

# **EXHIBIT J**

## O'Connor, Bridget K.

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**From:** O'Connor, Bridget K.  
**Sent:** Sunday, January 26, 2014 11:11 PM  
**To:** 'Pocklington, Amy M.'  
**Cc:** Allen, Winn; thomas.farr@ogletreedeakins.com; allison@southerncoalition.org; AnitaEarls@southerncoalition.org; apeters@ncdoj.gov; AStein@tinfulton.com; bob.stephens@nc.gov; butch@butchbowers.com; catherine.meza@usdoj.gov; cbrook@acluofnc.org; dale.ho@aclu.org; david.cooper@usdoj.gov; Donovan, Daniel T.; \*dlieberman@advancementproject.org; gill.beck@usdoj.gov; jebenstein@aclu.org; john.russ@usdoj.gov; Rancour, Kimberly D.; Imcdonald@aclu.org; spencer.fisher@usdoj.gov; Yannucci, Thomas D.; ijoyner@NCCU.EDU; \*phair@advancementproject.org; Lange, Michelle A.; Strach, Phillip J.  
**Subject:** RE: Motion to Compel

Amy:

I write in response to your email from last evening. As an initial matter, we were surprised that Defendants would suggest that Plaintiffs have failed to meet and confer regarding discovery served over two months ago (and not complied with) and about which we have already had several conferences both with you and with the Court. In short, we disagree that Plaintiffs failed to meet-and-confer on the matters addressed in our Motion to Compel filed Friday evening. (Notably, and in contrast to the record here, Defendants did not not confer -- at all -- before filing your motion to quash.) I've laid out the basis for our disagreement below. But, I want to emphasize that as we explained in our motion, we are willing to continue to work with you to resolve some or all of these discovery issues. To that end, please feel free to call me tomorrow to discuss further the issues raised in the motion.

First, as described in our Motion to Compel and acknowledged in your email, Plaintiffs have met-and-conferred with Defendants several times now on these and other issues related to Defendants' efforts to respond to Plaintiffs' first set of RFPs. Moreover, Defendants have already filed briefs with the Court on related issues, including their motion seeking to add certain provisions to the ESI order. In the last of these meet-and-confer calls, Defendants' counsel stated plainly that it their position on whether Defendants intended to stand on their objections was "very clear." When I followed up to clarify whether that position was as articulated in your written responses to the RFPs and whether Defendants planned to produce responsive documents even if they fell within one of your objections, Defendants' counsel stated that you did not plan to produce documents to which you had objected. To us, that was a "very clear" statement that Defendants would not produce documents to which they objected in their written responses. Our motion therefore focuses on those objections.

Second, we very much disagree with your suggestion that Plaintiffs did not participate in last week's meet-and-confer in good faith or that the purpose of last week's call was not actually to address Defendants' written responses to Plaintiffs first RFPs. Mr. Allen's January 16, 2014 email to Defendants' counsel requesting the meet-and-confer specifically noted that: "During that call, we would like to discuss a number of issues related to the email below **and Defendants' written responses to Plaintiffs' Requests for Production.**" (Emphasis added.) Despite that specific request -- and despite the facts that (i) the RFPs at issue were served months ago in late November 2013; (ii) Defendants' written responses were issued weeks ago on January 8, 2014; (iii) that Defendants are presently overdue to produce documents responsive to those requests; and (iv) that most of

your team present on the call -- when asked about those written responses and Defendants' plans for making productions pursuant to those requests, Defendants expressed for the first time that they were not prepared to answer those questions, and in fact, that they would not be available to address those questions for another full week, until Thursday, January 30. (This, of course, came after the call had already been delayed once at Defendants' request.) Later in the call, however, Defendants' counsel did ultimately explain your intention to withhold documents on the basis of your written objections (as described above and in my email on Friday evening). Thus, the purpose of last week's call was precisely to address the question at issue, and Defendants answered the fundamental question on that point.

Third, in light of the Defendants' non-production of documents after two months (other than primarily public documents) and in combination with Defendants' continued pattern of delay, Defendants' response to Plaintiffs' fundamental question about their planned approach to producing documents (or, more importantly, to **not producing** documents) revealed to Plaintiffs that Defendants had no intention of producing documents in the broad and important categories to which Defendants had objected, and that Plaintiffs could not afford to wait any longer for Defendants to start complying with their obligations under the Federal Rules and the Court's instructions in this case. If Defendants are willing to waive their already asserted objections and positions, we look forward to receiving such documents as soon as possible. After our many meet-and-confer discussions, it is clear that the parties do not agree and we cannot continue to tolerate the Defendants' delay given the schedule in this case. Your suggestion that we needed to contact you again before filing the motions is, therefore, incorrect.

If Defendants' position with respect to its plans to stand on its objections has changed from Thursday's meet-and-confer call, please call us tomorrow to discuss the Defendants' position on the various categories of objections that Defendants have advanced. Of course, if we are able to resolve these disputes Plaintiffs would be happy to notify the Court of our agreements and, in fact, would welcome that opportunity. Our priority is still to obtain the discovery we have sought from Defendants and to which we believe our client is entitled in this important matter. It is the Defendants' failure to produce documents, much less in a timely fashion, that has led to the unfortunate circumstance of the Plaintiffs having to expend resources to compel the production of documents Defendants should have produced weeks ago.

Sincerely,

Bridget K. O'Connor

**Bridget K. O'Connor**

KIRKLAND & ELLIS LLP

655 Fifteenth Street, NW, Suite 1200

Washington, D.C. 20005

Ph: (202) 879-5048 F: (202) 879-5200

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**From:** Pocklington, Amy M. [mailto: Amy.Pocklington@ogletreedeakins.com]

**Sent:** Saturday, January 25, 2014 7:38 PM

**To:** O'Connor, Bridget K.

**Cc:** Allen, Winn; thomas.farr@ogletreedeakins.com; allison@southerncoalition.org; AnitaEarls@southerncoalition.org; apeters@ncdoj.gov; AStein@tinfulton.com; bob.stephens@nc.gov; butch@butchbowers.com; catherine.meza@usdoj.gov; cbrook@acluofnc.org; dale.ho@aclu.org; david.cooper@usdoj.gov; Donovan, Daniel T.;

\*dlieberman@advancementproject.org; gill.beck@usdoj.gov; jebenstein@aclu.org; john.russ@usdoj.gov; Rancour, Kimberly D.; lmcdonald@aclu.org; spencer.fisher@usdoj.gov; Yannucci, Thomas D.; ljoyner@NCCU.EDU;

\*phair@advancementproject.org; Lange, Michelle A.; Strach, Phillip J.

**Subject:** Motion to Compel

Counsel,

We received your Motion to Compel filed last night as well as the email from Bridgette O'Connor. In light of your failure to meet and confer on the subject matter of your motion to compel, we suggest that you withdraw the motion so that the Court's time and resources are not spent on matters that the parties have not discussed or attempted to reach agreement on.

The timing of your motion, on the heels of a meet and confer on ESI issues and immediately preceding a scheduled meet and confer on the subject matter of your motion to compel, as well as the tone of our last meet and confer, strongly suggest that you did not participate in that conversation in good faith as you are required to do. Instead, it is clear by the questions that were asked of us regarding your allegation that we were "standing on our objections," that your real purpose for a call on ESI issues was to prematurely set up a planned and probably already prepared motion to compel related to topics that were not scheduled to be discussed during the ESI meet and confer and which we advised we were not prepared to discuss for that very reason.

Thus, it is clear that you were planning to file this motion regardless of any statements or positions on our part or the outcome of that call. In addition, although, presumably unintentional, your Motion and supporting memorandum and Certificate of Compliance with Local Rule 37.1 contain blatant misrepresentations regarding the parties' communications and the defendants' position on the matters raised in your Motion, which require immediate correction. For example, you contend that during the parties' meet and confer on Jan. 23, "the **defendants addressed some of the issues** discussed herein (as addressed in this Motion and upon which the parties could not agree), but **refused** to address others. The parties are scheduled to hold another meet-and-confer ...on Jan. 30 to address **other discovery-related issues** that the Defendants indicated they were not prepared to address during the January 23, 2014 meet-and-confer call." This is simply not true.

The purpose of the Jan. 23 meet and confer was to discuss outstanding ESI issues raised in an email exchange between the parties, namely search terms and databases. The subject line of that email exchange supports that conclusion. During the course of that call, Plaintiffs asked if defendants intended to "stand on their objections" to written discovery requests. Defendants responded that they were simply not prepared to discuss each individual request as plaintiffs had never requested a meet and confer on those issue and that was not the purpose of the conference. Defendants offered to set up a separate call to address responses and objections to written discovery. Plaintiffs agreed to participate in that call. The parties went on to have a productive discussion, reaching agreement on a deadline for producing the SADLS and SEIMS databases (Jan. 31), using all of the new search terms proposed by plaintiffs and an agenda for the Jan. 30 meet and confer including: establishing time frames for producing emails and addressing responses and objections to discovery requests. In a follow up email communication, sent just hours after the meet and confer, Plaintiffs took the surprising position that Defendants were "standing on their objections." (Jan. 23 Email from Bridgette O'Connor). Defendants quickly responded to this email and clarified that we "intended to produce relevant not privileged documents and communications, notwithstanding our objections," and that we looked forward to discussing specific discovery requests on the Jan. 30 meet and confer. (Jan. 24 email from Phil Strach). Plaintiffs bizarrely answered that email by filing the instant motion to compel. This course of events suggests that Plaintiffs went into the meet and confer with a hidden agenda, namely to manufacture a basis for this motion to compel, and, consequently, did not participate in the meet and confer in good faith as required by the Rules.

As is clear from the above, defendants never **refused** to address the issues as plaintiffs represent to the Court. We simply suggested they be taken up at a different time and plaintiffs agreed. In fact, as we recall, plaintiffs understood defendants' concern about discussing issues on that call which they were not prepared to discuss because the call had been represented by plaintiffs as pertaining only to ESI issues. Despite this agreement to postpone that discussion, the defendants nevertheless answered plaintiffs' "fundamental question," which is now the subject of the motion to compel, in their Jan. 24<sup>th</sup> email, and confirmed that we would be producing relevant, not privileged documents, notwithstanding our objections. Moreover, the purpose of the Jan. 30 meet and confer is not to address "**other** discovery related issues," as plaintiffs represent. The purpose is to address **the exact issues** which are the subject of the motion to compel. If Plaintiffs would have preferred to hold that conference at an earlier time, they were free to so suggest, but Plaintiffs are not free to circumvent the rules and the process by filing premature motions and raising arguments and concerns that may very well be put to rest after a meaningful discussion on the topic. That is the fundamental purpose of the meet and confer requirements under the Rules.

To date, plaintiffs have served hundreds of discovery requests on defendants with additional requests coming in nearly weekly. In addition, plaintiffs have asked that defendants use well over 350 search terms to search electronic documents for over 45 custodians across several different agencies. In recognition of the compressed time frame in this case, Defendants are devoting substantial resources and significant time to diligently complying with all requests. In fact, defendants' counsel, their staff, and agency personnel have already spent hundreds of hours attempting to gather the relevant information and to comply with their obligations under the Rules. But, it is a monumental task and cannot be done "immediately" as plaintiffs continue to demand. Defendants asked plaintiffs nearly 2 months ago, to please identify the categories of documents that would be most useful so that we could perform the production in stages, on a rolling basis. For example, your motion to compel references the deadline for expert reports yet you have declined to advise us the material that is needed by your experts so we could facilitate that production. Instead, Plaintiffs rotely responded that all requests were equally important and that all required responses within the time allotted by the Rules. This position (in addition to baseless battles over non-existent discovery disputes) does nothing to advance the expedited schedule this case is on or the ability of plaintiffs to get the information they need. Regardless, defendants continue to work to produce the responsive information.

The SADLS and SEIMS databases will be produced no later than Jan. 31. The parties will meet and confer on the specific objections to requests and will attempt to secure agreement on a reasonable time frame for production of electronic documents. Given that this meet and confer, which is the subject of plaintiffs' motion to compel has yet to take place and that plaintiffs have already agreed to the database production deadline, also the subject of the motion to compel, the motion is both premature and moot. Accordingly, in conformity with plaintiffs' obligations under the Rules, it should be withdrawn immediately. Finally, your motion for expedited briefing should be withdrawn because you did not ask us for our position on that motion before it was filed as you are required to do under the Rules. Please advise of us of your course of action as soon as possible so that we may respond accordingly.

**PLEASE NOTE NEW ADDRESS**

**Amy M. Pocklington | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**

Riverfront Plaza - West Tower, 901 East Byrd Street, Suite 900 | Richmond, VA 23219 | Telephone: 804-663-2335 | Fax: 804-225-8641

[amy.pocklington@ogletreedeakins.com](mailto:amy.pocklington@ogletreedeakins.com) | [www.ogletreedeakins.com](http://www.ogletreedeakins.com) | [Bio](#)

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**From:** O'Connor, Bridget K. [<mailto:boconnor@kirkland.com>]

**Sent:** Friday, January 24, 2014 8:00 PM

**To:** Strach, Phillip J.

Cc: Pocklington, Amy M.; Allen, Winn; [thomas.farr@ogletreedeakins.com](mailto:thomas.farr@ogletreedeakins.com); [allison@southerncoalition.org](mailto:allison@southerncoalition.org); [AnitaEarls@southerncoalition.org](mailto:AnitaEarls@southerncoalition.org); [apeters@ncdoj.gov](mailto:apeters@ncdoj.gov); [AStein@tinfulton.com](mailto:AStein@tinfulton.com); [bob.stephens@nc.gov](mailto:bob.stephens@nc.gov); [butch@butchbowers.com](mailto:butch@butchbowers.com); [catherine.meza@usdoj.gov](mailto:catherine.meza@usdoj.gov); [cbrook@acluofnc.org](mailto:cbrook@acluofnc.org); [dale.ho@aclu.org](mailto:dale.ho@aclu.org); [david.cooper@usdoj.gov](mailto:david.cooper@usdoj.gov); Donovan, Daniel T.; [\\*dlieberman@advancementproject.org](mailto:*dlieberman@advancementproject.org); [gill.beck@usdoj.gov](mailto:gill.beck@usdoj.gov); [jebenstein@aclu.org](mailto:jebenstein@aclu.org); [john.russ@usdoj.gov](mailto:john.russ@usdoj.gov); Rancour, Kimberly D.; [lmcdonald@aclu.org](mailto:lmcdonald@aclu.org); [spencer.fisher@usdoj.gov](mailto:spencer.fisher@usdoj.gov); Yannucci, Thomas D.; [ijoyner@NCCU.EDU](mailto:ijoyner@NCCU.EDU); [\\*phair@advancementproject.org](mailto:*phair@advancementproject.org); Lange, Michelle A.

**Subject:** Re: Outstanding ESI issues

Phil: Thank you for your response. With respect to your statement that Defendants were surprised that we concluded from the meet-and-confer that Defendants plan to stand on their objections as stated in their January 8, 2014 responses to RFPs, Plaintiffs specifically asked whether Defendants intended to withhold documents on the basis of those objections and Mr. Farr stated that Defendants' position was "very clear" and then defense counsel elaborated that you did not intend to produce documents to which you had objected. In light of this response to this fundamental question, we believe that the parties have discussed this point. The requests at issue were served on Defendants months ago, Defendants asserted these objections in writing weeks ago, and have been due to produce documents relating to those requests since that time.

We look forward to speaking with you next week regarding to the other topics relating to the documents that you do plan to produce outside your objections, but on this point, we understood you to be quite clear that you do not intend to produce documents that fall within the scope of your objections.

Sincerely,  
Bridget K. O'Connor

**Bridget K. O'Connor**  
KIRKLAND & ELLIS LLP  
655 Fifteenth Street, NW, Suite 1200  
Washington, D.C. 20005  
Ph: (202) 879-5048 F: (202) 879-5200

On Jan 24, 2014, at 9:13 AM, "Strach, Phillip J." <[Phil.Strach@ogletreedeakins.com](mailto:Phil.Strach@ogletreedeakins.com)> wrote:

Bridget:

Thank you for your email. We will continue to work diligently to produce the requested databases as we have since the requests were made and will produce the relevant information from the SADLS and SEIMS databases by Jan. 31. We are surprised by your conclusion that we intend to stand on our objections. When you posed that question on yesterday's call, we specifically noted that because the call was for the purpose of discussing outstanding ESI issues, we were not prepared to discuss our objections to the RFPs. We suggested that we do that in another call, now scheduled for next Thursday, and you agreed. In general, we are collecting and will produce relevant, non-privileged documents and communications, notwithstanding our stated objections. However, the parties have not yet had any meaningful discussion, if any discussion at all, on whether any compromises may be reached on the specific objections we raised with respect to each RFP. We look forward to having those discussions next Thursday as we agreed we would do on yesterday's call.

Regards,

**Phillip J. Strach | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**

4208 Six Forks Road, Suite 1100 | Raleigh, NC 27609 | Telephone: 919-789-3179 | Fax:  
919-783-9412

[phil.strach@ogletreedeakins.com](mailto:phil.strach@ogletreedeakins.com) | [www.ogletreedeakins.com](http://www.ogletreedeakins.com)

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**From:** O'Connor, Bridget K. [<mailto:boconnor@kirkland.com>]

**Sent:** Friday, January 24, 2014 5:43 AM

**To:** Pocklington, Amy M.

**Cc:** Allen, Winn; [thomas.farr@ogletreedeakins.com](mailto:thomas.farr@ogletreedeakins.com); [allison@southerncoalition.org](mailto:allison@southerncoalition.org);

[AnitaEarls@southerncoalition.org](mailto:AnitaEarls@southerncoalition.org); [apeters@ncdoj.gov](mailto:apeters@ncdoj.gov); [AStein@tinfulton.com](mailto:AStein@tinfulton.com);

[bob.stephens@nc.gov](mailto:bob.stephens@nc.gov); [butch@butchbowers.com](mailto:butch@butchbowers.com); [catherine.meza@usdoj.gov](mailto:catherine.meza@usdoj.gov);

[cbrook@acluofnc.org](mailto:cbrook@acluofnc.org); [dale.ho@aclu.org](mailto:dale.ho@aclu.org); [david.cooper@usdoj.gov](mailto:david.cooper@usdoj.gov); Donovan, Daniel T.;

\*[dlieberman@advancementproject.org](mailto:dlieberman@advancementproject.org); [gill.beck@usdoj.gov](mailto:gill.beck@usdoj.gov); [jebenstein@aclu.org](mailto:jebenstein@aclu.org);

[john.russ@usdoj.gov](mailto:john.russ@usdoj.gov); Rancour, Kimberly D.; [lmcdonald@aclu.org](mailto:lmcdonald@aclu.org);

[spencer.fisher@usdoj.gov](mailto:spencer.fisher@usdoj.gov); Strach, Phillip J.; Yannucci, Thomas D.; [ijoyner@NCCU.EDU](mailto:ijoyner@NCCU.EDU);

\*[phair@advancementproject.org](mailto:phair@advancementproject.org); Lange, Michelle A.

**Subject:** RE: Outstanding ESI issues

Counsel:

Thank you for participating in the meet-and-confer yesterday regarding the outstanding issues relating to the Defendants' responses to Plaintiffs' discovery requests. Based on that discussion, it is our understanding that Defendants intend to stand on their objections as stated in their responses to Plaintiffs' 1st RFPs to the State Board of Elections and to Governor McCrory, and do not intend to produce documents where those stated objections apply. Defendants also stated that they would produce the SADLS and SEIMS databases no later than Friday, January 31, 2014 -- and that they would produce at least the SEIMS database sooner if it is feasible to do so. We look forward to receiving those databases as soon as possible. In light of the delays in producing those databases, we would ask that Defendants send those productions by Federal Express for Monday delivery to the Plaintiffs, and to confirm by email on Friday that those databases have gone out. Finally, we understand from yesterday's discussions that Defendants are proceeding and have begun to search for and review documents based on the current list of custodians and search terms that have been circulated between the parties, and that Defendants have agreed to accept the last set of search terms proposed by the Plaintiffs.

With respect to the meet-and-confer call that we discussed having on Thursday, January 30, 2014 as to other issues relating to the specifics of the documents that Defendants do plan to produce outside of their stated objections, Plaintiffs would propose that that call take place at 11 AM Eastern. We can use the following dial-in number for that call: 866-331-1856, code 2028795048. We expect to raise at least the following points for discussion on Thursday: (1) Defendants' expected timing for productions of responsive emails is based on their current search efforts (both when those productions will start and when they will be complete); (2) Defendants' expected timing for production of privilege logs; and (3) Defendants' expected timing for productions of hard copy and other non-email materials.

Sincerely,  
Bridget K. O'Connor

**Bridget K. O'Connor**  
KIRKLAND & ELLIS LLP  
655 Fifteenth Street, NW, Suite 1200  
Washington, D.C. 20005  
Ph: (202) 879-5048 F: (202) 879-5200

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