UNPUBLISHED CASES

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United States District Court,
N.D. Alabama,
Northeastern Division.

ALABAMA EDUCATION ASSOCIATION; et al., Plaintiffs,
v.
Robert BENTLEY, in his official capacity as Governor of the State of Alabama and President of the State School Board; et al., Defendants.

Civil Action No. CV–11–S–761–NE. | Jan. 3, 2013.

Attorneys and Law Firms

Edward Still, Birmingham, AL, Alice O'Brien, Philip A. Hostak, National Education Association, Washington, DC, Annary A. Cheatham, Cheatham & Associates PLLC, Herman Watson, Jr., Rebekah Keith McKinney, Watson McKinney & Artrip LLP, Huntsville, AL, Gregory B. Stein, Stein and Pilcher LLC, J. Cecil Gardner, Samuel H. Heldman, The Gardner Firm PC, Mobile, AL, Robert D. Segall, Copeland Franco Screws & Gill PA, Theron Stokes, Alabama Education Association, Montgomery, AL, for Plaintiffs.

J.R. Brooks, Taylor P. Brooks, William W. Sanderson, Jr., Lanier Ford Shaver & Payne PC, Julian D. Butler, Sirote and Permutt PC, Huntsville, AL, for Defendants.

Opinion

MEMORANDUM OPINION AND ORDER

C. LYNWOOD SMITH, JR., District Judge.

***1** This action is before the court on motions to quash subpoenas *duces tecum* issued by plaintiffs to four non-parties: *i.e.*, Alabama Senate President *Pro Tempore* Del Marsh; Speaker of the Alabama House of Representatives Mike Hubbard; former Alabama Governor Robert R. ("Bob") Riley; and, current Alabama Governor Robert J. Bentley, who was a defendant until August 22, 2012, when all claims against him were dismissed.[1] Understanding how the documents sought by the contested subpoenas relate to claims asserted by plaintiffs requires a review of the case's procedural history.

1 *See* doc. no. 126 (Memorandum Opinion and Order), at 82–84 and 100; *see also* note 13, *infra*, and the accompanying text.

I. PROCEDURAL HISTORY

The Alabama Education Association ("AEA"), Alabama Voice of Teachers for Education ("A–VOTE"), and six individuals affiliated with those organizations commenced this action in February of 2011.[2] They challenged the constitutionality of Alabama Act No. 2010–761 ("Act No. 761"), an amendment of preexisting law that was enacted by the Alabama Legislature on December 15, 2010, and signed into law by Governor Riley on December 20, 2010.[3]

2 AEA is an Alabama non-profit corporation. Its membership consists of approximately 75,000 active and 30,000 retired public educators and education support personnel employed by the State of Alabama, or one of Alabama's four-year colleges and universities, or the State's Department of Postsecondary Education ("DPE"), or one of the State's postsecondary institutions (two-year colleges and trade and vocational training schools that function under the supervision of the DPE), or one of the State's local boards of education. *See* doc. no. 1 (Complaint) ¶¶ 5–7. "AEA's mission is to promote educational excellence, advocate for its members, and lead in the advancement of equitable and quality public education for a diverse population." *Id.* ¶ 24. To advance that mission, "AEA advocates on an array of issues that are of concern to its members, including questions relating to tax policy, pension and insurance issues, education funding, tenure protections for education employees, school curriculum, and charter schools." *Id.* ¶ 25.

"A–VOTE" is a political action committee sponsored by AEA that functions as "a vehicle for members who wish to support candidates whose positions are consistent with AEA's missions and goals." *Id.* ¶ 26. AEA members who contribute to A–VOTE have the "opportunity to participate in the electoral process and to support and elect candidates of their choice." *Id.* The "vast majority" of AEA members have, for decades, executed voluntary requests to have their AEA membership dues, as well as their voluntary

contributions to A–VOTE, automatically deducted from their respective paychecks. *Id.* ¶ 7.

The six individual plaintiffs, all of whom are members of AEA, are: Pam Hill, an education support professional who is employed by the Huntsville City Board of Education; Dr. Cathy McNeal, Ph.D., a professional educator who is employed by the same public school system; Chassity Smith, a professional educator who is employed by the City of Madison Board of Education; Jeff Breece, a professional educator who is employed by the Madison County Board of Education; Dorothy J. Strickland, a professional educator who is employed by the Lee County School District; and Ronald Slaughter, a professional educator who is employed by Alabama Agricultural & Mechanical University. *See* doc. no. 1 (Complaint) ¶¶ 8–13.

This court also allowed an intervention complaint to be filed by the Alabama State Employee Association ("ASEA"), the State Employee Association Political Action Committee ("SEA–PAC"), Randy Hebson (President of ASEA), Edwin J. McArthur (Executive Director of ASEA), and three State employees who are members of ASEA and contributors to SEA–PAC: *i.e.*, Larry Sanders, JoAnne Brown, and John Allen. *See* doc. no. 86 (Order entered May 30, 2012, allowing complaint in intervention to be filed), and doc. no. 87 (Complaint in Intervention). The intervenor-plaintiffs assert essentially the same claims as the original plaintiffs.

[3] *See* doc. no. 1 (Complaint) ¶¶ 1–2.

A. Preexisting Alabama Law

Prior to the enactment of Act No. 761, Alabama Code § 16–22–6 directed city and county boards of education, as well as some post-secondary institutions, to adopt procedures to allow employees to deduct from their paychecks contributions for, among other things, "membership dues" and "voluntary contributions." The pertinent portion of the statute as it then existed provided that:

> Each local board of education and certain postsecondary institutions shall adopt policies or regulations which will provide for deductions from salaries of its employees or groups of employees whenever a request is presented to the board or postsecondary institution by the employees or groups. The deductions shall be made from salaries earned in at least nine different pay periods and shall be remitted to the appropriate company, association, or organization as specified by the employees within 10 days following each deduction. *The deductions may be made for, but [are] not limited to,* savings plans, tax sheltered annuities, the Public Employees' Individual Retirement Account Fund, *membership dues, voluntary contributions,* and group insurance premiums. Deductions for membership dues and voluntary contributions shall be made based upon membership lists and forms provided by the employees' organization. Such lists are to be corrected, updated, and returned to the employees' designated organization(s) not later than November 10 of each school year....

Ala.Code § 16–22–6(a) (1975) (2001 Replacement Vol.) (emphasis and alteration supplied). Those statutory requirements had been a part of the *corpus* of Alabama law since at least 1973. Relatedly, Alabama Code § 36–1–4.3 provided that:

> (a) The state Comptroller shall adopt statewide policies which provide for deductions from the salaries of state employees or groups of state employees whenever a request is presented to the state Comptroller by a group of participating state employees equal in number to at least 200 provided, however, that deductions being made as of April 23, 1985, shall continue to be made. The deductions shall be made at least monthly and shall be remitted to the appropriate company, association, or organization as specified by the employees. The deductions may be made for *membership dues,* and *voluntary contributions,* and insurance premiums. Any deduction provided under the provisions of this section may be terminated upon two months' notice in writing by a state employee to the appropriate company, association, or organization and to the appropriate payroll clerk or other appropriate officials as specified by the state Comptroller.
>
> ***2** (b) The state Comptroller may, at his discretion, collect from the deductions withheld a cost of administration fee not to exceed one percent of the total deduction collected.

Ala.Code § 36–1–4.3 (1975) (2001 Replacement Vol.) (emphasis supplied). Again, the basis for those statutory requirements had been a part of the *corpus* of Alabama law since at least 1985.

Both of the foregoing statutes were tempered by Alabama Code § 17–17–5, which is located in a chapter addressing "Election Offenses," and which read as follows prior to the enactment of Act. No. 761:

> No person in the employment of the State of Alabama, a county, or a city whether classified or unclassified, shall use any state, county, or city funds, property or time, for any political activities. Any person who is in the employment of the State of Alabama, a county, or a city shall be on approved leave to engage in political action or the person shall be on personal time before or after work and on holidays. It shall be unlawful for any officer or employee to solicit any type of political campaign contributions from other employees who work for the officer or employee in a subordinate capacity. It shall also be unlawful for any officer or employee to coerce or attempt to coerce any subordinate employee to work in any capacity in any political campaign or cause. Any person who violates this section shall be guilty of the crime of trading in public office and upon conviction thereof, shall be fined or sentenced, or both, as provided by Section 13A–10–63.

Ala.Code § 17–17–5 (1975) (2007 Replacement Vol.). [4]

[4] The statute referenced in the last line of the textual quotation (*i.e.*, "Section 13A–10–63") states the elements of the crime of "trading in public office" as follows:

> (a) A person is guilty of trading in public office if:
>
> (1) He offers, confers or agrees to confer any pecuniary benefit upon a public servant or party officer upon an agreement or understanding that he himself will or may be appointed to a public office or public employment or designated or nominated as a candidate for public office; or
>
> (2) While a public servant or party officer, he solicits, accepts or agrees to accept any pecuniary benefit from another upon an agreement or understanding that that person will or may be appointed to a public office or public employment or designated or nominated as a candidate for public office.
>
> (b) This section does not apply to contributions to political campaign funds or other political contributions.
>
> (c) Trading in public office is a Class A misdemeanor.

Ala.Code § 13A–10–63 (1975) (2005 Replacement Vol.). Class A misdemeanors are punishable by imprisonment in the county jail or by hard labor for the county for a term of not more than one year, or by a fine of not more than $2,000, or both. *See id.* §§ 13A–5–2(c), 13A–5–7(a)(1), and 13A–5–12(a)(1).

B. Alabama Act No. 761

Act No. 761 specifically addressed Alabama Code § 17–17–5, and amended the language of that provision in the following manner:

> ENROLLED, **An Act,**
>
> **To amend Section 17–17–5, Code of Alabama 1975, relating to prohibited political activities by state, county, and city employees; to further specifically prohibit employees of the state, a county, a city, a local school board, or other governmental agency from using any agency funds, property, or time arranging for payments by salary deduction, or otherwise, to a political action committee or dues for membership organizations that use funds for political activities.**

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

> Section 1. Section 17–17–5, Code of Alabama 1975, is amended to read as follows:
>
> " § 17–17–5.
>
> "(a) No person in the employment of the State of Alabama, a county, a city, *a local school board, or any other governmental agency*, whether classified or unclassified, shall use any state, county, city, *local school board, or other governmental agency* funds, property, or time, for any political activities.

"(b) *No person in the employment of the State of Alabama, a county, a city, a local school board, or any other governmental agency may arrange by salary deduction or otherwise for any payments to a political action committee or arrange by salary deduction or otherwise for any payments for the dues of any person so employed to a membership organization which uses any portion of the dues for political activity. For purposes of this subsection (b) only, political activity shall be limited to all of the following:*

***3** "(1) *Making contributions to or contracting with any entity which engages in any form of political communication, including communications which mention the name of a political candidate.*

"(2) *Engaging in or paying for public opinion polling.*

"(3) *Engaging in or paying for any form of political communication, including communications which mention the name of a political candidate.*

"(4) *Engaging in or paying for any type of political advertising in any medium.*

"(5) *Phone calling for any political purpose.*

"(6) *Distributing political literature of any type.*

"(7) *Providing any type of in-kind help or support to or for a political candidate.*

"*Any organization that requests the State of Alabama, a county, a city, a local school board, or any other governmental agency to arrange by salary deduction or otherwise for the collection of membership dues of persons employed by the State of Alabama, a county, a city, a local school board, or any other governmental agency shall certify to the appropriate governmental entity that none of the membership dues will be used for political activity. Thereafter, at the conclusion of each calendar year, each organization that has arranged for the collection of its membership dues of persons employed by the State of Alabama, a county, a city, a local school board, or any other governmental agency shall provide the appropriate governmental entity a detailed breakdown of the expenditure of the membership dues of persons employed by the State of Alabama, a county, a city, a local school board, or any other governmental agency collected by the governmental entity. Any organization that fails to provide the required certifications, that reports any expenditures for political activity or that files false information about political activity in any of its reports shall be permanently barred from arranging for the collection of its membership dues by any governmental entity. The Examiners of Public Accounts shall annually review a sample of at least ten percent of the certifications filed with each governmental entity and report its findings to the appropriate governmental entity.*

> "(c)Any person who is in the employment of the State of Alabama, a county, a city, *a local school board, the State Board of Education or any other governmental agency*, shall be on approved leave to engage in political action or the person shall be on personal time before or after work and on holidays. *It shall be unlawful for any officer or employee to solicit any type of political campaign contributions from other employees who work for the officer or employee in a subordinate capacity.* It shall also be unlawful for any officer or employee to coerce or attempt to coerce any subordinate employee to work in any capacity in any political campaign or cause. Any person who violates this section shall be guilty of the crime of trading in public office and upon conviction thereof, shall be fined or sentenced, or both, as provided by Section 13A–10–63."

***4** Section 2. The provisions of this act are severable. If any part of this action is declared invalid or unconstitutional, that declaration shall not affect the part which remains.

Section 3. All law or parts of laws which conflict with this act are repealed.

Section 4. This act shall become effective 90 days following its passage and approval by the Governor or its otherwise becoming law.

Act of Dec. 15, 2010, Ala. Act No. 2010–761 (boldface emphasis in original, underscoring applied to language added to preexisting law).

C. Codification of Alabama Act No. 761

The language of Act No. 761 as signed into law by Governor Riley was subsequently codified as follows:

> (a) No person in the employment of the State of Alabama, a county, a city, a local school board, or any other governmental agency, whether classified or unclassified, shall use any state, county, city, local school board, or other governmental agency funds, property, or time, for any *political activities.*
>
> (b)(1) No person in the employment of the State of Alabama, a county, a city, a local school board, or any other governmental agency may arrange by salary deduction *or otherwise* for any payments to a political action committee or arrange by salary deduction *or otherwise* for any payments for the dues of any person so employed to a membership organization which uses any portion of the dues for *political activity.* For purposes of this subsection only, *political activity* shall be limited to all of the following:
>
> a. Making contributions to or contracting with any entity which engages in any form of political communication, including communications which mention the name of a political candidate.
>
> b. Engaging in or paying for public opinion polling.
>
> c. Engaging in or paying for any form of political communication, including communications which mention the name of a political candidate.
>
> d. Engaging in or paying for any type of political advertising in any medium.
>
> e. Phone calling for any political purpose.
>
> f. Distributing political literature of any type.
>
> g. Providing any type of in-kind help or support to or for a political candidate.
>
> (2) Any organization that requests the State of Alabama, a county, a city, a local school board, or any other governmental agency to arrange by salary deduction *or otherwise* for the collection of membership dues from persons employed by the State of Alabama, a county, a city, a local school board, or any other governmental agency shall certify to the appropriate governmental entity that none of the membership dues will be used for *political activity.* Thereafter, at the conclusion of each calendar year, each organization that has arranged for the collection of its membership dues from persons employed by the State of Alabama, a county, a city, a local school board, or any other governmental agency shall provide the appropriate governmental entity a detailed breakdown of the expenditure of the membership dues of persons employed by the State of Alabama, a county, a city, a local school board, or any other governmental agency and collected by the governmental entity. Any organization that fails to provide the required certifications, that reports any expenditures for *political activity,* or that files false information about *political activity* in any of its reports shall be permanently barred from arranging for the collection of its membership dues by any governmental entity. The Examiners of Public Accounts shall annually review a sample of at least 10 percent of the certifications filed with each governmental entity and report its findings to the appropriate governmental entity.
>
> ***5** (c) Any person who is in the employment of the State of Alabama, a county, a city, a local school board, the State Board of Education or any other governmental agency, shall be on approved leave to engage in political action or the person shall be on personal time before or after work and on holidays. It shall be unlawful for any officer or employee to solicit any type of political campaign contributions from other employees who work for the officer or employee in a subordinate capacity. It shall also be unlawful for any officer or employee to coerce or attempt to coerce any subordinate employee to work in any capacity in any political campaign or cause. Any person who violates this section shall be guilty of the crime of trading in public office and upon conviction thereof, shall be fined or sentenced, or both, as provided by Section 13A–10–63.

Ala.Code § 17–17–5 (1975) (Supp.2011) (boldface emphasis supplied).

D. This Court's Preliminary Injunction

Plaintiffs' complaint alleged, among other things, that the changes to preexisting Alabama law worked by Act No. 761 violated the Free Speech and Free Association Clauses of the First Amendment, as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitutions.[5] Following a hearing, this court held that the Act infringed important First Amendment rights, and that plaintiffs had demonstrated a substantial likelihood of

ultimately prevailing on the merits of their claims that the Act's restrictions were overly broad, and that the Act itself was unduly vague.[6] Specifically, this court reasoned that the phrase "or otherwise" reached beyond payroll deductions, and attached the personal political contributions of government employees.[7] This court also held that the term "political activity," found in both subsections of § 17–17–5(b), did not clearly define the nature of prohibited acts.[8] For such reasons, this court preliminarily enjoined the implementation and enforcement of Act. No. 761, and required defendants to honor all employee requests for payroll deductions to AEA, and to remit those deductions to AEA, including all amounts representing contributions to "A–VOTE,"[9] the political action committee sponsored by AEA.[10]

5 *See* doc. no. 1 (Complaint) at, *e.g.*, ¶¶ 1–2.

6 To justify the entry of an order granting preliminary injunctive relief, plaintiffs generally must satisfy four prerequisites: (1) demonstrate a substantial likelihood of ultimately prevailing on the merits; (2) show that plaintiffs will suffer irreparable harm if an injunction maintaining the *status quo pendente lite* does not issue; (3) prove that the threatened injury to plaintiffs outweighs whatever damage the proposed injunction may cause to the opposing parties; and (4) demonstrate that the injunction will not be adverse to the public interest. *See Alabama Education Association v. State Superintendent of Education*, 788 F.Supp.2d 1283, 1301–03 (N.D.Ala.2011).

7 *Id.* at 1319–24.

8 *Id.* at 1324–28.

9 *See* doc. no. 37 (Preliminary Injunction).

10 *See supra* note 2.

E. Appeal of Order Granting Preliminary Injunctive Relief

Most of the defendants appealed the order granting preliminary injunctive relief.[11] The Eleventh Circuit concluded that the constitutional issues raised by plaintiffs turned upon questions of state law that had not been specifically addressed by either the Alabama Supreme Court or the State's intermediate courts of appeal. Consequently, rather than speculating as to the proper interpretation of a state statute, the Circuit Court certified two questions:

11 *See* doc. no. 40 (Notice of Appeal by *AEA* Bice Defendants); doc. no. 41 (Amended Notice of Appeal by Bice Defendants); and doc. no. 45 (Notice of Appeal by *AEA* Governor Defendants).

TO THE SUPREME COURT OF ALABAMA AND THE HONORABLE JUSTICES THEREOF:

AEA contends that Alabama Act No. 2010–761 infringes a broader range of constitutionally protected activity than previously recognized as permissible under the First Amendment. Specifically, AEA argues that the Act's "or otherwise" language would prevent government employees from making contributions to an organization engaged in political activity through any means, including personal donations of their own money. AEA also argues that the term "political activity" reaches a wide number of ill-defined activities, making it impossible for any organization to certify that it is in compliance with the Act. The state counters that "or otherwise" simply prevents the use of state resources in any way—whether through salary deductions or some other state mechanism—from benefitting organizations involved in political activities. The state argues that "political activity" means electioneering activities.

***6** The interpretation of the Act is a question of state law that has not been specifically addressed by the Alabama Supreme Court or the intermediate state appellate courts. Therefore, we certify the following questions to the Alabama Supreme Court:

1. Is the "or otherwise" language in the statute limited to the use of state mechanisms to support political organizations, or does it cover all contributions by state employees to political organizations, regardless of the source?

2. Does the term "political activity" refer only to electioneering activities?

The answers to these questions will permit this court to address AEA's concerns and determine whether the Act runs afoul of the First Amendment. To facilitate the resolution of these questions, we direct the Clerk to transmit the entire record of this case, together with copies of the parties' briefs, to the Alabama Supreme Court. Of course, the Alabama Supreme Court is in no way limited by our questions and may consider the case as it sees fit.

Alabama Education Association v. State Superintendent of Education, 665 F.3d 1234, 1238–39 (11th Cir.2011) (Dubina, C.J.). [12]

12 The other judges comprising the panel are Emmett Ripley Cox, Senior Circuit Judge, and Willis B. Hunt Jr., United States District Judge for the Northern District of Georgia, sitting by designation.

The Circuit opinion on interlocutory appeal also narrowed this court's injunction, and permitted the State to enforce Act No. 761, but only to the extent that it restricted payroll deductions for organizations engaged in "electioneering activities." *Id.* at 10–12. That part of the Circuit opinion was based upon the Supreme Court's decision in *Ysursa v. Pocatello Education Association*, 555 U.S. 353, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009), holding that a properly conceived ban on salary deductions to organizations engaged in electioneering activities would be constitutional. The Eleventh Circuit opinion summarized the *Ysursa* holding as follows:

> In *Ysursa*, public employee unions challenged an Idaho state law ban on political payroll deductions as a violation of the First Amendment. The Court began by reiterating that the First Amendment "protects the right to be free from government abridgment of speech. While in some contexts the government must accommodate expression, it is not required to assist others in funding the expression of particular ideas, including political ones." *Id.* at 358, 129 S.Ct. at 1098; *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549, 103 S.Ct. 1997, 2003, 76 L.Ed.2d 129 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."). The Court accepted that the unions challenging Idaho's law faced substantial difficulties in collecting funds for their political speech without the assistance of the state through salary deductions. However, this fact posed no difficulty for the Court, which concluded,
>
> > While publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights, Idaho is under no obligation to aid the unions in their political activities. And the State's decision not to do so is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor.
>
> ***7** *Ysursa*, 555 U.S. at 359, 129 S.Ct. at 1098. The Court then held, "Idaho's decision to limit public employer payroll deductions as it has is not subject to strict scrutiny under the First Amendment." *Id.* (internal citations and quotation marks omitted). Instead, "[g]iven that the State has not infringed the unions' First Amendment rights, the State need only demonstrate a rational basis to justify the ban on political payroll deductions." *Id.* The Supreme Court concluded that the payroll deduction ban met the rational basis test. It wrote,
>
> > The concern that political payroll deductions might be seen as involving public employers in politics arises only because Idaho permits public employer payroll deductions in the first place.... [T]he State's response to that problem is limited to its source—in this case, political payroll deductions. The ban on such deductions plainly serves the State's interest in separating public employment from political activities.
>
> *Id.* at 361, 129 S.Ct. at 1099.
>
> Thus, the question before this court in the present case turns entirely on how the Act is interpreted. If it is meant only to reach payroll deductions for organizations engaged in electioneering activities such as those targeted by the Idaho statute at issue in *Ysursa*, then it presents no constitutional problems. A statute with a broader reach may implicate First Amendment concerns not explored in *Ysursa*....

Alabama Education Association, 665 F.3d at 1237–38 (alterations in original) (footnote omitted).

F. Subsequent Disposition of Claims Not Addressed in the Prior Opinion

This court recently narrowed the claims that were not addressed in the opinion granting preliminary injunctive relief. All claims against the current Governor of Alabama, Dr. Robert J. Bentley, M.D., were dismissed without prejudice on August 22, 2012. [13] The same opinion dismissed with prejudice all claims against any defendant that were based upon the Equal Protection Clause of the Fourteenth Amendment, as well as plaintiffs' claims for so-called "viewpoint discrimination" and "unconstitutional conditions." [14]

13 *See* doc. no. 126 (Memorandum Opinion and Order), at 82–84 and 100 ("Pursuant to the consent of both the

AEA and the *IAFF* plaintiffs, all claims asserted against Governor Robert Bentley are due to be, and hereby are, DISMISSED without prejudice."). Dr. Bentley assumed the Governor's office on January 17, 2011, after the events leading to the enactment of Act No. 761. Governor Bentley argued that, because plaintiffs failed to identify any specific connection between him and enforcement of the Act, plaintiffs had in effect sued the State of Alabama, which is immune from the claims asserted in both actions. Plaintiffs did not contest Governor Bentley's motion to dismiss. *See* doc. no. 75 (AEA's Response to Governor Bentley's Motion to Dismiss), at 1 ("The plaintiffs have no objection to the granting of Governor Bentley's motion to dismiss."); and doc. no. 109 (ASEA's Response to Governor Bentley's Incorporation of the Motions to Dismiss Against the Plaintiff Intervenors), at 1–2 ("As with AEA and A–VOTE, ASEA has no objection to the granting of Governor Bentley's Motion to Dismiss.").

14 *See* doc. no. 126 (Memorandum Opinion and Order), at 56–60 (discussion of "viewpoint discrimination" claims), 78–80 (discussion of "unconstitutional conditions" claims), and 100 (orders dismissing the foregoing claims with prejudice).

The ruling that led to the events forming the basis of the present motions to quash, however, was this court's determination that plaintiffs' First Amendment retaliation claim should not be dismissed. [15]

15 *Id.* at 60–78 (discussion of the motions to dismiss the First Amendment retaliation claim), and 100–01 (overruling the motions to dismiss that claim).

1. First Amendment Retaliation Claim

It is well established that governmental actions that do not violate the Constitution on their face may, nevertheless, become actionable constitutional "torts" *if* it is demonstrated that the contested acts were motivated in substantial part by a desire to punish an individual or group for the exercise of a constitutional right. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."). [16]

16 *See also, e.g., Crawford–El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) (holding that the act of intentionally depriving an inmate of his personal belongings may serve as the basis for a claim of retaliation for his exercise of First Amendment rights); *Board of County Commissioners, Wabaunsee County v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996) (nonrenewal of plaintiff's government contract in retaliation for his exercise of free speech is actionable).

***8** Thus, a cause of action may arise from the curtailment or elimination of a governmental benefit in retaliation for a plaintiff's exercise of First Amendment rights. *See, e.g., Georgia Association of Educators v. Gwinnett County School District*, 856 F.2d 142, 144–45 (11th Cir.1986) (recognizing a First Amendment retaliation claim based upon materially similar facts: *i.e.*, the termination of a payroll deduction service for three teachers' associations based upon an alleged desire to destroy the local teachers' union in retaliation for the union's exercise of First Amendment rights) (citing *Perry*, 408 U.S. at 597).

The policy rationale for the recognition of a cause of action for governmental acts motivated in substantial part by a desire to punish an individual or group for the exercise of First Amendment rights was succinctly stated by the Supreme Court in *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), where the Court held: "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.' " *Id.* at 256 (quoting *Crawford–El v. Britton*, 523 U.S. 574, 588 n. 10, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998)) (alteration in original).

a. *Prima facie* elements of a First Amendment retaliation claim

The Eleventh Circuit defined the elements of a *prima facie* First Amendment retaliation claim in *Castle v. Appalachian Technical College*, 631 F.3d 1194 (11th Cir.2011), holding that a plaintiff must show that: "(1) her speech was constitutionally protected; (2) she suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) there was a causal relationship between the adverse conduct and the protected speech." *Id.* at 1197 (citing *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir.2005)). "In order to establish a causal connection, the plaintiff must show that the defendant was subjectively motivated to take the adverse action because of the protected speech." *Keeton v. Anderson–Wiley*, 664 F.3d 865, 878 (11th Cir.2011) (quoting *Castle*, 631 F.3d at 1197).

b. The basis for plaintiffs' First Amendment retaliation claim

In substance, plaintiffs allege that AEA had a long history of expressing and advocating political viewpoints opposed by Alabama elected officials affiliated with the Republican Party. That difference of opinion and policy continued into and intensified during the two terms of the Riley Administration, [17] as seen by, among other disputes, AEA's act of lobbying for a cloture vote on then-State Senator Bradley Byrne's filibuster of a teacher tenure bill, and AEA's opposition to Governor Riley's 2007 nomination of Byrne for Chancellor of the Alabama Department of Postsecondary Education. [18] Further, and according to plaintiffs:

17 Robert R. "(Bob") Riley served two consecutive, four-year terms as Governor of the State of Alabama, from Jan. 20, 2003 to Jan. 17, 2011.

18 *See, e.g.*, doc. no. 1 (Complaint) ¶ 35.

> In late 2009 and early 2010, Governor Riley criticized AEA for its opposition to legislation authorizing charter schools. And, in 2010, AEA and Riley clashed over a State Board of Education policy prohibiting two-year college system employees from serving in the state legislature. Riley (then serving as both Governor of Alabama and *ex officio* President of the State Board of Education) and Bradley Byrne (whom Riley had appointed to be Chancellor of DPE) both supported the policy. AEA vocally opposed that policy, and brought a lawsuit to invalidate it. [19]

19 *Id.*

***9** The conflict between plaintiffs and Governor Riley came to a head during the 2010 election cycle, when AEA and A–VOTE spent a great deal of money in the Republican primary to thwart Bradley Byrne's attempt to become Riley's successor as Governor. As a result, a dark-horse candidate, Dr. Robert J. Bentley, M.D., a retired dermatologist from Tuscaloosa who had served two terms in the Alabama House of Representatives (2002 to 2010), surprised political analysts by finishing second in the June 1, 2010 primary election, and forcing a run-off with Byrne. [20] On June 26, 2010, during the run-up to the July 13th run-off election, Riley stated that "we do not support the AEA and we don't want 'em in our primary and we don't want anyone that wants 'em in our primary." [21] Only two days later, his administration ended the decades-old policy of making payroll deductions for public employee contributions to political action committees:

20 Out of a field of seven candidates, Byrne ran first with 137,349 votes (27.9% of all votes cast), followed by Bentley with 123,870 votes (25.2% of the total), and Tim James with 123,662 votes (25.1%). *See* http://www .sos.state.al.us/elections/2010/electionInfo2010.aspx.

21 Doc. no. 1 (Complaint) ¶ 39. *See also, e.g.*, www.youtube.com/watch?v=LaXwNIp34qg (videotape recording of a portion of Governor Riley's remarks at the GOP Summer Dinner).

> On June 28, 2010—two days after Governor Riley stated his desire that AEA stay out of the Republican primary—Alabama Comptroller Thomas White announced to all state departments, agencies and personnel officers that "Payroll deductions for Political Action Committees (PACs) will no longer be withheld from employees' pay effective July 1, 2010." Comptroller White subsequently amended the Fiscal Policy and Procedures Manual—which had expressly authorized payroll deductions for PAC contributions—to omit any mention of PACs as recipients of voluntary contributions. The Comptroller purported to have come to the view that, even though such requests had been honored and effectuated for decades, longstanding statutory authority—in particular, the provision of Ala.Code § 17–17–5 prohibiting public employees from "us[ing] any state, county, or city funds, property, or time, for any political activities"—made it unlawful for the State to comply with such payroll deduction requests. [22]

22 Doc. no. 1 (Complaint) ¶ 40 (alteration in original).

Governor Riley issued a press release taking credit for the change: *e.g.*, "the Riley Administration stopped payroll deductions...." [23]

23 *Id.* ¶ 41.

Despite Riley's public endorsement of Byrne prior to the primary run-off election, [24] Dr. Bentley handily defeated his opponent with 56% of the votes cast, and claimed the Republican nomination. He went on to defeat the nominee of the Democratic Party in the November 2, 2010 general election by a margin of 230,000 votes: just over 58% of the total number cast.

24 *See, e.g.*, David Catanese, *Riley lines up behind Byrne*, Politico (July 9, 2010, 4:05 p.m. EST), http://dyn.politico . com/news/stories/0710/39543.html.

Of greater significance, however, is the fact that, during the 2010 general election, Republicans gained firm control of

both chambers of the Alabama Legislature for the first time in 136 years. [25] According to plaintiffs, the "new Republican majority consist[ed] almost exclusively of legislators that AEA and A–VOTE failed to support or actively opposed during the 2010 election campaign." [26]

25 Republican candidates won 21 of 35 seats in the Alabama Senate, and 63 of 105 seats in the Alabama House of Representatives during the November 2010 general election. *See, e.g.*, www.legislature.state.al.us. Republicans previously controlled Alabama government only during a brief period following the Civil War and the end of "Presidential Reconstruction," and the general election of 1874, when candidates affiliated with the so-called "Conservative and Democratic Party" "redeemed" control of State government from the "Radical Republicans," a political coalition among Northern Carpetbaggers, Southern Scallywags, and a handful of recently-freed slaves. The adjective "radical" was used to describe those white, Northern Republican officeholders who had most strongly opposed slavery prior to and during the Civil War; who distrusted former Confederate Army officers and those who had held political offices in the former Confederate States; who believed that harsh and punitive policies were required to punish those who had led the nation into civil war, and to "Reconstruct" the South; who demanded civil and political rights for the recently-freed slaves; and who understood that the moral redemption and future prosperity of the South were dependent upon the education and elevation of the former slaves.

26 Doc. no. 1 (Complaint) ¶ 43 (alteration supplied).

Further, even though Alabama legislators assume office the day after they are elected, [27] they normally do not convene in Montgomery until the first Tuesday in March of the following year. [28] Thus, when Governor Riley "took the extraordinary step" on December 1, 2010 of issuing a "call" for a special session of the newly-elected legislature to convene on December 8th, [29] it gave him a "small window of opportunity" [30] to end his two terms in office with the enactment of "the most stringent ethics law in the country." [31]

27 *See* Ala. Const., art. IV, § 46(a), 2d sent. (1901) ("The terms of office of the senators and representatives shall commence on the day after the general election at which they are elected ....").

28 *See* Ala.Code § 29–1–4 (1975) (2003 Replacement Vol.). *See also* http://www.legi slature.state.al.us/misc/visitorsguide/visitorsguide.html # anchor985286.

29 Doc. no. 1 (Complaint) ¶ 45.

30 Cameron McWhirter, "Alabama Seeks Ethics Overhaul," *The Wall Street Journal* (Nov. 15, 2010) ("Now, with winning legislators taking office immediately and his own party in charge, Gov. Riley says he's winding down his eight years in office by using a 'small window of opportunity' to take action before budget debates consume political discussion."), at http://online.wsj.com/article/SB 10001424052748704865704575610730582946 15.

31 Kim Chandler, "Gov. Riley calls for special session on ethics reform for Alabama government," at http://blog.al.com/spotnews (posted Dec. 1, 2010).

***10** Plaintiffs assert that Republican lawmakers involved in the enactment of Act No. 761 shared Governor Riley's animus against AEA:

> 47. On December 10, 2010, Senator Marsh [President *Pro Tempore* of the upper house] introduced in the Alabama Senate a bill to prohibit public employees from "arrang[ing] by salary deduction or otherwise" for the payment of "dues for any membership organization which engages, directly or indirectly, in political activity" as well as to prohibit public employees from "arrang[ing] by salary deduction or otherwise" for the payment of PAC contributions.
>
> 48. On information and belief, defeated gubernatorial candidate Byrne participated in the drafting of the legislation and heavily lobbied Republican lawmakers to support it. Indeed, Byrne lobbied legislators on the floor of the legislature while the legislation was being debated.
>
> 49. On information and belief, a majority of the members of the new legislature share then-Governor Riley's antipathy toward the political activities of AEA and A–VOTE, and/or were recruited by then-Governor Riley and/or his supporters to support the Riley Administration's campaign against those activities through legislation. [32]

32 Doc. no. 1 (Complaint) ¶¶ 48–49 (first alteration supplied, all other alterations in original).

Plaintiffs also contend that the Act will reduce AEA's membership and A–VOTE's funding, thereby diminishing their future ability to engage in protected speech. [33]

33 *Id.* ¶ 75.

In summary, AEA and A–VOTE allege sufficient facts to show that they engaged in constitutionally protected speech during the 2010 Alabama Republican gubernatorial primary; that Governor Riley and members of his administration expressed animosity towards plaintiffs' political speech; and that those individuals played a critical role in the enactment of Act No. 761 shortly after plaintiffs utilized their protected speech to influence the selection of the Republican Party's nominee for the office of Governor.

Moreover, plaintiffs allege sufficient facts from which an inference can be drawn that a majority of the Republican members of the Alabama legislature who had been elected in the 2010 general election harbored an animus against AEA and A–VOTE due to their protected speech.

For all of those reasons, this court allowed plaintiffs' claim for First Amendment retaliation to survive defendants' motions to dismiss. [34]

34 *See* doc. no. 126 (Memorandum Opinion and Order), at 60–78.

G. The Contested Subpoenas

The need for the present opinion grew from plaintiffs' act of serving subpoenas *duces tecum* on Governor Bentley, former Governor Riley, Alabama Senate President *Pro Tempore* Del Marsh, and Speaker of the Alabama House of Representatives Mike Hubbard (collectively, "the Officials"). The subpoenas ask for the production of documents and communications that may show a causal relationship between plaintiffs' political speech during the 2010 Republican Party primary, and Act No. 761's termination of the payroll deduction service that had been a part of Alabama law since at least 1973. Specifically, plaintiffs request production of six categories of documents:

***11** 1. Produce each document in your possession or control which explains the requirements of Alabama Act 2010–761, including any cover letter showing the person or agency sending you the document or to whom you sent the document.

2. Produce each document in your possession or control which is a draft of (or proposal for) any legislative bill, proposed rule, or proposed regulation to prohibit or restrict payroll deductions of dues or contributions to the Alabama Education Association, the Alabama State Employees Association, any other organization composed primarily of state or local government employees, or any political action committee associated with any of the foregoing; and any document showing the person or persons who drafted the bill or proposal.

3. Produce each communication (including emails) of which you were the sender or a recipient and which related to or concerned Senate Bill 2 in the 2010 Special Session of the Alabama Legislature . [35]

35 Senate Bill 2 became Act No. 761. *See, e.g.,* http:// lrs.state.al.us/ publications/2010_special_summaries.html.

4. Produce each document or communication (including emails) in your possession or control with a known or apparent creation date in 2009 or 2010 and which related to or concerned Alabama Education Association, A–Vote, the Alabama State Employees Association, SEA–PAC, Dr. Paul Hubbert, Dr. Joe Reed, or Edwin "Mac" McArthur.

5. Produce each document or communication (including emails) received from the office of Gov. Bob Riley, the Comptroller, or the Finance Director and which related to or concerned any proposal to stop the collection of dues for membership organizations through payroll deduction.

6. Produce each document or communication (including emails) received from the office of Gov. Bob Riley, the Comptroller, or the Finance Director and which related to or concerned any proposal to stop the collection of contributions to political organizations through payroll deduction. [36]

36 Doc. no. 104–1(Motion to Quash Subpoenas Directed to Speaker Hubbard, President *Pro Tempore* Marsh, and Former Governor Riley, and to Stay All Discovery Pending Resolution of the Defendants' Motions to Dismiss by Alabama House of Representatives Speaker Mike Hubbard, Alabama Senate President *Pro Tempore* Del Marsh, and the Bice Defendants), Exhibit "A," at 33 (Attachment F) (alteration supplied).

The phrasing of the request for documents in the possession of Governor Bentley is not identical to the language quoted in the text accompanying this footnote, but it is substantially the same. *Compare id. with* doc. no. 104–2, Exhibit "B," at 3–4.

H. The Motions to Quash and the Privileges Relied Upon

Motions to quash plaintiffs' subpoenas were filed on behalf of the Officials.[37] The motions contend that the subpoenas seek information protected from disclosure by the privileges discussed in the following subsections.[38]

37 *See* doc. no. 104 (Motion to Quash Subpoenas Directed to Speaker Hubbard, President *Pro Tempore* Marsh, and Former Governor Riley, and to Stay All Discovery Pending Resolution of the Defendants' Motions to Dismiss by Alabama House of Representatives Speaker Mike Hubbard, Alabama Senate President *Pro Tempore* Del Marsh, and the Bice Defendants); doc. no. 106 (Motion to Quash Subpoena by Former Governor Riley); and doc. no. 127 (Motion to Quash Subpoena by Governor Bentley).

38 In addition to the privileges discussed hereafter, Governor Bentley argued that the subpoenaed documents are protected by the "attorney-client" and "work-product" privileges. *See* doc. no. 127, at 2–3.

1. Executive privilege

"Executive privilege"[39] refers to a doctrine under which "documents from a former or an incumbent President [or, arguably, the chief executive of a state government] are presumptively privileged." *United States v. Poindexter*, 727 F.Supp. 1501, 1505 (D.D.C.1989) (citing *United States v. Nixon*, 418 U.S. 683, 708–13, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)) (alteration supplied).[40] The privilege recognizes "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 382, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (citing *Nixon*, 418 U.S. at 715).

39 *See* doc. no. 104, at 1–2; doc. no. 106, at 1 (incorporating by reference the arguments in doc. no. 104); and doc. no. 127, at 2–3 (same).

40 Just as the President is the head of the executive branch of the United States government, so a Governor is the head of the executive branch of a state government. Thus, extending the executive privilege to the current and former Governors of Alabama serves the interest of maintaining the separation of powers between the executive and judicial branches of government. *See Thomas v. Cate*, 715 F.Supp.2d 1012 (E.D.Cal.2010); *Wilson v. Brown*, 404 N.J.Super. 557, 563–64, 962 A.2d 1122 (App.Div.2009) (both applying the executive privilege to discovery sought from Governors).

It may also serve the purpose of insulating a state government from federal intervention. *See generally Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 102, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). In *Pennhurst*, the Supreme Court held that a suit against state officials may be functionally equivalent to a suit against the state served by those officials, "if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the [Pennsylvania] Government from acting, or to compel it to act.' " *Id.* at 102 (citing *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963)) (alteration supplied). Even though there are no claims pending against any of the four current and former Alabama officials upon whom plaintiffs have served the subject subpoenas, plaintiffs are seeking documentary evidence that may support their challenge to Act No. 761. Thus, there is at least a colorable argument that state sovereignty is "in play." *See* doc. no. 104 (Motion to Quash Subpoenas Directed to Speaker Hubbard, President *Pro Tempore* Marsh, and Former Governor Riley, and to Stay All Discovery Pending Resolution of the Defendants' Motions to Dismiss by Alabama House of Representatives Speaker Mike Hubbard, Alabama Senate President *Pro Tempore* Del Marsh, and the Bice Defendants), at 15.

Any claim of executive privilege implicates three non-harmonious interests: (1) "the undeniable interest of the executive branch of government in maintaining confidentiality over certain types of information necessary for the performance of its constitutional duties"; (2) "the unquestionable interest of the litigant in seeking information for the just resolution of the legal dispute"; and (3) "the perplexing separation of powers question that is lurking in the background." *Assured Investors Life Insurance Co. v. National Union Associates, Inc.*, 362 So.2d 228, 233 (Ala.1978), *overruled on unrelated grounds by Ex parte Norfolk Southern Railroad Co.*, 897 So.2d 290, 295 (Ala.2004) (citing *United States ex rel. Jackson v. Petrilli*, 63 F.R.D. 152 (N.D.Ill.1974)). Given that mix of conflicting interests,

> ***12** claims of executive privilege, like other evidentiary privileges, must be narrowly construed so as to permit the broadest possible discovery otherwise allowed under the Rules. 35

> C.J.S. *Federal Civil Procedure* § 709. The governmental interest in favor of maintaining confidentiality under the cloak of privilege must be tempered by the historical function of the courts to provide compulsory process for the production of material needed for a just determination of the legal dispute.

Assured Investors, 362 So.2d at 233 (citing *Jabara v. Kelley*, 75 F.R.D. 475 (E.D.Mich.1977); *Equal Employment Opportunity Commission v. Los Alamos Constructors, Inc.*, 382 F.Supp. 1373 (D.N.M.1974); *Wood v. Strickland*, 420 U.S. 308, 317, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Glick v. McKesson & Robbins, Inc.*, 10 F.R.D. 477 (W.D.Mo.1950); 35A C.J.S. *Federal Civil Procedure* § 738).

2. Legislative immunity and legislative privilege

The Officials also urge this court to quash the subpoenas based on the doctrine of "legislative *immunity*," [41] which grants state legislators "common law immunity *from liability* for their legislative acts." *Scott v. Taylor*, 405 F.3d 1251, 1254 (11th Cir.2005) (emphasis supplied). [42] In order to effectuate its purpose of freeing state legislators from the "worries and distractions" of a lawsuit, legislative immunity applies regardless of the legislators' subjective motivations, regardless of whether the legislators are sued in their individual or official capacities, and regardless of whether the plaintiffs seek a retroactive or prospective form of relief. *Id.* at 1256–57.

41 *See* doc. no. 104 (Motion to Quash Subpoenas Directed to Speaker Hubbard, President *Pro Tempore* Marsh, and Former Governor Riley, and to Stay All Discovery Pending Resolution of the Defendants' Motions to Dismiss by Alabama House of Representatives Speaker Mike Hubbard, Alabama Senate President *Pro Tempore* Del Marsh, and the Bice Defendants), at 1–2; doc. no. 106 (Motion to Quash Subpoena by Former Governor Riley), at 1 (incorporating by reference the arguments in doc. no. 104); and doc. no. 127 (Motion to Quash Subpoena by Governor Bentley), at 2–3 (same) (emphasis supplied).

42 Despite the implication of its name, the doctrine of "legislative immunity" protects members of the executive branch as well as the legislative branch. *See Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir.2003) (applying legislative immunity to the Governor of Florida).

Of course, the Officials on whose behalf motions to quash the subpoenas have been filed are not, in fact, being *sued*. Even when the doctrine of legislative immunity applies, state legislators still may be "required to supply evidence in a federal civil case where, like the instant case, there is no threat of personal liability." *Doe v. Nebraska*, 788 F.Supp.2d 975, 984 n. 2 (D.Neb.2011) (interpreting *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)). Specifically, they "may be protected from testifying, but are not necessarily exempted from producing documents." *Id.* at 984 (citing *Small v. Hunt*, 152 F.R.D. 509, 513 (E.D.N.C.1994); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 302 n. 20 (D.Md.1992)).

Accordingly, the Officials supplement their discussion of legislative *immunity* with a discussion of a related doctrine called "legislative *privilege*," [43] which applies to protect legislators from the compulsory production of "evidence or testimony about all 'acts that occur in the regular course of the legislative process.' " *Corporacion Insular de Seguros v. Garcia*, 709 F.Supp. 288, 292 (D.P.R.1989) (quoting *U.S. v. Brewster*, 408 U.S. 501, 525, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972)). The doctrine of "legislative privilege" is an emanation of the Speech or Debate Clause of the United States Constitution and, as such, it "exists to safeguard ... legislative immunity and to further encourage the republican values it promotes." *Equal Employment Opportunity Commission v. Washington Suburban Sanitary Commission*, 631 F.3d 174, 181 (4th Cir.2011) (citing *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir.1996)).

43 *See* doc. no. 104 (Motion to Quash Subpoenas Directed to Speaker Hubbard, President *Pro Tempore* Marsh, and Former Governor Riley, and to Stay All Discovery Pending Resolution of the Defendants' Motions to Dismiss by Alabama House of Representatives Speaker Mike Hubbard, Alabama Senate President *Pro Tempore* Del Marsh, and the Bice Defendants), at, *e.g.*, 8, 12 (emphasis supplied).

***13** In spite of the importance of those interests, the legislative privilege is not absolute, and "may be overridden in circumstances where 'reason and experience' suggest that the claim of privilege should not be honored." *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 99–100 (S.D.N.Y.2003) (citing Fed.R.Evid. 501; *Manzi v. DiCarlo*, 982 F.Supp. 125, 131 (E.D.N.Y.1997)). Thus, courts must " 'balance the various competing interests' to determine whether to apply the ...

legislative privilege to shield the legislature's documents from discovery." *Rodriguez*, 280 F.Supp.2d at 99–100 (quoting *Manzi*, 982 F.Supp. at 131). When doing so, "any confidential privilege for legislators must be 'narrowly tailored.' " *Manzi*, 982 F.Supp. at 130 (quoting *In re Grand Jury*, 821 F.2d 946, 959 (3d Cir.1987)).

3. Deliberative process privileges

The motions to quash also assert the so-called "deliberative process privilege,"[44] which actually constitutes two related privileges: *i.e.*, the "*executive* deliberative process privilege," a subcategory of the executive privilege; and the "*legislative* deliberative process privilege," a subcategory of the legislative privilege.

44 *See id.* at 1–2; doc. no. 106 (Motion to Quash Subpoena by Former Governor Riley), at 1 (incorporating by reference the arguments in doc. no. 104); and doc. no. 127 (Motion to Quash Subpoena by Governor Bentley), at 2–3 (same).

a. Executive deliberative process privilege

The *executive* deliberative process privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 8–9, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001) (citing *Environmental Protection Agency v. Mink*, 410 U.S. 73, 86–87, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802, 104 S.Ct. 1488, 79 L.Ed.2d 814 (1984)). Thus, the privilege serves the purpose of enhancing the quality of decisions by "protecting open and frank discussion among those who make them within the Government." *Id.* (citing *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 151, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)).

The executive deliberative process privilege "covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Alabama v. Abbott Laboratories, Inc.*, No. 08–3429, 2009 U.S. Dist. LEXIS 20379, *5, 2009 WL 692189 (M.D.Ala. Mar. 13, 2009) (quoting *Klamath Water Users*, 532 U.S. at 8). As a result,

> [t]wo requirements must be met for the deliberative process privilege to apply. *First, the material must be pre-decisional, i .e.*, "prepared in order to assist an agency decision maker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975); *Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479, 1490–91 (11th Cir.1992) *abrogated on unrelated grounds*, *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 170, 113 S.Ct. 2014, 124 L.Ed.2d 84, (1993). *Second, it must be deliberative*, "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Nadler*, 955 F.2d at 1490–91. Even factual material contained in a "deliberative" document may be withheld pursuant to the privilege where disclosure of the factual material would reveal the deliberative process or where the factual material is so inextricably intertwined with the deliberative material that meaningful segregation is not possible. *Id.*, at 1490.

***14** *Abbott Laboratories*, 2009 U.S. Dist. LEXIS 20379 at *6–7, 2009 WL 692189 (alteration and emphasis supplied).

Nevertheless, the executive deliberative process privilege "is a qualified privilege which may be overcome upon a showing that the adverse party's need for disclosure outweighs the interest in confidentiality." *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 98 (S.D.N.Y.2003). When weighing the interests protected by the privilege against the adverse party's need for disclosure, the leading considerations include the following five factors:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence, *see, e.g.*, *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 331 (D.D.C.1966), *aff'd. on opinion below*, 128 U.S.App. D.C. 10, 384 F.2d 979, *cert. denied*, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967); (iii) the "seriousness" of the litigation and the issues involved, *see, e.g.*, *Freeman v. Seligson*, 132 U.S.App. D.C. 56, 60, 405 F.2d 1326, 1340 (D.C.Cir.1968); (iv) the role of the government in the litigation, *see, e.g.*, *Carl Zeiss Stiftung*, 40 F.R.D. at 329; *Bank of Dearborn v. Saxon*, 244 F.Supp. 394, 401–03 (E.D.Mich.1965), *aff'd.*, 377 F.2d 496 (6th Cir.1967); and (v) the possibility of future timidity by government employees who will be

> forced to recognize that their secrets are violable.

In re Franklin National Bank Securities Litigation, 478 F.Supp. 577, 583 (E.D.N.Y.1979).

b. Legislative deliberative process privilege

The "deliberative process privilege ... is more typically asserted in cases which challenge the decisions of administrative agencies." *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 97–98 (S.D.N.Y.2003). Even so, some courts have also extended that privilege to protect the deliberative processes of local legislators. *See, e.g.*, *North Pacifica, L.L.C. v. City of Pacifica*, 274 F.Supp.2d 1118, 1121 (N.D.Cal.2003). When doing so, those courts have reasoned that the deliberative process privilege for executive officials "provides a useful analogy for a confidentiality-based privilege for state legislators because executive agencies, like state legislators, engage in a wide variety of activities, including factual investigations for quasi-legislative rulemaking." *In re Grand Jury*, 821 F.2d 946, 958–59 (3d Cir.1987).

Thus, "in terms of the alleged need for secrecy surrounding deliberations, there is no principled distinction" between state legislators and executive officials. *United States v. Irvin*, 127 F.R.D. 169, 172 (C.D.Cal.1989). Like the *executive* deliberative process privilege, the *legislative* deliberative process privilege protects "only documents which are pre-decisional, deliberative and reflect the subjective intent of the legislators." *See Doe v. Nebraska*, 788 F.Supp.2d 975, 985 (D.Neb.2011) (citing *Qamhiyah v. Iowa State University*, 245 F.R.D. 393, 396 (S.D.Iowa 2007)). [45] However, it does not protect "documents containing factually based information used in the decision-making process or disseminated to legislators or committees, such as committee reports and minutes of meetings." *Doe*, 788 F.Supp.2d at 984–85. Likewise, it does not protect documents "shared with non-legislative members." *Id.* at 987.

45 Even though the *Abbott Labs* test for the *executive* deliberative process privilege discussed in the previous section lists only the first two prongs of the *Doe* test for the *legislative* deliberative process privilege (*i.e.*, that documents are protected only if they are both pre-decisional and deliberative), it appears that the definition of "deliberative" from *Abbott Labs* incorporates the third prong of *Doe* (*i.e.*, that protected documents must reflect the subjective intent of legislators). *Compare Abbott Labs*, 2009 U.S. Dist. LEXIS 20379, at *5, 2009 WL 692189 (describing a deliberative document as one that is "a direct part of the deliberative process in that it makes *recommendations* or expresses *opinions* on legal or policy matters") (emphasis supplied) (quoting *Nadler*, 955 F.2d at 1490–91) *with Doe*, 788 F.Supp.2d at 985 (requiring protected documents to "reflect the *subjective* intent of the legislators") (emphasis supplied).

***15** Further, and even though the purposes and applications of the executive and legislative deliberative process privileges are similar, there may be valid policy reasons for construing the legislative deliberative process privilege more narrowly. *See Rodriguez*, 280 F.Supp.2d at 98; *Manzi v. Dicarlo*, 982 F.Supp. 125, 130 (E.D.N.Y.1997); *Corporacion Insular de Seguros v. Garcia*, 709 F.Supp. 288, 298 (D.P.R.1989). In *Corporacion Insular*, for example, the court reasoned that legislators

> are part of the governmental branch that historically has been subjected to the greatest degree of public accountability. There are too many potentially detrimental ramifications to applying a confidentiality-based privilege to a governmental body that should continually remain open to the legitimate scrutiny of its constituents. Legislators should be protected from overreaching and intimidation by other branches of government and possibly from abusive or disruptive public intrusion but we refuse to swaddle them in a cocoon of secrecy for acts that go to the core of our democratic processes.

Id. at 298. Moreover,

> the cases discussing both the legislative and deliberate process privileges make clear that these protections are only "qualified." Accordingly, either privilege may be overridden in circumstances where "reason and experience" suggest that the claim of privilege should not be honored. *See* Fed.R.Evid. 501; *Manzi v. DiCarlo*, 982 F.Supp. 125, 131 (E.D.N.Y.1997) (indicating that the court needs to "balance the various competing interests" to determine

> whether to apply the deliberative process or state legislative privilege to shield the legislature's documents from discovery).

Rodriguez, 280 F.Supp.2d at 99–100.

Thus, even when a certain legislative record or document appears to fall under the privilege, "protection from production is not a given." *Doe*, 788 F.Supp.2d at 985. Instead, courts should balance four considerations: "(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Id.* (citing *Qamhiyah*, 245 F.R.D. at 396; *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir.1984); *Rodriguez*, 280 F.Supp.2d at 101). [46]

46 Unlike the five-factor *Franklin* test for the *executive* deliberative process privilege discussed at the end of the previous section, the *Doe* test for the *legislative* deliberative process privilege does not list the factor of "the 'seriousness' of the litigation and the issues involved." *See Franklin*, 478 F.Supp. at 583. However, both tests are worded in non-exclusive terms. *See id.* (listing "*some of the factors* that assume significance") (emphasis supplied); *Qamhiyah*, 245 F.R.D. at 396 (noting that, "[u]sually[,] four factors weigh in the balance") (alterations supplied).

c. The applicability of the deliberative process privileges when the governmental decision-making process is "*the* issue" in the litigation

Neither the executive nor the legislative deliberative process privilege is available when the governmental decision-making process is, itself, the subject of the litigation, or when the purpose of the disclosure is to expose governmental malfeasance. *See, e.g.*, *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C.Cir.1998); *Texaco P.R., Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir.1995); *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 99 (S.D.N.Y.2003); *Corporacion Insular de Seguros v. Garcia*, 709 F.Supp. 288, 292 (D.P.R.1989); *Burka v. New York City Transit Authority*, 110 F.R.D. 660, 667 (S.D.N.Y.1986).

***16** A number of courts have held that the deliberative process privilege does not apply in actions where the government's decision making is central to the plaintiff's case. *E.g. In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424–25, 330 U.S.App. D.C. 352 (D.C.Cir.1998); *United States v. Lake County Bd. of Comm'rs*, 233 F.R.D. 523, 526 (N.D.Ind.2005) (collecting cases). As the Court of Appeals for the District of Columbia explained in *In re Subpoena:*

> The privilege was fashioned in cases where the governmental decisionmaking process is collateral to the plaintiff's suit. *See, e.g., In re Subpoena Served Upon the Comptroller of the Currency*, 296 U.S.App. D.C. 263, 967 F.2d 630 (D.C.Cir.1992) (shareholders sought Comptroller's bank examination reports to prove fraud charges against corporation); *Singer Sewing Machine Co. v. NLRB*, 329 F.2d 200 (4th Cir.1964) (petitioner wanted deliberative materials to establish a defense to an unfair labor practice charge). If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place in a Title VII action or in a constitutional claim for discrimination. The Supreme Court struggled in *Crawford–El* and *Webster* with governmental claims that discovery in such a proceeding should be limited, but no one in any of these cases ever had the temerity to suggest that the privilege applied. The argument is absent in these cases because if either the Constitution or a statute makes the nature of governmental officials' deliberations *the* issue, the privilege is a *nonsequitur*. The central purpose of the privilege is to foster government decisionmaking by protecting it from the chill of potential disclosure. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975).

In re Subpoena, 145 F.3d at 1424–25.

Thomas v. Cate, 715 F.Supp.2d 1012, 1020–21 (E.D.Cal.2010) (emphasis in original); *see also Rodriguez*, 280 F.Supp.2d at 99 (relying on *In re Subpoena*, 145 F.3d at 1424, to grant voters' motions to compel their legislators to produce requested documents).

Because plaintiffs, in order to support their claim for First Amendment retaliation, must be able to explore any evidence indicating that defendants, acting through (among others) the Officials, intended to punish plaintiffs for their political speech, the governmental decision-making process in the drafting and enactment of Act No. 761 is "*the* issue" in this action.

II. DISCUSSION

Historically, courts have been cautious about the creation or extension of privileges because they do not aid in the ascertainment of truth. Those privileges that have been recognized by federal and state courts generally have been justified on the basis of protecting "interests or relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." *Ex parte Rudder*, 507 So.2d 411, 414 (Ala.1987) (Shores, J.) (citing *McCormick on Evidence* § 72, at 171 (1984)).

***17** It must always be remembered, however, that, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (alteration supplied) (footnote omitted).[47] Indeed, in the case just cited—overriding a sitting President's claims of executive privilege and compelling him to comply with a subpoena seeking recordings of his conversations with aides and advisers—the Supreme Court affirmed that the "need to develop all relevant facts in the adversary system is both fundamental and comprehensive.... The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Id.* at 709.[48]

47 *See also, e.g., Greenpeace v. National Marine Fisheries Service*, 198 F.R.D. 540, 543 (W.D.Wash.2000) ("Like all evidentiary privileges that derogate a court's inherent power to compel the production of relevant evidence, the deliberative process privilege is narrowly construed."); *Kaufman v. City of New York*, No. 98–2648, 1999 U.S. Dist. LEXIS 5779, at *11, 1999 WL 239698 (S.D.N.Y. Apr. 22, 1999) ("The [deliberative process] privilege, as it is in derogation of the search for truth, is not to be expansively construed.") (alteration supplied); *Pacific Gas & Electric Co. v. United States*, 70 Fed. Cl. 128, 133 (2006) (quoting *Greenpeace*, 198 F.R.D. at 543, and *Kaufman*, 1999 U.S. Dist. LEXIS 5779, at *11, 1999 WL 239698 with approval).

48 Even though the Court's opinion in *Nixon* addressed subpoenas that had been issued in aid of a criminal investigation, courts have regularly applied both its holding and rationale to civil cases in which government officials asserted the deliberative process privilege. *See, e.g., Kelly v. San Jose*, 114 F.R.D. 653, 659 (N.D.Cal.1987) (quoting *Nixon*, 418 U.S. at 710, for the proposition that, "[s]ince privileges derogate the search for the truth they are supposed to be narrowly construed") (alteration supplied); *Resolution Trust Corp. v. Diamond*, 773 F.Supp. 597, 604 (S.D.N.Y.1991) (quoting *Nixon*, 418 U.S. at 706, for the proposition that a "broad, undifferentiated ... generalized interest in confidentiality is insufficient to assert the deliberative-process privilege") (internal quotation marks and citations omitted); *Pacific Gas & Electric Co. v. United States*, 70 Fed. Cl. 128, 141 (2006) (quoting *Nixon*, 418 U.S. at 706, for the proposition that a "broad, undifferentiated claim of public interest in the confidentiality of ... conversations" is not enough to support the deliberative process privilege) (internal quotation marks and citations omitted).

Moreover, as the discussion in Part I(H) of this opinion demonstrates, none of the privileges relied upon as the basis for the motions to quash are absolute. Instead, each is qualified, and subject to a balancing of interests.

A. The Minimum Requirements for Invoking Governmental Privileges

At least four requirements must be satisfied in order to support a claim of privilege based upon the doctrines discussed in Part I(H) of this opinion, *supra.*

[1] The head of the agency claiming the privilege must personally review the material,[49] [2] there must be "a specific designation and description of the documents claimed to be privileged," and [3] there must be "precise and certain reasons for preserving" the confidentiality of the communications. [4] Usually such claims must be raised by affidavit.

49 Of course, none of the Officials are heads of "agencies" in the strict sense of that term. Nevertheless, Governor Bentley, former Governor Riley, Senate President *Pro Tempore* Marsh, and Speaker Hubbard are likewise subject to the requirement of personally reviewing the material requested by plaintiffs' subpoenas before a privilege may be validly invoked. *See, e.g., K.L. v. Edgar*, 964 F.Supp. 1206, 1209 (N.D.Ill.1997) (holding in the context of a motion to compel discovery from a governor and a mental health department that "the department head with control over the matter must make

a formal claim of privilege, after personal consideration of the problem").

United States v. O'Neill, 619 F.2d 222, 226 (3d Cir.1980) (alterations supplied) (quoting *A.O. Smith v. Federal Trade Commission*, 403 F.Supp. 1000, 1016 (D.Del.1975) (other citations omitted)). [50] As will be seen, the motions before this court do not comply with any of those requirements.

50 A recent decision of the Northern District of California in the case of *In re: McKesson*, 264 F.R.D. 595 (N.D.Cal.2009), parsed the requirements as follows:

> In order to invoke the privilege, there are several requirements, none of which is met here. For example, CDHCS *[i.e.*, the state agency supervising and operating California's medicaid program] should have provided *a declaration from an agency head* that includes the following information with respect to each document for which the deliberative process privilege is asserted: 1) specific facts demonstrating why each document is "deliberative" and "predecisional"; 2) specific facts concerning: a) the degree and type of harm that would result from requiring production of each document; and b) what type of protective order would be necessary to reduce that harm or, alternatively, why a protective order would not reduce this harm; and 3) what portions of each document are deliberative and, if specific sections are purely factual, why those sections cannot be produced. Without this information, the Court cannot determine whether the documents at issue are deliberative or predecisional. Nor can the Court adequately assess the harm that would result if production is ordered. *See e.g.*, *L.H. v. Schwarzenegger*, [No. 06–2042,] 2008 WL 2073958, *7 (E.D.Cal. May 14, 2008) (finding waiver of deliberative process privilege where no declarations supporting privilege were filed).

McKesson, 264 F.R.D. at 602 (alteration and emphasis supplied). None of the requirements have been satisfied in this case.

1. Personal consideration by the relevant official

The first requirement was best stated by the Supreme Court in *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), holding that: "There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7–8 (footnote omitted). [51] *See also, e.g.*, *L.H. v. Schwarzenegger*, No. 06–2042, 2008 U.S. Dist. LEXIS 86829, at *25, 2008 WL 2073958 (E.D.Cal. May 14, 2008) (holding that a public official "cannot invoke a privilege without personally considering the material for which the privilege is sought"); *In re Nelson*, 131 F.R.D. 161, 164 (D.Neb.1989) (holding that a privilege "exists only when raised by a formal claim of privilege, *lodged by the head of the department which has control over the matter*, after actual personal consideration by that officer") (emphasis in original); *Resident Advisory Board v. Rizzo*, 97 F.R.D. 749, 752 (E.D.Pa.1983) (quoting *Reynolds*, 345 U.S. at 7–8, *supra*); *Pierson v. United States*, 428 F.Supp. 384, 395 (D.Del.1977) ("Requiring the agency head to review the documents sought and to claim the privilege where appropriate is the most effective method available to assure consistency and prudence [in the invocation of the privilege].") (alteration supplied).

51 The omitted footnote emphasized the importance of this requirement:

> The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced.

United States v. Reynolds, 345 U.S. at 8 n. 20 (citation and internal quotation marks omitted). Even though *Reynolds* addressed a claim of privilege for state and military secrets, "its prerequisites for formal invocation of the privilege have been uniformly applied irrespective of the particular kind of executive claim advanced." *Carter v. Carlson*, 56 F.R.D. 9, 10 (D.D.C.1972). *See also, e.g.*, *United States v. O'Neill*, 619 F.2d 222, 226 (3d Cir.1980) (same).

***18** The Supreme Court's reference to "a formal claim of privilege" in *Reynolds*, *supra*, is a remark that calls attention to a corollary of the first requirement: *that is*, the claim of privilege cannot be invoked merely by attorneys acting on behalf of the governmental official. "Usually such claims must be raised by affidavit [of the responsible governmental official]." *O'Neill*, 619 F.2d at 226 (alteration supplied).

> The requirement that the privilege be invoked only by the head of the department after actual personal consideration has been promulgated to insure that the privilege remains a narrow privilege which is not indiscriminately invoked. As stated in *Coastal Corp. v. Duncan*, 86 F.R.D. 514 (D.Del.1980):
>
> > Requiring the agency head to claim the privilege assures the Court, which must make the ultimate decision, that

> executive privilege has not been lightly invoked by the agency, *United States v. Reynolds, supra,* and that in the considered judgment of the individual with an overall responsibility for the administration of the agency, the documents withheld are indeed thought to be privileged.
>
> *Id.* at 518. *Thus, the courts have not permitted staff attorneys, especially those who are participating in the pending litigation, to assert the privilege on behalf of the agency. Exxon Corp. [v. Department of Energy],* 91 F.R.D. [26,] 43–44 [(N.D.Tex.1981)]; *see also, Pierson v. United States,* 428 F.Supp. 384, 395 (D.Del.1977).

In re Nelson, 131 F.R.D. 161, 164 (D.Neb.1989) (emphasis and alterations supplied). *See also, e.g., O'Neill,* 619 F.2d at 225 (holding the invocation of a privilege by a municipality to be improper because, among other deficiencies, "it was not invoked by the department head, but by the attorney for the City"); *United States v. Burr,* 25 F. Cas. 187, 192 (C.C.Va.1807) (Marshall, C.J., sitting on Circuit) ("The propriety of withholding [the allegedly privileged letter] must be decided by [the President] himself, not by another for him.") (alteration supplied). [52]

52 For a discussion of Aaron Burr's attempts to obtain a copy of a letter from General James Wilkinson (one of the principals who accused Burr of treason) to President Thomas Jefferson, see Paul A. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege,* 88 HARV. L.REV.. 13, 22–31 (1974), and *In re Sealed Case,* 116 F.3d 550, 559 (D.C.Cir.1997).

No case reviewed by this court has held that the assertion of a privilege by only an attorney for the governmental official was adequate. *See, e.g., In re Nelson,* 131 F.R.D. at 165 ("An assertion of the 'deliberative process privilege' by defense counsel is wholly inadequate for the proper invocation of that privilege."); *Rizzo,* 97 F.R.D. at 752 (observing that, "in no case has assertion [of a privilege] by the litigation attorney for the government been held adequate") (alteration supplied); *United States v. American Telephone & Telegraph,* 86 F.R.D. 603, 605 (D.D.C.1979) ("All the cases sustaining government privilege appear to require an assertion of the claim by some responsible officer other than the Government's attorneys.").

The initial motion to quash plaintiffs' subpoenas was filed by the Alabama Attorney General on behalf of former Governor Riley, Senate President *Pro Tempore* Marsh, and Speaker Hubbard. [53] Notably, however, the motion was not accompanied by affidavits executed by any of those officials, and indicating that any of them had personally "seen and considered the contents of the documents [sought by plaintiffs' subpoenas] and ... formed the view that on grounds of public interest they ought not to be produced." *Reynolds,* 345 U.S. at 8 n. 20 (alterations supplied). [54]

53 *See* doc. no. 104 (Motion to Quash Subpoenas Directed to Speaker Hubbard, President *Pro Tempore* Marsh, and Former Governor Riley, and to Stay All Discovery Pending Resolution of the Defendants' Motions to Dismiss by Alabama House of Representatives Speaker Mike Hubbard, Alabama Senate President *Pro Tempore* Del Marsh, and the Bice Defendants), signed by Assistant Attorney General Joshual K. Payne.

Various Assistant Alabama Attorneys General previously had appeared on behalf of several of the named defendants. *See* doc. no. 22 (Notice of Appearance by Assistant Alabama Attorneys General James W. Davis, Margaret L. Fleming, and William G. Parker Jr. on behalf of defendants, Dr. Joseph B. Morton, State Superintendent of Education; Dr. Freida Hill, Chancellor of Postsecondary Education; and Robert T. Treese III, District Attorney of Lee County); doc. no. 83 (Notice of Appearance by Assistant Alabama Attorney General Joshua K. Payne as additional counsel for defendants Dr. Thomas R. Bice, State Superintendent of Education; Susan Price, Interim Chancellor of Postsecondary Education; and Robert T. Treese III, District Attorney of Lee County); doc. no. 101 (Notice of Appearance by Assistant Alabama Attorney General James W. Davis as counsel of record for non-parties Mike Hubbard, Speaker of the Alabama House of Representatives, and Del Marsh, President *Pro Tempore* of the Alabama Senate); doc. no. 102 (Notice of Appearance by Assistant Alabama Attorney General William G. Parker Jr. as additional counsel of record for non-parties Mike Hubbard, Speaker of the Alabama House of Representatives, and Del Marsh, President *Pro Tempore* of the Alabama Senate); and doc. no. 103 (Notice of Appearance by Assistant Alabama Attorney General Joshua K. Payne as additional counsel of record for non-parties Mike Hubbard, Speaker of the Alabama House of Representatives, and Del Marsh, President *Pro Tempore* of the Alabama Senate).

54 *See supra* note 51 and accompanying text.

***19** A separate motion to quash the subpoena issued to former Governor Riley was later filed by a member of the Birmingham law firm Bradley Arant Boult Cummings LLP. [55] Again, however, the motion did not include an

affidavit executed by Mr. Riley, indicating that he had personally seen and considered the contents of the documents sought by plaintiffs' subpoena, and personally concluded that, on grounds of public policy, they ought not to be produced.

55 *See* doc. no. 106 (Motion to Quash Subpoena by former Governor Riley).

A separate motion to quash the subpoena issued to Governor Bentley was also filed by attorneys affiliated with the Birmingham law firm Wallace Jordan Ratliff & Brandt LLC, and the Montgomery firm Ryals, Plummer, Donaldson, Agricola & Smith, P.C. [56] Yet again, the motion was not accompanied by an affidavit executed by Governor Bentley, indicating that he had seen and considered the contents of the documents sought by plaintiffs' subpoenas, and concluded that, on grounds of public policy, they ought not to be produced.

56 *See* doc. no. 127 (Motion to Quash Subpoena by Governor Bentley).

All cases hold that such omissions render the attempted invocation of privileges wholly inadequate. *See, e.g.*, *O'Neill,* 619 F.2d at 225 (holding "unsatisfactory" the omission of an affidavit indicating that "the privilege was being invoked by the responsible public official on the representation that he had personally examined the documents and determined nondisclosure was required"); *id.* at 226 (observing that "there was no indication here that the department heads made the type of personal careful examination which must precede invocation of the privilege"); *Rizzo,* 97 F.R.D. at 752 (holding an attempted invocation of privilege to be invalid because "there is no indication in the record that these officials personally reviewed the evidentiary material in question and made a determination that the public interest, as opposed to the government's interest in this litigation, would best be served by nondisclosure").

2. A specific description of the documents claimed to be privileged

The second requirement for invoking any of the privileges at issue is "a specific designation and description of the documents claimed to be privileged, of sufficient detail to allow a reasoned determination as to the legitimacy of the claimed privilege." *In re Nelson,* 131 F.R.D. at 165 (citations omitted). *See also, e.g, O'Neill,* 619 F.2d at 225 (holding a municipality's invocation of a privilege to be improper because, among other deficiencies, "it was a broadside invocation of privilege which failed to designate with particularity the specific documents to which the claim of privilege applied"); *Rizzo,* 97 F.R.D. at 753 ("Specificity of description is necessary to enable the Court to comply with its duty of insuring that the privilege is invoked as narrowly as possible consistent with its objectives."); *Black v. Sheraton Corp. of America,* 371 F.Supp. 97, 101 (D.D.C.1974) (Ritchey, J.) ("A formal and proper claim of executive privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality.") (citing *United States v. Article of Drug,* 43 F.R.D. 181, 190 (D.Del.1967); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 327 (D.D.C.1966)).

***20** "The 'precise and certain reasons' requirement is well established in the case law." *Resolution Trust Corp. v. Diamond,* 773 F.Supp. 597, 604 (S.D.N.Y.1991) (citing *O'Neill,* 619 F.2d at 225–26; *Mary Imogene Bassett Hospital v. Sullivan,* 136 F.R.D. 42, 44 (N.D.N.Y.1991); *Mobil Oil Corp. v. Department of Energy,* 102 F.R.D. 1, 5–6 (N.D.N.Y.1983); *Rizzo,* 97 F.R.D. at 752; *Coastal Corp. v. Duncan,* 86 F.R.D. 514, 519, 522 (D.Del.1980); *Black,* 371 F.Supp. at 101). [57]

57 Other decisions to the same effect as those cited in the text include *Mobil Oil Corp. v. Department of Energy,* 520 F.Supp. 414, 416 (N.D.N.Y.1981), and *A.O. Smith v. Federal Trade Commission,* 403 F.Supp. 1000, 1016 (D.Del.1975).

This case-law requirement was incorporated into Federal Rule of Civil Procedure 45, expressly commanding that privilege claims be stated with clarity and specificity:

> A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material *must:*
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

Fed.R.Civ.P. 45(d)(2) (emphasis supplied). [58] As emphasized by the italicized word "must," the requirements of that rule are mandatory, not precatory. [59] The Advisory Committee's Notes are consistent with the cases discussed

above, and make clear that "[t]he person claiming a privilege or protection cannot decide the limits of that party's own entitlement." Fed.R.Civ.P. 45 advisory committee's note (1991 amends.) (alteration supplied). Instead, the purpose of Rule 45(d)(2) "is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified." *Id.*

58 *See also* Fed.R.Civ.P. 26(b)(5)(A), which addresses the proper method for failing to produce materials that would otherwise be discoverable under Rule 26, but which the withholding party contends are subject to a privilege. Specifically:

> When a party withholds information otherwise discoverable by claiming that the information is privileged ... material, the party must:
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed.R.Civ.P. 26(b)(5)(A).

59 *See, e.g.*, Bryan A. Garner, *Garner's Dictionary of Legal Usage* 953 (3d ed.2011) (defining "must" as meaning "is required to").

Thus, broad, undifferentiated claims of privilege, such as those lodged in the motions before this court, provide sufficient reason to deny them. *See, e.g., O'Neill,* 619 F.2d at 227 ("The indiscriminate claim of privilege may in itself be sufficient reason to deny it"); *Resolution Trust Corp. v. Diamond,* 773 F.Supp. 597, 603 (S.D.N.Y.1991) (holding that a "blanket" approach of "asserting the privilege for all predecisional, deliberative documents, is unacceptably inflexible.... The deliberative process privilege presupposes a review to determine, document by document, whether the assertion of the privilege is justified in each instance.") (citations omitted); *In re Nelson,* 131 F.R.D. at 165 (holding that parties asserting a privilege must provide "a specific designation and description of the documents claimed to be privileged") (citations omitted).

3. Precise reasons for preserving confidentiality

The third requirement, closely related to the second, "is a demonstration, usually by affidavit of the responsible agency official, of precise and certain reasons for preserving the confidentiality of the governmental communication." *Rizzo,* 97 F.R.D. at 753. *See also, e.g., In re Sealed Case,* 856 F.2d 268, 271 (D.C.Cir.1988) (holding that "the information for which the privilege is claimed must be specified, with an explanation of why it properly falls within the scope of the privilege"); *A.O. Smith,* 403 F.Supp. at 1016 (holding that the requirement for the agency head to state "precise and certain reasons for preserving" the confidentiality of the communications sought "is necessary in order [for] a court [to] be able to make a knowledgable decision as to whether any document or portion thereof actually contains advisory or deliberative materials. Any attempts to invoke executive privilege in the absence of this specific factual showing are actually attempts to interfere with the proper functioning of the judicial branch of our government by appropriating the means of [making] this decision to the executive branch.") (alterations supplied); *In re Nelson,* 131 F.R.D. at 165 (holding that "there must be a specification of precise and certain reasons for the need to preserve the confidentiality of the documents at issue") (citing *Mobil Oil Corp.,* 102 F.R.D. at 6 (same)); *Coastal Corp.,* 86 F.R.D. at 517–19 (observing that the governmental entity "failed to proffer 'precise and certain' reasons for preserving the confidentiality of the requested documents"); *Exxon Corp. v. Department of Energy,* 91 F.R.D. 26, 44 (N.D.Tex.1981) (holding that the agency must articulate "precise reasons why the public interest would be affected adversely by disclosure").

***21** No such demonstration has been made in the present case. Indeed, no justification for withholding the documents sought by plaintiffs' subpoenas has been advanced at all, other than the bare assertion that one or more of the privileges discussed in Part I(H) of this opinion, *supra,* applies. Such broad, undifferentiated claims deprive this court of the ability to determine whether the plaintiffs' need for the documents and communications sought by the subject subpoenas "outweighs the harm that would result from their disclosure." *McKesson,* 264 F.R.D. at 602.

B. Conclusions

Numerous cases have held that improperly asserted claims of privilege are no claims of privilege at all. *See, e.g., Coastal Corp.,* 86 F.R.D. at 522–23; *A.O. Smith,* 403 F.Supp. at 1017; *Black,* 371 F.Supp. at 101.

In addition, when, as here, privileges are asserted in vague, nonspecific terms, untethered from the requirements discussed above, the privileges are deemed to have been waived. *See Nelson,* 131 F.R.D. at 165 (ordering a governmental agency to disclose requested documents because "conclusional assertions as to its right to protect

the documents at issue on the basis of privilege are wholly inadequate not only to invoke the privilege but also to demonstrate that they are properly within its coverage"); *L.H.*, 2008 U.S. Dist. LEXIS 86829, at *27, 2008 WL 2073958 (ordering the Governor of California and other state officials to disclose requested documents because "defendants have presented no declarations whatsoever to support their claim of deliberative process privilege or official information privilege"); *McKesson*, 264 F.R.D. at 602 (ordering the California agency responsible for overseeing and operating the state's medicaid program to disclose requested documents because it cited "no authority for the proposition that a state agency can avoid its initial burden to satisfy the requirements for invoking the deliberative process privilege simply by arguing financial burden"). [60]

60 *See* doc. no. 105 (AEA Plaintiffs' Response to Motion to Quash Subpoenas to Hubbard, Marsh, and Riley etc.), at 7 (arguing that "the Court should deny the motion to quash because of the failure of the Officials to comply with Rule 45(d)(2), FRCivP"); and doc. no. 129 (AEA Plaintiffs' Response to Alabama Governor Robert Bentley's Motion to Quash Subpoena), at 8 (arguing that the motion to quash is due to be denied "*because of the waiver of the claimed privilege* by Governor Bentley's predecessor, Governor Riley," *and*, "*in the alternative* ... because of Governor Bentley's failure to comply with Rule 45(d)(2), FRCivP") (emphasis supplied).

III. ORDERS

For all of the foregoing reasons, it is **ORDERED** that the motions to quash be, and the same hereby are, **DENIED.** It is further **ORDERED** that Alabama Governor Robert J. Bentley, M.D., former Alabama Governor Robert R. ("Bob") Riley, Alabama Senate President *Pro Tempore* Del Marsh, and Speaker of the Alabama House of Representatives Mike Hubbard, separately and severally, provide full and complete responses to the subpoenas *duces tecum* served upon each of them on or before Friday, February 1, 2013.

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United States District Court,
N.D. West Virginia.

Michael & Tiffany FRYE, Plaintiffs,
v.
DAN RYAN BUILDERS, INC., Frall Foundation Coating, Inc., Aluminators, Inc., and Richard B. Stine, Inc., Defendants.

Civ. Action No. 3:10–cv–39. | Feb. 11, 2011.

Attorneys and Law Firms

Kirk H. Bottner, Law Office of Kirk H. Bottner PLLC, Charles Town, WV, for Plaintiff.

Susan R. Snowden, Martin & Seibert, LC, Jeffrey W. Molenda, Pullin Fowler Flanagan Brown & Poe PLLC, Martinsburg, WV, John O. Easton, Jordan, Coyne & Savits, LLP, Fairfax, VA, Kenneth Hopper, Pullin Fowler Flanagan Brown & Poe PLLC, Morgantown, WV, for Defendant.

Opinion

MEMORANDUM OPINION AND ORDER GRANTING, AS FRAMED, DEFENDANT, DAN RYAN BUILDERS', INC. AND INTERESTED PARTY, BOWLES RICES' MOTION TO QUASH AND/OR MODIFY SUBPOENA

JAMES E. SEIBERT, United States Magistrate Judge.

***1** This matter comes before the Court on Bowles, Rice, McDavid, Graff & Love LLP's (hereinafter "Bowles Rice") Motion to Quash Subpoena Duces Tecum and Defendant, Dan Ryan Builders's, Inc., Motion to Quash and/or Modify Plaintiffs' Subpoena Duces Tecum both filed November 23, 2010. [1] The Court held an evidentiary hearing and argument on both motions on January 5, 2011. Plaintiffs, Michael and Tiffany Frye, appeared by Kirk H. Bottner, Esq. by telephone. Defendant, Dan Ryan Builders, Inc. (hereinafter "DRB"), appeared by Susan R. Snowden, Esq., in person. Interested Party, Bowles, Rice, appeared by William J. Powell, Esq., in person. Defendant, Richard B. Stine, Inc., appeared by Jeffrey W. Molenda, Esq., by phone. Defendant, Frall Foundation Coating, Inc., appeared by John O. Easton, Esq., by phone. The testimony of Tracey A. Rohrbaugh, Esq. was taken and Bowles Rice tendered Exhibit 1 the "Informed Consent," which was admitted into evidence. No other testimony was taken nor was any other evidence adduced.

1 Dkt. Nos. 66 & 67, respectively.

I. *INTRODUCTION*

A. *Background*

This action was initially filed on March 5, 2010 in the Circuit Court of Berkeley County, West Virginia alleging breach of contract violations arising out of alleged negligent construction of a home. Defendants timely removed the litigation pursuant to 28 U.S.C. § 1441(a) by alleging diversity jurisdiction. [2] DRB and Bowles Rice filed their Motions requesting the Court to quash or, alternatively, to modify the subpoena served upon Bowles Rice.

2 Dkt. No. 1.

B. *The Motions*

Bowles Rice's Motion to Quash Supoena Duces Tecum. [3]

3 Dkt. No. 66.

DRB's Motion to Quash and/or Modify Plaintiffs' Subpoena Duces Tecum. [4]

4 Dkt. No. 67.

C. *Decision*

Defendant, Dan Ryan Builders's, Inc., Motion to Quash and/or Modify Plaintiffs' Subpoena Duces Tecum is ***GRANTED AS FRAMED*** because execution of the 2001 Informed Consent Agreement did not, in subsequent litigation filed years later alleging defective construction, waive the attorney-client privilege and work product doctrine protections, as to the subsequent litigation.

Bowles Rice's Motion to Quash is also ***GRANTED AS FRAMED*** for the same reasons.

II. *FACTS*

1. On November 23, 2010, Bowles Rice filed its Motion to Quash Subpoena Duces Tecum. [5]

[5] Dkt. No. 66.

2. DRB also filed its Motion to Quash and/or Modify Plaintiffs' Subpoena Duces Tecum on November 23, 2010. [6]

[6] Dkt. No. 67.

3. The Court entered an Order on November 30, 2010 setting an evidentiary hearing and argument on both Motions.

4. Bowles Rice filed a Motion to Continue the Evidentiary Hearing on December 3, 2010, and such Motion was granted on December 6, 2010. [7]

[7] Dkt. Nos. 72 & 74, respectively.

5. Plaintiffs filed their Memorandum in Response to Bowles Rice's Motion on December 3, 2010. [8]

[8] Dkt. No. 73.

6. Plaintiffs filed their Memorandum in Response to DRB's Motion on December 7, 2010. [9]

[9] Dkt. No. 75.

7. DRB filed its Reply to Plaintiffs' Response in Opposition on December 9, 2010. [10]

[10] Dkt. No. 76.

***2** 8. Bowles Rice filed its Reply to Plaintiffs' Response on December 10, 2010. [11]

[11] Dkt. No. 77.

9. On January 5, 2011, the evidentiary hearing and argument was held.

10. Tracey A. Rohrbaugh, Esq., testified that she, through her employment at Bowles Rice, entered into an attorney-client relationship with Dan Ryan Builders as its attorney in approximately 2009. Ms. Rohrbaugh testified she became aware of a real estate closing that was handled by Bowles Rice on behalf of DRB and Plaintiffs subsequent to that engagement by DRB. Ms. Rohrbaugh further asserted that a deceased member of her firm conducted the real estate closing and that the civil action currently filed by Plaintiffs is unrelated to the 2001 real estate closing. Ms. Rohrbaugh stated the Bowles Rice firm considered the representation of the matter of the Fryes concluded in 2001 and, therefore, the real estate closing file was closed in that year. Additionally, Bowles Rice, through counsel, relayed that it did not object to any part of its file or any testimony under a subpoena related to the original real estate transaction being disclosed.

III. *DRB MOTION TO QUASH AND/OR MODIFY THE SUBPOENA AND BOWLES RICE'S MOTION TO QUASH THE SUBPOENA*

A. *Contentions of the Parties*

1. Bowles Rice's Motion to Quash Supoena Duces Tecum

Bowles Rice advances two arguments in support of its Motion to Quash. It argues the "subpoena duces tecum improperly seeks communications protected by the attorney-client privilege...." *See* Bowles Rice's Mot., Pg. 7 (Dkt.66). Particularly, Bowles Rice contends "[d]uring the course of its representation of DRB, Bowles Rice has received confidential communications from DRB and its agents for the purpose of seeking legal advice" and "there has been no express or implied waiver of the attorney client-privilege with respect to these communications." *Id.* at 8. Bowles Rice asserts "Plaintiffs' argument that by signing an informed consent form [ ] effectively waived [DRB's] attorney-client privilege with Bowles Rice for all future proceedings, including litigation, defies logic and has no merit." *Id.* at 9. Bowles Rice also argues the subpoena must be quashed because it seeks production of information protected by the work product doctrine. Bowles Rice contends Plaintiffs' "only seek protected work-product of Bowles Rice for which [Plaintiffs] could not have substantial need." *Id.* at 12. Therefore, Bowles Rice requests the subpoena be quashed.

In response, Plaintiffs argue "Bowles Rice cannot now attempt to assert the very privileges that they [sic] themselves [sic] informed the parties to this case would be waived and inapplicable." *See* Pls.' Resp., Pg. 4 (Dkt.73). Plaintiffs also contend Rule 45 of the Federal Rules of Civil Procedure does not support Bowles Rice's position because a "waiver is contained in the Informed Consent to Representation Agreement" and "[DRB] knowingly consented after consultation and [after] being informed of its right to consult with a lawyer of their [sic] own choosing about the legal effect of the [Agreement], to voluntarily waive any rights of confidentiality between the parties to the real

estate transaction in the event a future dispute arose." *Id.* at 5–6. Plaintiffs assert they are "entitled to information that would be considered attorney work product because [it] was knowingly prepared as the result of an improper and prohibited legal representation contrary to a contract with a former client and contrary to the interests of a former client." *Id.* at 11. Consequently, Plaintiffs request the Court to deny Bowles Rice's Motion to Quash.

***3** In its Reply, Bowles Rice maintains its argument that DRB's attorney-client privilege is still intact because the Informed Consent language creates only a "narrowly tailored waiver of the attorney-client privilege" and "only applies to confidences shared among the parties to the transaction ... that took place *during the real estate transaction eight years ago*." *See* Bowles Rice's Reply, Pg. 3 (Dkt.77) (emphasis in original). Bowles Rice also argues "the subpoena decus [sic] tecum runs afoul of the work product doctrine by demanding the mental impressions of Bowles Rice in the form of its selections and organization in its command for production of 'all records or information that would be considered work product.' " *Id.* at 6. Lastly, Bowles Rice contends it has a duty to invoke the attorney-client privilege under Rule 1.6 of the West Virginia Rules of Professional Conduct.

2. DRB's Motion to Quash and/or Modify Plaintiffs' Subpoena Duces Tecum

In support of its Motion, DRB proffers three arguments. First, DRB argues the issued subpoena should be "quashed or modified by this Court as [sic] it is clearly invasive of the attorney-client privilege." *See* DRB's Mot., Pg. 5 (Dkt.67). Specifically, DRB argues that "documents exchanged between Bowles [Rice] and DRB,..were authored or received by counsel in the scope of representation, dealt with the subject of representation, and were generated with a mutual expectation of confidentiality." *Id.* 6. Second, DRB contends that the "documents requested by the subpoena duces tecum are protected from compelled disclosure as attorney work product." *Id.* at 7. Lastly, DRB argues that because the subpoena is without temporal and substantive limitations it "should be quashed or modified as it is overly broad and seeks to compel the production of irrelevant documents." *Id.* at 8.

In opposition, Plaintiffs argue the subpoena, as issued, "does not improperly seek communications that are protected by attorney-client privilege as [sic] there was a waiver by [DRB]." *See* Pls.' Resp., Pg. 6 (Dkt.75). Plaintiffs contend that the language of the "Informed Consent Agreement" signed in 2001, does not indicate that "the waiver only applies to communications or actions that occurred during the [real estate] closing." *Id.* at 7. Plaintiff adamantly asserts that "the plain language of the consent agreement clearly states that no communications to [Bowles Rice] will be confidential." *Id.* Accordingly, Plaintiff states that "[DRB] knowingly gave up this right to refuse to disclose the requested information when it signed the Informed Consent to Representation Agreement." *Id.* at 12. Plaintiffs counter DRB's second argument by asserting Plaintiffs "are entitled to information that would be considered attorney work product because the work product was knowingly prepared as the result of an improper, prohibited and fraudulent legal representation contrary to a contract with a former client and contrary to the interests of a former client." *Id.* at 16. Plaintiffs also argue the subpoena is limited in time and in subject matter to information relevant to the case, therefore, DRB's Motion should be denied.

***4** In its Reply, DRB "confirms its assertion of the attorney-client privilege as to any communications associated with the instant litigation." *See* DRB's Reply, Pg. 1–2 (Dkt.76). DRB contends no waiver of the attorney-client privilege occurred because, under West Virginia law, "waiver requires the voluntary relinquishment of a known right ... [and] at no time [did] DRB voluntarily relinquish[ ] the privilege as it applied to this litigation." *Id.* DRB contends the execution of the "Informed Consent to Representation Agreement" did not constitute a voluntary relinquishment of the privilege relating to the current litigation. Moreover, DRB argues it had "an expectation that communications between it and its counsel, associated with the present suit" fell outside of the "Informed Consent to Representation Agreement's" scope. *Id.* at 2.

B. *Discussion*

Rule 45 of the Federal Rules of Civil Procedure governs the issuance of subpoenas. Fed.R.Civ.P. 45(a)(1)(A)(iii) requires the production of documents within a subpoenaed party's possession, custody, or control. A person in responding to a subpoena duces tecum, however, may invoke privilege. Fed.R.Civ.P. 45(c)(3)(A)(iii) specifically provides "on timely motion, the issuing court must quash or modify a subpoena that requires disclosure of privileged or other protected matter, if no exception or waiver applies." The party claiming the privilege has the burden of establishing the essential elements of the privilege. *United States v. Construction Prods. Research,* 73 F.3d 464, 473 (2d Cir.1996). Furthermore, Rule 45(d)(2) requires that the party claiming a privilege prepare a privilege log detailing "the

nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Fed.R.Civ.P. 45(d)(2). Failure to submit a privilege log may be deemed a waiver of the underlying privilege claim. *In re Grand Jury Subpoena*, 274 F.3d 563, 576 (1st Cir.2001).

In terms of claiming privilege, in diversity cases such as this one, the Court applies state law to issues concerning attorney client privilege and federal law to assertions of the work product doctrine. *Nicholas v. Bituminous Cas. Co.*, 235 F.R.D. 325, 329 n. 2 (N.D.W.Va.2006).

The West Virginia Supreme Court of Appeals has held there are three elements necessary to the assertion of privilege: "(1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal advisor; (3) the communication between the attorney and client must be intended to be confidential." *State ex rel. Med. Assur. of W. Va., Inc. v. Recht*, 213 W.Va. 457, 466, 583 S.E.2d 80, 89 (2003).

The work product doctrine protects the work of the attorney done in preparation for litigation. Fed.R.Civ.P. 26(b)(3). Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney. *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S.Ct. 385, 91 L.Ed. 451 (1947). The Fourth Circuit has described the work product doctrine as follows:

> ***5** Under the work product rule, an attorney is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation ... fact work product is discoverable only upon a showing of both a substantial need an an inability to secure the substantial equivalent of the materials by alternate means without undue hardship. Opinion work product is even more carefully protected, since it represents the thoughts and impressions of hte attorney ... an attorney's thoughts are inviolate, ... and courts should proceed cautiously when requested to adopt a rule that would have an inhibitive effect on an attorney's freedom to express and record his mental impressions and opinions without fear of having these impressions and opinions used against the client. As a result, opinion work product enjoys nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.

Chaudhry v. Gallerizzo, 174 F.3d 394, 403 (4th Cir.1999).

"In showing a substantial need for fact work product, the movant must specifically articulate the necessity for the documents or other tangible things ... and must also demonstrate why or how alternative sources for obtaining the substantial equivalent are unavailable." *Tustin v. Motorists Mutual Insurance Co.*, 5:08–cv–111, 2009 U.S. Dist. LEXIS 4853, at *13–14 (N.D.W.Va. Jan. 23, 2009). A non-exhaustive list of factors to be assessed in determining substantial need includes: 1) the importance of the materials to the party seeking them for case preparation; 2) the difficulty the party will have obtaining them by other means; and 3) the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents he seeks. Fed.R.Civ.P. 26(b)(3), advisory committee's note, 1970 Amendments.

When a party refuses to produce documents during discovery on the basis that they are privileged or protected, it has a duty to particularize that objection within the 30–day time period provided for discovery responses. Fed.R.Civ.P. 26(b)(5) (2010); Fed.R.Civ.P. 34(b)(2). To qualify as privileged work product, the document must be prepared "because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir.1992). The burden is on the party resisting discovery to show that the documents are protected. *See United States v. (Under Seal)*, 748 F.2d 871, 876 (4th Cir.1984). LR Civ. P. 26.04, in relevant parts, also provides:

> (a)(1) *Waiver:* Objections to disclosures or discovery that are not filed within the response time allowed by the Federal Rules of Civil Procedure, the scheduling order(s), or stipulation of the parties pursuant to Fed.R.Civ.P. 29, whichever governs, are waived unless otherwise ordered for good cause shown.

***6** (a)(2)(i)(A) *Claims of Privilege:* Where a claim of privilege is asserted in objecting to any means of discovery or disclosure including, but not limited to, a deposition, and an answer is not provided on the basis of such assertion [t]he attorney asserting the privilege shall identify the nature of the privilege (including work product) that is being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked and certify the attorney had reviewed each document for which privilege is asserted

LR Civ. P. 26.04(a)(1), (2)(i)(A).

"As the attorney-client privilege and the work product exception may result in the exclusion of evidence which is otherwise relevant and material and are antagonistic to the notion of the fullest disclosure of the facts, courts are obligated to strictly limit the privilege and exception to the purpose for which they exist." *State ex. rel. United States Fidelity and Guar. Co. v. Canady*, 194 W.Va. 431, 438, 460 S.E.2d 677, 684 (1995). The person asserting the privilege has the burden of showing it applies. *Id.*

Initially, the Court notes that both DRB's and Bowles Rice's Motions are jointly considered because of the similarity of the parties' positions.

The parties in this case do not agree as to the scope of the waiver language in the Informed Consent to Representation of all Parties Real Estate Transaction/Loan document (hereinafter "the Agreement") which was executed in 2001. The waiver language in dispute is as follows:

> Paragraph 2. Among the parties, no communications to the firm will be considered confidential. However, all such communications will be kept confidential with respect to anyone not a party to the transaction. Should a dispute arise, a member of the firm may be called as a witness by any of the parties to testify about any conversation or actions with [sic] took place concerning this real estate transaction.

See DRB's Mot., Exhibit A (Dkt.75–1).

Plaintiffs argue the plain language of the Agreement regarding the waiver of confidentiality is "very broad and contains no time limitations or any other limitations of any kind." *See* Pls.' Resp., Pg. 2 (Dkt.75). In contrast, DRB and Bowles Rice argue the Agreement was limited to documents and communications disclosed in solely the real estate transaction which occurred on December 20, 2001. Plaintiffs' interpretation of the waiver language is unrealistic. Plaintiffs, additionally, make much ado about Bowles Rice's and DRB's perpetuation of a fraud upon Plaintiffs by failing to disclose the long-standing history between Bowles Rice and DRB.

Notwithstanding Plaintiffs' complaints, the issue before the Court is: whether the Agreement, as executed in 2001, effectively renounced DRB's right to protection from disclosure under the attorney-client privilege and work product doctrine ten years later. The Court is inclined to disagree with Plaintiffs' position because Plaintiffs take far too broad a stance to uphold. First, the Agreement was executed in 2001 to provide informed consent to both the Plaintiffs, as well as, DRB that Bowles Rice would be the real estate attorney in that particular *real estate transaction.* (emphasis added). The waiver language contained in the Agreement is independent from Bowles Rice's ten-year-later representation of DRB. Second, while the waiver language exists, the Court finds the Agreement does not transcend the boundaries of the real estate closing so as to waive the attorney-client privilege and work product doctrine protections afforded to DRB in the current dispute. DRB sought legal advice from Bowles Rice regarding the dispute about the construction of the home in question. Both DRB and its attorney from Bowles Rice, Ms. Rohrbaugh, contemplated that the attorney-client relationship existed and intended their communications to be confidential. There has been no current express or implied waiver of this privilege and, accordingly, Plaintiffs' argument in this regard must fail. *See In re von Bulow*, 828 F.2d 94, 100 (2d Cir.1987) (finding administration of privilege in courts requires recognition that 'sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.") (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)).

***7** Plaintiffs' argument regarding waiver of the work product doctrine protection similarly falters from the same deficiencies. Plaintiffs contend the attorney work product should be produced because it was "knowingly

prepared as the result of an improper and prohibited legal representation....” *See* Pls.' Resp., Pg. 11 (Dkt.5). Both DRB and Bowles Rice assert Plaintiffs seek protected documents and, that although the protection is not absolute, Plaintiffs have not shown the requisite substantial need to gain access to such documents. Here again, the Agreement was limited in scope to that particular real estate transaction which occurred on December 20, 2001. The Court finds there has been no express or implied waiver of this protection by DRB's execution of the Agreement. Therefore, the attorney work product protection as to the current dispute is intact. Bowles Rice and DRB, however, are not in full compliance with the Federal Rules of Civil Procedure. Rule 45(d)(2)(A)(ii) requires one withholding subpoenaed information under a claim that it is privileged “to describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.” In this case, neither Bowles Rice nor DRB have prepared a privilege log as required under Fed.R.Civ.P. 45(d)(2). This is the rare exception, however, which proves the rule. Here, there are two separate and distinct files: 1) the 2001 real estate file and 2) the file related to this litigation. There is no attorney-client privilege or work product doctrine in the real estate closing file. Both attorney-client privilege and work product doctrine are in the entire litigation file. Therefore, in this one-of-a-kind situation, no privilege log is necessary.

C. *Decision*

Defendant, Dan Ryan Builders's, Inc., Motion to Quash and/or Modify Plaintiffs' Subpoena Duces Tecum is ***GRANTED*** as follows: all documents related to the 2001 real estate transaction shall be produced. No documents related to the representation of DRB by Bowles Rice in this litigation shall be produced.

Bowles Rice's Motion to Quash is also ***GRANTED*** as follows: all documents related to the 2001 real estate transaction shall be produced. No documents related to the representation of DRB by Bowles Rice in this litigation shall be produced.

Filing of objections does not stay this Order.

Any party may, within fourteen (14) days after being served with a copy of this Order, file with the Clerk of the Court written objections identifying the portions of the Order to which objection is made, and the basis for such objection. A copy of such objections should also be submitted to District Court Judge of Record. Failure to timely file objections to the Order set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Order.

***8** The Clerk of the Court is directed to transmit a copy of this Order to parties who appear *pro se* and any counsel of record, as applicable.

IT IS SO ORDERED.

2013 WL 6570903

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Florida.

The LEAGUE OF WOMEN VOTERS OF FLORIDA, et al., Petitioners,
v.
The FLORIDA HOUSE OF REPRESENTATIVES, et al., Respondents.
Rene Romo, et al., Petitioners,
v.
The Florida House of Representatives, et al., Respondents.

Nos. SC13–949, SC13–951. | Dec. 13, 2013.

Synopsis

Background: Challengers to congressional apportionment plan brought action against state legislature for declaratory and injunctive relief, asserting unconstitutional partisan or discriminatory intent. The Circuit Court granted in part and denied in part the legislature's motion for a protective order with regard to challengers' discovery requests. On certiorari review, the First District Court of Appeal, 113 So.3d 117, Wetherell, J., quashed the order. The Supreme Court granted review.

Holdings: Addressing novel issues of law, the Supreme Court, Pariente, J., held that:

[1] state legislators and legislative staff members possess a legislative privilege under the state constitution's separation of powers provision;

[2] legislative privilege is not absolute and may yield to a compelling, competing interest;

[3] legislative privilege had to be balanced against a compelling, competing interest in ensuring compliance with state constitutional prohibiting against partisan political gerrymandering; and

[4] legislators and staff members could assert or waive legislative privilege at discovery stage as to their subjective thoughts or impressions, but could not refuse to testify or produce documents concerning any other information or communications pertaining to reapportionment process.

Decision of District Court of Appeal quashed.

Labarga, J., concurred with an opinion in which Lewis, J., concurred.

Perry, J., concurred with an opinion in which Quince, J., concurred.

Canady, J., dissented with an opinion in which Polston, C.J., concurred.

West Headnotes (6)

[1] Appeal and Error
Cases Triable in Appellate Court

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In General

Existence of a legislative privilege, and the parameters of such a privilege, are questions of law subject to de novo review.

1 Cases that cite this headnote

[2] Constitutional Law
Nature and Scope in General

States
Privileges and Exemptions

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)1 In General
92k2340 Nature and Scope in General
360 States
360II Government and Officers
360k24 Legislature
360k28 Members
360k28(2) Privileges and Exemptions

State legislators and legislative staff members possess a legislative privilege under Florida law, based on the principle under state constitution's separation of powers provision that no branch may encroach upon the powers of another and on inherent principles of comity that exist between the coequal branches of government; in other words, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. West's F.S.A. Const. Art. 2, § 3.

1 Cases that cite this headnote

[3] States

Privileges and Exemptions

360 States
360II Government and Officers
360k24 Legislature
360k28 Members
360k28(2) Privileges and Exemptions

Legislative privilege that exists under separation of powers principles codified in state constitution is not absolute and may yield to a compelling, competing interest. West's F.S.A. Const. Art. 2, § 3.

1 Cases that cite this headnote

[4] States

Privileges and Exemptions

360 States
360II Government and Officers
360k24 Legislature
360k28 Members
360k28(2) Privileges and Exemptions

When the legislative privilege is asserted, courts must engage in two-step inquiry to determine, first, whether the information sought falls within the scope of the privilege, and, second, whether the purposes underlying the privilege, namely, the deference owed by each coequal branch of government to the others and the practical concerns of legislators' abilities to perform their legislative functions free from the burdens of forced participation in private litigation, are outweighed by a compelling, competing interest. West's F.S.A. Const. Art. 2, § 3.

[5] States

Privileges and Exemptions

360 States
360II Government and Officers
360k24 Legislature
360k28 Members
360k28(2) Privileges and Exemptions

Legislative privilege based on separation of powers provision in state constitution had to be balanced against a compelling, competing interest in ensuring compliance with state constitutional prohibiting against partisan political gerrymandering, in action against state legislature in which challengers sought declaratory and injunctive relief in connection with congressional reapportionment plan, asserting improper legislative intent. West's F.S.A. Const. Art. 2, § 3, Art. 3, § 20(a).

[6] States

Privileges and Exemptions

360 States
360II Government and Officers
360k24 Legislature
360k28 Members
360k28(2) Privileges and Exemptions

Legislators and their staff members could assert or waive a claim of legislative privilege at discovery stage of declaratory judgment action against state legislature in connection with congressional reapportionment plan that purportedly violated state constitutional prohibition against partisan political gerrymandering, to the extent that challengers sought testimony or documents revealing legislators' or staff members' subjective thoughts or impressions, but could not refuse to testify or produce documents concerning any other information or communications pertaining to reapportionment process. West's F.S.A. Const. Art. 2, § 3, Art. 3, § 20(a).

Attorneys and Law Firms

Talbot D'Alemberte of D'Alemberte & Palmer, PLLC, Tallahassee, FL; Adam M. Schachter and Gerald E. Greenberg of Gelber Schachter & Greenberg, P.A., Miami, FL; David B. King and Thomas A. Zehnder of King, Blackwell, Zehnder & Wermuth, P.A., Orlando, FL; Mark Herron, Robert J. Telfer III and Angelina Perez of Messer Caparello P.A., Tallahassee, FL; and Marc Elias and John Devaney of Perkins Coie LLP, Washington, D.C., for Petitioners.

Raoul G. Cantero, Jason N. Zakia, and Jesse L. Green of White & Case LLP, Miami, FL; George T. Levesque, General Counsel, The Florida Senate, Tallahassee, FL; Charles T. Wells, George N. Meros, Jr., Jason L. Unger, and Andy Bardos of Gray Robinson, P.A., Tallahassee, FL; Miguel A. DeGrandy of Holland & Knight LLP, Miami, FL; and Daniel E. Nordby, General Counsel, The Florida House of Representatives, Tallahassee, FL; J. Andrew Atkinson, General Counsel, and Ashley E. Davis, Assistant General Counsel, Florida Department of State, Tallahassee, FL, for Respondents.

Daniel J. Gerber of Rumberger, Kirk & Caldwell, Orlando, FL, for Amici Curiae James Harold Thompson, John M. McKay, and Ken Pruitt.

Opinion

PARIENTE, J.

***1** Does enforcement of the explicit prohibition in the Florida Constitution against partisan political gerrymandering and improper discriminatory intent in redistricting outweigh a claim of an absolute legislative privilege? Specifically, the issue presented to the Court is whether Florida state legislators and legislative staff members have an absolute privilege against testifying as to issues *directly* relevant to whether the Legislature drew the 2012 congressional apportionment plan with unconstitutional partisan or discriminatory "intent." *See* art. III, § 20(a), Fla. Const.

This Court is charged with the solemn obligation to ensure that the constitutional rights of its citizens are not violated and that the explicit constitutional mandate to outlaw partisan political gerrymandering and improper discriminatory intent in redistricting is effectively enforced. While the Legislature asserts that the challengers should be precluded from accessing relevant discovery information because it is absolutely privileged, we conclude that there is no unbending right for legislators and legislative staff members to hide behind a broad assertion of legislative privilege to prevent the discovery of relevant evidence necessary to vindicate the explicit state constitutional prohibition against unconstitutional partisan political gerrymandering and improper discriminatory intent.

This Court has held, in interpreting the constitutional redistricting "intent" standard, that "the focus of the analysis must be on both direct and circumstantial evidence of intent." *In re Senate Joint Resolution of Legislative Apportionment 1176 (Apportionment I),* 83 So.3d 597, 617 (Fla.2012). Further, this Court has stated that "there is no acceptable level of improper intent." *Id.* As Chief Judge Benton aptly observed in his dissenting opinion to the First District Court of Appeal's decision below, "[t]he enactment of article III, section 20 of the Florida Constitution makes plain that how and why the Legislature redistricts is a matter of paramount public concern." *Fla. House of Reps. v. Romo,* 113 So.3d 117, 131 (Fla. 1st DCA 2013) (Benton, C.J., dissenting).

In this opinion, we decide for the first time that Florida should recognize a legislative privilege founded on the constitutional principle of separation of powers, thus rejecting the challengers' assertion that there is no legislative privilege in Florida. We also hold, however, that this privilege is not absolute where, as in this case, the purposes underlying the privilege are outweighed by the compelling, competing interest of effectuating the *explicit* constitutional mandate that prohibits partisan political gerrymandering and improper discriminatory intent in redistricting. We therefore reject the Legislature's argument that requiring the testimony of individual legislators and legislative staff members will have a "chilling effect" among legislators in discussion and participation in the reapportionment process, as this type of "chilling effect" was the precise purpose of the constitutional amendment outlawing partisan political gerrymandering and improper discriminatory intent.

***2** We also unequivocally reject the dissent's hyperbolic assertion that our decision "grievously violates the constitutional separation of powers," dissenting op. at ——, by recognizing a legislative privilege but concluding that it is not absolute as to enforcing this explicit constitutional mandate. To the contrary, we strike the appropriate balance between respecting the separation of powers and fulfilling this Court's obligation to uphold the

citizens' explicit constitutional protection against partisan political gerrymandering and improper discriminatory intent in redistricting.

Accordingly, we quash the First District's decision in *Florida House of Representatives v. Romo,* 113 So.3d 117 (Fla. 1st DCA 2013), which erroneously afforded legislators and legislative staff members the absolute protection of a legislative privilege. We approve the circuit court's order permitting the discovery of information and communications, including the testimony of legislators and the discovery of draft apportionment plans and supporting documents, pertaining to the constitutional validity of the challenged apportionment plan. Further, we emphasize that the circuit court is not constrained by this opinion from considering, as discovery proceeds, how a specific piece of information protected by the privilege fits into the balancing approach set forth in this opinion.

FACTS AND BACKGROUND

In February 2012, the Florida Legislature approved the decennial plan apportioning Florida's twenty-seven congressional districts, based on population data derived from the 2010 United States Census. Soon after its adoption, two separate groups of plaintiffs filed civil complaints in circuit court, which were later consolidated, challenging the constitutionality of the plan under new state constitutional redistricting standards approved by the Florida voters in 2010 and now enumerated in article III, section 20, of the Florida Constitution. Those standards, governing the congressional reapportionment process, appeared on the 2010 general election ballot as "Amendment 6" and, together with their identical counterparts that apply to legislative reapportionment ("Amendment 5"), were generally referred to as the "Fair Districts" amendments. [1] All together, these "express new standards imposed by the voters clearly act as a restraint on legislative discretion in drawing apportionment plans." *Apportionment I,* 83 So.3d at 599.

The Florida Constitution's Redistricting Standards

Article III, section 20, of the Florida Constitution prohibits the Legislature from drawing an apportionment plan or individual district "with the intent to favor or disfavor a political party or an incumbent" and "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." Art. III, § 20(a), Fla. Const. Specifically, this constitutional provision provides in its entirety as follows:

***3** In establishing congressional district boundaries:

(a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Art. III, § 20, Fla. Const.

In interpreting the identical standards in article III, section 21, [2] during its initial 2012 review of the legislative apportionment plan, this Court explained that the requirement that "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent" is "a top priority to which the Legislature must conform during the redistricting process." *Apportionment I,* 83 So.3d at 615. This Court stated that "by its express terms, Florida's constitutional provision prohibits intent, not effect, and applies to both the apportionment plan as a whole and to each district individually." *Id.* at 617.

Because "redistricting will inherently have political consequences," this Court explained that "the focus of the analysis must be on both direct and circumstantial evidence of intent." *Id.* In reviewing the objective evidence before it, this Court held that "the effects of the plan, the shape of district lines, and the demographics of an area are all factors that serve as objective indicators of intent." *Id.* Moreover, as to the intent to favor or disfavor an incumbent, this Court

stated that "the inquiry focuses on whether the plan or district was drawn with this purpose in mind," and as to objective indicators of intent to favor or disfavor a political party, these "can be discerned from the Legislature's level of compliance with our own constitution's tier-two requirements, which set forth traditional redistricting principles." *Id.* at 618.

In reviewing these factors to assist this Court in discerning circumstantial evidence of intent, however, this Court was mindful that it was unable to engage in fact-finding. *See id.* at 612 & n. 13 (noting that the sole type of information available was "objective data" and refusing to consider an expert affidavit); *see also In re Senate Joint Resolution of Legislative Apportionment 2–B (Apportionment II),* 89 So.3d 872, 893 (Fla.2012) (Pariente, J., concurring) ("Working within a strict time period, this Court is realistically not able to remand for fact-finding, which creates concerns that are compounded by the fact that the Court is constrained to the legislative record that is provided to it."). Indeed, in *Florida House of Representatives v. League of Women Voters of Florida (Apportionment III),* 118 So.3d 198, 207 (Fla.2013), this Court subsequently explained that its decisions in *Apportionment I* and *Apportionment II* were "based solely on objective evidence and undisputed facts in the limited record before the Court." This Court also highlighted the need for judicial review of fact-intensive claims in order to effectuate the intent of the voters, who "clearly desired more judicial scrutiny" of apportionment plans, "not less." *Id.* at 205.

The Current Dispute

***4** In the consolidated circuit court lawsuit challenging the validity of the 2012 congressional apportionment plan under the Florida Constitution's redistricting standards, the challengers[3] allege that the congressional apportionment plan and numerous individual districts violate the article III, section 20, standards by impermissibly favoring Republicans and incumbents, by intentionally diminishing the ability of racial and language minorities to elect representatives of their choice, and by failing to adhere to the requirement that districts be compact and follow existing political and geographical boundaries where feasible. The challengers seek both a declaratory judgment invalidating the entire plan, or at least the specific districts challenged, as well as a permanent injunction against conducting any future elections using the congressional district boundaries established by the 2012 apportionment plan.

As part of ongoing pretrial civil discovery—and specifically in an effort to uncover and demonstrate alleged unconstitutional partisan or discriminatory intent in the congressional apportionment plan—the challengers sought information from the Legislature and from third parties regarding the 2012 reapportionment process. From third-party discovery, the challengers uncovered communications between the Legislature and partisan political organizations and political consultants, which they allege reveal a secret effort by state legislators involved in the reapportionment process to favor Republicans and incumbents in direct violation of article III, section 20(a). The challengers have also taken deposition testimony from numerous third-party witnesses as to their involvement in the redistricting process and their communications with state legislators and legislative staff members, and have been provided with e-mail communications between legislators and legislative staff, as well as other public records from the Legislature.

In order to further develop and discover evidence concerning their claim of unconstitutional legislative intent in violation of article III, section 20(a), the challengers served a notice of taking depositions of the then-state Senate Majority Leader, an administrative assistant to the Senate Reapportionment Committee, and the staff director of the House Redistricting Committee. Thereafter, the Legislature filed a "Motion for Protective Order Based on Legislative Privilege," in which it requested the circuit court to enter an order "declaring that (i) no legislators or legislative staff may be deposed, and (ii) unfiled legislative draft maps and supporting documents are not discoverable." The Legislature's motion for a protective order was filed in direct response to the challengers' notice of taking depositions; however, the Legislature sought to more generally prevent the depositions of *any* legislators and legislative staff, as well as the "discovery of legislatively drawn draft redistricting plans that were never filed as bills."

***5** The circuit court granted in part and denied in part the Legislature's motion for a protective order. The circuit court determined that, although a legislative privilege exists in Florida, the privilege is not absolute and "must be balanced against other compelling government interests." Finding it "*difficult to imagine a more compelling, competing government interest* than that represented by the [challengers'] claim," the circuit court drew a distinction between "subjective" thoughts or impressions of legislators and the thoughts or impressions shared with legislators by staff or other legislators, and "objective" information or communication that "does not encroach" into those thoughts

or impressions. (Emphasis added.) In drawing this distinction, the circuit court observed that "there are some categories of information and communications that are most in need of the protection offered by the privilege and some that are less in need of such protection."

Accordingly, because "the motive or intent of legislators in drafting the reapportionment plan is one of the specific criteria to be considered when determining the constitutional validity of the plan," and because the information sought by the challengers "is certainly relevant and probative of intent," the circuit court held that all "objective" information or communications "should not be protected by the privilege." However, the circuit court cautioned that any individual legislators or legislative staff members who assert a claim of legislative privilege "shall not be deposed regarding their 'subjective' thoughts or impressions or regarding the thoughts or impressions shared with them by staff or other legislators." The circuit court also determined that the same dichotomy applied to the production of documents. It therefore ordered the Legislature to produce all requested documents that do not contain "subjective" information and to schedule an in camera review as to any disputed documents.

On a petition for a writ of certiorari to review the circuit court's non-final order, the First District, relying on its prior decision in *Florida House of Representatives v. Expedia, Inc.*, 85 So.3d 517 (Fla. 1st DCA 2012), which was the first published Florida case to explicitly recognize the existence of a legislative privilege in Florida, concluded that the circuit court's order departed from the essential requirements of law when it allowed the challengers to depose legislators and legislative staff members "on any matter pertaining to their activities in the reapportionment process." *Romo,* 113 So.3d at 123. The First District reasoned that the legislative privilege "equally protects 'subjective' information, such as the legislator's rationale or motivation for proposing or voting on a piece of legislation, and 'objective' information, such as the data or materials relied on by legislators and their staff in the legislative process." *Id.* Thus, the First District quashed the circuit court's order "insofar as it permits [the challengers] to depose legislators and legislative staff members concerning the reapportionment process and insofar as it requires production of draft maps and supporting documents for an in camera review under the erroneous, unworkable objective/subjective dichotomy." *Id.* at 128.

***6** Chief Judge Benton dissented, observing in part that "[p]artisan political shenanigans are not 'state secrets,' " and that, at this stage of the litigation, "it is impossible to say that any question [the challengers] would actually have asked would be objectionable." *Id.* at 130–31 (Benton, C.J., dissenting). Subsequently, after both groups of challengers in the consolidated litigation below sought review, we exercised our discretion to accept jurisdiction to review the First District's decision because that decision expressly affects a class of constitutional officers—namely, legislators—and because this Court has never considered whether a legislative privilege exists, which is clearly an important issue to resolve. *See* art. V, § 3(b)(3), Fla. Const.

ANALYSIS

[1] The questions we confront require this Court to interpret the Florida Constitution to determine whether a legislative privilege exists and to define the parameters of that privilege as applied in this case. These are pure questions of law that are subject to de novo review.

We hold, first, that a legislative privilege exists in Florida, based on the principle of separation of powers codified in article II, section 3, of the Florida Constitution. However, we conclude that this privilege is not absolute and may yield to a compelling, competing interest. We then proceed to review whether a compelling, competing interest exists in this case. Finally, we explain why we embrace the circuit court's balancing approach at this stage of the litigation, which determined that the compelling, competing constitutional interest present here outweighs the purposes underlying the privilege, therefore allowing discovery but retaining the right of an individual legislator or legislative staff member to assert the privilege as to his or her thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators.

I. Florida's Legislative Privilege

The challengers contend that this Court should not recognize a legislative privilege because the Florida Constitution lacks a Speech or Debate Clause, which is the constitutional provision upon which the legislative privilege is traditionally premised. This clause, which generally states that legislators shall in all cases except treason, felony, or breach of the peace, not be questioned in any other place for any speech or debate in either legislative chamber,[4] is the general justification that the federal courts and other states with a state-specific

clause have utilized in recognizing the legislative privilege. *See City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co.*, 942 So.2d 455, 457 (Fla. 4th DCA 2006) ("The federal courts which have acknowledged and applied the privilege have done so based largely on the Speech and Debate Clause in Article I, section 6, of the United States Constitution, which protects federal legislators from suits."); *Kerttula v. Abood*, 686 P.2d 1197, 1205 (Alaska 1984) (applying Alaska's state constitutional version of the Speech or Debate Clause to preclude the deposition of a state legislator).

***7** In contrast to the vast majority of states, the Florida Constitution does not include a Speech or Debate Clause and has not included one since the clause was omitted during the 1868 constitutional revision. [5] In fact, Florida is one of only two states in the country that lacks either a state constitutional Speech or Debate Clause or a provision protecting legislators from arrest during legislative session. [6]

Coupled with the absence of a Speech or Debate Clause in the Florida Constitution is the presence of Florida's broad constitutional right of access to public records, set forth in article I, section 24, and right to transparency in the legislative process, codified in article III, section 4. Specifically regarding the Legislature, the Florida Constitution mandates as follows:

> [A]ll prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.

Art. III, § 4(e), Fla. Const. Further, article I, section 24(a), which "specifically includes the legislative" branch, provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body" of the state. Art. I, § 24(a), Fla. Const.

Thus, the absence of a Speech or Debate Clause and the strong public policy, as codified in our state constitution, favoring transparency and public access to the legislative process, are factors weighing against recognizing a legislative privilege in Florida. Florida statutes also do not provide for a legislative privilege. [7] Further, any common law legislative privilege has been abolished by a provision in the Florida Evidence Code providing that Florida law recognizes only privileges set forth by statute or in the state or federal constitutions. [8]

These factors, however, are not conclusive because there is another important factor that weighs in favor of recognizing the privilege—the doctrine of separation of powers. It is through this separate and important constitutional principle, which is codified in article II, section 3, of the Florida Constitution, that we recognize a legislative privilege under Florida law.

Forty states, including Florida, have a specific state constitutional provision recognizing the separation of powers between the three branches of government. [9] Article II, section 3, of the Florida Constitution, which is Florida's separation of powers provision, provides as follows:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

***8** Art. II, § 3, Fla. Const.

In *Expedia*, which was the first published case to analyze and recognize the existence of a legislative privilege in Florida, the First District concluded that the state constitutional separation of powers provision provides an independent basis to recognize a legislative privilege under Florida law. 85 So.3d at 524. The issue in *Expedia* was whether a legislator and a member of the legislator's staff could be deposed in tax-related litigation so that a party in the lawsuit could "refute a claim that it had waived the attorney-client privilege" as to several documents the legislator had obtained. *Id.* at 525. The First District held that the legislator and his aide were entitled to assert a legislative privilege against the compelled testimony and that there was no compelling interest in seeking the depositions because the party seeking them was "attempting to refute a fact that has not yet been proven, and, as it appears from this record, may never be proven." *Id.*

Although *Expedia* was the first published Florida case to explicitly conclude that state legislators may assert a legislative privilege, various Florida circuit courts have, in unpublished orders over the years, quashed subpoenas requesting the testimony of state legislators or legislative staff members for various reasons. For example, in 2003, a circuit court quashed a subpoena seeking to elicit the intent, purpose, or motive behind a particular state senator's introduction of certain amendments to a 2002 piece of legislation. *See* Order Granting Motion to Quash, *Billie v. State*, No. 02–499–CA (Fla. 17th Cir.Ct. Feb. 7, 2003). None of these orders specifically analyzed the legislative privilege, however, and most have been premised on the tenet that an individual legislator's testimony as to individual intent is usually irrelevant in a typical lawsuit challenging a statute. These orders nevertheless support the premise that the judicial branch has respected the separation of powers between the three branches of government, particularly where no compelling interest in seeking the testimony has been demonstrated.

Such respect between the three branches is inherent in our democratic system of government. This Court has previously described the constitutional tenet of separation of powers as "[t]he cornerstone of American democracy," *Bush v. Schiavo*, 885 So.2d 321, 329 (Fla.2004), and has explained that article II, section 3, which is the state constitutional separation of powers provision, "encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power." *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 264 (Fla.1991). Indeed, as pointed out by several former presiding officers of the Legislature in their amicus curiae brief filed in this case, "the legislative privilege is critical to a proper separation of powers, upon which our system of government is built." [10]

***9** **[2]** Accordingly, because of the role that the principle of separation of powers plays in the structure of Florida's state government, as embodied in article II, section 3, of our state constitution, we reject the challengers' contention that there is no legislative privilege in Florida and hold that state legislators and legislative staff members do possess a legislative privilege under Florida law. This privilege is based on the principle that "no branch may encroach upon the powers of another," *Chiles*, 589 So.2d at 264, and on inherent principles of comity that exist between the coequal branches of government. In other words, "the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." *United States v. Nixon*, 418 U.S. 683, 705, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

Several reasons support recognition of a legislative privilege. The most obvious is the practical concern of protecting the integrity of the legislative process by not unnecessarily interfering with the Legislature's business. As the circuit court cogently articulated, "[l]egislators could not properly do their job if they had to sit for depositions every time someone thought they had information that was relevant to a particular court case or administrative proceeding." In addition, other reasons for recognizing a privilege include the "historical policy ... of protecting disfavored legislators from intimidation by a hostile executive" and protecting legislators "from the burdens of forced participation in private litigation." *Kerttula*, 686 P.2d at 1202. These other policies undergirding the legislative privilege aim to ensure that the separation of powers is maintained so that the Legislature can accomplish its role of enacting legislation in the public interest without undue interference.

[3] Although separation of powers principles require deference to the Legislature in refusing to provide compelled testimony in a judicial action, we emphasize that the legislative privilege is not absolute. As the United States Supreme Court has noted in determining that the President of the United States does not enjoy an absolute privilege of immunity from judicial process in all circumstances, "when the privilege depends solely on the broad, undifferentiated claim of public interest ... a confrontation with other values arises." *Nixon*, 418 U.S. at 706, 94 S.Ct. 3090. This public interest component is especially true in Florida, where one of our state constitutional values is a strong and well-established public policy of transparency and public access to the legislative process, which is enshrined in the Florida Constitution.

Indeed, the proposition that a legislative privilege is not absolute, particularly where another compelling, competing interest is at stake, is not a novel one. For example, in *United States v. Gillock*, 445 U.S. 360, 369, 372, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), the Supreme Court acknowledged the need to avoid unnecessary intrusion by the executive or judicial branches into the "affairs of a coequal branch," as well as the Court's "sensitivity to interference with the functioning of state legislators." However, the Court concluded nevertheless that "although principles of comity command careful consideration, ... where important federal

interests are at stake, as in the enforcement of federal criminal statutes, comity yields." *Id.* at 373, 100 S.Ct. 1185. The Court stated as follows:

> ***10** We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive privilege were found wanting in *United States v. Nixon*, 418 U.S. 683 [94 S.Ct. 3090, 41 L.Ed.2d 1039] (1974), when balanced against the need of enforcing federal criminal statutes. There, the genuine risk of inhibiting candor in the internal exchanges at the highest levels of the Executive Branch was held insufficient to justify denying judicial power to secure all relevant evidence in a criminal proceeding. *See also United States v. Burr*, 25 F.Cas. 187 (No. 14,694) (C.C.Va.1807). Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.

Id. While the interest implicated in this case is not the enforcement of the criminal laws, this case involves the vindication of an explicit constitutional prohibition against partisan political gerrymandering and a constitutional restraint on the Legislature's actions—a public interest that is also compelling.

[4] As the First District itself has recognized, there may be a compelling, competing interest in a particular case that outweighs the purposes underlying the privilege. *See Expedia*, 85 So.3d at 525. When the legislative privilege is asserted, therefore, courts must engage in an inquiry to determine both if the privilege applies to protect the particular information being sought and the reason the information is being sought. [11] This inquiry is a two-step process.

The first step is to determine whether the information sought falls within the scope of the privilege. This is an important determination because, for example, information concerning evidence of a crime would not be covered by the legislative privilege. For purposes of our analysis in this case, however, we assume that all of the information being sought by the challengers, which relates to functions undertaken by legislators and legislative staff during the course of their legitimate legislative duties, would fall within the scope of the privilege. We therefore proceed to the next step.

Once a court determines that the information being sought is within the scope of the legislative privilege, the court then must determine whether the purposes underlying the privilege —namely, the deference owed by each coequal branch of government to the others and the practical concerns of legislators' abilities to perform their legislative functions free from the burdens of forced participation in private litigation —are outweighed by a compelling, competing interest. With this in mind, we next address the compelling, competing interest asserted in this case. Then, we analyze whether this compelling, competing interest outweighs the purposes underlying the privilege.

II. The Compelling, Competing Interest

***11** **[5]** The compelling, competing interest in this case is ensuring compliance with article III, section 20(a), which specifically outlaws improper legislative "intent" in the congressional reapportionment process. The language of article III, section 20(a), explicitly places legislative "intent" at the center of the litigation. Indeed, as the circuit court succinctly stated, it is "difficult to imagine a more compelling, competing government interest" than the interest represented by the challengers' article III, section 20(a), claims. The circuit court explained this finding as follows:

> [The challengers' claim] is based upon a specific constitutional direction to the Legislature, as to what it can and cannot do with respect to drafting legislative reapportionment plans. It seeks to protect the essential right of our citizens to have a fair opportunity to select those who will represent them. In this particular case, the motive or intent of legislators in drafting the reapportionment plan is one of the specific criteria to be considered when determining the

> constitutional validity of the plan. The information sought is certainly relevant and probative of intent. Frankly, if the compelling government interest in this case does not justify some relaxing of the legislative privilege, then there's probably no other civil case which would.

The first-tier requirements in article III, section 20, provide that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." Art. III, § 20(a), Fla. Const. We recently explained that, in enacting these constraints on the Legislature's reapportionment of congressional and state legislative districts, "the framers and voters clearly desired more judicial scrutiny" of the apportionment plans, "not less." *Apportionment III,* 118 So.3d at 205. Indeed, as this Court has previously noted, "[t]he new requirements dramatically alter the landscape with respect to redistricting by prohibiting practices that have been acceptable in the past.... By virtue of these additional constitutional requirements, the parameters of the Legislature's responsibilities under the Florida Constitution" and therefore the scope of judicial review of the validity of an apportionment plan "have plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance." *Apportionment I,* 83 So.3d at 607.

Although the dissent relies heavily on the historical roots of the legislative privilege and the United States Supreme Court's decision in *Tenney,* 341 U.S. 367, 71 S.Ct. 783 *Tenney* was "a civil action brought by a private plaintiff to vindicate private rights." *Gillock,* 445 U.S. at 372, 100 S.Ct. 1185. Specifically, the issue in *Tenney* was whether an individual plaintiff could maintain a cause of action for monetary damages against members of the California state legislature's "Fact–Finding Committee on Un–American Activities" after the committee held a hearing that the plaintiff alleged was designed "to intimidate and silence [him] and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature." *Tenney,* 341 U.S. at 369, 371, 71 S.Ct. 783.

***12** The compelling, competing interest in this case is a far cry from the interests implicated in *Tenney.* Unlike the plaintiff in *Tenney,* the challengers seek not to vindicate private rights, but to determine whether the Florida Legislature violated an explicit constitutional provision outlawing improper partisan and discriminatory intent in the redistricting process. The challengers do not seek monetary damages, but instead challenge whether the congressional districts in which citizens exercise their fundamental democratic right to elect representatives of their choice were drawn in compliance with the Florida Constitution.

In order to fully effectuate the public interest in ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering, it is essential for the challengers to be given the opportunity to discover information that may prove any potentially unconstitutional intent. The challengers assert that documents they have so far uncovered, primarily through third-party discovery, reveal direct, secret communications between legislators, legislative staff members, partisan organizations, and political consultants. In addition, because of Florida's broad public records laws, the challengers have received 16,000 e-mails, including e-mails between legislators and legislative staff, as part of the discovery process. [12] Contrary to the Legislature's argument, the fact that the challengers have already discovered communications between legislators and legislative staff, as well as between legislators, legislative staff members, and outside political consultants, related to the congressional apportionment plan, at least in part because Florida's strong public records constitutional provision requires it, does not make the depositions sought any less important to the critical issue of intent that is the focus of the challengers' article III, section 20(a), claims.

If the Legislature alone is responsible for determining what aspects of the reapportionment process are shielded from discovery, the purpose behind the voters' enactment of the article III, section 20(a), standards will be undermined. As we recently stated in connection with our decision to allow a fact-based challenge to the legislative apportionment plan to proceed in circuit court, the failure to permit factual inquiry and the development of a factual record in circuit court proceedings would allow

> the Legislature to circumvent the constitutional standards regarding "intent to favor or disfavor a political party or an incumbent" by concealing evidence of that intent from the public, knowing full well that discovery of any documents demonstrating this unconstitutional intent would never be reviewed by a court. While we do not suggest that this occurred during the 2012 redistricting process, these are the

exact types of claims that must be subject to a fact-finder's scrutiny.

Apportionment III, 118 So.3d at 211.

In *Apportionment I,* we acknowledged the Legislature for engaging in extensive public hearings as indicative of an unprecedented transparent reapportionment process. *See Apportionment I,* 83 So.3d at 664 ("We commend the Legislature for holding multiple public hearings and obtaining public input."); *see also id.* at 637 n. 35 (noting that the Legislature held twenty-six hearings at different locations around the state, during which the public had the opportunity to provide recommendations for the legislative and congressional apportionment plans). However, if evidence exists to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate.

***13** We reject the approach of the dissenting opinion, which contends that a broad claim of an absolute legislative privilege should prevent this discovery, and emphasize that this Court's first obligation is to give meaning to the explicit prohibition in the Florida Constitution against improper partisan or discriminatory intent in redistricting. The existence of a separate process to draw the maps with the intent to favor or disfavor a political party or an incumbent is precisely what the Florida Constitution now prohibits. This constitutional mandate prohibiting improper partisan or discriminatory intent in redistricting therefore requires that discovery be permitted to determine whether the Legislature engaged in actions designed to circumvent the constitutional mandate.

Additionally, the compelling, competing constitutional interest in this case is completely unlike any competing interests implicated in a traditional lawsuit challenging a statutory enactment, where a court looks to determine legislative intent through statutory construction. Specifically, the Legislature argues that intent in a statutory enactment is best revealed through the actual language used and any applicable legislative history, rather than through the testimony of individual legislators regarding their subjective intentions in proposing, amending, or voting for or against a particular piece of legislation. *See, e.g., Heart of Adoptions, Inc. v. J.A.,* 963 So.2d 189, 198 (Fla.2007) (stating the general principle of statutory construction that "legislative intent is determined primarily from the statute's text"). In this context, however, the "intent" standard in the specific constitutional mandate of article III, section 20(a), is entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction.

This Court has explained that the "intent" standard "applies to both the apportionment plan as a whole and to each district individually," and that "there is no acceptable level of improper intent." *Apportionment I,* 83 So.3d at 617. Thus, the communications of individual legislators or legislative staff members, if part of a broader process to develop portions of the map, could directly relate to whether the plan as a whole or any specific districts were drawn with unconstitutional intent.

As another court has explained in evaluating a similar claim, "[t]his is not ... 'the usual "deliberative process" case in which a private party challenges governmental action ... and the government tries to prevent its decision-making process from being swept up unnecessarily into [the] public [domain].' " *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections,* No. 11–C–5065, 2011 WL 4837508, at *8 (N.D.Ill.2011) (quoting *United States v. Bd. of Ed. of City of Chicago,* 610 F.Supp. 695, 700 (N.D.Ill.1985)). Instead, "the decisionmaking process ... [itself] *is* the case." *Id.* The same court also noted that cases concerning voting rights, "although brought by private parties, seek to vindicate public rights" and are, in this respect, "akin to criminal prosecutions." *Id.* at *6.

***14** Therefore, this case is completely distinguishable from the various circuit court orders and cases outside the reapportionment context from other jurisdictions cited by the Legislature that have quashed subpoenas of legislators or legislative staff members where the testimony of an individual member of the Legislature was not directly relevant to any issue in the case. This case is also readily distinguishable from the First District's decision in *Expedia,* where the party seeking to depose a member of the Legislature and a legislative aide was "attempting to refute a fact that ha[d] not yet been proven and ... may never be proven" by seeking to ask a question to which the parties had already acknowledged the answer. *Expedia,* 85 So.3d at 525. Unlike *Expedia* and other disputes not directly involving the Legislature, the lawsuit brought by the challengers seeks to vindicate the public interest in ensuring that unconstitutional partisan political gerrymandering by the Legislature itself did not occur.

Having concluded that this case presents a compelling, competing interest against application of an absolute legislative privilege, we now address the critical issue of whether this interest outweighs the purposes underlying the privilege.

III. The Balancing Approach

In this case, the circuit court determined that the legislative privilege does not shield most information or communications regarding the congressional apportionment process, but does protect the thoughts or impressions of individual legislators and legislative staff members at this stage of the litigation. We embrace the circuit court's balancing approach. We conclude that the compelling, competing constitutional interest in prohibiting the Legislature from engaging in unconstitutional partisan political gerrymandering outweighs the purposes underlying the legislative privilege as to all discovery, except to the extent that the circuit court protected the thoughts or impressions of individual legislators or legislative staff at this stage of the litigation. This is not a bright line, however, and involves a balancing of interests as specific questions are posed and additional discovery information is received in this case. The circuit court therefore is not constrained by this opinion from considering, as discovery proceeds, how a specific piece of information protected by the privilege fits into this balancing approach.

Although the Legislature, as well as the former legislative presiding officers in their amicus curiae brief, assert that a "chilling effect" will result if legislators are compelled to testify in this case, we reject this argument. In doing so, we emphasize that this case is wholly unlike the traditional lawsuit challenging a statutory enactment, where the testimony of an individual legislator is not relevant to intent in statutory construction and there are few, if any, compelling, competing interests weighing against application of the privilege.

***15** Further, we observe that the major "chilling effect" asserted by the former presiding officers would be the alleged reluctance of legislators to meet with constituents to discuss private or intimate matters in fear of those private conversations becoming public. [13] This example is obviously a far cry from this case, which involves nothing less than the public's interest in ensuring compliance with a constitutional mandate in a process this Court has described as "the very bedrock of our democracy." *Apportionment I*, 83 So.3d at 600.

To the extent the Legislature and the former presiding officers assert that there will be a "chilling effect" among legislators in discussion and participation as to future apportionment plans, this type of "chilling effect" was the explicit purpose of the constitutional amendment imposing the article III, section 20(a), redistricting standards—to prevent partisan political gerrymandering and improper discriminatory intent. Indeed, if in fact there was a separate, secret process undertaken by the Legislature to create the 2012 congressional apportionment plan in violation of the article III, section 20(a), standards, the voters clearly intended for the Legislature to be held accountable for violating the Florida Constitution and to curb unconstitutional legislative intent in this and future reapportionment processes.

We also reject the Legislature's argument that this Court should apply an absolute privilege and preclude the discovery sought because all courts that have considered this issue have precluded similar discovery. First, we note that this Court has never had the occasion to specifically consider whether a legislative privilege exists in Florida and to delineate its boundaries, and, as we have explained, Florida stands apart from many other states in lacking a constitutional Speech or Debate Clause.

Second, although the Legislature has made a point of arguing that no court anywhere has ever allowed a legislator to be deposed regarding the legislative process outside of the criminal context, the Legislature also has candidly admitted that no court in a state with a constitutional provision similar to Florida's, which explicitly prohibits improper intent or purpose in redistricting, [14] has ever addressed this particular issue. Thus, despite the Legislature's claim that no court in any of these states has ever permitted the compelled testimony of a state legislator, no court in any of these states has ever expressly prohibited it either. In other words, there is no precedent on this issue in the narrow context of a constitutional provision that explicitly prohibits improper legislative intent in redistricting.

To say, as the dissent does, that our decision stands alone "in the recorded history of our Republic" in compelling legislators to be interrogated "in a civil case concerning their legislative activities," dissenting op. at —— – ——, fails to take into account that this case is unlike any other "civil" case involving the legislative privilege. In contrast

to traditional civil cases, this case concerns an issue of first impression involving an explicit state constitutional prohibition against partisan political gerrymandering and improper discriminatory intent.

***16** We likewise reject the dissent's reliance on a single case decided by a federal district court judge, who determined the scope of the federal legislative privilege in the context of preclearance review under the Federal Voting Rights Act. *See Florida v. United States*, 886 F.Supp.2d 1301, 1302 (N.D.Fla.2012). Although legislative purpose may be a relevant factor in a discriminatory intent challenge brought pursuant to the Federal Voting Rights Act, challenges under the federal statute primarily involve "effect" rather than "intent," which is an easier standard to establish since it does not involve probing the motives behind the plan. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In addition, federal courts have long recognized the existence of a federal legislative privilege based on the explicit text of the Speech or Debate Clause of the United States Constitution and through federal common law—neither of which applies to an action in state court based on a specific prohibition in the state constitution.

Finally, in embracing the circuit court's approach, we reject the argument propounded by the First District that the dichotomy between discoverable and non-discoverable information recognized by the circuit court is an unworkable test. *See Romo*, 113 So.3d at 121. To the contrary, we have confidence that the circuit court will be able to capably make these determinations on a situation-by-situation basis as the specific issues arise, as circuit courts are often called upon to do, and that the parties will conduct discovery in a good faith manner.

As to the procedure to determine whether the draft apportionment plans and supporting documents should be produced, we reject the First District's reasoning and approve the circuit court's approach. As the circuit court stated:

> Florida has a long and rich tradition of open government and the case law in this area suggests that questions about the interpretation of the Public Records Act should be resolved in favor of access by the public. Any specific exemptions are therefore to be strictly construed. Noting the legislative history of the exemption under which the [Legislature] seek[s] protection, I conclude that their very broad interpretation of the exemption is not supported by the language of the statute nor the case law in this area. The [challengers'] interpretation might be a little too narrow, as they suggest that once any plan has been passed, any documents that might have been exempted from the act, are no longer so.
>
> It is difficult for me to know where to draw the line between the plan that was actually proposed and adopted by the legislature and any other draft of a plan. The [challengers'] argument is that the entire process is designed to create a plan, not several plans. Without having precise knowledge of how plans are proposed, discussed, and developed, it is difficult for me to evaluate that assertion. The only way I know how to do so is to have any disputed documents presented to me in camera, with explanatory testimony as to their nature and how they compare or contrast with the plan ultimately adopted.

***17** We agree that the first issue to be decided is whether the draft plans fall within the scope of the public records exemption in section 11.0431(2)(e), Florida Statutes (2012), and that this exemption should be strictly construed in favor of disclosure. *See Rameses, Inc. v. Demings*, 29 So.3d 418, 421 (Fla. 5th DCA 2010) ("In light of the policy favoring disclosure, the Public Records Act is construed liberally in favor of openness, and exemptions from disclosure are construed narrowly and limited to their designated purpose."). However, even if the circuit court concludes, after undertaking an in camera review of any disputed documents, that the draft plans are exempt from public records disclosure, the circuit court should still require the Legislature to produce the draft apportionment maps and supporting documents under appropriate litigation discovery rules, to the extent these documents do not contain information regarding individual legislators' or legislative staff members' thoughts or impressions. *See Dep't of High. Saf. & Motor Veh. v. Krejci Co.*, 570 So.2d 1322, 1325 (Fla. 2d DCA 1990) (determining that a statutory exemption from public records disclosure is not a per se bar to insulate records from discovery in a civil action); *see also* Fla. R. Civ. P. 1.280(b)(1) ("Parties may obtain discovery regarding *any matter, not privileged*, that is relevant to the subject matter of the pending action...." (emphasis added)).

We emphasize that this case presents novel issues of law and the first circuit court litigation under the new article III, section 20(a), redistricting standards. Indeed, the specific claims raised by the challengers in this case are first of their kind claims under the Florida Constitution that require considerable factual development. *See Apportionment III*, 118 So.3d at 210. Given that the record at this time does not indicate that the challengers "have so much as framed

the questions to be asked on deposition," *Romo,* 113 So.3d at 130 (Benton, C.J., dissenting), the challengers should not be prevented from developing evidence to support their constitutional claims.

Although the dissent criticizes our approval of the dichotomy between discoverable and non-discoverable information as having no principled basis, we approve the distinction drawn in the well-reasoned order of the circuit court, recognizing that this order was entered in anticipation of the depositions being set and the types of questions that could be posed. As Chief Judge Benton pointed out, "[a]ctually knowing what questions the litigants intended to ask could well shed an invaluable light on these important issues." *Id.* at 133. Without the depositions having taken place and specific objections raised, this Court can rule only on issues that are before us.

While the Florida Constitution authorizes the Legislature to adopt redistricting plans, it places significant limitations on how the redistricting plans are drawn and therefore the power is vested in the courts to determine the constitutionality of those plans. Accordingly, for all these reasons, we conclude that the circuit court recognized the proper balance in determining what information is protected by the legislative privilege at this stage of the litigation and what information the challengers should be permitted to discover. Because we conclude that the circuit court committed no error of law in its order, we also necessarily conclude that the First District erred in granting certiorari review of that non-final order because the circuit court's order did not depart from the essential requirements of law, a necessary prerequisite for granting certiorari relief. *See Citizens Prop. Ins. Corp. v. San Perdido Ass'n,* 104 So.3d 344, 351 (Fla.2012).

***18** **[6]** In sum, we hold that individual legislators may waive their privilege, or legislators and legislative staff members may assert a claim of legislative privilege at this stage of the litigation only as to any questions or documents revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators, but may not refuse to testify or produce documents concerning any other information or communications pertaining to the 2012 reapportionment process. Further, we emphasize that the circuit court is not constrained by this opinion from considering, as discovery proceeds, how a specific piece of information protected by the privilege fits into the balancing approach embraced herein.

CONCLUSION

Based on the foregoing, we conclude that Florida law should recognize a legislative privilege, but that this privilege is not absolute in this case, where the violations alleged are of an explicit state constitutional provision prohibiting partisan political gerrymandering and improper discriminatory intent in redistricting. We further conclude that the circuit court determined the proper balance of interests by protecting the thoughts or impressions of individual legislators and legislative staff members at this stage of the litigation, but recognizing the compelling, competing interest in ensuring that the Legislature complies with the constitutional mandate regarding redistricting by permitting discovery of all other information and communications pertaining to the constitutional validity of the challenged apportionment plan. Accordingly, we quash the First District's decision under review, approve the circuit court's order, and remand for further proceedings in accordance with this opinion.

It is so ordered.

LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.

LABARGA, J., concurs with an opinion in which LEWIS, J., concurs.

PERRY, J., concurs with an opinion in which QUINCE, J., concurs.

CANADY, J., dissents with an opinion in which POLSTON, C.J., concurs.

LABARGA, J., concurring.

I concur and write to emphasize the important duty of this Court to honor and effectuate the intent of the voters in passing Florida's groundbreaking constitutional amendment prohibiting partisan or discriminatory intent in drawing the congressional apportionment plan at issue in this case. While examination of objective data can disclose a discriminatory result, only the discovery authorized by the majority can disclose unconstitutional intent, if there be any, in the apportionment process. Moreover, the majority recognizes a constitutionally-founded legislative privilege, although not an absolute one. It is the Florida Constitution, not the judiciary, that creates the necessity for the Legislature to disclose any evidence of improper intent. Thus, there is no violation of the principle of separation of powers. Without

the limited discovery authorized in this case, there is no other meaningful or practicable way for the intent of the voters in enacting the constitutional amendment to be realized.

***19** As has been true throughout Florida's constitutional history, the Legislature must act within the constitutional limitations imposed upon it by the people of Florida. *See e.g., In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session,* 263 So.2d 797, 805 (Fla.1972) ("It is well settled that the state Constitution is not a grant of power but a limitation upon power."). Nowhere is the will of the people expressed more strongly than in the Florida Constitution. In the matter before the Court, the people have spoken through their amendment limiting the ability of their elected representatives to carry out legislative redistricting with any partisan or discriminatory intent. The decision reached today allows realization of this limitation on legislative power. Thus, I fully concur in the majority decision in this case.

LEWIS, J., concurs.

PERRY, J., concurring.
I fully concur with the majority's decision in this case. And, I write separately to emphasize my agreement with Justice Pariente's previously expressed observations in *In re Senate Joint Resolution of Legislative Apportionment 2–B (Apportionment II),* 89 So.3d 872 (Fla.2012) (Pariente, J., concurring). It bears repeating that our constitution requires that politics be removed from the reapportionment process. Art. III, §§ 20(a), 21(a), Fla. Const.; *see also In re Senate Joint Resolution of Legislative Apportionment 1176,* 83 So.3d 597, 598 (Fla.2012). However, the reality is that there can never be an apolitical result from an inherently political process. As Justice Pariente so aptly stated in *Apportionment II:*

> The voters have spoken that neutrality, and not partisan politics, must be the polestar of legislative apportionment.
>
> ....
>
> ... In other words, the Fair Districts Amendment changed the standards governing the manner in which the Legislature accomplishes that task, adding an express prohibition against partisan and incumbent favoritism to eliminate the partisan nature of the apportionment process.
>
> ....
>
> ... [C]hanges must be made to the process to ensure that the purpose of the amendment—to take politics out of the apportionment equation—can be fully realized.... [I]t would be wise at this juncture to seriously examine the adoption of an independent apportionment commission to oversee this inherently political task....
>
> The creation of an independent commission as a means to reform the process is not a novel concept. Other states have established independent redistricting commissions to redraw legislative districts. *See, e.g.,* Ariz. Const. art. IV, pt. 2, § 1(3) (added by initiative measure in 2000); Cal. Const. art. XXI, § 2 (added by initiative measure in 2008); Idaho Const. art. III, § 2(2) (created in 1994); Wash. Const. art. II, § 43 (added by constitutional amendment in 1982). In fact, even in Florida, numerous proposals have been advanced, but never adopted, for the creation of such a commission over the years.
>
> ***20** ....
>
> ... the time has come for this state to reevaluate the value of an independent apportionment commission.

Id. at 892–95. [15]

Indeed, the time has come for this idea to be given due consideration. I believe that the citizens of Florida would be well-served by an independent redistricting commission established for purposes of redrawing legislative districts. Such a commission would help ensure that the constitutional requirement of an apolitical reapportionment process is realized. Furthermore, an independent commission would limit the number of cases in which parties litigate reapportionment decisions that are perceived to be motivated by self-serving partisanship.

QUINCE, J., concurs.

CANADY, J., dissenting.
***20** In this case, for the first time in the recorded history of our Republic, a court has ruled that state legislators are required to submit to interrogation in a civil case concerning their legislative activities. I dissent from this unprecedented decision—a decision which effectively abrogates the well-established common law legislative privilege and grievously violates the constitutional separation of powers. I would approve the First District Court of Appeal's cogent decision.

I.

The legislative privilege—which the majority reduces to a matter of judicial discretion—is firmly rooted in the English common law and inherent in the constitutional separation of powers. In *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), the United States Supreme Court explained the historical origins of the privilege.

> The privilege of legislators to be free from ... civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.... In 1689, the Bill of Rights declared in unequivocal language: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."

Id. at 372, 71 S.Ct. 783 (quoting 1 Wm. & Mary, Sess. 2, c.II). Central elements of the Bill of Rights of 1689 were a provision abolishing the royal suspending power—that is, the monarch's asserted power to suspend the operation of laws without the consent of Parliament—and the provision recognizing the legislative privilege. "Together, the two provisions preserved the freedom of legislative debate and the force of legislative enactment, thus assuring the functional independence of Parliament in a system of separate powers." Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L.Rev. 1113, 1135 (1973). Along with the other provisions of the English Bill of Rights, Magna Charta, and the writ of habeas corpus, the legislative privilege stands as a component in "a towering common law lighthouse of liberty." *Boumediene v. Bush*, 553 U.S. 723, 845, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (Scalia, J., dissenting) (quoting Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 663 (1996)). The legislative privilege undeniably is one of "the presuppositions of our political history." *Tenney*, 341 U.S. at 372, 71 S.Ct. 783.

***21** As *Tenney* recognizes, "[t]he claim of an unworthy purpose does not destroy the privilege." 341 U.S. at 377, 71 S.Ct. 783. The privilege exists so that legislators will be "immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Id.* "The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's [or judge's] speculation as to motives." *Id.* Any impairment of the legislative privilege threatens both to undermine the ability of legislators to carry out their constitutional duties and to weaken the constitutional separation of powers.

The autonomy of the core internal operations of the legislative branch is a bulwark of the separation of powers. That autonomy is violated by the intrusion of the judicial branch into the internal operations of the legislative process. When the constitutional autonomy of one branch is breached by another branch, the separation of powers is violated. Florida law has recognized that the judicial branch should not intrude into the internal operations of the legislative branch. "Florida courts have full authority to review the final product of the legislative process, but they are without authority to review the internal workings of [the Legislature]." *Fla. Senate v. Fla. Pub. Emps. Council 79*, 784 So.2d 404, 409 (Fla.2001); *see also Moffitt v. Willis*, 459 So.2d 1018, 1022 (Fla.1984) (rejecting judicial inquiry into "the propriety and constitutionality of certain internal activities of members of the legislature").

Due respect for the separation of powers precludes the judicial branch from requiring that legislators and legislative employees submit to an inquisition conducted to ferret out evidence of an improper purpose in the legislative process. As the Supreme Court stated in *Tenney*, the view that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U.S. at 377, 71 S.Ct. 783 (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130, 3 L.Ed. 162 (1810)). Courts are highly sensitive to the fact that "judicial inquiries into legislative ... motivation represent a substantial intrusion into the workings of [an]other branch[ ] of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n. 18, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). That is why the majority has been unable to cite any decision in which a legislator has been required to provide testimony in a civil case regarding the legislative process. The best that the petitioners offer is an unreported federal trial court order compelling a legislative staff member to submit to a deposition. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 2011 WL 6122542 (E.D.Wis.2011).

Contrary to the majority's suggestion, *Tenney's* recognition of the important purpose of the legislative privilege is by no means undermined by *United States v. Gillock*, 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), where the Supreme

Court held that the legislative privilege was not applicable in a federal criminal prosecution of a state legislator. In *Gillock,* the Supreme Court reasoned that "the separation of powers doctrine [ ] gives no support to the grant of a privilege to state legislators in federal criminal prosecutions" because "federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch." 445 U.S. at 370, 100 S.Ct. 1185.

***22** Given "the absence of a constitutional limitation on the power of Congress to make state officials, like all other persons, subject to federal criminal sanctions," the Supreme Court concluded that no basis existed "for a *judicially created limitation* that handicaps proof of the relevant facts." *Id.* at 374, 100 S.Ct. 1185 (emphasis added). *Gillock* thus does not address the role that the legislative privilege plays in the separation of powers between the legislative and judicial branches. Instead, *Gillock* is a case about the scope of federal legislative power vis-à-vis state legislators. In *Gillock,* the recognition of the legislative privilege would have required "a judicially created limitation" impinging on the prosecution of federal offenses created by Congress. Here, however, it is the majority's failure to honor the legislative privilege that has required "a judicially created limitation" on the legislative privilege—a privilege that is rooted in the English common law and inherent in the constitutional separation of powers.

The absence of persuasive authority justifying the compelled deposition of state legislators was recently recognized by Judge Robert L. Hinkle in *Florida v. United States,* 886 F.Supp.2d 1301 (N.D.Fla.2012), a case arising under section 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973(a)–1973(q) (2006). Although Judge Hinkle recognized that in Voting Rights Act cases, as in equal protection cases, "the critical question often is whether the legislature acted with a discriminatory purpose," he held that legislators and legislative staff could not be compelled to testify. He observed:

> The considerations that support the result include the burden that being compelled to testify would impose on state legislators, the chilling effect the prospect of having to testify might impose on legislators when considering proposed legislation and discussing it with staff members, and perhaps most importantly, the respect due a coordinate branch of government. Legislators ought not call unwilling judges to testify at legislative hearings about the reasons for specific judicial decisions, and courts ought not compel unwilling legislators to testify about the reasons for specific legislative votes. Nothing in the Voting Rights Act suggests that Congress intended to override this long-recognized legislative privilege.

Florida, 886 F.Supp.2d at 1303.

II.

The majority recognizes "that a legislative privilege exists in Florida, based on the principle of separation of powers codified in article II, section 3, of the Florida Constitution" but concludes "that this privilege is not absolute and may yield to a compelling, competing interest." Majority op. at ——. The majority holds that a compelling, competing interest is operative here because with the passage of article III, section 20, Florida Constitution, " 'the framers and the voters clearly desired more judicial scrutiny' of the [redistricting] plans, 'not less.' " Majority op. at —— (quoting *Fla. House of Representatives v. League of Women Voters of Fla.,* 118 So.3d 198, 205 (Fla.2013)). The majority adopts a "balancing approach"—applicable to both depositions and document production—under which "most information or communications regarding the congressional [redistricting] process" are discoverable, but the "thoughts or impressions of individual legislators and legislative staff members" are not subject to discovery "at this stage of the litigation." Majority op. at ——. The majority also holds that "any common law legislative privilege has been abolished by" the Florida Evidence Code. Majority op. at ——.

***23** The majority's conclusion that the common law legislative privilege has been abolished is unwarranted. Section 90.501, Florida Statutes (2013), which the majority relies on to support this conclusion, simply provides that no evidentiary privilege exists other than those "provided by [chapter 90], any other statute, or the Constitution of the United States or of the State of Florida." The English common law legislative privilege, however, is given the force of law in Florida by the terms of another statute. Section 2.01, Florida Statutes (2013), provides that the general "common and statute laws of England ... down to the 4th day of July,

1776, are declared to be in force in this state" to the extent they are "not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state." Section 90.501 does nothing to abolish any privilege established in Florida law by section 2.01. By the plain terms of section 2.01, the legislative privilege contained in the Bill of Rights of 1689 is in force under Florida law.

The majority is correct in acknowledging that the legislative privilege is inherent in the separation of powers under Florida's Constitution. But the majority errs in reducing the constitutional legislative privilege to a matter of unfettered judicial discretion. Like the presumption of constitutionality historically applied to redistricting plans passed by the Florida Legislature but effectively abrogated by this Court last year, what now remains of the legislative privilege in this context promises to be swiftly vanishing. There is an unmistakable signal in the majority's statements that the "thoughts or impressions of individual legislators and legislative staff members" are not discoverable "*at this stage of the litigation* " and that the circuit court "is *not constrained* by [the majority's] opinion from considering, as discovery proceeds, how a specific piece of information protected by the privilege fits into this balancing approach" adopted by the majority. Majority op. at —— (emphasis added). To the extent that the improper motivations of individual legislators are a legal basis for determining that a constitutional violation by the Legislature has occurred—a point the majority assumes but does not establish—it is unclear what rationale exists for holding that the "thoughts and impressions" of individual legislators are protected from discovery. It would seem to be axiomatic that an individual's improper motivation will be reflected in that individual's "thoughts and impressions." Although the majority adopts the thoughts-and-impressions limitation "at this stage of the litigation," the majority certainly has not articulated a specific rationale for the limitation. Majority op. at ——. The tenuousness of the limitation is manifest; there is no reason to believe that the limitation will long survive.

The majority's balancing approach boils down to the exercise of unfettered judicial discretion: the legislative privilege inherent in the separation of powers will give way to the extent that an entirely subjective judicial determination requires that the privilege must give way. This is not the way that one branch of government should approach the acknowledged constitutional privilege of an equal and coordinate branch of government. When the judicial branch is called on to consider the scope of a privilege granted by the Constitution to another branch of government, it is incumbent upon the judicial branch to articulate clearly grounded, objective rules that can be applied without the suggestion that the coordinate branch's privilege is subject to diminishment or abrogation through the unfettered discretion of judges. At no time would it be more appropriate to pay heed to the maxim that "he is the best judge who leaves the least to his own discretion." [16] In a context such as this—where the internal functioning of a coordinate branch of government is at issue—due respect for the separation of powers requires that judicial restraint be at its zenith. Unfortunately, the balancing approach adopted by the majority represents the nadir of judicial restraint.

***24** Nothing in article III, section 20, justifies this evisceration of the constitutional legislative privilege. The majority's assertion that the constitutional legislative privilege is restricted by the desire of the voters for "more judicial scrutiny" is based purely on supposition. Majority op. at ——. The text of article III, section 20, provides directives to the Legislature regarding the redistricting process but says nothing about judicial scrutiny or the legislative privilege. Therefore, any impact of the adoption of this constitutional provision on the constitutional legislative privilege could arise only by implication. But the annulment or the fundamental alteration of an essential component of the constitutional separation of powers does not properly arise by implication. *See Jackson v. Consol. Gov't of City of Jacksonville*, 225 So.2d 497, 500–501 (Fla.1969) ("[I]t is settled that implied repeal of one constitutional provision by another is not favored, and every reasonable effort will be made to give effect to both provisions. Unless the later amendment expressly repeals or purports to modify an existing provision, the old and new should stand and operate together unless the clear intent of the later provision is thereby defeated.")

The view adopted by the majority works a radical change in the relationship between the judicial branch and the legislative branch by thrusting judicial officers into the internal workings of the legislative process. Such a radical alteration in the operation of the separation of powers should not be accomplished absent the clear assent of the people of Florida. No such assent was manifested by the adoption of article III, section 20. Nothing in the text of the proposed amendment—much less the ballot summary—informed the voters that this alteration would be a consequence of the adoption of the amendment by the people. When the validity of the ballot summary was under consideration in this Court,

the sponsor of the proposed amendment argued that the proposal "*changes no judicial functions whatsoever*" and has "*no effects on judicial functions.*" Amended Answer Brief of Sponsor at 7, 15 n. 2, *Advisory Op. to Atty. Gen. re Standards for Establishing Legislative District Boundaries (Legislative District Boundaries),* 2 So.3d 175 (Fla.2009) (emphasis added). The Court's plurality opinion approving the ballot summary concluded that the proposed amendment "*do[es] not alter the functions of the judiciary.*" *Legislative District Boundaries,* 2 So.3d at 183 (emphasis added). But now the Court has effectively accepted the petitioners' argument in this case that "[a]rticle III, section 20, *revised the balance of powers* in the redistricting context" and created a "*new arrangement*" requiring an aggressive judicial role. Petitioners' Initial Brief on the Merits at 19, *League of Women Voters of Fla. v. Fla. House of Representatives,* No. SC13–949, *review granted,* 122 So.3d 868 (Fla.2013) (table) (emphasis added). A revision of the "balance of powers" between the judicial and legislative branches should not be brought about by stealth.

III.

***25** In its treatment of the legislative privilege, the majority damages one of the "presuppositions of our political history." *Tenney,* 341 U.S. at 372, 71 S.Ct. 783. I dissent from this further unwarranted judicial encroachment on the Legislature's exercise of its constitutional authority to adopt redistricting plans. The decision of the First District should be approved.

POLSTON, C.J., concurs.

1 Amendment 5 is now codified in article III, section 21, of the Florida Constitution. The standards in article III, section 20—governing congressional reapportionment—and those in article III, section 21—governing legislative reapportionment—are identical.

2 Article III, section 21, provides as follows:

> In establishing legislative district boundaries:
>
> (a) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Art. III, § 21, Fla. Const. The only difference between article III, section 21, and article III, section 20, is that article III, section 21, applies to legislative reapportionment, whereas article III, section 20, applies to congressional reapportionment. The substantive standards governing the Legislature's discretion in redistricting are identical in the two provisions. *See Apportionment I,* 83 So.3d at 598 n. 1 ("Amendment 6 adopted identical standards for congressional redistricting.").

3 The challengers collectively include the League of Women Voters of Florida, Common Cause Florida, named plaintiff Rene Romo, and ten other individually named plaintiffs.

4 *See* art. IV, § 11, Fla. Const. (1865); *see also* U.S. Const. art. I, § 6, cl. 1.

5 *See Girardeau v. State,* 403 So.2d 513, 515 n. 3 (Fla. 1st DCA 1981) ("Florida's 1865 Constitution contained a speech and debate clause in language substantially similar to that found in the United States Constitution; however, the clause was omitted from the 1868, 1885, and the current (1968) Florida Constitutions.").

6 North Carolina is the other state. Forty-three states have a state constitutional Speech or Debate Clause and five other state constitutions contain an arrest exemption without explicitly conferring a speech or debate privilege. Many states have both provisions.

7 *See Swerdlow Lightspeed Mgmt. Co.,* 942 So.2d at 457 ("No Florida legislative testimonial privilege has been recognized in the Evidence Code, statutes, or Florida constitution.").

8 *See Marshall v. Anderson,* 459 So.2d 384, 387 (Fla. 3d DCA 1984) (stating that the adoption of section 90.501, Florida Statutes (1981), "abolishe[d] all common-law privileges existing in Florida," making "the creation of privileges dependent upon legislative action or pursuant to the Supreme Court's rule-making power" (quoting Law Revision Council Note)).

9 *See* art. II, § 3, Fla. Const.; Ala. Const. art. III, § 43; Ariz. Const. art. III; Ark. Const. art. IV, § 2; Colo. Const. art. III; Conn. Const. art. II; Ga. Const. art. I, § 2, ¶ III; Idaho Const. art. II, § 1; Ill. Const. art. II, § 1; Ind. Const. art. III, § 1; Iowa Const. art. III, § 1; Ky. Const. §§ 27, 28; La. Const. art. II, § 2; Me. Const. art. III, § 2; Md. Const. Decl. of Rts. art. 8; Mass. Const. pt. 1, art. XXX; Mich. Const. art. III, § 2; Minn. Const. art. III, § 1; Miss. Const. art. I, § 2; Mo. Const. art. II, § 1; Mont. Const. art. III, § 1; Neb. Const. art. II, § 1; Nev. Const. art. III, § 1; N.H. Const. pt. 1, art. 37; N.J. Const. art. III, ¶ 1; N.M. Const. art. III, § 1; N.C. Const. art. I, § 6; N.D. Const. art. XI, § 26; Okla. Const. art. IV, § 1; Or. Const. art. III, § 1; R.I. Const. art. V; S.C. Const. art. I, § 8; S.D. Const. art. II; Tenn. Const. art. II, § 2; Tex. Const. art. II, § 1; Utah Const. art. V, § 1; Vt. Const. ch. II, § 5; Va. Const. art. III, § 1; W. Va. Const. art. V, § 1; Wyo. Const. art. II, § 1.

10 The amicus curiae brief from which this quotation is derived was filed by three former presiding officers of the Florida Legislature—former Senate Presidents Ken Pruitt and John M. McKay and former Speaker of the House James Harold Thompson—in support of the Legislature.

11 This case does not involve legislative immunity, nor does it involve the liability of any individual legislator. We note that the legislative privilege (that is, an evidentiary privilege against compelled judicial process) is different than legislative immunity from suit, even though federal courts have held that the legislative privilege is derived from the principles underlying legislative immunity. *See Gravel v. United States*, 408 U.S. 606, 615, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). These principles are based on the United States Constitution's Speech or Debate Clause, *see* U.S. Const. art. I, § 6, cl. 1, and arise out of "the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

12 The number of e-mails—16,000—was provided during oral argument by the attorney representing the Legislature.

13 As an example, the former presiding officers assert in their amicus curiae brief that constituents will be less likely to bring difficult, emotional issues, such as issues relating to someone who has been the victim of a crime or a "glitch in Florida law" causing a businessperson to be unable to make ends meet, to the attention of their legislator without the protection of a dependable legislative privilege.

14 *See Apportionment I*, 83 So.3d at 615 n. 19 (noting that California and Washington share a similar constitutional provision and Idaho, Iowa, Montana, and Oregon codify similar provisions by statute).

15 In addition to Arizona, California, and Idaho, Alaska, Arkansas, Colorado, Hawaii, Missouri, New Jersey, Ohio, Pennsylvania, and Washington give an independent body primary responsibility for drawing legislative districts. *See* Alaska Const. Art. VI, § 3 (amended 1988); Ark. Const. Art. VIII, §§ 1–6; Colo. Const. Art. V, § 48; Haw. Const. Art. IV § 2; Mo. Const. Art. III, § 2; N.J. Const. Art. II § 2; Ohio Const. Art. XI, § 11.01; Pa. Const. Art. II, § 17; Wash. Const. Art. II, § 43.

16 From the Latin maxim *Optimus judex qui minimum sibi*. *Black's Law Dictionary* 1858 (9th ed. 2009).

Parallel Citations

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court, N.D. California, San Jose Division.

RYAN INVESTMENT CORPORATION, Plaintiff,
v.
PEDREGAL DE CABO SAN LUCAS; CAPELLA PEDREGAL-CABO SAN LUCAS, formerly known as Farallon Spa & Resort; Juan Diaz Rivera, an individual; Desarrolladora Farallon, Sociedad De Responsabilidad Limitada De Capital Variable, commonly known as Desarrolladora Farallon S. De R.L.; and Does 1 through 20, inclusive, Defendants.
Desarrolladora Farallon, Sociedad De Responsabilidad Limitada De Capital Variable, Counter-Claimant,
v.
Ryan Investment Corporation, a California Corporation; and Brent R. Waldman, an individual, Counter-Defendants.

No. C 06-3219 JW (RS). | Dec. 18, 2009.

Attorneys and Law Firms

Mark Aloysius O'Connor, Horan, Lloyd Law Offices, Monterey, CA, for Plaintiff/Counter-Defendants.

George John Berger, Allen Matkins Leck Gamble Mallory & Natsis LLP, San Diego, CA, for Plaintiff/Defendants/Counter-Defendants.

Opinion

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL

RICHARD SEEBORG, United States Magistrate Judge.

INTRODUCTION

***1** This discovery dispute has arisen post-judgment and is governed by Federal Rule of Civil Procedure 69(a)(2), which regulates discovery in aid of judgment or execution. As set forth below, plaintiff's motion to compel is granted in part and denied in part.

FACTUAL AND PROCEDURAL HISTORY

In March 2009, the presiding judge in this real estate contract dispute entered judgment in favor of plaintiff Ryan Investment Corporation and against defendants Pedregal de Cabo San Lucas, Leticia Diaz Rivera, and Manuel Diaz Rivera, jointly and severally, in the amount of $1,500,000.00. Defendants' appeal is currently pending before the Ninth Circuit. Meanwhile plaintiff has begun discovery proceedings to aid in execution of its judgment, propounding numerous interrogatories and requests for production ("RFPs") on defendants. Apparently defendants' assets in the United States are limited to a few dormant bank accounts. As to their assets in Mexico, defendants have informed plaintiff that they "will not at this time provide any specifics." Furthermore, they object to many of plaintiff's discovery requests on the grounds of overbreadth, privilege, harassment, and "third party confidentiality." Plaintiff has therefore brought this motion to compel defendants to respond to both its interrogatories and its RFPs.

LEGAL STANDARD

Federal Rule of Civil Procedure 69 provides, in pertinent part: "In aid of the judgment or execution, the judgment creditor ... may obtain discovery from any person-including the judgment debtor-as provided in these rules or by the procedure of the state where the court is located." Fed.R.Civ.P. 69(a)(2). "The discovery contemplated by Rule 69(a) is a distinct phase of the litigation with a narrow focus. It is solely to enforce the judgment by way of the supplemental proceedings." *Danning v. Lavine*, 572 F.2d 1386, 1390 (9th Cir.1978). One purpose of such special discovery is "to identify assets that can be used to satisfy a judgment." *1ST Tech., LLC v. Rational Enters. Ltd.*, 2007 WL 5596692, at *4 (D.Nev. Nov.13, 2007). Another purpose is "to discover concealed or fraudulently transferred assets." *Fid. Nat'l Fin., Inc. v. Friedman*, 2007 WL 446134, at *2 (D.Ariz. Feb.7, 2007); *see also British Int'l Ins. Co., Ltd. v. Seguros La Republica, S.A.*, 200 F.R.D. 586, 589 (W.D.Tex.2000) ("*British International II*") (noting that post-judgment discovery can be used to gain information

relating to the "existence or transfer of the judgment debtor's assets").

Generally, the scope of post-judgment discovery is broad. " '[T]he judgment creditor must be given the freedom to make a broad inquiry to discover hidden or concealed assets of the judgment debtor.' " *1ST Technology,* 2007 WL 5596692 at *4 (quoting *British International II,* 200 F.R.D. at 588). Further, due to its broad scope, a party is free to use any means of discovery allowable under the Federal Rules of Civil Procedure. *Sec. and Exch. Comm'n v. Tome,* 1987 WL 9415, at * 1 (S.D.N.Y. Apr.3, 1987); *see also* Fed.R.Civ.P. 69 advisory committee's note to 1970 Amendment ("The amendment assures that, in aid of execution on a judgment, all discovery procedures provided in the rules are available[.]"). "A judgment creditor is therefore ordinarily entitled to a very thorough examination of a judgment debtor with respect to its assets, including discovery [of] the identity and location of any of the judgment debtor's assets, wherever located." *British Int'l Ins. Co. v. Seguros La Republica, S.A.,* 2000 WL 713057, at *5 (S.D.N.Y. June 2, 2000) ("*British International I*") (internal citations omitted).

ANALYSIS

A. *Effect of Foreign Law on Rule 69 Discovery Proceedings*

***2** Defendants' principal objection is that Mexican law bars the execution of the March 2009 judgment on defendants' Mexican property until the entire case, including the appeal, is complete. [1] Defendants reason that, if their property cannot yet be subject to execution, it is premature to supply plaintiff with information about such property.

[1] The papers pertaining to this motion do not contain a request for judicial notice of relevant Mexican law to this effect. Nonetheless, it appears undisputed that Mexican law bars execution of judgments while an appeal is pending, and the Court will so assume for purposes of this motion.

The Ninth Circuit has not directly addressed this issue, nor has it arisen in many other judicial decisions. In *British International I,* an opinion from the Southern District of New York, the execution of an American judgment on property located in Mexico was at issue. 2000 WL 713057, at *6. Contrary to the present action, in that case there was no pending appeal. Rather, all that remained was a parallel Mexican proceeding which sought to challenge the result in the American case. *Id.* at *1. In ruling that Rule 69 discovery could proceed despite the Mexican action, the court noted: "Indeed, if this action did not involve a second lawsuit in a foreign country, [the losing party] would be able to reverse this Court's judgment only by successfully prosecuting an appeal. Absent the entry of a stay, however, [the prevailing party] would be entitled to conduct asset discovery during the pendency of that appeal." *Id.* at *6. The court then cited settled authority indicating that discovery in aid of execution is not precluded by the filing of an appeal. *Id.; see also Brae Asset Funding, L.P. v. Applied Financial, LLC,* 2006 WL 3497876, at *3 (N.D.Cal. Dec.4, 2006) (holding that " 'discovery in aid of its execution is not precluded by the filing of an appeal' " (quoting *Nat'l Serv. Indus., Inc. v. Vafla Corp.,* 694 F.2d 246 (11th Cir.1982)).

The decision in *British International I* is consistent with the built-in choice of law language in Rule 69(a)(2) itself, which provides that discovery may proceed "as provided in these rules or by the procedure of the state where the court is located"-thereby suggesting that the discovery procedures in the Federal Rules can trump equivalent procedures in the jurisdiction where the assets are located. [2] For these reasons, defendants' objections based on Mexican law must fall.

[2] This is not to say that Mexican law bars discovery in aid of execution while an appeal is still pending. Tellingly, defendants have only asserted that Mexican law bars execution of a judgment, not discovery in aid of such execution.

B. *Overbreadth*

Defendants also contend that many of plaintiff's discovery requests suffer from overbreadth, first because they request information reaching as far back as 2006; and second because they request information concerning all transfers in amounts over $500-an amount which defendants contend is too low. [3]

[3] The only discovery requests that actually contain a lower limit of $500 are RFPs 3 and 7, and thus these are the only discovery requests to which this sub-dispute pertains.

As to the former concern, the complaint indicates that the parties first began business dealings in 2002, and plaintiff commenced this case in April 2006. The time period from 2006 to the present is a reasonable time period for the scope of Rule 69 discovery. This type of discovery is designed specifically to aid in the enforcement of the court's judgment,

and, as noted above, its scope is necessarily very broad. *1ST Technology*, 2007 WL 5596692 at *4.

***3** As to the amount which triggers the disclosure obligation, "[a]ny non-*de minimis* transfers of assets after [the date at which the disclosing party knows the extent of its liability] could be construed as an attempt by [that party] to avoid his financial obligation ... by liquidating any personal holdings that might be levied upon in the event of default." *Dering v. Pitassi*, 1988 WL 115806, at *2 (E.D.Pa. October 26, 1988). While defendants complain that plaintiff's $500 "floor" is too low and will cause unnecessary and irrelevant disclosure, they make no specific showing in support of that claim. Rather, by all appearances, defendants will have to examine the same body of information and records to respond to plaintiff's discovery requests, whether the "floor" is $500, $5,000, or any other amount. It is possible to imagine circumstances in which transactions in the $500 range might be considered *"de minimis,"* but in this case defendants have shared no information about the kind of transactions in which they typically engage. Accordingly, plaintiff's motion to compel will be granted insofar as it requests information on defendants' financial transactions dating back to 2006 and disclosure of all transactions over $500.

C. *Privilege*

Defendants next contend that three of plaintiff's requests for production (7, 8, and 15) seek materials that are privileged under the attorney-client privilege and the work product doctrine. Defendants have not, however, produced a log detailing any materials being withheld on such privilege grounds.

As noted at the hearing, counsel's communications with the client and work product developed once the litigation commences are presumptively privileged and need not be included on any privilege log. As to other materials, however, such as publicly available documents filed with the Mexican courts, no privilege would attach. Plaintiff's motion to compel is therefore denied to the extent it seeks to require a log of post-litigation counsel communications and work product, but is granted to the extent that any other materials withheld on privilege grounds must be accounted for on a privilege log. *See In re Grand Jury Investigation*, 974 F.2d 1068 (9th Cir.1992). [4] Should plaintiff later wish to press for disclosure of the logged items, it may bring a motion to compel at that time.

4 "[P]rivilege logs must be sufficiently detailed to allow informed evaluation of the objecting party's claims. To that end, this Court will require that privilege logs separately identify each document withheld under claim of privilege, and set forth for each document (1) its type (i.e., letter, memo, notes, etc.), (2) its author, (3) its intended recipients, (4) the names of any other individuals with access to the document, (5) the date of the document, (6) the nature of the claimed privilege (i.e., attorney-client, work-product, etc.), and (7) a brief summary of the subject matter of the document." *In re Grand Jury Investigation*, 974 F.2d at 1070.

D. *Third Party Confidentiality*

Defendants also object to responding to several of plaintiff's discovery requests on the grounds that they seek private and confidential information about third parties. [5] Third persons can only be examined about assets of the judgment debtor and cannot be required to disclose their own assets. *Caisson Corp. v. County W. Bldg. Corp.*, 62 F.R.D. 331, 334 (D.Pa.1974). Nonetheless, discovery may be permitted where the relationship between judgment debtor and nonparty is sufficient to raise a reasonable doubt about the "bona fides of the transfer of assets." *Strick Corp. v. Thai Teak Prods. Co.*, 493 F.Supp. 1210, 1218 (D.Pa.1980). Here, defendants have failed to explain exactly why plaintiff's discovery requests would require third parties to disclose their own private information. Insofar as information exists about *defendants'* assets, however, plaintiff is entitled to that information. Defendants are instructed to respond to plaintiff's discovery requests with these considerations in mind.

5 Specifically, defendants raise this objection as to RFPs 1, 3-5, 7, 16, 17, and 20-27; and Interrogatories 9-13, 15, 19, and 32-34.

E. *Harassment*

***4** As several federal courts have noted, Rule 69 discovery can indeed resemble the proverbial fishing expedition, "but a judgment creditor is *entitled* to fish for assets of the judgment debtor." *Banco Cent. de Para. v. Para. Humanitarian Found.*, 2006 WL 3456521, at *9 (quoting *Capital Co. v. Fox*, 15 F.Supp. 677, 678 (S.D.N.Y.1936)) (emphasis added). Of course, discovery requests propounded solely to harass must be forbidden. *Caisson*, 62 F.R.D. at 334. None of the requests listed by defendants warrants such a characterization. [6] Without more specific information as to why defendants believe such requests exist only for this purpose, their objections must be overruled.

6 This list includes RFPs 1, 3, 4, 7, 8, and 20-27; and Interrogatory 19.

F. *Response Already Complete*

Finally, defendants claim that they have responded completely to RFPs 8, 15, 18, and 19. It is not entirely clear whether plaintiff disputes this claim. To the extent that any material responsive to these requests remains to be produced, defendants will be required to complete that production within 20 days of the date of this order.

CONCLUSION

Plaintiff's motion to compel is granted in part and denied in part as set forth above.

IT IS SO ORDERED.

2010 WL 1529248
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. New York.

UNITED STATES, Plaintiff,
v.
BOUCHARD TRANSPORTATION, et al., Defendants.

No. 08–CV–4490 (NGG) (ALC). | April 14, 2010.

Attorneys and Law Firms

Tiana A. Demas, United States Attorneys Office, Brooklyn, NY, for Plaintiff.

Ronald W. Zdrojeski, Edward J. Heath, Nuala Droney, Peter R. Knight, Robinson & Cole, LLP, Hartford, CT, for Defendants.

Opinion

ORDER

CARTER, United States Magistrate Judge.

***1** On February 22, 2010, Plaintiff filed a motion to compel Defendants to produce a privilege log for all documents and communications created on or before January 1, 2008, which were withheld on the basis of privilege. According to Plaintiff, Federal Rule of Civil Procedure 26(b)(5) and Local Civil Rule 26(a)(2) (A), which both require a party to disclose specific information with regard to documents withheld on the basis of privilege, "are not starting points for a discussion concerning the handling of privileged documents nor are they merely suggested practice guidelines that attorneys are free to disregard. They are *rules*, and in the absence of a court [o]rder or stipulation providing otherwise, they must be obeyed." Pl.'s Mot. at 3 (citing *FG Hemisphere Assocs. v. Republique du Congo*, No. 01–CV–8700, 2005 WL 545218, at *5 (S.D.N.Y. Mar.8, 2005)).

Moreover, Plaintiff argues that it is substantially prejudiced as a result of Defendants' failure to produce a privilege log. According to Plaintiff, Defendants are in possession of multiple documents which are not covered by the work product privilege or which are nevertheless discoverable despite a properly asserted privilege. Plaintiff gives several examples of factual materials it believes Defendants are refusing to produce on the basis of privilege but to which Plaintiff feels it is entitled based on its substantial need and inability, without undue hardship, to obtain the substantial equivalent through other means. *See* Fed.R.Civ.P. 26(b)(3)(A)(ii). It is Plaintiff's position that, without a privilege log, it has no means of contesting Defendants' failure to produce records that are in fact discoverable.

Defendants oppose Plaintiff's motion, arguing that requiring Defendants to produce a privilege log would be "pointless and wasteful." Defs.' Resp. at 2. Defendants' argument rests on the contention that, because several government investigations were initiated immediately after the February 21, 2003 explosion of a Bouchard barge on the Arthur Kill Waterway, all documents created from that point forward were necessarily created "in anticipation of litigation." Defendants list three inquiries, warrants, and/or subpoenas that were served or propounded on Defendants in the few months immediately following the incident. Citing *Capital Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44, 51 (S.D.N.Y. Aug.13, 2009), Defendants argue that the shift in their focus from investigating the cause and potential consequences of the incident to defending possible lawsuits "occurred when Bouchard's attorneys arrived on the scene of the explosion and defended against the onslaught of Government inquiries and potential civil claims flowing from the explosion." Defs.' Resp. at 3.

I have read the parties' submissions and find that, pursuant to Fed.R.Civ.P. 26(b)(5) and Local Civil Rule 26(a)(2)(A), Defendants are required to submit a privilege log for documents created before January 1, 2008. I appreciate Defendants' argument that, in light of various government investigations that took place in the several months immediately after the incident, all documents created from that point forward were created in anticipation of litigation. Ultimately, however, I find Defendants' argument unpersuasive for several reasons.

***2** First, privilege logs are commonly limited to documents created before the date litigation was initiated. This is due to the fact that, in many situations, it can be assumed that all documents created after charges have been brought or a lawsuit has been filed and withheld on the grounds of

privilege were created “because of” that pending litigation. It may be the case here that Defendants are in fact able to claim privilege with regard to every document created between the time of the incident and the inception of litigation as having been created in anticipation of litigation. But unlike cases in which litigation has commenced, the facts here are not sufficient for the Court to automatically assume so. *Capital Records* is not to the contrary. Although the Honorable Magistrate Judge Maas in that case recognized that the defendant's transition to creating documents solely because of litigation arguably occurred before the commencement of the litigation pending before him, he nevertheless tied the cutoff date of the defendant's privilege log to the date a prior, overlapping litigation was filed. *See Capital Records, Inc.*, 261 F.R.D. at 51. Here, no similar bright-line date marking the commencement of litigation, as opposed to investigation, exists to support Defendants' position. [1]

1 Although I find that Plaintiff is legally required to produce a privilege log for all documents created before the date this lawsuit was filed, the Plaintiff has agreed to further limit the time period to January 1, 2008, the date when Plaintiff began communication with Defendants about bringing this action.

In addition, as a practical matter, it is not clear that a party in Defendants' position would have remained “in anticipation of litigation” for the entire five year period at issue. Defendants point to government investigations that were initiated in the initial months after the incident. According to Defendants, at some point after responding to those government inquiries, Defendants' responsive documents were packed up and placed in storage. Defs.' Resp. at 2. Therefore, it is conceivable that at some point in the intervening five years, when no complaints or lawsuits were forthcoming, Defendants' anticipation of litigation diminished.

Finally, Defendants' argument that, rather than requiring Defendants to produce a lengthy privilege log, “the Government should specifically indentify what documents it requests” and should “subpoena the third party consultants directly” is equally unpersuasive. Plaintiff does identify several examples of documents-*that it is aware of*-which were created by third party consultants, and Plaintiff has in fact subpoenaed those consultants. Defs.' Resp. at 4. However, there may be additional documents, or additional third party consultants, of which Plaintiff is completely unaware. Without an exhaustive privilege log, Plaintiff would be unable to “specifically indentify” all documents to which it believes it is entitled.

CONCLUSION

For the reasons set forth above, Plaintiff's motion to compel is granted. On or before June 9, 2010, Defendants are directed to produce a privilege log for all documents and communications created on or before January 1, 2008.

SO ORDERED.

2008 WL 2676365
Only the Westlaw citation is currently available.
United States District Court, D. Hawai'i.

Ernestine Ching YOUNG, et al., Plaintiffs,
v.
CITY AND COUNTY OF
HONOLULU, et al., Defendants.

Civil No. 07–00068 JMS–LEK. | July 8, 2008.

Attorneys and Law Firms

David A. Nakashima, Lerisa L. Heroldt, Alston Hunt Floyd & Ing, Honolulu, HI, for Plaintiffs.

Don S. Kitaoka, Kyle K. Chang, Office of Corporation Counsel, Lori–Ann Kimie Koseki Sunakoda, Department of Corporation Counsel, Honolulu, HI, for Defendants.

Opinion

DISCOVERY ORDER

ORDER DENYING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

LESLIE E. KOBAYASHI, United States Magistrate Judge.

***1** On November 26, 2007, Plaintiffs Ernestine Ching Young, et al. ("Plaintiffs") filed the instant Motion to Compel Production of Documents ("Motion"). Defendant City and County of Honolulu ("the City") filed its memorandum in opposition on December 20, 2007 and Plaintiffs filed their reply on December 27, 2007. This matter came on for hearing on January 7, 2008. Appearing on behalf of Plaintiffs was David Nakashima, Esq., and appearing on behalf of the City were Don Kitaoka, Esq., and Kyle Chang, Esq. On April 4, 2008, this Court orally announced its denial of the Motion and that it would issue a written order to that effect. After careful consideration of the Motion, supporting and opposing memoranda, and the arguments of counsel, Plaintiffs' Motion is HEREBY DENIED for the reasons set forth below.

BACKGROUND

Plaintiffs own leasehold, residential condominium units in the Admiral Thomas Apartments in Honolulu ("Admiral Thomas"). Plaintiffs and the City entered into contracts to allow Plaintiffs to purchase the fee interest for their respective units ("the Contracts") pursuant to Chapter 38 of the Revised Ordinances of Honolulu 1990 ("Chapter 38"). Plaintiffs were all properly qualified and designated under Chapter 38 and the Rules of Residential Condominium Cooperative and Planned Development Leasehold Conversion.

On May 8, 2003, the City initiated an eminent domain action regarding the Admiral Thomas in state court pursuant to Chapter 38 ("the Condemnation Action"). During the pendency of the Condemnation Action, Honolulu City Council ("Council") Member Mike Gabbard introduced Council Bill 04–53 (2004), which provided for the repeal of Chapter 38 ("Bill 53"). On or about January 5, 2005, Council Member Charles Djou introduced a modified version of Bill 53 which would have exempted leasehold condominium developments that were validly designated for fee conversion before Bill 53's effective date or that had a sufficient number of lessees who had lease fee purchase contracts with the City before Bill 53's effective date. The Council's Executive Matters Committee ("EMC") rejected Djou's draft on January 13, 2005.

After that vote, Council Member Romy Cachola asked James Mee, Esq ., who represented the lessors of the Admiral Thomas and other properties, to clarify his proposed amendments to Bill 53. Mee informed the EMC that his suggested modification would clarify that only the units designated by the City and approved by the Council would be exempt. Council Member Barbara Marshall expressed concern with Mee's proposed "savings clause" and asked to hear from the attorneys representing the lessees: "I'd like to hear from the other side. I'm a little leery about taking **a recommendation** of an attorney from one side of an issue this controversial **which** I believe **contradicts advice of our own counsel....**" [Mem in Supp. of Motion at 6 (quoting Exh. 5 to Motion) (emphases in original).] Joachim Cox, Esq., attorney for the Kahala Beach Apartment lessees responded that Mee's savings clause would prevent additional individuals from going forward, even if they had a contract with the City. He also argued that repealing Chapter 38 would constitute a breach of the contracts held by the lessees at the Kahala Beach Apartments and the Admiral Thomas.

***2** The Council ultimately adopted a version of Bill 53 containing Mee's savings clause and Mayor Mufi Hannemann approved and signed Bill 53 into law. It became Honolulu City Ordinance 05–001 ("the Repeal Ordinance").

Plaintiffs contend that the Repeal Ordinance unnecessarily bars qualified and designated applicants who had already begun the process to purchase the fee interests for their units. For example, five Admiral Thomas unit owners were designated by the City in 2004, but the Council refused to approve them before the adoption of the Repeal Ordinance ("Group Three Plaintiffs"). They are now barred from joining ongoing condemnation actions. The state court dismissed Condemnation Action because the Group Three Plaintiffs could not join.

Plaintiffs filed the instant action on February 8, 2007. Their First Amended Complaint, filed February 26, 2007, alleges *inter alia*, that: Chapter 38 should be construed to apply to them because its repeal violates their constitutional rights; and the City breached the Contracts.

On May 29, 2007, Plaintiffs sent two discovery requests to the City. The City objected, claiming that the requested information was protected by the attorney-client privilege, legislative immunity, and the deliberative process privilege. After the parties submitted letter briefs on these issues, this Court issued a Discovery Order on October 9, 2007. This Court ordered the City to conduct a good faith search for responsive documents and to create a privilege log for any documents the City believed were privileged. The Court instructed the parties to meet and confer on the issue and to submit any documents that the City still refused to produce for the Court's *in camera* inspection. The City did so and, on November 6, 2007, this Court issued another Discovery Order, which required the City to produce some of the documents referenced in its privilege log. The Court, however, found that the remainder of the documents were protected from discovery based on the privileges that the City asserted.

In the instant Motion, Plaintiffs seek an order compelling the City to produce various documents referenced in its privilege log. [Mem. in Supp. of Motion at 3 (listing documents by Bates stamp numbers).] Plaintiffs argue that the City waived all claims of privilege as to any and all documents referring, relating, and/or regarding legal advice about Mee's savings clause because Council Member Marshall voluntarily disclosed the fact that the adoption of Mee's savings clause contradicted the advice of the Council's attorneys. According to Plaintiffs, this disclosure waived the deliberative process privilege because the disclosure of material and/or information to persons or entities outside the government constitutes a waiver. They emphasize that her voluntary disclosure was on the record and is available to the public. Further, it was more than a vague allusion to privileged information; she summarized a significant portion of the legal advice. Plaintiffs also contend that Council Member Marshall had the authority to waive the deliberative process privilege, and other privileges, for the Council. Moreover, none of the other Council members objected to or took steps to rectify her disclosure. The City's current objections, almost three years after the fact, does not render the matter privileged.

***3** Plaintiffs also argue that Council Member Marshall's disclosure waived the attorney-client privilege. Pursuant to the fairness doctrine, the City cannot disclose as much of counsel's advice as it pleases and withhold the remainder. Under Ninth Circuit law, a voluntary disclosure of privileged attorney communication waives the privilege as to all other communication on the same subject. Plaintiffs contend that courts interpret the same subject requirement broadly and that communications between the City and its attorneys regarding the adoption of Mee's savings clause are clearly the same subject matter as Council Member Marshall's disclosure.

Finally, Plaintiffs argue that the disclosure waived the protection of the work product doctrine. Council Member Marshall made the disclosure during a public meeting with many people in the audience who opposed Bill 53 and Mee's savings clause. Thus, the disclosure substantially increased the opportunity for the City's adversaries to obtain information about legal advice that the Council obtained, and the disclosure was inconsistent with maintaining the secrecy of the legal advice. In addition, Plaintiffs have a substantial need for the information because whether the Council rejected contrary legal advice in adopting the Repeal Ordinance is relevant to the issue whether the impairment of the Contracts was reasonable and necessary to fulfill an important public purpose.

In its memorandum in opposition to the Motion, the City argues that Council Member Marshall did not have the authority to waive privileges for the Council. The City argues that, under state law, a single member of the Council can only waive privileges for the Council when she has actual or apparent authority to do so. Similarly, under federal law, a council member will not be found to have waived others' privileges unless there is evidence that she had authority to do so. The City asserts that there is no evidence that Council Member Marshall had actual or apparent authority to waive the Council's or the City's privileges.

The City also argues that, even assuming, *arguendo*, that Council Member Marshall had the required authority, she did not waive the deliberative process privilege because she did not disclose a significant portion of the legal advice. Her statement that she believed the adoption of Mee's savings clause was contrary to the advice of counsel did not divulge the substance of any legal advice. The City also stresses that no documents regarding counsel's advice were disseminated in this case.

With regard to the attorney-client privilege, the City emphasizes that Marshall did not disclose any legal research, theories, impressions, or conclusions. Further, even assuming, *arguendo*, that Marshall's statements waived her individual protection arising from the work product doctrine, the City's Department of the Corporation Counsel ("Corporation Counsel"), which gave advice as legal counsel for the City, is also protected. The City argues that Council Member Marshall could not waive Corporation Counsel's protection.

***4** In their reply, Plaintiffs assert that Council Member Marshall's statements, taken in context, reveal the substance of Corporation Counsel's legal advice. Plaintiffs also point out that the City did not address the complete lack of timely objection to or rectification of Marshall's disclosure. Since courts strictly construe the attorney-client privilege, even an inadvertent disclosure constitutes a waiver, particularly where there is a failure to object or rectify the consequences. Plaintiffs clarify that they do not argue that Marshall's statements waived the Council's attorney-client privilege as to all documents concerning Bill 53. Finally, with regard to the work product doctrine, Plaintiffs note that the City did not refute Plaintiffs' substantial need for the discovery.

DISCUSSION

Federal Rule of Civil Procedure 26(b)(1) provides, in pertinent part: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense[.]" In the instant Motion, Plaintiffs seek documents referring or relating to Corporation Counsel's legal advice about Mee's savings clause. This Court reviewed these documents *in camera* and ruled in its November 6, 2007 Discovery Order that the documents were protected by the deliberative process privilege, the attorney-client privilege, and the attorney work product doctrine, as the City asserted. Plaintiffs argue that Council Member Marshall waived these protections with her disclosure during the public session. The City argues that the protections belong to the Council and the City and that Marshall did not have the authority to waive them.

Federal Rule of Evidence 501 states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience....

Thus, federal law controls the applicable privileges where jurisdiction is based on a federal question. *See City of Rialto v. United States Dep't of Def.*, 492 F.Supp.2d 1193, 1197 n. 3 (C.D.Cal.2007) (citing *Kerr v. U.S. Dist. Court for the N. Dist. of Calif.*, 511 F.2d 192, 197 (9th Cir.1975)). While Plaintiffs also have a pendent state law contract claim, federal law privilege still applies. *See* Fed.R.Evid. 501 advisory committee's note (1974 Enactment) ("[i] t is also intended that the Federal law of privileges should be applied with respect to pendent State law claims where they arise in a Federal question case").

I. *Deliberative Process Privilege*

Federal law recognizes a deliberative process privilege, the purpose of which is " 'to allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny.' " *Carter v. United States Dep't of Commerce*, 307 F.3d 1084, 1088–89 (9th Cir.2002) (quoting *Assembly of Cal. v. United States Dep't of Commerce* ("*Assembly* "), 968 F.2d 916, 920 (9th Cir.1992)) (some citations omitted). In other words, it ensures that government agencies do not have to operate in a fishbowl. *See id.* at 1090. The privilege protects " 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' " *Id.* at 1089 (quoting *Dep't of Interior v. Klamath Water Users*

Protective Assoc., 532 U.S. 1, 8, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001)).

***5** A document falls within the deliberative process privilege if it is predecisional and deliberative. *See id.*

> "A predecisional document is one prepared in order to assist an agency decisionmaker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. A predecisional document is a part of the deliberative process, if the disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."

Carter, 307 F.3d at 1089 (quoting *Assembly*, 968 F.2d at 920) (some citations and quotation marks omitted). This Court has ruled that the City properly asserted the deliberative process privilege with respect to the disputed documents.

A. ***Waiver***

Plaintiffs argue that Council Member Marshall's statements constituted a waiver of the deliberative process privilege with regard to the requested documents. The City argues that Council Member Marshall did not have the authority to waive the deliberative process privilege on behalf of the City and, even if she did, her statements did not constitute a waiver.

The Court need not address whether Council Member Marshall had the authority to waive the deliberative process privilege because the Ninth Circuit does not consider prior disclosure of information to constitute a waiver of the deliberative process privilege because " '[a]gencies should not be penalized for openness.' " *See Carter*, 307 F.3d at 1091 (quoting *Assembly*, 968 F.2d at 922–23 n. 5 (alteration in original). Courts should only consider prior disclosures "to determine whether the disclosure would expose the decision-making process any more than it has already been disclosed." *Id.* Thus, the issue is whether the disclosure of the requested documents would expose the Council's decision-making process more than Council Member Marshall's statements did.

Council Member Marshall essentially stated that she believed that Mee's savings clause contradicted Corporation Counsel's advice. Her statements did not provide any details about the advice and only reflected her beliefs about such advice. The Court finds that disclosure of the requested documents would expose the Council's decision-making process more than Council Member Marshall's statements did and therefore her statements do not negate the deliberative process privilege.

B. ***Overcoming the Deliberative Process Privilege***

The deliberative process privilege, however, is a qualified privilege. *See F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir.1984). A litigant may overcome the privilege if his need for the materials and the interest in accurate fact-finding outweighs the government's interest in non-disclosure. *See id.* Among the factors that courts may consider in making this determination are: "1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions[;]" *see id.* (citations omitted); "5) the interest of the litigant, and ultimately society, in accurate judicial fact finding, (6) the seriousness of the litigation and the issues involved, (7) the presence of issues concerning alleged governmental misconduct, and (8) the federal interest in the enforcement of federal law." *N. Pacifica, LLC v. City of Pacifica*, 274 F.Supp.2d 1118, 1122 (N.D.Cal.2003) (citation omitted).

***6** The interest in accurate fact finding always weighs in favor of disclosure. *See id.* at 1124. In the present case, the City's role as the sole defendant, the federal interest in the enforcement of Plaintiffs' federal constitutional rights, and the seriousness of the litigation and the issues involved weigh in favor of disclosure. Further, as in *North Pacifica*, "the decisionmaking process of the City Council is by no means collateral to the litigation; indeed, the decisionmaking process is not swept up into the case, it *is* the case." *Id.* (citation and quotation marks omitted) (emphasis in original).

The Court, however, finds that Corporation Counsel's legal advice about Mee's savings clause is of limited relevance to the instant case because the courts are able to determine the legal issues involved in this case without such evidence. To the extent that the documents sought contain factual information about the Council's consideration of Mee's

savings clause, the Court finds that comparable evidence is available in the Council's public record and the other documents that the City previously disclosed. The availability of comparable evidence from other sources is arguably the most important factor in determining whether the moving party has overcome the deliberative process privilege. *See id.* Finally, the Court finds that compelling the City to disclose documents containing Corporation Counsel's legal advice about Mee's savings clause would hinder frank and independent discussions of bills pending before the Council. The Council members would likely be discouraged from any discussion of Corporation Counsel's advice about pending legislation if this Court were to find that a general reference like Council Member Marshall's statements would require the disclosure of all documents relating to Corporation Counsel's advice on the issue.

Thus, having considered the relevant factors, the Court finds that the City's interest in non-disclosure outweighs Plaintiffs' interest in disclosure and that Plaintiffs have not overcome the deliberative process privilege.

III. *Attorney-client Privilege and Work Product Doctrine*

This Court ruled in its November 6, 2007 Discovery Order that the City properly asserted the attorney-client privilege and the work product doctrine with regard to the documents at issue here. The Court therefore turns to Plaintiffs' argument that these protections have been waived.

If a privileged communication is disclosed to someone outside the attorney-client relationship, the privilege is waived as to communications about the matter actually disclosed, and intent (or lack thereof) to waive the attorney-client privilege is not dispositive. *See Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 341 (9th Cir.1996) (citing *Weil v. Investment/Indicators, Research & Management*, 647 F.2d 18 (9th Cir.1981)). A court may then deem an "express waiver" or "waiver by voluntary disclosure", as referred to by some commentators in order to distinguish this type of waiver from an "implied waiver," or "waiver by claim assertion". *See Bittaker v. Woodford*, 331 F.3d 715, 719 n. 4 (9th Cir.2003) (citations omitted). For instance, such waiver would occur where documents are turned over to a third party not bound by the privilege. The Ninth Circuit has stated that a waiver of attorney-client "applies equally to the work product privilege, a complementary rule that protects many of the same interests." *Id* . at 722 n. 6 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 400, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)).

***7** Plaintiffs argue that Council Member Marshall's disclosure during a public session constitutes an express waiver of the attorney-client privilege and the work product doctrine. The City counters that these protections belong to the City and the Council and that Council Member Marshall did not have the authority to waive them. This Court agrees.

An agent acting within the scope of her authority can waive a corporation's privilege. *See Interfaith Housing Delaware, Inc. v. Town of Georgetown*, 841 F.Supp. 1393, 1399 (D.Del.1994); *see also Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985) ("[T]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors."). Thus, a corporation's president can make statements waiving the corporation's attorney-client privilege, as a mayor can for a city. *See Interfaith Housing*, 841 F.Supp. at 1399. A corporate president and a mayor "have clear leadership positions which give them authority to bind their respective principals. One can reasonably assume a mayor or corporate president has the authority ... to waive the attorney-client privilege." *Id.* (citations omitted). In contrast, a reasonably prudent person would not assume that a single member of a city or town council has the authority to waive privileges on behalf of the city or town without evidence of such authority. *See id.; see also United States v. Ferrell*, No. CR07–0066MJP, 2007 WL 2220213, at *3 (W.D.Wash. Aug.1, 2007) ("It is generally agreed that the [attorney-client] privilege belongs to the government agency, and not an individual government employee. 'The privilege for governmental entities may be asserted or waived by the responsible public official or body.' " (quoting Restatement Third, Law Governing Lawyers § 74, Comment e)); *N. Pacifica*, 274 F.Supp.2d at 1126 n. 3 (stating that, even where a city council member willingly testified about his or her uncommunicated motivations, the court would not rule that this waived the deliberative process privilege because "the privilege is held by the body and not the individual legislator" (citing *Nissei Sangyo Am. v. IRS*, No. 95–1019 (TFH/PJA), 1997 U.S. Dist. LEXIS 22473, at *20, 1997 WL 1091466 (D.D.C. May 8, 1997) (noting that privilege belongs to government))).

In the present case, Plaintiffs have not presented any evidence establishing that individual Council members, or Council Member Marshall in particular, have the authority to make legal decisions on behalf of the City. The Court therefore finds that Council Member Marshall did not have

the authority to waive the attorney-client privilege or the protection of the work product doctrine on behalf of the City or the Council. Council Member Marshall's statements therefore did not constitute a waiver of the attorney-client privilege or the protection of the work product doctrine.

In light of the Court's findings, the Court need not address the remainder of Plaintiffs' arguments.

CONCLUSION

***8** On the basis of the foregoing, Plaintiffs' Motion to Compel Production of Documents, filed November 26, 2007, is HEREBY DENIED.

IT IS SO ORDERED.