

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.,

Plaintiffs,

and

ROBERT HART, et al.,

Intervenor-Plaintiffs,

Case No. 2:13-cv-00953

v.

JUDGE WATSON
MAGISTRATE JUDGE KEMP

JON HUSTED,
in his Official Capacity as Secretary of State,

Defendant,

THE STATE OF OHIO,

Intervenor-Defendant,

and

GREGORY A. FELSOCI,

Intervenor-Defendant.

PLAINTIFFS' REPLY TO NON-PARTY CASEY'S RESPONSE TO PLAINTIFFS'
MOTION TO COMPEL PRODUCTION UNDER RULE 45

Plaintiffs' June 19, 2015 subpoena served on Mr. Terry Casey, Intervenor-Defendant-Felsoci's confidential (or "secret") co-client, specifically asked for the following:

4. Any and all documents and communications between Terry Casey, Intervenor-Defendant-Felsoci ("Felsoci"), agents of the 2014 campaign of John Kasich for Governor (including Matt Carle, Dave Luketic, and Steve Polesovsky), and/or John Musca, **relating to Felsoci's protest of Charlie Earl from January 1, 2014 to present;**

(Emphasis added).

This request for communications between Casey and agents of the Kasich Campaign was not limited or conditioned in any way, other than temporally ("from January 1, 2014 to present"). If the document or communication "relat[ed] to Felsoci's protest of Charlie Earl," and occurred between January 1, 2014 and June 19, 2015, it was to be produced.¹

According to MERRIAM-WEBSTER'S DICTIONARY, the verb "relate" means "to show or make a connection between (two or more things)." MERRIAM-WEBSTER'S ON-LINE DICTIONARY, <http://www.merriam-webster.com/dictionary/relate>. Hence, Request # 4 sought documents or communications that were "related" or "connected" to Felsoci's protest of Earl. Obviously, even documents and communications that occur after-the-fact can be "related" or "connected" to a prior event. And if these documents or communications discuss events that happen after-the-fact, they still must be related to and connected with the underlying event.

Even assuming that a protest can be broken down into its various procedural parts -- administrative versus judicial -- discussions about the judicial phase would still necessarily be "related" to and "connected" with the administrative phase. Even under Casey's own logic, discussions about the Supreme Court's denial of a stay would still be "related" to and "connected" with the protest. One cannot discuss the appeal of an administrative protest without necessarily having that discussion "relate" to the administrative protest itself. Casey's argument is disingenuous to the point of being troubling.

¹ Casey attempts to insert words into Plaintiffs' Request # 4, like placing "administrative" before "protest." He also attempts to create ambiguity where none exists by pointing to other requests that use different language. These other requests, however, were about payments and invoices. Further, it is not uncommon for one to use more inclusive language in one request than in another. Casey attempts to create ambiguity where there is none.

Documents and communications discussing subsequent appeals in a "case" provide the perfect example. A "case" does not end with a trial; it continues through appeal.² *See, e.g., Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174, 1181 (10th Cir. 2004) ("this case includes appeals"). A request for documents and communications "connected" to or "related" to a "case" therefore necessarily includes those surrounding the case's appeal. Even if the appeal is formally separated from the trial, no one would claim that documents involving the appeal were not "related" to or "connected" with the case. At most it is a separate "state of the case."³

The same is true here with Plaintiffs' reference to Felsoci's protest. Documents and communications relating to "Felsoci's protest of Charlie Earl" necessarily include documents and communications that relate to any and all proceedings -- including appeals of the protest. These documents and communications could not relate to additional proceedings -- including appeals of the protest -- without also relating to the initial protest itself.

Casey's argument is nothing less than this; anything said after the administrative phase of the protest was concluded on March 7, 2014 cannot be "related" or "connected" to the protest. It is therefore not subject to Request # 4 in the subpoena. The argument strains law and language to the breaking point.

How far he is willing to push this strained linguistic logic is proved by the fact that **every communication** he produced, other than the checks and invoices (which were subject to separate

² If it were any other way, federal appellate courts (including the Supreme Court) could not hear appeals under Article III of the Constitution because they would not continue to be "cases."

³ The "state of the case," in contrast to "the case" itself, may vary. According to BLACK'S LAW DICTIONARY, the "state of the case" is the "posture of litigation as it develops, as in discovery, at trial, or on appeal." BRYAN A. GARNER, BLACK'S LAW DICTIONARY (10th ed. 2014). It is all part of the same "case." Plaintiffs here did not limit Request # 4 to any particular "state of the case" or "state of the protest."

requests), **was dated before (or on) March 7, 2014**. Casey simply stopped producing documents "relating to Felscoi's protest of Charlie Earl" that were created after March 7, 2014, the day the proceedings before Defendant-Secretary closed. He is arguing that a "case" cannot include its appeal. He is arguing that "related" and "connected" do not mean what everyone knows them to mean.

Casey's argument is but another effort (in a long line) to shield evidence from Plaintiffs' legitimate requests. It raises serious questions about whether Casey has failed to produce other documents produced after March 7, 2014 that fall under Request # 4 and were not properly produced.

Plaintiffs understand that the Court is conducting an *in camera* review of the two documents at issue. Plaintiffs also respectfully request that the Court order not only the production of this redacted material, but also order Casey to produce any other "documents" and "communications" created after March 7, 2014 that relate to Felsoci's protest of Plaintiff-Earl, even if they also focus on and discuss appellate events. These, too, are related to the protest.

CONCLUSION

Plaintiffs' Motion to Compel should be **GRANTED**. Further, Casey should be compelled to produce **all** documents and communications under the terms of Request # 4, including those created after March 7, 2014 and that, according to Casey, only relate to judicial proceedings.

Respectfully submitted,

s/ Mark R. Brown

Mark R. Brown, Trial Counsel
Ohio Registration No. 81941
303 East Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
mbrown@law.capital.edu

Mark G. Kafantaris
Ohio Registration No. 80392
625 City Park Avenue
Columbus, Ohio 43206
(614) 223-1444
(614) 300-5123(fax)
mark@kafantaris.com

CERTIFICATE OF SERVICE

I certify that this Reply was filed using the Court's electronic filing system, will thereby be electronically delivered to all parties through their counsel of record, and was also electronically mailed to Steve Tigges (tigges@litoio.com), John Zeiger (zeiger@litoio.com) and Dan Mead (mead@litoio.com), attorneys for Terry Casey this same day.

s/ Mark R. Brown

Mark R. Brown