

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

BRIAN F. EGOLF, JR., HAKIM BELLAMY, MEL HOLGUIN, MAURILIO CASTRO, and ROXANE SPRUCE BLY,)	
)	
Plaintiffs,)	
)	NO. D-101-CV-2011-02942
v.)	
)	CONSOLIDATED WITH:
)	D-101-CV-2011-02944
)	D-101-CV-2011-02945
DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official capacity s New Mexico Governor, JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate, TIMOTHY Z. JENNINGS, in his official capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN, SR., in his official capacity as Speaker of the New Mexico House of Representatives,)	D-101-CV-2011-03016
)	D-101-CV-2011-03099
)	D-101-CV-2011-03107
)	D-202-CV-2011-09600
)	D-506-CV-2011-00913
Defendants.)	
)	

LEGISLATIVE DEFENDANTS’ MOTION FOR PROTECTIVE ORDER

COME NOW Ben Lujan, Sr., in his official capacity as Speaker of the House of Representatives of the State of New Mexico, and Timothy Z. Jennings, in his official capacity as President Pro-Tempore of the New Mexico Senate (together “Legislative Defendants”), by and through their counsel of record, and hereby request an Order from this Court providing that certain information and materials requested by New Mexico Governor Susana Martinez, Lt. Governor John Sanchez, and Secretary of State Dianna J. Duran (collectively “Executive Defendants”) in their Notice of Deposition Duces Tecum of Brian Sanderoff need not be produced or disclosed. As grounds for this Motion, Legislative Defendants would show this Court as follows:

I. INTRODUCTION

Pursuant to Rule 1-026(C) NMRA, the Court may make any order with respect to discovery which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense. Additionally the Court has broad discretion under the New Mexico Rules of Civil Procedure to set limitations necessary for the proper management of discovery. See Rule 1-026(B)(2) & 1-026(F) NMRA; *DeTevis v. Aragon*, 104 N.M. 793, 797, 727 P.2d 558, 562 (Ct. App. 1986).

Executive Defendants have served upon the parties a *Notice of Deposition Duces Tecum of Brian Sanderoff* which is attached hereto as Exhibit A. Brian Sanderoff and his firm, Research and Polling, Inc., were hired by Legislative Council Service (LCS) to serve as consultants to aid the Legislature and its members in redistricting before and during the 2011 Special Session. In this capacity, Mr. Sanderoff and his firm worked closely with legislators and their staff, and LCS, to assist in the drafting of redistricting plans for Congress, the Legislature and the PRC. Mr. Sanderoff has been designated by Legislative Defendants as their expert witness for purposes of the House, Senate, and PRC trials.

In their Deposition Notice, Executive Defendants have made a number of requests of Mr. Sanderoff which are non-discoverable by virtue of the legislative privilege as created by New Mexico's Speech or Debate Clause and are subject to qualified discovery immunity in light of NMSA 1978 § 2-3-13, as is discussed more fully herein.¹ Specifically, Mr. Sanderoff is being asked to disclose his communications with legislators and legislative staff concerning the

¹ The Legislative Defendants have been able to reach agreement with the Executive Defendants as to other areas of disagreement concerning requests contained in the Deposition Notice, so those items are not included in this Motion. Secretary of State Duran has also agreed to withdraw her First and Second Sets of written discovery, so those items are not included here, either.

quintessentially legislative acts of drafting and introducing legislation. Due to the highly technical nature of redistricting, which requires the use of sophisticated software and statistical analysis, legislators and their staff are not able to complete this important work without the services of Mr. Sanderoff and his firm. Communications between legislators and staff and Mr. Sanderoff and his employees concerning these legislative acts are privileged and non-discoverable for the reasons set forth below. Moreover, such communications are irrelevant to this litigation, as the issues before the Court are whether the plans presented, as drawn, comply with the legal requirements and principles governing redistricting – not what any individual legislator’s motivations or objectives may have been in promoting a particular plan.

II. ARGUMENT

A. Executive Defendants are seeking information which is protected by legislative privilege pursuant to the Speech or Debate Clause of the New Mexico Constitution.

New Mexico’s Speech or Debate Clause provides:

Members of the legislature shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and on going to and returning from the same. And they shall not be questioned in any other place for any speech or debate or for any vote cast in either house.

N.M. Const. art VI, § 13.

The New Mexico Speech or Debate Clause, like the clause contained in the United States Constitution, creates an evidentiary privilege which makes evidence of “legislative acts” inadmissible in court.² *United States v. Helstoski*, 442 U.S. 477, 489 (1979). It also protects

² New Mexico courts have not had occasion to interpret the legislative privilege granted by the Speech and Debate clause contained in New Mexico’s Constitution. However, decisions applying the privilege under the federal constitution are instructive. The United States Constitution contains a similar Speech and Debate clause as New Mexico’s, providing that legislators “shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and

the motives for those legislative acts. *United States v. Johnson*, 383 U.S. 169, 185 (1966). This privilege encompasses material which would reveal a legislator's motivations with respect to particular legislation. See *United States v. Johnson*, 383 U.S. 169, 185, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966); *Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984). This privilege is justified on separation of powers grounds as it is created to "prevent intimidation of legislators by the Executive and accountability before a hostile judiciary." See *Gravel v. United States*, 408 U.S. 606, 617 (1972).

The privilege is vital to the proper functioning of government, as it enhances the quality of legislative action by encouraging free legislative debate. See *Irons v. Rhode Island Ethics Com'n*, 973 A.2d 1124, 1125 (R.I. 2009). The privilege serves to "safeguard the decision-making process of government by fostering candid expression of recommendations" and to prevent members from "temper[ing] their comments because of their concern for their own personal interests, safety, or reputation." See *State ex. rel. Atty. Gen. v. First Judicial Dist. Court of New Mexico*, 96 N.M. 254, 258 (1981) (discussing executive privilege and noting that the legislative branch enjoys a similar privilege). In this regard the legislative privilege is said to exist "not with the intention of protecting the members [of the Legislature] ...but to support the rights of the people, by enabling their representatives to execute the functions of their office, without fear of prosecutions, civil or criminal." *Id.* at 1131 (internal quotations and citations omitted). Additionally, the privilege is designed to spare legislators from having to spend the time and effort defending their legislative acts in court. *Eastland v. U. S. Servicemen's Fund*, 421

returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. Const. Art. I, § 6.

U.S. 491, 503, 95 S. Ct. 1813, 1821, 44 L. Ed. 2d 324 (1975); *In re Arnold*, 991 So.2d 53, 542 (La. Ct. App. 2008).

Legislative acts are any acts which are “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings . . . with respect to . . . matters . . . within the jurisdiction of either House.” *In re Grand Jury Investigation Into Possible Violations of Title 18, U.S. Code, Sections 201, 371, 1962, 1952, 1951, 1503, 1343 & 1341*, 587 F.2d 589, 595 (3d Cir. 1978). Legislative acts include acts such as introducing a bill, *Helstoski*, 442 U.S. at 489, and drafting, debating, and voting on a bill, *Lattaker v. Rendell*, 2008 WL 723978 (3rd Cir. 2008). Legislative acts also include participation in committee hearings and preparation of committee reports, *Gravel*, 408 U.S. at 624, and preparation for committee hearings or floor debates. *U.S. v. Swindall*, 971 F.2d 1531, 1546 (11th Cir. 1992); *Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 57 (D.D.C. 2007).

The development of a legislative redistricting plan is a legislative act. For instance in *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984), the court refused to allow Plaintiffs to introduce evidence from a consultant to the legislature’s Reapportionment Commission and from several legislators concerning the formation of the state reapportionment plan. In that case, the court stated:

The excluded testimony of the legislators concerned the actions and motivations of the legislators and the General Assembly in proposing and passing the reapportionment plan. Inquiry by the court into the actions or motivations of the legislators in proposing, passing, or voting upon a particular piece of legislation (as plaintiffs attempted to require) falls clearly within the most basic elements of legislative privilege.
Id. at 984.

This privilege is not limited solely to legislators and applies to legislative aides and staff members who are engaged in legislative activity. *Gravel v. United States*, 408 U.S. at 616, 92 S.Ct. at 2622, 33 L.Ed.2d at 597; *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992) (“Who may claim the legislative privilege is decided with reference to the function performed by an individual rather than the individual’s title.”) This privilege extends to aides and consultants in the redistricting context. *See Arizona Independent Redistricting Comm’n v. Fields*, 75 P.3d 1088 (Ariz. 2003); *Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984). Courts recognize that the scope of the protection should be broadened where a part-time legislature with budgetary constraints needs to rely on non-legislators and outside experts in order perform their legislative duties. *Fields*, 75 P.3d at 1098; *see also ACORN v. County of Nassau*, 05CV2301, 2009 WL 2923435 (E.D.N.Y. Sept. 10, 2009). Therefore, Mr. Sanderoff is entitled to claim this privilege in connection with his work with legislators and legislative staff to develop, create and draft redistricting plans.

B. Executive Defendants seek information which is subject to qualified immunity by virtue of NMSA 1978 § 2-3-13.

In addition to this legislative privilege created by virtue of the New Mexico Constitution, NMSA 1978 § 2-3-13 provides a qualified immunity for information related to requests for service made from legislators to the Legislative Council Service (“LCS”) and those that LCS hires in connection with LCS’s statutory mandate and authority to assist the members of the legislature in connection with the performance of their legislative duties. *See* NMSA 1978 §§ 2-3-2 and 2-3-8. Specifically § 2-2-13 (“Services; confidential nature”) provides in relevant part:

Neither the director nor any employee of the [LCS] shall reveal to any person outside of the service the contents or nature of any request or statement for service, except with the consent of the person making such request or statement.

NMSA 1978, § 2-2-13.

While this statute does not explicitly create immunity from discovery, where the information concerns “a matter of great public concern as expressed by the legislature,” the New Mexico Supreme Court will find such a qualified immunity. *Estate of Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 15, 139 N.M. 671, 137 P.3d 611. As in *Romero*, the legislature has evidenced through § 2-2-13 an intent that requests or statements for service to LCS and those it hires be kept confidential. This statute concerns a matter of great public concern as it is fairly characterized as an effort to preserve and enhance the quality of legislative action by encouraging free information gathering and exchange. Moreover, the sensitivity of this information, in light of separation of powers principles discussed above, further bolsters the necessity of such immunity. These separation of powers principles require the judiciary to recognize that “another co-equal branch of government ... has the right not to be unduly subjected to scrutiny in a judicial proceeding where information in its possession is being sought by a litigant.” *See State ex. rel. Atty. Gen. v. First Judicial Dist. Court of New Mexico*, 96 N.M. 254, 258 (1981) (discussing the similar executive privilege). In order to obtain items covered by the afore discussed immunity, the Executive Defendants have the burden to show that the information is critical to the cause of action or defense and that it is otherwise unavailable. *Romero*, 2006-NMSC-028, ¶ 19. They must also show that the public interest in preserving confidentiality does not outweigh their need for the information. *Id.*

Executive Defendants’ Notice of Subpoena specifically requests materials which are protected by the legislative privilege and/or the statutorily-created immunity discussed above:

- Item No. 1.a. seeks letters, memoranda, e-mail, notes of conversations or workpapers concerning requests from legislators and legislative staff for “specific kinds of redistricting plans or requests for plans which accomplish specific objectives.”
- Item No. 10 seeks communications between Mr. Sanderoff and any person or entity that relates in any manner to this litigation. The request states that it “specifically includes communications with legislators.” In addition to being overly broad, this request seeks information which is privileged and/or subject to qualified immunity.

Discovery of communications between legislators and/or their staff and Mr. Sanderoff and his firm concerning redistricting and discovery of other material which reveals individual legislator’s motivations or objectives for engaging in particular legislative acts should not be permitted. Communications between legislators or staff and Mr. Sanderoff or his employees concerning redistricting plans are clearly entitled to the protection of the legislative privilege and/or the statutorily created immunity codified in the LCS statute. To compel such disclosure would violate the constitutional and statutory protections discussed above. In addition, to compel such disclosure would have terrible policy implications, as it would have a chilling effect on legislators who must rely on staff members and technical experts such as Mr. Sanderoff to develop and draft important legislation. Legislators and their staff must be able to communicate with technical experts about proposed or contemplated legislation in confidence, without fear that those communications will be exposed in litigation. These are the very same policies embodied in our New Mexico Constitution, the United States Constitution, and the statutes setting forth the important role of our Legislative Council Service.

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