IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EMILY GILBY; TEXAS DEMOCRATIC PARTY; DSCC; DCCC; TERRELL BLODGETT, *Plaintiffs*, v. RUTH HUGHS, in her official capacity as the Texas Secretary of State, *Defendant.*	CIVIL ACTION NO. 1:19-cv-01063

PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND CONTINUE THE RULE 30(b)(6) DEPOSITION OF DEFENDANT TEXAS SECRETARY OF STATE RUTH HUGHS

Emily Gilby, Texas Democratic Party, DSCC, DCCC, and Terrell Blodgett ("Plaintiffs") respectfully move the Court to compel Defendant Secretary of State Ruth Hughs ("the Secretary") to produce all documents improperly withheld on the basis of the legislative privilege or deliberative process privilege and to permit Plaintiffs to continue the deposition of the Secretary's witness under Federal Rule of Civil Procedure 30(b)(6) in order to ask questions regarding the contents of those improperly withheld documents.[1]

The Secretary has withheld or redacted hundreds of documents on the basis of the legislative privilege or deliberative process privilege or both, including Exhibits 1 through 4. The documents, as reflected by Exhibits 1 through 4, include discussions of potential changes to H.B. 1888 when it was before the legislature, discussions concerning bills introduced prior to H.B. 1888 that included similar language, and discussions following a question from a county official about

[1] Exhibits 1, 2, and 4 were originally produced by the Secretary on May 8, 2020, while Exhibit 3 was produced on May 27. Only during the May 29 deposition of the Secretary's 30(b)(6) witness did the Secretary's counsel state that they had been inadvertently produced. Plaintiffs submit them under seal for the Court's consideration pursuant to Rule 26(b)(5)(B).

H.B. 1888. Neither the deliberative process privilege nor the legislative privilege should permit the Secretary to withhold this critical evidence which goes to the heart of the constitutionality of H.B. 1888, its burden on the right to vote, and the state interests purportedly justifying this burden. First, the Secretary has no standing to assert legislative privilege. Second, it is not clear that the deliberative process privilege applies to state agencies at all and, even if it does, it is a qualified privilege easily overridden here. Plaintiffs respectfully request the Court grant their motion.

I. Background

In response to Plaintiffs' requests for production, the Secretary produced documents on May 8, 2020 and May 27, 2020. Neither production was initially accompanied by a privilege log.

These productions included the documents attached (and now being filed under seal) as Exhibits 1 through 4. These documents include a discussion among Secretary of State employees regarding potential changes to H.B. 1888, communications with a county election official regarding H.B. 1888, and discussions regarding H.B. 2027 (2015) and H.B. 2725 (2015), two bills introduced prior to H.B. 1888 which addressed similar subject matter.

On May 29, 2020 Plaintiffs deposed Keith Ingram, the Secretary's witness pursuant to Rule 30(b)(6). Plaintiffs' counsel sought to question Mr. Ingram regarding Exhibits 1 through 4, at which point the Secretary's counsel, for the first time, announced that these documents had been inadvertently produced and were privileged. The Secretary's counsel instructed Mr. Ingram not to answer questions regarding these documents on that basis. Pursuant to Rule 26(b)(5)(B), Plaintiffs' counsel sequestered the documents and did not continue to use them in the deposition, and requested that the Secretary immediately produce a privilege log.

The Secretary produced a privilege log on June 2, 2020 and an amended privilege log appearing to contain the same documents on June 5, 2020. The updated privilege log is attached

as Exhibit 5, and contains in excess of 500 documents. As shown in Exhibit 6, which was compiled based on the Secretary's June 2 privilege log, this appears to include 68 documents withheld or redacted based on both the legislative and deliberative process privileges, 314 based on the deliberative process privilege, and 34 based on the legislative privilege. Like Exhibits 1-4, these documents are relevant because they contain internal and external discussions regarding H.B. 1888 and similar bills which preceded it. The parties engaged in a meet-and-confer on June 4, 2020 but were unable to resolve this dispute. The discovery cut-off was June 1, 2020; Plaintiffs have filed this motion within seven days of that date pursuant to Local Rule CV-16(d).

II. Argument

A. The withheld and redacted documents at issue are relevant and critical to Plaintiffs' case.

The documents at issue here are relevant and critical to Plaintiffs' case. Plaintiffs bring claims for a burden on the right to vote, equal protection, the Twenty-Sixth Amendment, and the Americans with Disabilities Act, alleging that H.B. 1888—by eliminating the possibility of having early voting locations open for less than the full two weeks of early voting—will result in fewer early voting locations in places which provided elderly and young voters with access to early voting. This law will make it harder for both groups to exercise the franchise, and Plaintiffs contend that the law was passed with the intention of harming young voters.

The documents at issue here, as demonstrated by Exhibits 1 through 4, go directly to those issues. *First*, the documents involve discussions during drafting about H.B. 1888 and proposed laws prior and similar to H.B. 1888. *See* Ex. 1; Ex. 2. These discussions are relevant to establishing the burden on Plaintiffs' right to vote, the legitimacy of the state's interests and—since many of the documents appear to include discussions with the legislature—the question of whether the legislature's purported intent for passing H.B. 1888 was mere pretext. *See, e.g.*, *Page v. Virginia*

State Bd. of Elections, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014) ("Obviously, any documents containing the opinions and subjective beliefs of legislators or their key advisors would be relevant to the broader inquiry into legislative intent . . . ."); *Baldus v. Brennan*, No. 1-CV-562, 2011 WL 6122542, at *1 (E.D. Wis. Dec. 8, 2011) (In voting rights claims involving intent "proof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence.").

Second, the documents involve discussions about the effects of H.B. 1888 and H.B. 2027, a law authored by Representative Bonnen (the author of H.B. 1888) and passed in 2015 to confront the same issues with which H.B. 1888 was purportedly concerned. *See* Ex. 3; Ex. 4. The effects of a previously passed law are directly relevant to whether H.B. 1888 was necessary, and evaluations of H.B. 1888's effects post-passage go to the heart of the questions before this Court regarding the "character and magnitude" of the burden on Plaintiffs' right to vote, and the necessity of that burden to further the state's interests. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

These are precisely the types of documents Plaintiffs' requests for production were meant to capture. The fact that the Secretary included the documents on a privilege log means the Secretary considered the documents responsive to these requests and that there is no real dispute regarding relevance under Rule 26. *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."). Indeed, Exhibits 1 through 4 strongly suggest that the other documents the Secretary is improperly withholding are critical to Plaintiffs proving elements of their case.

With relevance not in dispute, the only question is if the Secretary's claims of legislative or deliberative process privilege are appropriate. For the reasons discussed below, they are not.

B. The Secretary has no standing to assert the legislative privilege.

First, and perhaps most fundamentally, the Secretary has no standing to assert the

legislative privilege. When applied to state legislatures in federal court, the legislative privilege is an evidentiary privilege "governed by federal common law, as applied through Rule 501 of the Federal Rules of Evidence." *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) (quoting *Perez v. Perry*, No. SA-11-CV-360-OLG-JES, 2014 WL 106927, at *1 (W.D. Tex. Jan. 8, 2014)). It "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Id*. (internal quotation marks and citation omitted).

Here, the Secretary does not have standing to assert legislative privilege. As another court in this district made clear, the privilege is personal and "neither the Governor, *nor the Secretary of State* or the State of Texas has standing to assert the legislative privilege on behalf of any legislator or staff member." *Perez*, 2014 WL 106927, at *1 (emphasis added). The Secretary—because she is not a legislator—cannot assert the legislative privilege over documents in her possession any more than she could assert the doctor-patient or priest-penitent privilege.

While this alone should end the inquiry into whether the Secretary can withhold documents based on the legislative privilege, it should be noted that the privilege also "may be waived or asserted by each individual legislator." *Id.* at *1. In other words, if "any legislator, legislative aide, or staff member had conversations or communications with any outsider (e.g. party representatives, non-legislators, or non-legislative staff), any privilege is waived as to the contents of those specific communications." *Id*. at *2. Given that the very reason the Secretary possesses these documents is because a legislative employee had communications with the Secretary or her staff—that is, non-legislators and non-legislative-staff—the privilege has been waived for each

and every document on her privilege log.[2] This includes Exhibits 1, 2, and 3, which involve (or purport to involve) internal and external discussions regarding a legislative inquiry.

C. To the extent the Texas Secretary of State has any deliberative process privilege in federal court, is easily overridden here.

It is not clear that the Secretary enjoys any deliberative process privilege in federal court. While the Supreme Court has recognized the deliberative process privilege as covering "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)), it has only applied the privilege to *federal* agencies. Likewise, the Fifth Circuit has only applied the privilege in the context of *federal* executive agencies. *See, e.g.*, *Martin Operating P'ship, L.P. v. United States*, 616 F. App'x 688, 698-99 (5th Cir. 2015); *Batton v. Evers*, 598 F.3d 169, 182-83 (5th Cir. 2010). Accordingly, at least one district court in this Circuit has found that no such privilege exists for a state governmental agency, *Buford v. Holladay*, 133 F.R.D. 487, 494 (S.D. Miss. 1990), reasoning that the privilege has only been extended "to policy formulations at the highest levels of the federal executive branch." *Id.*

But even assuming that the Secretary enjoys any deliberative process privilege in federal court, it is easily overridden. The deliberative process privilege is qualified and can be overcome by a sufficient showing of need, which involves weighing (1) the relevance of the evidence; (2)

[2] *See Perez*, 2014 WL 106927, at *1; *see also Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 343 (E.D. Va. 2015) (ordering production of "any documents or communications shared with, or received from, any individual or organization outside the employ of the legislature"); *Page*, 15 F. Supp. 3d at 668 (denying legislative privilege to consultant independently contracted by partisan political party); *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012) ("[A] legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations."); *Doe v. Nebraska*, 788 F. Supp. 2d 975, 987 (D. Neb. 2011) (ordering production of documents that "were communicated to or shared with non-legislative members").

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. *Harding v. Cty. of Dallas, Texas*, No. 3:15-CV-0131-D, 2016 WL 7426127, at *12 (N.D. Tex. Dec. 23, 2016).[3] Courts in this Circuit have held the privilege yields when the documents at issue are highly relevant to the plaintiff's claims and the information cannot be discovered elsewhere, as here. *See id.* at *13; *Doe v. City of San Antonio*, No. SA-14-CV-102-XR, 2014 WL 6390890, at *4 (W.D. Tex. Nov. 17, 2014); *Kluth v. City of Converse*, No. SA-04-CA0798XR, 2005 WL 1799555, at *2 (W.D. Tex. Jul. 27, 2005); *see also Brfhh Shreveport, LLC v. Willis-Knighton Med. Ctr.*, No. 15-cv-2057, 2017 WL 1425584, at *3 (W.D. La. Apr. 19, 2017); *Klein v. Jefferson Par. Sch. Bd.*, 2003 WL 1873909, at *5 (E.D. La. Apr. 10, 2003).

All four factors weigh heavily in Plaintiffs' favor. First, as discussed above, the documents withheld are relevant and critical to the issues in this litigation. *See supra* Section II.A. In *Harding*, the court overrode claims of deliberative process and legislative privilege in a voting rights case, noting that the documents at issue were particularly relevant "insofar as these communications would tend to prove or disprove defendants' motivations in creating the allegedly discriminating map." 2016 WL 7426127, at *13. So too here. Although the substance of communications between the legislature and the Secretary as H.B. 1888 and similar bills were being considered, as well as the Secretary's evaluations of such bills, is relevant to all of Plaintiffs' claims, it is particularly important for those claims which involve legislative intent. *See supra* at 3-4 (citing cases).

Second, the evidence is not available from other sources. During the depositions of both

[3] The same test applies to whether the qualified legislative privilege can be overridden, *Perez*, 2014 WL 106927, at *1, and would similarly require that the legislative privilege yield and that the Secretary produce the documents at issue here. However, because the Secretary does not have standing to assert the legislative privilege and it is waived as to any documents in the Secretary's possession, *supra* Section II.B, the Court need not consider this test in ruling against the Secretary's invocation of legislative privilege.

the Secretary and Representative Bonnen, counsel for the Secretary instructed the witnesses not to answer any questions regarding these issues based on these privileges, so testimony cannot replace the documents. The state has also sought to block Plaintiffs' access to documents from legislators themselves, broadly invoking the legislative privilege to cover a wide range of documents (which is the subject of Plaintiffs' pending motion to compel). The unavailability of other evidence was also a key consideration in *Harding*. 2016 WL 7426127 at *13 ("This is especially true when the documents have central relevance to plaintiffs' equal protection claim and there is no suggestion that plaintiffs could obtain the information the documents contain from other sources.").

Third, the Secretary is a party here and the decision-making process that went into passing H.B. 1888—a process that involved the Secretary according to the privilege log and the subject line of Exhibit 1—is a key issue, so this factor weighs in Plaintiffs' favor. *See Harding*, 2016 WL 7426127, at *6 ("This is not, then, '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].' Rather, 'the decisionmaking process . . . [itself] *is* the case . . . .'") (quoting *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011)).

Finally, "the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions" does not weigh against disclosure. First, at least one court has noted that this concern generally relates to depositions of high-ranking executive or legislative officials, and the "sound policy reasons against compelling depositions of high ranking officials do not apply with equal force to the compelled production of documents." *Harding*, 2016 WL 7426127, at *13. Indeed, when considering voting rights claims, "[t]his is especially true when the documents have central relevance to plaintiffs' equal protection claim and there is no

suggestion that plaintiffs could obtain the information the documents contain from other sources." *Id.* That is precisely the case here. Further, in accord with the idea that this factor has little weight when considering documents, numerous courts in this Circuit to consider the deliberative process privilege have similarly held it provides little shield to permit state governmental agencies to withhold documents. *See id.*; *Doe*, 2014 WL 6390890, at *4; *Kluth*, 2005 WL 1799555, at *2; *see also Brfhh Shreveport, LLC*, 2017 WL 1425584, at *3; *Klein*, 2003 WL 1873909, at *5.

Accordingly, the Secretary should be required to promptly produce any documents which she purports to withhold solely on the basis of the deliberative process privilege, including Exhibit 4 and, given that she also enjoys no standing to assert legislative privilege, *supra* Section II.B, any documents she purports to withhold on the basis of both the legislative privilege and the deliberative process privilege, including Exhibits 1, 2, and 3. Exhibit 6 includes the documents which appear to fall into these categories based on the Secretary's privilege log.

D. The deliberative process privilege is inapplicable to significant portions of the documents purportedly withheld on this basis.

Even were the deliberative process privilege to apply (it does not), the Secretary has over redacted and over withheld. When it applies, "[t]he deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual. . . ." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (citations omitted); *see also Norwood v. F.A.A.*, 993 F.2d 570, 577 (6th Cir. 1993) ("[P]urely factual, investigative matters that are severable without compromising the private remainder of the documents do not enjoy the protection of the exemption."). (internal quotation marks and citation omitted)). Courts generally agree that the deliberative process privilege "protects only documents which are pre-decisional, deliberative and reflect the subjective intent of the legislators." *Doe*, 788 F. Supp. 2d at 985 (citing cases).

Here, by way of example, the Secretary's redactions to Exhibit 2 would eliminate everything other than the email headings. *See* Exhibit 7. Exhibit 2, however, involves numerous factual assertions which plainly could be included "without compromising the private remainder of the documents," *Norwood*, 993 F.2d at 577, such as the reply email from Melanie Best on the bottom of page 2. At a bare minimum, even if the deliberative process privilege permits the Secretary to withhold or redact anything here, the Secretary has vastly overapplied the privilege and should be required to properly apply the privilege as to withheld and redacted documents.

E. Plaintiffs should be entitled to continue the deposition of Keith Ingram to question him regarding the subject matter of Exhibits 1, 2, 3, 4.

Given that Exhibits 1, 2, 3, and 4, along with the other documents purportedly withheld and/or redacted based on the legislative and deliberative process privileges, are not privileged and should have been disclosed, the instructions from the Secretary's counsel to Mr. Ingram not to answer questions regarding these matters were inappropriate. While the documents themselves are informative, the context here—including, given the claims regarding intent at issue here, what was communicated to the legislature and when—is critically relevant and can only be understood from deposition testimony. Plaintiffs were entitled to ask Mr. Ingram about this context but were unable to do so due to documents being wrongly withheld and the Secretary's counsel's instructions. Accordingly, Plaintiffs request that they be afforded the opportunity to depose Mr. Ingram regarding the documents improperly withheld by the Secretary and the circumstances surrounding them. *See, e.g.*, *Moon v. City of El Paso*, SA-06-CA-925-OG, 2007 WL 9702910, at *2 (W.D. Tex. Dec. 7, 2007) (permitting continuation of deposition after ruling counsel's objections and instructions had been improper); *Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip.*

Res., Inc., No. CIV.A. 03-1496, 2004 WL 1237450, at *6 (E.D. La. June 2, 2004) (same).[4]

III. Conclusion

For the reasons stated herein, Plaintiffs respectfully request that the Secretary be required to produce any documents she has withheld on the basis of the legislative privilege, deliberative process privilege, or both privileges, and that Plaintiffs be allowed to depose Keith Ingram regarding the matters detailed in those improperly withheld documents.

Dated: June 8, 2020.

Respectfully submitted,

/s/ *Kevin J. Hamilton*

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[4] Given that Plaintiffs will be irreparably harmed if there is not relief before the November elections and discovery in this matter has otherwise been completed, Plaintiffs request that the Court order that the continuation of Mr. Ingram's deposition occur as soon as practicable.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 8, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Kevin J. Hamilton
Kevin Hamilton