IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FAIR FIGHT ACTION, INC., ***et al.*****,**

Plaintiffs,

v.

BRAD RAFFENSPERGER, ***et al.*****,**

Defendants.

CIVIL ACTION FILE
NO. 1:18-CV-5391-SCJ

ORDER

This matter comes before the Court on a discovery dispute between the parties. On November 26, 2019, Plaintiffs sent the Court a letter requesting that the Court order Defendants to produce two documents: (1) minutes of a November 11, 2018 conference call of an executive session of the State Election Board ("SEB") and (2) notes SEB member David Worley took of that call. Doc. No. [152]. On December 2, 2019, Defendants sent the Court their response. Doc. No. [151]. Defendants argue both documents are protected by attorney-client and work product privileges. The matter is now ripe for review by the Court.

I. BACKGROUND

Plaintiffs seek two documents created during the November 11, 2018 SEB teleconference: the contemporaneous notes taken by David Worley, and the minutes taken by the Secretary's staff. It is undisputed that the SEB was in executive session at the time the documents were created. "The stated purpose of the executive session—announced and voted on by the [SEB] at the meeting—was to discuss multiple, active lawsuits filed in the heat of the 2018 election." Doc. No. [151], p. 1. The participants of the call were Interim Secretary of State ("SOS") Crittenden; SEB Members David Worley, Seth Harp, Rusty Simpson, and Rebecca Sullivan; Senior Assistant Attorney General Russ Willard and Assistant Attorney General Cris Correia; SOS Press Secretary Candice Broce; Assistant Elections Director and SOS Deputy General Counsel Kevin Rayburn; and Deputy SOS and SOS General Counsel Ryan Germany. Doc. No. [152], p. 1. Jansen Head, an SOS staff attorney, "may have been on the call as well." Id.

Some time during the call, the participants decided to issue an Official Election bulletin ("OEB") regarding absentee and provisional ballots. See Worley Dep., pp. 48. The next day, the SOS issued the OEB. Id. at 43. Mr. Worley disagreed strongly with the contents of the OEB, and testified that it

was contrary to what the call participants had decided to publish the night before. Id. at 45–46. Mr. Worley sent an email expressing his disagreement and frustration to the call participants as well as journalists at the *Atlanta Journal Constitution* and *National Public Radio*.[1] Doc. No. [152-1].

Plaintiffs argue the minutes and notes from the call are not privileged for one of two reasons. Plaintiffs claim the privilege either (1) does not apply because the SEB members and Secretary lacked a common interest, or (2) was waived by Mr. Worley when he emailed the press. Plaintiffs also note that Mr. Worley, also an attorney, testified he did not consider the call a privileged communication, as he believed Mr. Germany was acting in his capacity as Deputy SOS, not giving legal advice as SOS General Counsel. See Worley Dep., p. 47, 49.

Defendants respond that whether Mr. Worley believed he was receiving legal advice from Mr. Germany is irrelevant—all participants in the call were co-defendants (either as individuals or through their respective offices) in the

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[1] Mr. Worley's email stated in part: "I am deeply and profoundly disturbed that [the OEB], which cites advice from the Attorney General, completely omits the Attorney General's own reference to the Voting Rights Act provisions which he has relied on in the past to support his own position, and which we of course discussed as the basis for our decision last night." Doc. No. [152], pp. 1–2.

ongoing litigation and were jointly represented by the Attorney General's office. Doc. No. [151], pp. 2–3. "Accordingly, the contemporaneous notes reflecting that advice and [Senior Assistant Attorney General] Willard's legal work product are subject to the attorney-client privilege and work product doctrine because there was a joint defense arrangement between participants in *active litigation*." Id. at 3 (emphasis in original).

II. LEGAL STANDARD

A. Attorney-Client Privilege

"The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law." 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The attorney-client privilege may be invoked with respect to communications made in confidence for the purpose of obtaining or providing legal assistance. See Restatement (Third) of the Law Governing Lawyers § 68 (2000).

"The objectives of the attorney-client privilege apply [equally] to governmental clients." United States v. Jicarilla Apache Nation, 564 U.S. 162,

169–70 (2011). "Unless applicable law provides otherwise, the Government may invoke the attorney-client privilege in civil litigation" to protect confidential communications between government officials and government attorneys. Restatement (Third) of the Law Governing Lawyers § 74 (2000).

B. Common Interest Doctrine

The common interest doctrine serves as "an exception to the general rule that disclosure to a third party of privileged information thereby waives the privilege." In re: Androgel Antitrust Litig. (No. II), No. 1:09-CV-955-TWT, 2015 WL 9581828, at *2 (N.D. Ga. Dec. 30, 2015). This exception allows individuals with the same legal interests to "share information without waiving the attorney-client privilege . . . ." Holland v. Island Creek Corp., 885 F. Supp. 4, 6 (D.D.C. 1995). Also known as the "joint defense privilege," the doctrine "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." United States v. Almeida, 341 F.3d 1318, 1324 (11th Cir. 2003) (quoting United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989)). The party claiming the privilege must demonstrate that "(1) the material is privileged, (2) the parties had an identical legal and not solely commercial interest, and (3) the

communication was designed to further the shared legal interest." Androgel Antitrust, No. 1:09-CV-955-TWT, 2015 WL 9581828, at *2 (citations and internal quotations omitted).

C. Waiver

A waiver of the attorney-client privilege "extends to all other communications relating to the same subject matter." QBE Ins. Corp. v. Jorda Enterprises, Inc., 286 F.R.D. 661, 666 (S.D. Fla. 2012) (citing Fort James Corp. v. Solo Cup Co., 412 F.3d 1340, 1349–50 (Fed. Cir. 2005)). "As a general rule, the smaller the amount of privileged information disclosed, the narrower the scope of the waiver." Id. Waiver is to be determined on a case-by-case basis, as "determinations [of a waiver's scope] properly depend heavily on the factual context in which the privilege is asserted." In re Sealed Case, 29 F.3d 715, 719 (D.C. Cir. 1994).

However, some courts have held that, where the common interest doctrine applies, a "unilateral disclosure of privileged information without the consent of the joint privilege-holder [] cannot waive the privilege for the document." Holland v. Island Creek Corp., 885 F. Supp. 4, 7 (D.D.C. 1995); see also In re Sealed Case, 29 F.3d 715, 719 (D.C. Cir. 1994) (holding "a jointly held privilege can be waived only by all of its holders"); 8 John H. Wigmore,

Evidence § 2328, at 639 (McNaughton rev. 1961) ("Where the consultation was held by several clients jointly, the waiver should be joint for joint statements, and neither could waive for the disclosure of the other's statements . . . .").

III. DISCUSSION

A. Common Interest

Plaintiffs admit that the minutes and notes were taken during an executive session, as authorized by Georgia law. See O.C.G.A. §§ 50-14-2(1); 50-14-3(b)(4); 50-18-72(a)(41). The Notice of the Special Called Meeting stated the purpose of the call was to "discuss[] matters pertaining to pending and potential litigation with legal counsel." Doc. No. [151], p. 2. The SEB and the SOS were involved as co-defendants and were jointly represented in at least two different lawsuits at the time. Id. Thus, the Court finds the purpose of the call was to discuss legal matters with counsel.

Plaintiffs argue that, even so, the common interest doctrine does not apply because the positions of the SEB Members and the SOS staff were so different that "negotiations over the [OEB] language" were necessary. Doc. No. [15-1], p. 1. However, the common interest doctrine requires that the parties claiming the privilege had a common *legal* interest—not that they unanimously

agreed on how to further that interest.[2] The call participants were co-defendants in pending litigation regarding the election and contemplated that more suits might be filed against them. This is sufficient to demonstrate a common legal interest.

Even if the difference in opinion regarding the language were enough to defeat the common interest, "[w]hether the parties shared a 'common interest' in the anticipated litigation must be evaluated as of the time that the confidential information is disclosed." Holland, 885 F. Supp. at 6 (citation omitted). The negotiations regarding the exact language of the OEB apparently happened after the conference call, while Acting Secretary Crittenden and Attorney General Chris Carr drafted the bulletin. Doc. No. [151-1], p. 1. Thus, at the time of the phone call, there was no divergence of interest—the participants voted to issue OEB guidance regarding absentee and provisional ballots. This was a joint decision regarding their common interest as co-

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[2] In fact, courts have recognized that even adverse parties may nonetheless share a common legal interest. For example, in Androgel Antritrust, the court found that the defendants shared a common legal interest when, as a part of settlement discussions in a suit where they were adverse to each other, they formulated a common defense to future antitrust litigation. No. 1:09-CV-955-TWT, 2015 WL 9581828, at *2–3.

defendants in the litigation. Because the Court concludes that a common interest existed at the time of the call, it finds the notes and minutes of the call are protected by attorney-client privilege.

B. Waiver

Because the call was protected by the joint defense privilege, the Court finds Mr. Worley could not have unilaterally waived it. The Court also notes, however, that Defendants have never claimed a privilege as to Mr. Worley's email—it was been produced multiple times. Furthermore, Mr. Worley testified about the email at his deposition, reiterating that he did not agree with the OEB guidance that was ultimately issued. See Worley Dep., pp. 56–58. Mr. Worley did not, however, testify as to the legal advice given by the Attorney General's office during the executive session. Rather, he declined to answer those questions on the advice of counsel. See Worley Dep., pp. 47–48, 52–53.

The final wording of the OEB was apparently the result of a discussion between Acting Secretary Crittenden and Attorney General Carr which occurred *after* the November 11 conference call. Thus, Mr. Worley's email "relates to his disagreement with the subsequently issued [OEB] itself, not any

disagreement pertinent to the November 11 meeting."[3] Doc. No. [151], p. 4. Even if Mr. Worley could unilaterally waive privilege, the waiver would be limited to the topics discussed in his email and the basis for his disagreement, which he has already testified to at length. See Worley Dep., pp. 46–59.

IV. CONCLUSION

The Court finds that the notes and minutes of the November 11, 2018 executive session call are protected by attorney-client privilege, and that there was no waiver. As such, Plaintiffs' request for production (Doc. No. [152]) is **DENIED**.

IT IS SO ORDERED this 4th day of December, 2019.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

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[3] Plaintiffs also argue privilege was waived when Defendants produced Acting Secretary Crittenden's response to Mr. Worley's email. Again, these emails involve a disagreement which arose after the November 11 call.