

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

ROBERT W. OTTO, et al.)
v.) Civil Action No.: 9:18-cv-80771-RLR
CITY OF BOCA RATON, et al.,)

PLAINTIFFS' DISCOVERY MEMORANDUM FOR AUGUST 10, 2018 HEARING

This discovery dispute involves the outright refusal of Defendant Palm Beach County (“County”) to even discuss, let alone work in good faith with Plaintiffs Robert Otto and Julie Hamilton (“Plaintiffs”) to agree on the scope of the County’s searches for electronically stored information (“ESI”). The County’s refusal is not only unprofessional and discourteous, but also in violation of this Court’s expectations and prejudicial to Plaintiffs.

Because Plaintiffs’ discovery requests¹ to the County and its co-defendant City of Boca Raton (“City”) involve a significant amount of ESI from numerous document custodians, Plaintiffs attempted to engage both Defendants in good faith to agree on the scope of the ESI searches, including the custodians, devices and accounts to be searched, and the search terms to be employed. (**Exhibit A** – July 25, 2018 Mihet Communication to all counsel for Defendants.)

The City Defendant responded cooperatively, noting some concerns and suggesting compromises. (**Exhibit B** – email correspondence between Plaintiffs and the City.) Plaintiffs and the City then worked collaboratively to resolve those differences, with each making compromises, and a resolution of all issues was reached. (*Id.*) **This is how ESI discovery is supposed to work.**

Once again, however, the County Defendant has chosen another route. Initially the County curtly responded that it is “taking the search terms under advisement.” (**Exhibit C** – composite of email communications between Plaintiffs and the County) (*id.* at page 4 (top), July 27, 2018 Fahey email to Mihet). The County then completely ignored a follow-up communication from Plaintiffs, urging the County to “work proactively to resolve ESI issues” and requesting the County’s position on the document custodians, devices and accounts, search terms and privilege log issues identified by Plaintiffs. (**Exhibit C**, p. 3). Then, in an August 3, 2018 telephone call, Plaintiffs attempted again to discuss ESI issues with the County and the City. (**Exhibit C**, p. 2). The City indicated a willingness to discuss ESI issues, but the County’s counsel stated that the County had nothing else

¹ Plaintiffs do not believe that the discovery requests themselves are relevant to this threshold dispute, but if the Court needs to review them, they were previously filed at dkts. 27-1 and 27-3.

to add to its prior refusal to discuss ESI issues. (*Id.*) Plaintiffs confirmed this in writing, and once again asked the County to cease and desist its refusal to even come to the [ESI] table. (*Id.*) The County responded that it will respond to Plaintiffs' discovery requests on its own terms and object as it deems "appropriate." (*Id.* at 1).

There are at least three reasons why the County's refusal to engage in ESI discussions with Plaintiffs is improper:

First, it violates the clear expectations of this District and numerous other sister courts that parties must work cooperatively, proactively and in good faith to identify and resolve ESI issues:

Ironically, this type of cooperation is **exactly** what this Court has been expecting from the parties and their counsel throughout this case—**to work together to arrive at reasonable search terms**, ... and then to continue to refine the search terms in a cooperative, professional effort However, ... despite this Court's suggestions to the parties and their counsel as to the **cooperative and professional manner in which the parties should engage in the e-discovery process** in this case, there has instead been an apparent lack of cooperation and constant bickering over discovery.

UnitedHealthcare of Fla., Inc. v. Am. Renal Assocs. LLC, No. 16-CV-81180, 2017 WL 4785457, at *3 (S.D. Fla. Oct. 20, 2017) (emphasis added) (chastising the parties for refusing to cooperate and thus "mak[ing] the discovery process in this case as expensive, time-consuming and difficult as possible"); *see id.* at *4 ("Courts expect that counsel will endeavor to cooperate and reach agreements **early in litigation** regarding the ... scope of search efforts (custodians, date ranges, sources); [and] the method of search (keyword[s])." (citing *The Federal Judges' Guide to Discovery*, Edition 3.0, The Electronic Discovery Institute (2017), at 50.)). *See also, Reilly v. Chipotle Mexican Grill, Inc.*, No. 15-CV-23425, 2016 WL 10644064, at *10 & n.12 (S.D. Fla. Sept. 26, 2016) (chastising the parties for failing to agree on an ESI protocol, and giving them "one last opportunity" to do what the Court expected to happen in the first place – "work together in a good faith effort" to come up with agreed search terms and custodians); *Siemens Aktiengesellschaft v. Jutai 661 Equipamentos Electronicos, Ltda.*, No. 08-21568-CIV, 2009 WL 800143, at *3 (S.D. Fla. Mar. 25, 2009) ("In light of the short time frame for production," ordering parties to meet and confer to agree on search terms and document custodians beforehand); *L-3 Commc'ns Corp. v. Sparton Corp.*, 313 F.R.D. 661, 667 (M.D. Fla. 2015) ("**Crafting appropriate search terms requires ... cooperation with opposing counsel ...**, and perhaps most importantly, for keyword searching to be an effective information retrieval tool, the process of crafting keywords **must be a cooperative one**") (emphasis added); *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 109–10 (E.D.

Pa. 2010) (“the Court deems it reasonable to compel the parties to confer and come to some agreement on the search terms that Defendants **intend** to use, the custodians they **intend** to search, the date ranges for their new searches, and any other essential details.”) (emphasis added).²

Second, the County’s refusal to engage in ESI collaboration with Plaintiffs cannot be justified by the County’s unfounded, pretextual fear that it will be “bombarded by your every concern” and that Plaintiffs have unreasonable ESI expectations. (Exhibit C at 1). Plaintiffs’ successful resolution of ESI issues with the City Defendant demonstrates that the process the County refuses to engage in is reasonable, necessary, and fruitful. The County’s unfounded fear that Plaintiffs will make unreasonable ESI demands proves exactly the opposite – that the parties do have different positions on the scope of ESI, and that they must cooperate to resolve them.

Third, the County’s preferred approach – that Plaintiffs await the County’s document production and take the County’s deposition in order to identify differences in expectations regarding the scope of ESI searches – is ineffective, wasteful and completely unworkable in this case. That process may well require a subsequent document production by the County to include items missing from its first search, as well as a subsequent deposition of the County’s witness(es) to cover previously undisclosed ESI. Even if that were possible, there is no reason for such waste. But, more importantly, multiple productions and depositions are not even possible on the short timetable and abbreviated discovery schedule set by the Court for the Preliminary Injunction hearing. The parties have one chance to get it right and keep the train moving on time. The County’s apparent tactic of forcing Plaintiffs to wait until it is too late to address ESI issues should not be countenanced by the Court.

For these and other reasons to be discussed at the August 10, 2018 hearing, Plaintiffs respectfully request that the Court require the County to collaborate in good faith with Plaintiffs regarding the scope of ESI searches, to work cooperatively to resolve differences that can be resolved, and to bring unresolved disputes to the Court promptly. Because the County’s refusal is unreasonable, Plaintiffs also request a fee and cost award sufficient to deter similar future conduct and to make Plaintiffs whole.

² At the eleventh hour, the County demanded that Plaintiffs provide the County with “authority” for the proposition that counsel must cooperate with each other in good faith in ESI discovery. (**Exhibit D** – Mihet-Fahey email communications, p.2). Plaintiffs did not have this authority at that time, nor did they believe that they should be required to substantiate with authority such a basic, well-accepted and routinely observed obligation. (*Id.* at 1).

Respectfully Submitted,

/s/ Horatio G. Mihet

Horatio G. Mihet (FL Bar 026581)
Roger K. Gannam (FL Bar 240450)
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
Email: court@lc.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August 2018, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notification system.

/s/ Horatio G. Mihet

Horatio G. Mihet

Attorney for Plaintiffs

From: [Horatio Mihet](#)
To: [Rachel Fahey](#); [Anne Flanigan](#)
Cc: [Patricia Grotto](#); [Daniel L. Abbott](#); [Jamie Alan Cole](#); [Monique Sarraff-Ravelo](#); [Denise Fishel](#); [Melanie Cullen J.](#); [Kim Phan](#); [Roger Gannam](#); [Lauren Dennis](#)
Bcc: [Daniel Schmid](#); [Jill M. Lowe \(jill@lc.org\)](#)
Subject: Otto - Search Terms and Document Custodians
Date: Wednesday, July 25, 2018 10:07:00 AM

Anne and Rachel:

As previously discussed, I am writing to provide you with Plaintiffs' expectations/proposal regarding Defendants' search for documents responsive to Plaintiffs' discovery requests. Please let us know **this week** whether Defendants object to any part of our proposal/expectations. It is important that we identify any disagreements quickly, so that we can address them, and, if necessary, seek the Court's guidance, in sufficient time prior to the response/production deadlines to allow for complete responses and productions to take place on the current timetable.

Document Custodians: Plaintiffs expect that Defendants will search the devices and communication accounts of all persons within their employment or control who had (or have) material involvement in the consideration, drafting, enactment, interpretation or enforcement of the respective Ordinances, or in any of the other subject areas covered by Plaintiffs' requests. At a minimum, this must include all individuals identified in Plaintiffs' Initial Disclosures. To the extent not identified in Plaintiffs' Initial Disclosures, Defendants must also search the records of:

- (a) the mayors,
- (b) all current City Council or County Commission members,
- (c) all staff members who had material involvement in the consideration, drafting, enactment, interpretation or enforcement of the respective Ordinances, and
- (d) any former mayors, council or commission members, or staff members (back to the time the Ordinances were first considered) who are still under Defendants' control, or whose communication accounts are still in Defendants' possession.

Lastly, the list of document custodians searched must also include all attorneys (inside or outside counsel) working on the Ordinance or this lawsuit. (See note below on Privilege Logs).

We emphasize that this list is not exclusive. Until we take Defendants' depositions, Defendants likely know the identity of all document custodians better than Plaintiffs. All other persons known to Defendants to have had a material involvement in the subject matter should be searched.

Devices and Accounts Searched: For each document custodian, Plaintiffs expect that **all** of their communication devices and accounts will be searched, whether or not they are "official" devices or accounts of the City or County. This would include business and "personal" cell phones and computers, business and "personal" email accounts (e.g. Gmail), and business or "personal" social media accounts. I use quotes around "personal" because government officials often conduct government business or communicate about public issues on devices or accounts not belonging to the government. Defendants should instruct the document custodians under their control to search all devices and accounts for responsive documents. Text messages and social media posts should be

included.

Search Terms: At a minimum, we believe the following search terms must be used to obtain responsive documents and communications regarding the Ordinances and SOCE:

1. sexual orientation change efforts
2. SOCE
3. S.O.C.E.
4. reparative therapy
5. reparative counseling
6. conversion therapy
7. conversion counseling
8. reorientation therapy
9. reorientation counseling
10. change counseling
11. change therapy
12. gay therapy
13. sexual orientation
14. gender identity
15. APA Task Force Report
16. APA Report
17. APA Task Force
18. APA Resolution
19. American Psychological Association
20. Rand Hoch
21. Hoch
22. Rachel Needle
23. Needle
24. Human Rights Council
25. Human Right Commission
26. Human Rights Campaign
27. HRC
28. Equality Florida
29. Robert Otto
30. Otto
31. Julie Hamilton
32. Hamilton
33. Liberty Counsel
34. Mihet
35. Pickup v. Brown
36. Pickup
37. King v. Governor of New Jersey
38. King
39. Vazzo
40. Rosik

41. City of Boca Raton Ordinance 5407
42. Ordinance 5407
43. Palm Beach County Ordinance 2017-046
44. Ordinance 2017-046

The foregoing terms cover only ESI, and only the subject matter related to the Ordinances and SOCE. They should not be the exclusive means employed by Defendants to gather all documents (ESI and non-ESI) responsive to all of Plaintiffs' discovery requests. For example, we will leave it to Defendants for now as to how they will search for the various studies, or the various non-SOCE ordinances, requested by Plaintiffs.

Privilege Logs: We do not expect Defendants' privilege logs to include any communications which (1) occurred AFTER the filing date of this lawsuit, **AND** (2) were solely between a document custodian **and their own** lawyer. However, if a communication was copied **to anyone else** (including a lawyer representing a different party in this lawsuit), we would expect it to be logged in a privilege log so that we can assess whether any claimed privilege has been waived through disclosure.

I await your soonest response. If you'd like to have a telephonic meet-and-confer about the above, I am generally available this week.

Kind Regards,

Horatio G. Mihet, Esq.
*Vice President of Legal Affairs &
Chief Litigation Counsel*
Liberty Counsel
407-875-1776 phone
407-875-0770 fax
www.LC.org • hmihet@LC.org

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From: Daniel L. Abbott
To: [Horatio Mihet](mailto:Hmihet@lc.org)
Cc: [Patricia Grotto](mailto:PGrotto@wsh-law.com); [Jamie Alan Cole](mailto:JCole@wsh-law.com); [Monique Sarraff-Ravelo](mailto:rgarraff@wsh-law.com); [Roger Gannam](mailto:rgannam@lc.org); [Anne Flanigan](mailto:Aflanigan@wsh-law.com)
Subject: RE: Otto - Search Terms and Document Custodians
Date: Tuesday, August 7, 2018 10:43:26 AM

Sure, Harry.

--Dan

From: Horatio Mihet <hmihet@lc.org>
Sent: Monday, August 06, 2018 7:32 PM
To: Daniel L. Abbott <DAbbott@wsh-law.com>
Cc: Patricia Grotto <PGrotto@wsh-law.com>; Jamie Alan Cole <JCole@wsh-law.com>; Monique Sarraff-Ravelo <msarraff@wsh-law.com>; Roger Gannam <rgannam@lc.org>; Anne Flanigan <Aflanigan@wsh-law.com>
Subject: RE: Otto - Search Terms and Document Custodians

Thanks Dan. It occurs to me now that, because of the way that case was styled, "Jersey" may be more than 5 words removed from King. Can we make that "King /10 Jersey," to be safe? With that adjustment, I think we're on the same page. Thanks for the City's cooperation.

Horatio G. Mihet, Esq.*
*Vice President of Legal Affairs and
Chief Litigation Counsel*
Liberty Counsel

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From: Daniel L. Abbott <DAbbott@wsh-law.com>
Sent: Monday, August 6, 2018 3:53 PM
To: Horatio Mihet <hmihet@lc.org>
Cc: Patricia Grotto <PGrotto@wsh-law.com>; Jamie Alan Cole <JCole@wsh-law.com>; Monique Sarraff-Ravelo <msarraff@wsh-law.com>; Roger Gannam <rgannam@lc.org>; Anne Flanigan <Aflanigan@wsh-law.com>
Subject: RE: Otto - Search Terms and Document Custodians

Hello, Harry:

In order:

1. Yes.
2. Yes.
3. We are able to do Boolean searches. We will add to the search terms: (a) Julie /3 Hamilton; (b) Pickup /3 Brown; and (c) King /5 Jersey.
4. We are checking for potentially responsive Electronically Stored Information that might be housed on mobile devices and/or private email accounts.

We trust that this resolves the issues related to identification of materials responsive to Plaintiffs' Requests for Production.

Regards,

Dan

From: Horatio Mihet <hmihet@lc.org>
Sent: Sunday, August 05, 2018 10:18 PM
To: Daniel L. Abbott <DAbbott@wsh-law.com>; Anne Flanigan <Aflanigan@wsh-law.com>
Cc: Patricia Grotto <PGrotto@wsh-law.com>; Jamie Alan Cole <JCole@wsh-law.com>; Monique Sarraff-Ravelo <msarraff@wsh-law.com>; Roger Gannam <rgannam@lc.org>
Subject: RE: Otto - Search Terms and Document Custodians

Dan and Anne:

Thank you for discussing the issues below further with me on Friday. I appreciate the City's willingness to work collaboratively, and appreciate the progress we have made. I await your response – hopefully on Monday – regarding these follow-up questions I asked, and one additional item that I had raised below but forgot to re-iterate on Friday:

- 1) Start date: Is City willing to employ 1/1/2013?
- 2) End Date: Is City willing to employ 7/21/2018 (subject to seasonable supplementation down the road)?
- 3) Is City able and willing to employ Boolean operators (e.g., Julie /3 Hamilton, Pickup w/5 Brown, King /5 Jersey) or (Julie AND Hamilton, Pickup AND Brown, King AND Jersey)?
- 4) Is the City searching mobile devices for text messages and other ESI, and is the City instructing those people within its control to search non-City owned devices and accounts (e.g., Gmail) for responsive communications?

Thanks,

Horatio G. Mihet, Esq.*
*Vice President of Legal Affairs and
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Liberty Counsel
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From: Horatio Mihet

Sent: Saturday, July 28, 2018 1:50 PM

To: 'Rachel Fahey' <RFahey@pbcgov.org>; Daniel L. Abbott <DAbbott@wsh-law.com>

Cc: Anne Flanigan <Aflanigan@wsh-law.com>; Patricia Grotto <PGrotto@wsh-law.com>; Jamie Alan Cole <JCole@wsh-law.com>; Monique Sarraff-Ravelo <msarraff@wsh-law.com>; Denise Fishel <DFishel@pbcgov.org>; Melanie Cullen J. <MJCullen@pbcgov.org>; Kim Phan <KPhan@pbcgov.org>; Roger Gannam <rgannam@lc.org>; Lauren Dennis <LDennis@pbcgov.org>

Subject: RE: Otto - Search Terms and Document Custodians

Dan and Rachel – thank you for your messages.

Dan – I look forward to your substantive response on Monday.

Rachel: I knew that you would be out on Friday, and that is why I wrote you on Wednesday morning. Your message does not respond to the issues I raised, nor does it state that a response is forthcoming. While we appreciate that the County is taking the search terms under advisement, we need an immediate assurance that we are on the same page. As discussed, we cannot wait until we receive the County's document production and depose its witness to determine whether the County disputes Plaintiffs' expectations regarding these issues. This is because, if we have a dispute that we cannot resolve, we intend to seek immediate relief from the Court, so that we can receive the responses and production we expect on the current timetable, and prior to the County's deposition.

We believe the Court wants us to work proactively to resolve ESI issues, particularly in the circumstances of this case.

Please let me know **on this Monday:** (1) which, if any, of the Document Custodians discussed below the County does not agree to search; (2) which, if any, of the Devices and Accounts discussed below the County does not agree to search or to instruct its employees to search; (3) which, if any, of the search terms below the County does not agree to employ; and (4) which, if any, of the Privilege Log information below the County does not agree to provide.

If you do not provide this information on Monday, I will understand that the County is refusing to provide it, and will immediately request the Court's assistance to secure the County's compliance.

In the event we need a telephonic meet and confer, please let me know a time on Monday afternoon or Tuesday morning that you are available to discuss.

Kind Regards,

Horatio G. Mihet, Esq.
*Vice President of Legal Affairs &
Chief Litigation Counsel*
Liberty Counsel
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www.LC.org ▪ hmihet@LC.org

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From: Rachel Fahey <RFahey@pbcgov.org>
Sent: Friday, July 27, 2018 5:50 PM
To: Daniel L. Abbott <DAbbott@wsh-law.com>; Horatio Mihet <hmihet@lc.org>
Cc: Anne Flanigan <Aflanigan@wsh-law.com>; Patricia Grotto <PGrotto@wsh-law.com>; Jamie Alan Cole <JCole@wsh-law.com>; Monique Sarraff-Ravelo <msarraff@wsh-law.com>; Denise Fishel <DFishel@pbcgov.org>; Melanie Cullen J. <MCullen@pbcgov.org>; Kim Phan <KPhan@pbcgov.org>; Roger Gannam <rgannam@lc.org>; Lauren Dennis <LDennis@pbcgov.org>
Subject: Re: Otto - Search Terms and Document Custodians

Good afternoon, Harry,

As you know, I am out of the office today. Please excuse the brevity of this email. The County is taking the search terms under advisement. We will respond to Plaintiffs' first set of discovery requests as required by the applicable rules.

Have a wonderful weekend,

Rachel

Sent from my iPhone

On Jul 27, 2018, at 5:15 PM, Daniel L. Abbott <DAbbott@wsh-law.com> wrote:

Good afternoon, Harry:

Thank you for writing.

We are evaluating your various proposals, including trying to obtain estimates of the number of documents likely to be captured through use of your suggested email search terms. Unfortunately, we have not yet been able to complete our analysis. We hope to have our comments regarding your suggestions to you on Monday.

In the meantime, we wish you an enjoyable weekend.

Regards,

Dan

From: Horatio Mihet <hmihet@lc.org>
Sent: Wednesday, July 25, 2018 10:08 AM
To: Rachel Fahey <RFahey@pbcgov.org>; Anne Flanigan <Aflanigan@wsh-law.com>
Cc: Patricia Grotto <PGrotto@wsh-law.com>; Daniel L. Abbott <DAbbott@wsh-law.com>; Jamie Alan Cole <JCole@wsh-law.com>; Monique Sarraff-Ravelo <msarraff@wsh-law.com>; Denise Fishel <DFishel@pbcgov.org>; Melanie Cullen J. <MJCullen@pbcgov.org>; Kim Phan <KPhan@pbcgov.org>; Roger Gannam <rgannam@lc.org>; Lauren Dennis <LDennis@pbcgov.org>
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- (c) all staff members who had material involvement in the consideration, drafting, enactment, interpretation or enforcement of the respective Ordinances, and
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Lastly, the list of document custodians searched must also include all attorneys (inside or outside counsel) working on the Ordinance or this lawsuit. (See note below on

Privilege Logs).

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Search Terms: At a minimum, we believe the following search terms must be used to obtain responsive documents and communications regarding the Ordinances and SOCE:

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2. SOCE
3. S.O.C.E.
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7. conversion counseling
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9. reorientation counseling
10. change counseling
11. change therapy
12. gay therapy
13. sexual orientation
14. gender identity
15. APA Task Force Report
16. APA Report
17. APA Task Force
18. APA Resolution
19. American Psychological Association
20. Rand Hoch
21. Hoch
22. Rachel Needle
23. Needle

24. Human Rights Council
25. Human Right Commission
26. Human Rights Campaign
27. HRC
28. Equality Florida
29. Robert Otto
30. Otto
31. Julie Hamilton
32. Hamilton
33. Liberty Counsel
34. Mihet
35. Pickup v. Brown
36. Pickup
37. King v. Governor of New Jersey
38. King
39. Vazzo
40. Rosik
41. City of Boca Raton Ordinance 5407
42. Ordinance 5407
43. Palm Beach County Ordinance 2017-046
44. Ordinance 2017-046

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I await your soonest response. If you'd like to have a telephonic meet-and-confer about the above, I am generally available this week.

Kind Regards,

Horatio G. Mihet, Esq.
*Vice President of Legal Affairs &
Chief Litigation Counsel*
Liberty Counsel

From: Rachel Fahey
To: [Horatio Mihet](#)
Cc: [Kim Phan](#)
Subject: RE: Otto - Search Terms and Document Custodians
Date: Friday, August 3, 2018 6:28:16 PM

Hi Harry,

Glad to have been able to confer with you about the amended joint discovery plan this afternoon. Looking forward to hearing from you with your response on Monday.

The County intends to fully and fairly respond to all of your discovery requests diligently and in good faith as required by the rules. As I indicated previously, we have taken your suggested search terms under advisement and will definitely be giving them consideration. However, we do not want to be bombarded by your every concern before the discovery is due or before an objection has been asserted to the discovery that was propounded. If the County finds it appropriate to object to the propounded discovery, we will timely do so as required by the rules.

Though we vehemently disagree that there is presently a discovery dispute in any shape or form, you have requested our dates of availability and they are: August 9 and 10.

Have a good evening and weekend.

Rachel

Rachel Fahey
Assistant County Attorney
Palm Beach County Attorney's Office
300 North Dixie Highway, Suite 359
West Palm Beach, Florida 33401
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From: Horatio Mihet <hmihet@lc.org>
Sent: Friday, August 03, 2018 4:23 PM
To: Rachel Fahey <RFahey@pbcgov.org>
Cc: Kim Phan <KPhan@pbcgov.org>
Subject: RE: Otto - Search Terms and Document Custodians

Rachel – in our telephone conversation of this afternoon, you indicated that the County remains unwilling to provide and discuss the information requested in items (1) through (4) in my last email below. Although we did not specifically discuss it, I assume the County is also unwilling to discuss the start and end dates for its ESI searches. If that is incorrect, please let me know.

As we discussed, Plaintiffs believe that the parties should and must discuss these issues now, to resolve any disagreements, because the discovery schedule leading up to the Preliminary Injunction Hearing does not afford the opportunity of waiting until the document production is made, and depositions are taken, to begin to address ESI disputes as to scope, search terms, dates, etc.

I advised you that, given the County's refusal, we intend to seek the Court's assistance immediately. As requested on the phone, please provide me prior to close of business today with two afternoons in the next seven days when the County would be available to attend a discovery hearing with the Court.

Thanks,

Horatio G. Mihet, Esq.*
*Vice President of Legal Affairs and
Chief Litigation Counsel*
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From: Horatio Mihet
Sent: Saturday, July 28, 2018 1:50 PM
To: 'Rachel Fahey' <RFahey@pbcgov.org>; Daniel L. Abbott <DAbbott@wsh-law.com>
Cc: Anne Flanigan <Aflanigan@wsh-law.com>; Patricia Grotto <PGrotto@wsh-law.com>; Jamie Alan

Cole <JCole@wsh-law.com>; Monique Sarraff-Ravelo <msarraff@wsh-law.com>; Denise Fishel <DFishel@pbcgov.org>; Melanie Cullen J. <MJCullen@pbcgov.org>; Kim Phan <KPhan@pbcgov.org>; Roger Gannam <rgannam@lc.org>; Lauren Dennis <LDennis@pbcgov.org>

Subject: RE: Otto - Search Terms and Document Custodians

Dan and Rachel – thank you for your messages.

Dan – I look forward to your substantive response on Monday.

Rachel: I knew that you would be out on Friday, and that is why I wrote you on Wednesday morning. Your message does not respond to the issues I raised, nor does it state that a response is forthcoming. While we appreciate that the County is taking the search terms under advisement, we need an immediate assurance that we are on the same page. As discussed, we cannot wait until we receive the County's document production and depose its witness to determine whether the County disputes Plaintiffs' expectations regarding these issues. This is because, if we have a dispute that we cannot resolve, we intend to seek immediate relief from the Court, so that we can receive the responses and production we expect on the current timetable, and prior to the County's deposition.

We believe the Court wants us to work proactively to resolve ESI issues, particularly in the circumstances of this case.

Please let me know **on this Monday:** (1) which, if any, of the Document Custodians discussed below the County does not agree to search; (2) which, if any, of the Devices and Accounts discussed below the County does not agree to search or to instruct its employees to search; (3) which, if any, of the search terms below the County does not agree to employ; and (4) which, if any, of the Privilege Log information below the County does not agree to provide.

If you do not provide this information on Monday, I will understand that the County is refusing to provide it, and will immediately request the Court's assistance to secure the County's compliance.

In the event we need a telephonic meet and confer, please let me know a time on Monday afternoon or Tuesday morning that you are available to discuss.

Kind Regards,

Horatio G. Mihet, Esq.
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From: Rachel Fahey <RFahey@pbcgov.org>
Sent: Friday, July 27, 2018 5:50 PM
To: Daniel L. Abbott <DAbbott@wsh-law.com>; Horatio Mihet <hmihet@lc.org>
Cc: Anne Flanigan <Aflanigan@wsh-law.com>; Patricia Grotto <PGrotto@wsh-law.com>; Jamie Alan Cole <JCole@wsh-law.com>; Monique Sarraff-Ravelo <msarraff@wsh-law.com>; Denise Fishel <DFishel@pbcgov.org>; Melanie Cullen J. <MJCullen@pbcgov.org>; Kim Phan <KPhan@pbcgov.org>; Roger Gannam <rgannam@lc.org>; Lauren Dennis <LDennis@pbcgov.org>
Subject: Re: Otto - Search Terms and Document Custodians

Good afternoon, Harry,

As you know, I am out of the office today. Please excuse the brevity of this email. The County is taking the search terms under advisement. We will respond to Plaintiffs' first set of discovery requests as required by the applicable rules.

Have a wonderful weekend,

Rachel

Sent from my iPhone

On Jul 27, 2018, at 5:15 PM, Daniel L. Abbott <DAbbott@wsh-law.com> wrote:

Good afternoon, Harry:

Thank you for writing.

We are evaluating your various proposals, including trying to obtain estimates of the number of documents likely to be captured through use of your suggested email search terms. Unfortunately, we have not yet been able to complete our analysis. We hope to have our comments regarding your suggestions to you on Monday.

In the meantime, we wish you an enjoyable weekend.

Regards,

Dan

From: Horatio Mihet <hmihet@lc.org>
Sent: Wednesday, July 25, 2018 10:08 AM
To: Rachel Fahey <RFahey@pbcgov.org>; Anne Flanigan <Aflanigan@wsh-law.com>
Cc: Patricia Grotto <PGrotto@wsh-law.com>; Daniel L. Abbott <DAbbott@wsh-law.com>; Jamie Alan Cole <JCole@wsh-law.com>; Monique Sarraff-Ravelo <msarraff@wsh-law.com>; Denise Fishel <DFishel@pbcgov.org>; Melanie Cullen J.

<MCullen@pbcgov.org>; Kim Phan <KPhan@pbcgov.org>; Roger Gannam <rgannam@lc.org>; Lauren Dennis <LDennis@pbcgov.org>

Subject: Otto - Search Terms and Document Custodians

Anne and Rachel:

As previously discussed, I am writing to provide you with Plaintiffs' expectations/proposal regarding Defendants' search for documents responsive to Plaintiffs' discovery requests. Please let us know **this week** whether Defendants object to any part of our proposal/expectations. It is important that we identify any disagreements quickly, so that we can address them, and, if necessary, seek the Court's guidance, in sufficient time prior to the response/production deadlines to allow for complete responses and productions to take place on the current timetable.

Document Custodians: Plaintiffs expect that Defendants will search the devices and communication accounts of all persons within their employment or control who had (or have) material involvement in the consideration, drafting, enactment, interpretation or enforcement of the respective Ordinances, or in any of the other subject areas covered by Plaintiffs' requests. At a minimum, this must include all individuals identified in Plaintiffs' Initial Disclosures. To the extent not identified in Plaintiffs' Initial Disclosures, Defendants must also search the records of:

- (a) the mayors,
- (b) all current City Council or County Commission members,
- (c) all staff members who had material involvement in the consideration, drafting, enactment, interpretation or enforcement of the respective Ordinances, and
- (d) any former mayors, council or commission members, or staff members (back to the time the Ordinances were first considered) who are still under Defendants' control, or whose communication accounts are still in Defendants' possession.

Lastly, the list of document custodians searched must also include all attorneys (inside or outside counsel) working on the Ordinance or this lawsuit. (See note below on Privilege Logs).

We emphasize that this list is not exclusive. Until we take Defendants' depositions, Defendants likely know the identity of all document custodians better than Plaintiffs. All other persons known to Defendants to have had a material involvement in the subject matter should be searched.

Devices and Accounts Searched: For each document custodian, Plaintiffs expect that **all** of their communication devices and accounts will be searched, whether or not they are "official" devices or accounts of the City or County. This would include business and "personal" cell phones and computers, business and "personal" email accounts (e.g. Gmail), and business or "personal" social media accounts. I use quotes around "personal" because government officials often conduct government business or

communicate about public issues on devices or accounts not belonging to the government. Defendants should instruct the document custodians under their control to search all devices and accounts for responsive documents. Text messages and social media posts should be included.

Search Terms: At a minimum, we believe the following search terms must be used to obtain responsive documents and communications regarding the Ordinances and SOCE:

1. sexual orientation change efforts
2. SOCE
3. S.O.C.E.
4. reparative therapy
5. reparative counseling
6. conversion therapy
7. conversion counseling
8. reorientation therapy
9. reorientation counseling
10. change counseling
11. change therapy
12. gay therapy
13. sexual orientation
14. gender identity
15. APA Task Force Report
16. APA Report
17. APA Task Force
18. APA Resolution
19. American Psychological Association
20. Rand Hoch
21. Hoch
22. Rachel Needle
23. Needle
24. Human Rights Council
25. Human Right Commission
26. Human Rights Campaign
27. HRC
28. Equality Florida
29. Robert Otto
30. Otto
31. Julie Hamilton
32. Hamilton
33. Liberty Counsel
34. Mihet
35. Pickup v. Brown
36. Pickup

37. King v. Governor of New Jersey
38. King
39. Vazzo
40. Rosik
41. City of Boca Raton Ordinance 5407
42. Ordinance 5407
43. Palm Beach County Ordinance 2017-046
44. Ordinance 2017-046

The foregoing terms cover only ESI, and only the subject matter related to the Ordinances and SOCE. They should not be the exclusive means employed by Defendants to gather all documents (ESI and non-ESI) responsive to all of Plaintiffs' discovery requests. For example, we will leave it to Defendants for now as to how they will search for the various studies, or the various non-SOCE ordinances, requested by Plaintiffs.

Privilege Logs: We do not expect Defendants' privilege logs to include any communications which (1) occurred AFTER the filing date of this lawsuit, **AND** (2) were solely between a document custodian **and their own** lawyer. However, if a communication was copied **to anyone else** (including a lawyer representing a different party in this lawsuit), we would expect it to be logged in a privilege log so that we can assess whether any claimed privilege has been waived through disclosure.

I await your soonest response. If you'd like to have a telephonic meet-and-confer about the above, I am generally available this week.

Kind Regards,

Horatio G. Mihet, Esq.
*Vice President of Legal Affairs &
Chief Litigation Counsel*
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Dan Abbott
Member

From: [Horatio Mihet](#)
To: [Rachel Fahey](#)
Cc: [Kim Phan](#)
Bcc: [Roger Gannam](#); [Daniel Schmid](#); [Jill M. Lowe \(jill@lc.org\)](#)
Subject: RE: Request for Discovery Hearing -- Otto et al. v. Palm Beach County et al. -- 18cv80771
Date: Monday, August 6, 2018 7:42:00 PM

Rachel:

I wholeheartedly agree that parties should not create issues for the court that should be instead resolved amongst themselves, which is why I am disappointed and dismayed with the County's refusal to do that which routinely takes place amongst counsel in federal litigation – work cooperatively on ESI parameters. As you know, the City was willing to discuss our concerns and issues with us in good faith, and I'm pleased to report that this evening we resolved all of them. The County's steadfast refusal to even discuss ESI parameters with us is wrong and unprofessional.

As discussed on the phone last week, we are not in the habit of doing our opponents' research for them. No "research" should have been required for this. The City did not require us to do their research and to obligate them to cooperate in discovery with us. Neither should have the County.

That said, if you have research supporting the County's stubborn refusal, I would be happy to review it. If the County reconsiders its position before or after our Discovery Memorandum, please let me know immediately.

Kind Regards,

Horatio G. Mihet, Esq.*
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From: Rachel Fahey <RFahey@pbcgov.org>
Sent: Monday, August 6, 2018 6:32 AM
To: Horatio Mihet <hmihet@lc.org>
Cc: Kim Phan <KPhan@pbcgov.org>
Subject: Re: Request for Discovery Hearing -- Otto et al. v. Palm Beach County et al. -- 18cv80771

Harry,

On the phone Friday, I requested that you provide me with authority so that I could review it to determine what was required of the County. You stated that there was none. You stated that it was simply a matter of courtesy. You now represent to the court that authority supports your position. If you have authority, provide it to allow the County an opportunity to review it before you file a discovery memorandum.

There is no need to create issues for the court that could be resolved by the parties

Rachel

Sent from my iPhone

On Aug 5, 2018, at 10:49 PM, Horatio Mihet <hmihet@lc.org> wrote:

Judge Reinhart:

As you may recall from the recent correspondence below, I represent the Plaintiffs in the above-referenced matter. Although the discovery dispute raised below was resolved last week by Judge Rosenberg, a new dispute has unfortunately arisen between Plaintiffs and Defendant Palm Beach County ("County") which again requires the Court's guidance to resolve. Therefore, I write pursuant to the Standing Discovery Order (dkt. 12) to request a Discovery Hearing for the afternoon of either Thursday or Friday, August 9 or 10. We anticipate needing 10 to 15 minutes of the Court's time.

Certification of Counsel: I certify that: (1) I have attempted in good faith to resolve the dispute via multiple telephone and email communications with the County, but have not been successful; and (2) counsel for the County has advised that she is available on either afternoon.

Request for Telephonic Appearance: We once again respectfully request leave to attend the discovery hearing by telephone, for the same reasons that leave was granted in connection with the previous dispute, to wit: (1) counsel are based north of Orlando, approximately 200 miles away from the Court, which would require approximately 6 hours of travel time round-trip to attend this hearing; and (2) the hearing involves a simple and straightforward issue, is anticipated to be very short, and should not require extensive argument. Allowing counsel for Plaintiffs to participate by telephone would serve the ends of justice and economy, and would allow Plaintiffs to seek the County's compliance with basic discovery obligations without incurring more fees and expenses than they already have.

Brief Synopsis of Dispute: The document requests propounded by Plaintiffs to both the County and its co-defendant City of Boca Raton ("City"), require Defendants to search for ESI from many potential document custodians. Plaintiffs have attempted to confer in good faith with both Defendants as to the search terms being employed, the start and end dates of the searches, the custodians being searched, and other related

issues. Although the City defendant has been working cooperatively with Plaintiffs and the two parties have made progress on reaching agreement regarding the scope of the ESI searches, the County defendant is outright refusing to even engage in the process with Plaintiffs. The timing of the document production viz the upcoming depositions and Preliminary Injunction Hearing does not permit Plaintiffs the luxury of awaiting the County's production and taking the County's deposition to find out whether the scope of the County's ESI search is satisfactory, and to address any deficiencies with the Court. To be clear, the instant dispute is not about the search terms being employed or the relevant dates being searched, but about the County's refusal to collaboratively discuss these issues with Plaintiffs. In their Discovery Memorandum, Plaintiffs will present the Court with authorities from this District and elsewhere which show that the County is required to do what it unreasonably refuses.

Kind Regards,

Counsel for Plaintiffs Robert W. Otto and Julie H. Hamilton,

Horatio G. Mihet, Esq.*
*Vice President of Legal Affairs and
Chief Litigation Counsel*

Liberty Counsel

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From: Horatio Mihet

Sent: Tuesday, July 24, 2018 2:51 PM

To: reinhart@flsd.uscourts.gov

Cc: Patricia Grotto <PGrotto@wsh-law.com>; Daniel L. Abbott <DAbbott@wsh-law.com>; Jamie Alan Cole <JCole@wsh-law.com>; Monique Sarraff-Ravelo <msarraff@wsh-law.com>; Denise Fishel <DFishel@pbcgov.org>; Melanie Cullen J. <MJCullen@pbcgov.org>; Kim Phan <KPhan@pbcgov.org>; Roger Gannam <rgannam@lc.org>; Lauren Dennis <LDennis@pbcgov.org>; Anne Flanigan <Aflanigan@wsh-law.com>; Rachel Fahey <RFahey@pbcgov.org>

Subject: Request for Discovery Hearing -- Otto et al. v. Palm Beach County et al. -- 18cv80771

Judge Reinhart:

On behalf of Plaintiffs in the above-referenced matter, I write pursuant to the Standing Discovery Order (dkt. 12) to request a Discovery Hearing for the afternoon of either Monday or Tuesday, July 30 or 31. The hearing is necessary to resolve a discovery dispute among Plaintiffs and one of the two defendants – Palm Beach County (“County”). We anticipate needing 10 to 15 minutes of the Court’s time.

Certification of Counsel: I certify that: (1) we have attempted in good faith to resolve the dispute via multiple telephone and email communications with the County, but have not been successful; and (2) counsel for the County has advised us that she does not have a scheduling conflict on either afternoon.

Request for Telephonic Appearance: Although the Court’s Standing Order indicates that “counsel are required to appear in person at the discovery hearing” (dkt. 12, p. 2), I respectfully ask the Court to consider making an exception on this occasion, if possible, and permitting Plaintiffs’ counsel to appear by telephone, for two reasons: (1) counsel are based north of Orlando, approximately 200 miles away from the Court, which would require approximately 6 hours of travel time round-trip to attend this hearing; and (2) the hearing involves a simple and straightforward issue, is anticipated to be very short, and should not require extensive argument. Allowing counsel for Plaintiffs to participate by telephone would serve the ends of justice and economy, and would allow Plaintiffs to seek the County’s compliance with basic discovery obligations without incurring more fees and expenses than they already have.

Brief Synopsis of Dispute: Plaintiffs intend to fully describe the dispute in their forthcoming discovery memorandum, to be filed within 24 hours of the Court’s setting of the hearing. (Dkt. 12 at 2). However, in the event it will assist the Court in evaluating and deciding Plaintiffs’ request for permission to attend by telephone, Plaintiffs provide a brief synopsis here.

At issue is (a) the County’s outright refusal to respond to Plaintiff Otto’s Second Set of Discovery Requests (comprised of four (4) Interrogatories and 15 Document Requests) served on July 21, 2018; and (b) the County’s outright refusal to designate a Rule 30(b) (6) witness to testify on a handful of additional deposition topics identified in Plaintiffs’ Amended Deposition Notice, served also on July 21, 2018. Even though the Amended Deposition Notice was served **six weeks prior** to the County’s scheduled deposition on August 30, 2018, and even though both the Second Set of Discovery and the Amended Deposition Notice were served almost **seven months prior** to the February 11, 2019 discovery cutoff (dkt. 19, p. 2), the County contends that it can ignore both because they are “untimely,” because they were served **four (4) days** “late” – that is, four days after the July 17, 2018 deadline set by the Court in the Preliminary Injunction Discovery Plan (dkt. 25) for the parties to serve written discovery **for preliminary injunction purposes**.

Thus, the Court is being asked to decide: (1) whether, despite having no language or warning to this effect, the Preliminary Injunction Discovery Plan (dkt. 25) has somehow

impliedly supplanted the Civil Rules and the general discovery Scheduling Order (dkt. 19), such that no other discovery may take place in the case until after the Preliminary Injunction is decided **several months from now** (as the County contends); and (2) even if the answer to the first question is affirmative, whether Plaintiffs' four-day "delay" in serving the subject discovery may be excused, and the County required to respond, where the County still has six weeks to prepare a witness for deposition, and 30 days to respond to the written discovery (as provided in Civil Rules 33 and 34).

We believe that these questions may be easily answered by quick reference to the general Scheduling Order (dkt. 19), the Preliminary Injunction Discovery Plan (dkt. 25), and Civil Rules 33 and 34, and that telephonic participation by Plaintiffs' counsel would not hamper the Court's resolution in any way. Candidly, we regret even troubling the Court over a four-day issue that the parties should have been able to resolve, and we do so only as a matter of last resort.

Kind Regards,

Counsel for Plaintiffs Robert W. Otto and Julie H. Hamilton,

Horatio G. Mihet, Esq.*
*Vice President of Legal Affairs &
Chief Litigation Counsel*
Liberty Counsel
PO Box 540774
Orlando, FL 32854
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