UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 12-128**
	)	**(DST, RMC, RLW)**
ERIC H. HOLDER, JR.,	)	
Defendant.	)	

ORDER

Before the Court is the United States Attorney General's motion to compel the production of documents in possession of the Texas Office of the Governor and the Texas Legislative Council (TLC). The Attorney General contends that Texas has improperly asserted legislative privilege and attorney-client privilege over certain Governor's Office documents, that the deliberative process and legislative privileges must yield to competing interests in disclosure, and that no attorney-client privilege attaches to communications between legislators and the TLC. Having considered the parties' briefs and reviewed certain documents *in camera*, the Court shall grant the motion in part and deny it in part, as follows:

1. Texas's Assertion of Legislative Privilege over Governor's Office Documents. Texas has asserted legislative privilege over three letters from members of the Texas House of Representatives to Governor Rick Perry "regarding actions the Governor could take to advance the legislative enactment of a voter ID law." (Dkt. 152-3 at 1). The Attorney General objects to this assertion of privilege on grounds that (1) the legislative privilege has no application to documents in the possession of executive agencies, and (2) the letters at issue constitute

political lobbying of the executive branch, rather than essential legislative activities. The Court disagrees and will deny the motion to compel as to these documents.

Although the legislative privilege does not protect attempts by legislators to influence the executive branch "with respect to the administration of a federal statute," *Gravel v. United States*, 408 U.S. 606, 625 (1972), or with respect to the Executive's prosecutorial powers, *see United States v. Johnson*, 383 U.S. 169, 172 (1966), state executive officials "are entitled to legislative immunity when they perform legislative functions." *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998); *see also Bryant v. Jones*, 575 F.3d 1281, 1305 (11th Cir. 2009) ("Because the applicability of legislative immunity necessarily focuses on particular acts or functions, not on particular actors or functionaries, immunity also extends to legislative acts performed by executive officials and other non-legislators."). As explained in our Order of June 5, 2012, this legislative immunity also provides a testimonial and evidentiary privilege. *See* Order on Motions to Compel at 2 (Dkt. 167).

The Texas Constitution grants the Governor the power to call special legislative sessions, Tex. Const. art. IV § 8(a), and to declare emergency matters to be considered early in the legislative session, Tex. Const. art. III § 5(b). In our view, both of these functions—convening the legislature and placing items at the top of its agenda—constitute "integral steps in the legislative process," *Bogan*, 523 U.S. at 55, that come within the scope of the legislative privilege. *See id.* (mayor's act of submitting a budget proposal to city council is a legislative act covered by the legislative privilege); *Baraka v. McGreevey*, 481 F.3d 187, 196 (3d Cir. 2007) ("[W]hen a governor and a governor's appointee advocate bills to the legislature, they act in a legislative capacity."). Given Texas's representation that the letters at issue involved attempts by legislators to encourage the Governor to exercise these legislative powers, the letters form

part of the "due functioning of the [legislative] process," *United States v. Brewster*, 408 U.S. 501, 516 (1972). The legislative privilege therefore applies, and Texas need not produce the documents.

2. Texas's Assertion of Deliberative Process Privilege over Governor's Office Documents. Texas has asserted deliberative process privilege as a basis for withholding numerous documents in possession of the Governor's Office. In our May 21, 2012 Order (Dkt. 128), we advised Texas that its privilege log was insufficient to assess its claims for deliberative process privilege and ordered Texas to provide complete privilege logs. The Attorney General does not contend that the revised privilege logs fail to establish that the documents withheld are "deliberative" and "predecisional," as required for deliberative process protection, *see In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). Instead, the Attorney General argues that the deliberative process privilege must yield to competing considerations in this case, at least with respect to "the subset of withheld documents that relate to the Governor's contemporaneous understanding of the purpose and likely effect of SB 14." Att'y Gen. Mem. at 9 (Dkt. 152-1).

The deliberative process privilege is a qualified privilege that can be overcome by a showing of need, as determined on a case-by-case basis. *In re Sealed Case*, 121 F.3d at 737. To determine whether a showing of need suffices to overcome the privilege, courts balance the competing interests at stake, "taking into account factors such as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the possibility of future timidity by government employees." *Id.* at 737–38 (internal quotation marks omitted). The Attorney General argues that the importance of disclosure outweighs the need for the privilege in this case because (1) the Governor's contemporaneous statements about the purpose and likely effect of SB 14 are highly relevant to section 5's

purpose inquiry and may differ from his or other officials' public statements; (2) this information is unavailable to the Attorney General from any other source; and (3) any chilling effect caused by disclosure is outweighed by the seriousness of the rights at issue, as well as the Attorney General's critical need to enforce the Voting Rights Act.

We agree that the subject of this litigation—enforcement of the right to vote free of discrimination based on race or membership in a language minority group—is vitally important. And the Governor's contemporary statements about a bill he signed into law may well have some relevance to the inquiry into the legislation's purpose. *See Arlington Heights*, 429 U.S. 252, 268 (1977) (stating that "contemporary statements by members of the decisionmaking body" may be "highly relevant"). But, as explained in our May 21 Order (Dkt. 128 at 2–3), this case turns not on the Governor's subjective motivations, but on overall legislative purpose—that is, the overall purpose of a bill voted for by over a hundred legislators—and thus although relevant, the Governor's private statements about SB 14 are unlikely to have the critical and central relevance that the Attorney General's argument assumes. Moreover, although the Attorney General speculates that the Governor's private statements and deliberations may disclose motivations that his public statements do not reveal, the Attorney General has not explained why other available evidence of purpose, such as the legislative history (including, perhaps, the Governor's designation of SB 14 as emergency legislation) and any evidence of disparate impact gleaned from Texas's databases, is insufficient. In assessing purpose in section 5 cases, we "look to [the Supreme Court's] decision in *Arlington Heights* for guidance," *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997), and *Arlington Heights*, in turn, instructs that inquiries into discriminatory purpose ordinarily focus on public information, including the public statements of decisionmakers. *See Arlington Heights*, 429 U.S. at 268 ("The legislative

or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."). Given this, and given our obligation to apply section 5 in a manner that limits "federal intrusion into sensitive areas of state and local policymaking," *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009); *see also* May 28, 2012 Order at 6 (Dkt. 154), we find that the Attorney General has failed to make a showing of need strong enough or specific enough to overcome the privilege.

3. Texas's Assertion of Attorney-Client Privilege over Governor's Office Documents. The Attorney General also challenges Texas's assertion of attorney-client privilege over numerous documents in possession of the Office of the Governor. For most of these documents, Texas also claimed deliberative process privilege or, in at least one instance, work product privilege. Because we have held that deliberative process privilege applies, and because the Attorney General does not challenge Texas's assertion of work product privilege, Att'y Gen. Mem. at 2 n.1 (Dkt. 152-1), these documents are properly withheld, meaning that we need only address the small subset of challenged documents for which Texas has asserted only attorney-client privilege.

Of these, the Attorney General has identified two sets of documents (TX_00057324-TX_00057324, TX_00057547-TX_00057562) for which it argues that Texas failed to provide sufficient information to assess the claim of attorney-client privilege. These documents are described as confidential communications between Governor's Office attorneys and staff for the purpose of "seeking or providing legal advice regarding Voter ID" and "seeking or providing legal advice," respectively. (Dkt. 152-3 at 5–6, 16). This Court has already held similar descriptions to be sufficient, *see* June 5, 2012 Order at 12–13 (finding privilege log description

of confidential communications "made for the purpose of giving or seeking legal advice" sufficient), and we therefore find these privilege log descriptions sufficient as well.

The Attorney General also challenges Texas's assertion of attorney-client privilege in communications between Governor's Office attorneys and General Counsel for the Secretary of State (TX_00057456-TX_00057475, TX_00057699-TX_00057746). Texas contends that attorney-client privilege attaches to these communications by virtue of the "common interest" privilege. *See In re Lindsey*, 158 F.3d 1263, 1282 (D.C. Cir. 1998) ("As a usual rule, disclosure of attorney-client or work product confidences to third parties waives the protection of the relevant privileges; however, when the third party is a lawyer whose client shares an overlapping 'common interest' with the primary client, the privileges may remain intact."). We need not decide whether the common interest privilege exists in these circumstances, however, because, having reviewed these documents *in camera*, we find no indication that the communications between the Governor's Office and Secretary of State attorneys " 'rest on confidential information obtained from the client.' " *See Tax Analysts v. IRS*, 117 F.3d 607, 618 (1997) (attorney client privilege "protects communications from attorneys to their clients if the communications 'rest on confidential information obtained from the client' " (quoting *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)). The existence of a common interest does not provide an independent basis for privilege; it merely permits an attorney to disclose otherwise privileged attorney-client confidences to another attorney without waiving the privilege. *See In re Lindsey*, 158 F.3d at 1282 (common interest allows attorney-client privilege to "remain intact" when confidences are disclosed to a third-party); Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 1.III.E3.H (5th ed. 2007) ("The common interest privilege is not an independent basis for privilege but an exception to the general rule

that no attorney-client privilege attaches when confidential communications are communicated in the presence of or to third parties."). The documents at issue contain attorney communications regarding revisions to a draft legal document and do not appear to rest on any client confidences that would be protected by attorney-client privilege. Although these documents might arguably constitute attorney work product materials, Texas did not assert work product privilege as a basis for the withholding. Accordingly, finding no basis for attorney-client privilege, we grant the motion to compel as to documents TX_00057456-TX_00057475 and TX_00057699-TX_00057746.

4. Texas's Assertions of Privilege over TLC Documents. Finally, the Attorney General objects to Texas's assertions of legislative and attorney-client privilege over documents in the possession of the TLC. As for the legislative privilege, the Attorney General does not dispute that the TLC documents at issue involve legislative acts covered by the privilege, but instead argues that the privilege should yield. Att'y Gen. Mem. at 12 (Dkt. 152-1). As explained in previous orders, however, the Attorney General has not established the extraordinary circumstances required to abrogate the privilege. (Dkt. 84 at 2, Dkt. 167 at 4). Accordingly, the legislative privilege protects all of the TLC documents withheld, and we need not determine whether attorney-client privilege also applies.

There is, however, one exception. The Attorney-General claims that Texas has asserted legislative privilege on behalf of opponents of SB 14 who have waived the privilege. In support of this contention, the Attorney General points to a declaration, submitted as an exhibit to its May 21 motion to compel, by counsel for the Mexican American Legislative Counsel (MALC) for the Texas House of Representatives with a list of twenty-two MALC members who agreed to waive both the legislative privilege and any privilege over TLC documents relating to voter

ID legislation. (Dkt. 136-16 at 2–3). Also included in this exhibit are waivers from Senator Rodney Ellis, Senator Royce West, and Representative Helen Giddings. (Dkt. 136-16 at 4–9). Viewing these waivers as insufficient, Texas contends that it cannot disclose documents until it receives waivers directly from legislators. As we have explained, however, because Texas bears the burden of establishing with reasonable certainty that the privilege applies, Texas must ensure that each legislator has asserted the privilege before claiming it on his or her behalf. *See* Order on Motions to Compel at 5 (Dkt. 167). Texas has had ample time to do so, and we have already stated that failure to assert legislative privilege by this point in the litigation constitutes waiver. *Id.* Given this, and given the affirmative waivers submitted by the Attorney General, we find that the twenty-two MALC members, as well as Senators Ellis and West and Representative Giddings, have waived any privilege with respect to communications and other materials exchanged with the TLC. Accordingly, the motion to compel is granted with respect to the documents involving Representative Alonzo (TX_00043237-TX_00043307; TX_00043339-TX_00043347; TX_00043372- TX_00043379; TX_00206929- TX_00206932; TX_00208260-TX_00208287; TX_00208575-TX_00208604; TX_00209951- TX_00209957), Representative Coleman (TX_00206631-TX_00206643; TX_00206656-TX_00206659; TX_00206938-TX_00206956), Representative Veronica Gonzales (TX_00208499-TX_00208513), and Representative Hernandez (TX_00209631-TX_00209648). Out of solicitude for the absolute attorney client privilege—and without deciding whether such a privilege exists in this context—we will grant Texas additional time to determine whether the legislators for whom we lack waivers have in fact waived any attorney-client privilege that might apply to their communications with the TLC. Accordingly, by noon EST on Monday, June 11, 2012, Texas must either produce the TLC documents involving Representatives Castro

and Martinez-Fisher (TX_00043354- TX_00043359) and Representatives Leibowitz, Herrero, and Armando Martinez (TX_00209649- TX_00209673), or produce affidavits establishing that they are asserting attorney-client privilege over the TLC materials. (Although Representatives Martinez-Fisher and Armando Martinez are on MALC's list of legislators who have waived privileges, they cannot unilaterally waive the privileges of other legislators. *See* Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 1.II.B.8 (5th ed. 2007).)

For the foregoing reasons, it is hereby

ORDERED that the Attorney General's Motion to Compel [Dkt. 152] is **GRANTED** in part and **DENIED** in part; and it is

FURTHER ORDERED that Texas shall, by no later than June 8, 2012, produce the following documents from the Office of the Governor: TX_00057456-TX_00057475 and TX_00057699-TX_00057746; and it is

FURTHER ORDERED that Texas shall, by no later than June 8, 2012, produce all TLC documents involving Representative Alonzo (TX_00043237-TX_00043307; TX_00043339-TX_00043347; TX_00043372- TX_00043379; TX_00206929- TX_00206932; TX_00208260-TX_00208287; TX_00208575-TX_00208604; TX_00209951- TX_00209957), Representative Coleman (TX_00206631-TX_00206643; TX_00206656-TX_00206659; TX_00206938-TX_00206956), Representative Veronica Gonzales (TX_00208499-TX_00208513), and Representative Hernandez (TX_00209631-TX_00209648); and it is

FURTHER ORDERED that Texas shall, by no later than noon EST on June 11, 2012, either produce all TLC documents involving Representatives Castro and Martinez-Fisher (TX_00043354-TX_00043359) and Representatives Leibowitz, Herrero, and Armando Martinez

(TX_00209649-TX_00209673), or produce affidavits establishing that they are asserting attorney-client privilege over the TLC materials.

Date: June 7, 2012

/s/
DAVID S. TATEL
United States Circuit Judge

/s/
ROSEMARY M. COLLYER
United States District Judge

/s/
ROBERT L. WILKINS
United States District Judge