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

EMILY GILBY; TEXAS DEMOCRATIC PARTY; DSCC; DCCC; and TERRELL BLODGETT,

Plaintiffs,

v.

RUTH HUGHS, in her official capacity as the Texas Secretary of State,

Defendant.

CIVIL ACTION NO. 1:19-cv-01063

THE TEXAS SECRETARY OF STATE'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

Plaintiffs Emily Gilby, et al. ("Plaintiffs") assert that information contained in four documents is so critical to the claims they bring that this Court should ignore applicable legislative and deliberative process privileges. Not so. The information contained in the four documents Plaintiffs seek, though privileged, is tangential to this litigation, and stripping the information of well-established evidentiary privileges will not further the Court's or the parties' stated goal of bringing this case to a conclusion at trial. The Secretary's objections are appropriate, and Plaintiffs' motion does not meet the heavy burden of demonstrating a strong, specific need that would merit overriding well-established privileges. Therefore, the Court should deny Plaintiffs' motion to compel.

A. The Texas Secretary of State properly asserted the legislative privilege.

The Secretary of State has properly withheld communications between legislative staffers and the Secretary of State's Elections Division as subject to the legislative privilege. Those

communications concern both pending legislation and the impact of enacted legislation for purposes of potential future legislation. *See, e.g.*, Dkt. Nos. 84-3, 84-4. The Secretary of State withheld these documents consistent with directly applicable precedent. The United States District Court for the District of Columbia has explained that a "legislator's request for information to a State agency regarding pending legislation is subject to the legislative privilege and need not be produced." *Texas v. Holder*, No. 12-128, 2012 WL 13070060, at *4 (D.D.C. June 5, 2012); *see also Baraka v. McGreevey*, 481 F.3d 187, 196 (3d Cir. 2007) ("[A]ctivities by legislators that directly affect drafting, introducing, debating, passing or rejecting legislation, are an integral part of the deliberative and communicative processes, and are properly characterized as legislative, not political patronage."(quotation omitted)). That holding fulfills the purpose of the legislative privilege: legislators need the flexibility to obtain candid input about pending legislation from the Executive Branch that will ultimately enforce, implement, or provide interpretations of a law. *See Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (noting that "[r]egardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability"). As another federal district court has reasoned in a similar context, "[i]ntra-branch communications about contemplated legislation differ from the type of lobbyist-legislator communications that courts have found not to be privileged by virtue of the fact they are internal, not external, communications." *Citizens Union of City of New York v. Attorney General of New York*, 269 F. Supp. 3d 124, 161–62 (S.D.N.Y. 2017).

Accordingly, there has been no waiver of the privilege because (a) the legislators who communicated with the Secretary of State did so under the veil of legislative privilege, and (b) the Secretary of State can properly invoke the legislative privilege. As the Eleventh Circuit noted,

"[t]he privilege protects the legislative process itself, and therefore covers both governors' and legislators' actions in the proposal, formulation, and passage of legislation." *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015). Thus, "state executive officials are entitled to legislative immunity when they perform legislative functions." *Texas v. Holder*, No. 12-128, 2012 WL 13070113, at *1 (D.D.C. June 7, 2012) (quotation omitted). Indeed, in *Texas v. Holder*, the district court expressly rejected the argument that "the legislative privilege has no application to documents in the possession of executive agencies," *see id.*, and this Court should do the same. The documents that Plaintiffs attach to their motion to compel, *e.g.*, Dkt. No. 84-3, involve attorneys within the Texas Secretary of State's Office providing clarification and information to legislators for purposes of formulating or refining legislation. Those functions fall within the sphere of legislative privilege, *see Hubbard*, 803 F.3d at 1308, and the Secretary of State can properly assert it, *see id.*

The cases that Plaintiffs cite in their brief on the subject of legislative privilege are inapposite. For example, Plaintiffs cite *Perez v. Perry*, No. SA-11-cv-360, 2014 WL 106927 (W.D. Tex. Jan. 8, 2014), for the proposition that "neither the Governor, nor the Secretary of State or the State of Texas has standing to assert the legislative privilege," Dkt. No. 82 at 5, but do not include the remainder of that sentence—"on behalf of any legislator or staff member *that may be deposed*." *Perez*, 2014 WL 106927, at *1 (emphasis added). *Perez v. Perry* concerned whether counsel for the State of Texas could assert legislative privilege on behalf of legislators at a deposition, not whether the Secretary of State could claim legislative privilege over documents in her possession that reflect legislative functions. Likewise, the cases cited in Plaintiffs' footnote for the proposition that the legislators have waived the privilege, *see* Dkt. No. 82 at 6 n.2, either deal

with communications between legislators and consultants or the general public (which the eight subpoenaed legislators have already produced) or do not specifically address the precise situation here: legislators who have communicated with a state agency within the executive branch to obtain guidance in formulating legislation.

Finally, to the extent the Court disagrees that the Secretary of State can assert the legislative privilege, Plaintiffs' motion to compel should still be denied. First, eight legislators—including Representative Bonnen, whose staffer corresponded with the Secretary of State's Office in one of the emails filed under seal, Dkt. No. 84-4—have already asserted legislative privilege. *See* Dkt. No. 43. Thus, even if the Secretary cannot assert the privilege as to those documents, the eight legislators who have been subpoenaed, including Representative Bonnen, can and already have. Moreover, given the import of the privilege, *see Hubbard*, 803 F.3d at 1307 (noting that the legislative privilege is "important" and "has deep roots in federal common law"), any other legislators who were not previously subpoenaed to produce documents should be given the opportunity to claim the privilege, too.

For these reasons, the Court should uphold the Secretary of State's assertion of legislative privilege.

B. The Texas Secretary of State properly asserted the deliberative-process privilege.

a. The deliberative process privilege applies to the Texas Secretary of State.

Plaintiffs argue that the deliberative process privilege does not apply to the Texas Secretary of State's Office. Plaintiffs are mistaken. The deliberative-process privilege has been recognized and applied to a Texas state agency in federal court. In *Texas v. Holder*, the United States District Court for the District of Columbia upheld the State of Texas's assertion of the deliberative-process

privilege covering deliberative, pre-decisional documents in a voting rights case and rejected the United States Department of Justice's arguments that DOJ's need for the documents should overcome the privilege. 2012 WL 13070113, at *2. While the district court recognized that the deliberative-process privilege is a qualified privilege, the district court ultimately held that the DOJ failed to make a strong or specific enough showing of need to justify vitiating the privilege in the context of a voting rights case. *Id.*

Plaintiffs further argue that the Fifth Circuit has only applied the privilege in the context of federal agencies, but notably, Plaintiffs cannot point to any case from the Fifth Circuit that precludes the application of a deliberative-process privilege to Texas state agencies. *See* Dkt. No. 82 at 6. Instead, Plaintiffs lean on *Buford v. Holladay*, 133 F.R.D. 487 (S.D. Miss. 1990), for the proposition that a federal district court in the Fifth Circuit has declined to extend the deliberative-process privilege to a State. Plaintiffs' reliance is misplaced. *Buford's* analysis of the deliberative-process privilege focused on whether the federal district court should recognize the applicability of a state deliberative-process privilege under the Federal Rules of Evidence, and ultimately found that a deliberative-process privilege did not apply because Mississippi did not recognize a deliberative-process privilege under state law. *Buford*, 133 F.RD. at 491-94. *Buford* is not binding on this Court, but even if this Court followed *Buford's* reasoning, it supports applying the deliberative-process privilege here because Texas—unlike Mississippi in 1990—recognizes a state deliberative-process privilege. *See, e.g.*, *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000) (explaining that Texas courts and the Attorney General have consistently recognized the existence of a common-law deliberative process privilege that protects certain agency communications from discovery).

b. Plaintiffs failed to make a showing of need strong or specific enough to overcome the privilege.

Since the deliberative-process privilege applies, this Court must evaluate whether Plaintiffs' requests for additional information should override the Secretary's entitlement to assert the privilege. The deliberative-process privilege applies to documents that reflect "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) (citation and quotation omitted). Courts have recognized that deliberative-process privilege can be overcome if a Plaintiff can show a weighty need for the information demonstrated by the (1) 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 impair the ability of decision makers to conduct decision making with full candor. *See Harding v. County of Dallas*, No. 3:15-CV-0131-D, 2016 WL 7426127, at *12 (N.D. Tex. Dec. 23, 2016).

First, Plaintiffs contend the materials are highly relevant, focusing largely on legislative intent. But courts typically resolve "unconstitutional purpose" challenges to state legislation like the challenges here by relying exclusively on the public record without demanding that legislators or executive-branch officials disclose internal communications or memoranda. *See, e.g., McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Hunter v. Underwood*, 471 U.S. 222 (1985); *Larson v. Valente*, 456 U.S. 228, 254–55 (1982); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Plaintiffs make no attempt to explain why confidential communications in a case concerning passage of legislation requiring uniform ballot access should extend beyond the

disclosures required in other statutory challenges involving claims of unconstitutional motivation or purpose.

Secondly, Plaintiffs complain that information concerning legislative intent is not available from alternative sources. In support, Plaintiffs argue that Texas Legislators have invoked legislative privilege, leaving Plaintiffs without access to alternative sources of information. Of course, Plaintiffs' position ignores the reams of publicly available information concerning the passage of H.B. 1888. That information is readily available for Plaintiffs' review. For example, the Secretary has ordered certified transcriptions of relevant portions of the legislative record developed during passage of HB 1888 and produced those transcriptions to Plaintiffs during discovery. *See* Ex. 1 (Second Supplemental Disclosures). Plaintiffs also have access to former State Representative Glen Maxey, the corporate representative for the Texas Democratic Party, and other witnesses, who testified during the legislative session concerning HB 1888. Further, Plaintiffs' co-counsel represents several Texas legislators that Plaintiffs have disclosed as witnesses in this case.[1] Those legislative witnesses have testified at deposition on behalf of Plaintiffs and, notably, the majority of them have asserted legislative privilege during their own depositions. The notion that privileged communications are necessary because evidence is otherwise unavailable to Plaintiffs would require this Court to accept that 16 depositions, the legislative record of H.B. 1888, dozens of discovery responses, and thousands of pages of documents produced during discovery in response to Plaintiffs' requests amount to nothing.

[1] Co-counsel for the Texas Democratic Party represents Representative Celia Israel, Representative John Bucy, and Representative Chris Turner.

Third, Plaintiffs contend that the Secretary is a party to this case and part of the decision-making process involving passage of H.B. 1888. Not so. While the Secretary of State is a party to this case, she is not a legislator and is not part of the decision-making process regarding the passage of H.B. 1888. Plaintiffs' contention is based upon documents demonstrating that members of the Texas Legislature communicated with the Secretary's employees concerning pending legislation. The information communicated by the Secretary to individual members of the Legislature is not a matter at issue in this case.

Finally, Plaintiffs attempt to meet their burden of showing that chilling internal deliberations is outweighed by the needs of the case by suggesting that courts routinely hold the deliberative-process privilege "provides little shield to permit state governmental agencies to withhold documents." Dkt. No. 82 at 9. But Plaintiffs' selected cases are inapposite. *Doe v. City of San Antonio*, No. SA-14-CV-102-XR, 2014 WL 6390890, at *4 (W.D. Tex. Nov. 17, 2014), concerned whether an internal affairs investigation into police misconduct should be produced over a deliberative-process privilege claim where no other evidence was available. In *Kluth v. City of Converse*, No. SA-04-CV-0798-XR, 2005 WL 1799555, at *2 (W.D. Tex. Jul. 27, 2005), the court found that the defendants in an employment discrimination case failed to establish the applicability of the deliberative-process privilege. So, too, did the courts in *Brfhh Shreveport, LLC v. Willis-Knighton Med. Ctr.*, No. 15-cv-2057, 2017 WL 1425584, at *3 (W.D. La. Apr. 19, 2017), and *Klein v. Jefferson Par. Sch. Bd.*, No. 00-3401, 2003 WL 1873909, at *5 (E.D. La. Apr. 10, 2003). Documents must satisfy two requirements in order to qualify for the deliberative-process privilege. *FDIC v. Schoenberger*, No. 89-2756, 1990 WL 52863, at *3 (E.D. La. Apr. 24,1990). First, the document must be predecisional, that is, generated before the adoption of an agency policy or

decision and prepared in order to assist an agency decision maker in arriving at his or her decision. *Id*. Second, the document must be deliberative in nature, containing opinions, recommendations or advice about agency policies. *Id*. Here, Plaintiffs do not contest in their motion that the documents withheld under the deliberative process privilege meet those two requirements, and as noted above, there are vast publicly available sources—including sources that have already been disclosed by the Secretary's counsel in discovery—to obtain the information Plaintiffs seek. Accordingly, none of Plaintiffs' selected cases support their attempt to override applicable privileges.

C. There is no need for additional deposition testimony from the Secretary's corporate representative.

Plaintiffs' request for additional testimony from the Secretary's corporate representative is predicated on the assumption that this Court will find the invocation of legislative and deliberative-process privileges was inappropriate. For the preceding reasons, the legislative and deliberative-process privileges apply to the documents withheld by the Secretary, and Plaintiffs did not adequately demonstrate a strong and specific need sufficient to overcome the application of those privileges.

If the Court does believe that the four documents identified by Plaintiffs should be disclosed, the Secretary asserts that the Court should limit the inquiry to the four documents that Plaintiffs actually referenced in their motion, not the full complement of documents listed in the privilege log, and restrict any further deposition of the Secretary's corporate representative to 45 minutes and limit that time to a discussion of the four documents identified.

Conclusion

Because Plaintiffs failed to identify a strong, specific need for any of the documents withheld on account of legislative or deliberative-process privileges, this Court should deny Plaintiffs' motion.

Date: June 12, 2020

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on June 12, 2020, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
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