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

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

The Secretary conflates legislative *immunity* with the evidentiary doctrine of legislative *privilege*. The Secretary, however, is not a legislator nor even a member of the legislative branch and cannot claim legislative immunity. And she has no basis to assert the legislative privilege over documents in her possession. But even if she could, both the legislative privilege and the deliberative process privilege the Secretary also advances are qualified, not absolute, and they must yield here given the critical import and relevance of the withheld documents. The Court should grant the motion to compel.

I. Argument

A. Legislative privilege cannot protect documents in the Secretary's possession.

The Secretary repeatedly cites *Texas v. Holder*, No. 12-128, 2012 WL 13070113 (D.D.C. 2012), in support of her ability to invoke the legislative privilege, *see* ECF No. 88 at 1-2, but *Holder* is not binding authority here and its holding in any event is simply wrong. Like the Secretary, *Holder* relies on cases involving legislative *immunity* when considering the scope of the legislative privilege, *see Holder*, 2012 WL 13070113 at *1, but this is in error. While certain

officials performing legislative functions are absolutely immune from civil liability under federal common law, *see Bogan v. Scott–Harris*, 523 U.S. 44 (1998), there is no absolute "evidentiary privilege for state legislators for their legislative acts." *United States v. Gillock*, 445 U.S. 360, 366–67 (1980). Whether an act is legislative and provides legislative *immunity from suit* thus does not answer the question of who can invoke the legislative *privilege*. The cases relied upon the Secretary are accordingly inapposite. *See* Sec'y Resp. at 2 (citing *Baraka v. McGreevey*, 481 F.3d 187, 196 (3d Cir. 2007) (discussing legislative immunity only, not legislative privilege) and *Bogan*, 523 U.S. 44 (same)).[1]

The cases cited by Plaintiffs set forth the bright-line and common-sense rule for the qualified legislative privilege: it applies solely to state legislators and is waived when documents are shared outside the legislature. The Secretary seeks to distinguish *Perez v. Perry*, Civ. No. SA-11-cv-360, 2014 WL 106927 (W.D. Tex. Jan. 8, 2014), because it involved depositions, but it answered the precise question that this Court must answer here: who can invoke the legislative privilege? The court held that the Secretary, among others, could not, because "no person entitled to assert any privilege ha[d] done so." *Id*. at *1. The Secretary also misses the point when she argues that there has been no waiver because certain legislators have invoked the privilege over their documents. This does not alter the fact that the legislators sent the documents to the Secretary, thereby waiving the privilege. *See* ECF No. 82 at 6 n.2. The Secretary's attempt to distinguish cases cited by Plaintiff for this unsurprising proposition on the basis that none of the cases involved

[1] None of the other cases cited by the Secretary stand for a different proposition. The portion of *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), upon which the Secretary relies refers to communications within a single branch ("[i]ntra-branch communications"), *see* ECF No. 88 at 2, not between different branches of government, as is the case here. And *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015), involved whether specifically subpoenaed individuals could invoke the privilege in a case to which they were not parties, a separate question not relevant to Plaintiffs' motion to compel.

a Secretary of State falls flat: like here, the communications resulting in waiver in those other cases were made to non-legislators. *Id*. The Secretary cannot assert the legislative privilege, and it has been waived as to documents in her possession.

B. Both the legislative privilege and deliberative process privilege must yield given the importance of the evidence here.

To the extent the Secretary enjoys any deliberative process privilege or can assert a legislative privilege, those privileges should in any event yield given the importance of the evidence here.[2] As Plaintiffs have noted, both are qualified privileges which can be overcome by a sufficient showing of need, which includes weighing similar factors: (1) the 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 hinder discussion regarding contemplated policies and decisions. *See* ECF No. 82 at 6-7, 7 n.3 (citing *Harding v. Cty. of Dallas,* No. 3:15-CV-0131-D, 2016 WL 7426127, at *12 (N.D. Tex. Dec. 23, 2016) (deliberative process privilege), and *Perez*, 2014 WL 106927, at *2 (legislative privilege)). The legislative privilege inquiry may also weigh a fifth factor, the seriousness of the litigation, *Perez*, 2014 WL 106927, at *2, a factor that in voting rights cases weighs heavily *in favor of disclosure*. *See Harding*, 2016 WL 7426127, at *6.

First, as demonstrated by the exhibits Plaintiffs filed under seal, the documents at issue are highly relevant and go to the heart of every claim in this case. Contrary to the Secretary's assertion

[2] As Plaintiffs noted, ECF No. 82 at 6, at least one court in this Circuit has found that a state agency is not entitled to any deliberative process privilege in federal court. *See Buford v. Holladay*, 133 F.R.D. 487, 493-95 (S.D. Miss. 1990). The Secretary seeks to distinguish *Buford* because the opinion discussed the fact that no deliberative process privilege existed under Mississippi law, ECF No. 88 at 5, but *Burford* also considered whether federal common law would provide a state agency a deliberative process privilege, and found it would not. *Id*. at 494. The Secretary once more turns to *Holder* to refute *Burford*'s conclusion, ECF No. 88 at 4-5, but *Holder* is no more binding on this court than *Burford*, and *Burford* correctly held that federal common law does not provide a deliberative process privilege to a state executive agency. *See also Fish v. Kobach*, No. 16-2105-JAR, 2017 WL 1373882 at *5 (April 17, 2017) (rejecting Kansas Secretary of State's assertion of deliberative process privilege for similar reasons).

that their relevance is limited to the legislative intent inquiry necessary under the Twenty-Sixth Amendment claim, the documents also relate to H.B. 1888's burdens and whether those burdens are necessary to further the interests which the law purportedly serves, an inquiry this Court must undertake to resolve both Plaintiffs' undue burden and equal protection claims. *See* ECF No. 82 at 3-4.[3] The Secretary also asserts that public documents are available to demonstrate intent, *see* ECF No. 88 at 6-7, but the fact that there is other information publicly available about the legislation demonstrates nothing about the availability of the specific information in *these* documents. Moreover, in *Citizens Union of City of New York*, a case the Secretary cites in her motion, *see* ECF No. 88 at 2, the court recognized that publicly-available documents are often insufficient to establish intent in voting rights cases: "[I]n discrimination cases like the redistricting and voting rights cases cited by Plaintiffs, evidence needed to demonstrate invidious or discriminatory motives or self-dealing may not be available from sources other than individual legislators; indeed, the legislator may have actively attempted to hide evidence of self-dealing or unlawful motives." 269 F. Supp. 3d at 167. In such instances, "the second factor may weigh in favor of disclosure," *id.*, as it does here.

The Secretary claims she is entitled to legislative privilege because her staff was "perform[ing] legislative functions," ECF No. 88 at 3, but just a few pages later admits that, "she is not a legislator and is not part of the decision-making process regarding the passage of H.B. 1888," *Id.* at 8. The Secretary cannot have it both ways. Either she plays an ancillary role in the legislative process such that her communications with the legislature (and her staff's internal discussions) are neither legislatively privileged nor part of a policy or decision (making them

[3] For this reason *Holder* is, again, distinguishable, as it held that the Governor's statements about a law were not sufficiently relevant to overcome the deliberative process privilege in a case with a single claim requiring proof of legislative intent. *See* 2012 WL 13070113 at *2.

outside the deliberative process privilege), or she enjoys a legislative privilege and is a quasi-legislator who was involved in the drafting and refinement of H.B. 1888 such that the third factor (her role in this litigation) weighs in favor of disclosure. But, as discussed, regardless of which accurately describes the Secretary's role, she should be required to turn over these documents because of their critical importance in this litigation. *See, e.g.*, *Harding*, 2016 WL 7462127, at *13-14 (finding interest in disclosure outweighs assertion of legislative privilege in voting rights case and compelling production of documents); *Favors v. Cuomo*, No. 11-CV-5632 DLI RR, 2015 WL 7075960, at *16 (E.D.N.Y. Feb. 8, 2015) (same); *Veasey v. Perry*, No. 2:13-CV-193, 2014 WL 1340077, at *4-5 (S.D. Tex. Apr. 3, 2014) (same).

Finally, the Secretary does not argue that the disclosure of these documents would chill internal discussion, only asserting that Plaintiffs have not met their burden on this point and that the cases Plaintiffs cite are distinguishable. ECF No. 88 at 8-9. Neither argument holds water. First, the Secretary flips the burden inquiry. *See In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001) ("A party asserting a privilege exemption from discovery bears the burden of demonstrating its applicability."). Second, Plaintiffs have cited numerous cases in this Circuit where concerns about purported chill did not outweigh other considerations, especially when the documents are highly relevant. *See* ECF No. 82 at 9 (citing cases). The same is true here.

C. Plaintiffs Should Be Entitled to Question the Secretary's Corporate Representative About Any Documents Improperly Withheld.

Should this Court find that the documents identified in the Secretary's privilege log were improperly withheld, the Secretary asserts that the Court should limit any continued deposition of the Secretary's corporate representative to the four documents Plaintiffs have identified. ECF No. 88 at 9. The Secretary provides no case law for this contention, and any such limitation would reward the Secretary for improperly withholding hundreds of documents. Instead, the Court should

order the Secretary to produce all documents improperly withheld, and permit Plaintiffs to depose the Secretary's corporate representative regarding any documents improperly withheld and the subjects discussed in those documents.

Dated: June 19, 2020.

Respectfully submitted,

/s/ John M. Geise

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 19, 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/ John M. Geise
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