] The emails at issue do not mention (or include on the sender-recipient lines), current Secretary of State/Defendant, Brad Raffensperger, Chris Harvey, or Jordan Fuchs. In their motion, Plaintiffs state that they "are not required to prove with certainty at this juncture that all SOS employees communicated in this manner." Doc. No. [262-1], p. 11.

[4] By contrast, Defendants state that "if there were something else truly responsive to Plaintiffs' discovery, the [House Oversight Committee] would have unveiled it." Doc. No. [273], p. 12. Plaintiffs disagree and assert that the House Oversight Committee investigative requests for documents did not cover the entirety of their current litigation discovery requests. Doc. No. [283], p. 12, n.11.

II. LEGAL STANDARD

Under the Federal Rules of Civil Procedure, parties may obtain discovery regarding any matter that is not privileged and which is relevant to the subject matter involved in the pending action and proportional to the needs of the case. See Fed. R. Civ. P. 26(b)(1). If one party does not comply with discovery requests, the opposing party may seek a motion to compel discovery responses. See Fed. R. Civ. P. 37(a)(1).

"A party does not have authority to compel the production of documents outside the possession, control, or custody of a party to the case through a motion to compel under Rule 37." Bloodworth v. United States, 623 F. App'x 976, 979 (11th Cir. 2015). The party seeking production of the documents, here Plaintiffs, have the burden of showing control. See United States v. Int'l Union of Petroleum & Indus. Workers, 870 F.2d 1450, 1452 (9th Cir. 1989) ("The party seeking production of the documents . . . . bears the burden of proving that the opposing party has such control.").

The Eleventh Circuit has held that "[c]ontrol is defined not only as possession, but as the legal right to obtain the documents requested upon demand." Searock v. Stripling, 736 F.2d 650, 653 (11th Cir. 1984). As correctly

noted by Plaintiffs, the Eleventh Circuit appears to have recognized that control is also when a party has a "practical ability to obtain" responsive documents. Sergeeva v. Tripleton Int'l Ltd., 834 F.3d 1194, 1201 (11th Cir. 2016) (citing Costa v. Kerzner Int'l Resorts, Inc., 277 F.R.D. 468, 470–71 (S.D. Fla. 2011)).

If the Court finds that one or both parties faltered in their discovery obligations, it has discretion to compel appropriate discovery responses. See Commercial Union Ins. Co. v. Westrope, 730 F.2d 729, 731 (11th Cir. 1984) ("Case law states that a motion to compel discovery is committed to the discretion of the trial court . . . ."). "[A] district court is allowed 'a range of choice'" in deciding whether to grant or deny a motion to compel discovery responses. Holloman v. Mail-Well Corp., 443 F.3d 832, 837 (11th Cir. 2006).

III. ANALYSIS

While the parties have raised a number of arguments that range from timeliness[5] to scope of discovery, the Court finds that the threshold issue here

[5] The Court particularly acknowledges that both parties raise valid arguments regarding the issue of timeliness. More specifically, in response to Defendants' argument that Plaintiff's motion was untimely filed, Plaintiffs state in their reply brief that "immediately upon learning that Defendants addressed issues critically important to this case using their private email accounts" on February 25, 2020, they moved to compel a targeted production of those emails ten days later on March 6, 2020. Doc. No. [283], p. 7.

concerns control of personal email accounts of the six custodians named in Plaintiffs' motion, who are current and former employees of the Office of Georgia's Secretary of State ("SOS"). To determine whether Defendants have possession, custody, and control of the personal email accounts, the Court must decide whether Plaintiffs' proffered example documents show that SOS employees were conducting official SOS business on personal accounts, using personal accounts for professional work, or otherwise communicating about governmental affairs on personal accounts.

In their motion, Plaintiffs assert that the House Oversight Committee documents that they have proffered show "on their face" that SOS personnel were using personal (and non-official SOS accounts) to discuss SOS matters responsive to Plaintiffs' discovery request. Doc. No. [262-1], p. 11. Plaintiffs also assert that "[w]hen a government employee uses a personal email account to communicate about governmental affairs, the personal email falls within the relevant government agency's 'possession, custody, or control.'" Doc. No. [262-1], p. 8. Additionally, Plaintiffs contend that governing case law interpreting the federal Freedom of Information Act ("FOIA") mirrors the "possession, custody, or control" standard for discovery obligations: "the agency must be in control of

the requested materials at the time the FOIA request is made," meaning "the materials have come into the agency's possession in the legitimate conduct of its official duties." Id. at p. 8. Applying this FOIA standard, courts have concluded that employees' communications on non-agency accounts may constitute "agency records" subject to the FOIA. Id. at p. 9. Plaintiffs further contends that Georgia's Open Records Act ("ORA") is in accord and that "[w]hile Georgia courts have not yet considered whether this statutory definition extends to email sent or received by government employees on topics related to public affairs, the definition parallels—or is even broader than—the definitions under which courts have found a public right to personal emails like those at issue here." [6] Id. at p. 10.

In response, Defendants assert that Secretary of State Raffensperger, "does not have possession, custody, or control of private email accounts." Doc. No. [273], p. 7. Defendants assert that "the State of Georgia and its agencies cannot exercise control over private email accounts simply because a person is employed by the State." Doc. No. [273], p. 19. They further state that "the Office

[6] While Plaintiffs concede that this is not an open records case, they argue that Defendants "suggest no logical basis. . . for holding that employees' personal emails can constitute government records for the purposes of an agency's open records obligations but not for its discovery obligations." Doc. No. [283], p. 13.

of the Secretary of State does not use private email accounts to conduct official state business, and Plaintiffs' unsupported assertion does not show otherwise." Doc. No. [273], p. 6.[7]

Defendants assert that while the communications at issue involve individuals who serve (or served) in the Secretary of State's office, the fundamental nature or purpose of these communications is "unofficial personal communications." Doc. No. [273], p. 11. More specifically, Defendants state that "Plaintiffs' proffered examples show only campaign and personal banter—not the conduct of State business." Doc. No. [273], p. 19.

In reply, Plaintiffs appear to concede that "purely personal communications among SOS employees are not within Defendants' 'control'" for present purposes, but state that they are only seeking "communications on issues directly related to this case and [the employee's] work at the SOS." Doc. No. [283], p. 15. Plaintiffs state that while Defendants may not have been

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[7] Plaintiffs state that there is no citation of factual or record support for Defendants' statement that the Office of the Secretary of State does not use private email accounts. Doc. No. [283], p. 5. The Court has accepted and considered the statement made by Counsel for the Secretary of State (for purposes of the pending motion only) in their roles as officers of the court, with a duty of candor. Cf. Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993) ("All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice.").

"doing" state business, "they were certainly talking about state business—that being the very important business of conducting elections." Doc. No. [283], p. 5, n.6. Plaintiffs state that the House Oversight Committee "emails show that SOS employees used their personal emails to discuss official business, including the 'work' of top SOS officials to avoid public scrutiny of shortcomings in the State's elections system." Doc. No. [283], p. 15. Plaintiffs also state that "government employees' personal emails do not need to constitute strictly 'official' communications to constitute government records within the control of the relevant entity." Doc. No. [283], p. 15, n.14.

Upon review, the Court finds that Plaintiffs have failed to satisfy their burden of proving that Defendants have control over the private email accounts of the six custodians at issue. As acknowledged by Plaintiffs, this is not an open records case, as the FOIA does not apply to state agencies and there is no Georgia ORA request before this Court. Thus, their reliance on the FOIA and Georgia ORA and the cases litigated under those statutes is misplaced. Plaintiffs nevertheless argue that even if the Office of the SOS was not a government agency, it would still be obligated to conduct a diligent search of personal email accounts of employees who used their personal accounts for their professional

work. Yet Plaintiffs' proffered examples do not demonstrate that official state business was conducted over private email accounts.

For example, the February 17, 2017 private email from Kemp to Kansas Secretary of State Kris Kobach contains no official state business, as it is devoid of any analysis, explanation or observations. Rather, it merely reinstates language from a resolution of the National Association of Secretaries of State. Moreover, with respect to both the September 23, 2017 email chain regarding an article from *The Atlanta Journal-Constitution* and the October 2017 email chain in response to a campaign email from Stacey Evans, the Court cannot see how these reactionary exchanges constitute official state business such that the SOS could be said to have control over the private email accounts at issue. The Court finds that these two exchanges constitute private commentary—not official government work.

Finally, while Plaintiffs acknowledge that Kemp and Dove are no longer SOS employees, they state that they are still employed by the State of Georgia and thus, "[f]or all intents and purposes, the SOS has the ability to obtain Kemp's and Dove's personal emails." Doc. No. [262-1], p. 13. Plaintiffs, however, cite no binding case law to this regard. Furthermore, even assuming the SOS does have control over document of former employees, the proffered examples still do not

sufficiently demonstrate that official state business was being conducted over private email accounts.

In sum, the Court concludes that Plaintiffs have failed to satisfy their burden of proving that Defendants have control over the private email accounts of the six custodians at issue.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Compel (Doc. No. [262]) is **DENIED**.

IT IS SO ORDERED this 1st day of April, 2020.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE