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 Case No. 1:19-cv-01063

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION, OR IN THE ALTERNATIVE, FOR CERTIFICATION OR CLARIFICATION

After extended briefing on Plaintiffs' Motion to Compel, on July 10, 2020, this Court ordered the Secretary to produce a variety of documents she had withheld on claims of legislative and deliberative process privilege. ECF No. 96 ("Order"). In defiance of that Order, and notwithstanding the urgency of this litigation, the Secretary first delayed responding at all, then announced that she would not produce those materials and instead intended to file a motion for reconsideration or for certification for interlocutory appeal, which she filed on Friday, July 17, 2020 (ECF No. 97). The motion is little more than a warmed-over version of the Secretary's original opposition to the motion to compel and it is no more persuasive in its second telling. Indeed, the motion is primarily based on two orders from a nonbinding district court decision, *Texas v. Holder*, No. 12-128 (D.D.C. 2012), both of which get the law wrong and, tellingly, have never been cited by another court (in Texas or anywhere else) for the propositions for which the Secretary tries to use them. Indeed, the Secretary relied on this inapt authority for almost the entirety of her Opposition to Plaintiffs' Motion to Compel, ECF No. 88, and Plaintiffs of course already addressed that case in their Reply in Support of Plaintiffs' Motion to Compel, ECF No. 89. Thus, it was already raised, considered, and rejected by this Court. Repeating previously considered arguments is, with all due respect, not an appropriate ground for reconsideration, much less for certification for an interlocutory appeal.

The Court should deny the Secretary's motion and instead order the Secretary to turn over the documents by 5 p.m. on Tuesday July 21, 2020, and, that same day, provide available dates for her representative's deposition to take place during the last week of July. The Court should also unseal Exhibits 1-4 (Docs. 84-2, 84-3, 84-4, and 84-5 to the Motion to Seal (Doc. 84)), as the Court has already ruled that these documents are not privileged. *See* Order at 6-7.

I. BACKGROUND

On July 10, 2020, the Court granted Plaintiffs' Motion to Compel Documents and Continue the Deposition of Defendant Secretary of State Ruth Hughs, ordering the Secretary to turn over hundreds of documents she has inappropriately withheld since Plaintiffs' initial request for production in December 2020 and to permit Plaintiffs to depose her 30(b)(6) representative regarding the content of these documents. *See generally* Order. Given the rapidly narrowing timeframe for relief in this litigation, Plaintiffs' counsel immediately contacted the Secretary requesting the documents and inquiring regarding availability for the continued deposition.[1]

The Secretary did not respond until July 13, 2020, and then, rather than providing the documents or a date by which they would be provided, explained instead that her counsel would "reach out to [Plaintiffs' counsel] after we made a decision regarding how to proceed in response to the *Gilby* order." Plaintiffs' counsel requested to be told, one way or the other, by the end of that same day whether the Secretary intended to produce the documents, but her counsel waited until another day had passed to notify Plaintiffs' counsel that, while a decision of whether or not to comply with this Court's order "requires careful deliberations, [] we should have an answer for you by tomorrow," July 15. July 15 came—and went—with no production. The Secretary's counsel instead informed Plaintiffs' counsel that they intended to move for reconsideration or, "in the alternative, certification of an interlocutory appeal under 28 U.S.C. Section 1292(b) or clarification of the Court's Order granting your motion to compel." The motion was not filed until July 17.

[1] This correspondence and the email correspondence detailed in the next paragraph is attached hereto as Exhibit A.

II. ARGUMENT

A. The Court should not reconsider its Order or certify for interlocutory appeal.

As this Court has recognized, "[r]econsideration of an order is an extraordinary remedy that should be used sparingly." *Bray v. Siemens Indus., Inc.*, No. 1:12-CV-00575-LY, 2013 WL 12076560, at *1 (W.D. Tex. Mar. 12, 2013) (denying motion for reconsideration of a motion to remand). While the Secretary's motion is one properly considered under Fed. R. Civ. P. 54(b), Courts in this Circuit apply the same standard to a Rule 54(b) motion as to a motion under Rule 59(e) if the Rule 54(b) motion is made within 28 days of the Court's order. *See Gomez v. Loomis Armored US LLC*, No. 5:16-CV-931-DAE, 2018 WL 6265114, at *2 (W.D. Tex. Aug. 17, 2018) ("The exact standard applicable to the granting of a motion under Rule 54(b) is not clear. But the general practice of courts in this Circuit has been to evaluate Rule 54(b) motions under the same standard that governs Rule 59(e) motions when it is filed within 28 days from the date of the interlocutory order."); *see also Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (clarifying when a motion for reconsideration is considered under Rule 54(b) as opposed to Rule 59(e)). Under the Rule 59(e) standard, "[a] motion for reconsideration is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of the court's order." *Bray*, 2013 WL 12076560, at *1. The Secretary here offers little more than a rehash of the same argument, based on the same misguided authority, previously considered and rejected by the Court. This is not an appropriate basis for a motion for reconsideration.

The Secretary's motion, like her opposition to the underlying motion to compel, primarily relies on two holdings from the district court in *Holder*. *See* ECF No. 88 at 2-3, 4-5. As Plaintiffs already pointed out in their Reply, *Holder*'s holding regarding legislative privilege (*Texas v.*

Holder, No. 12-128, 2012 WL 13070060 (D.D.C. June 5, 2012) ("*Holder I*")) is non-binding and simply wrong. *See* ECF No. 89 at 1-2. It conflates legislative immunity with legislative privilege. *Id.* In fact, it is telling that not *one case* (in Texas or elsewhere) has cited *Holder I* for the argument that the Secretary now advances. Instead, the only case that has cited *Holder I* at all is for the principle, relevant here, that plaintiffs who claim the government acted with invidious purpose are entitled to discovery that can sometimes overcome the legislative and executive privilege. *See In re Gee*, 941 F.3d 153, 168 (5th Cir. 2019). This explains why the Secretary has extensively relied on *Holder I* but not offered any other case that has followed *Holder I*'s reasoning. No such case exists.

Further, as to legislative privilege, the Secretary misconstrues the Court's Order by arguing that the Court found that the documents in the Secretary's possession were entitled to legislative privilege, but that the Secretary simply did not have standing to assert the privilege. ECF No. 97 at 2-4. Perhaps in the rush to file this motion, the Secretary simply misread this Court's Order. The Court in fact articulated the logical rule that "[t]o the extent that legislators or legislative staff communicated with any outsider (e.g. non-legislators, non-legislative staff) any legislative privilege is waived as to the contents of those specific communications," Order at 4, and that "[c]ommunications received by the Secretary from legislators looking to obtain guidance in formulating legislation are not meaningfully different from communications received by constituents from legislators or communications received by lobbyists, think-tanks, or any outsider." *Id.* at 6. It is not that the Secretary lacks *standing* to assert legislative privilege—it's that there *is no legislative privilege* as to documents in her possession.

Regarding deliberative process privilege, the Secretary clarifies (for the first time) that she

relies on a different order from *Holder* (*Texas v. Holder*, No. 12-128, 2012 WL 13070113 (D.D.C. June 7, 2012) ("*Holder II*"), but this, too, is not a sufficient basis for the Court to overturn its prior ruling. This Court has held that deliberative-process privilege protects candor in agency decision making, and "[t]his rationale does not support privilege for communications where the agency is not the decision maker and the separation of powers veil has been pierced. At issue here is not the internal decision-making processes of the executive branch, but instead a part of the legislative process." Order at 5. This reasoning is supported by the facts and case law. The Secretary admits in her motion for reconsideration that "she, of course, does not pass legislation," ECF No. 97 at 4, making her claims of deliberative process privilege here outside the purpose of deliberative process privilege. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) (noting deliberative-process privilege protects candor in agency decision making). *Holder II* was based on the Governor's assertion of deliberative process privilege over documents revealing his office's internal deliberations regarding a voter ID law, which he would actually have a role in passing. *Holder II*, 2012 WL 13070113 at *2. The deliberative process privilege is actually a relevant consideration in that instance, unlike the Secretary's position here, where she "does not pass legislation." ECF No. 97 at 4. Further, like *Holder I*, *Holder II* has tellingly never been cited for the principle the Secretary advances by any other court. This inapposite case should not alter this Court's conclusion. The Secretary enjoys no deliberative process privilege over the documents at issue here and should turn all such documents over immediately, just as the Court previously ordered.

Nor should the Court certify a decision on discovery for interlocutory appeal. The Supreme Court has made clear that privilege determinations are not collateral orders subject to immediate

appeal. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009) ("The question before us is whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine. Agreeing with the Court of Appeals, we hold that they do not."). The Secretary seeks to have this Court certify the issue for appellate review under 28 U.S.C. § 1292(b)—a concession that there is otherwise no path for appellate review, as that provision applies to "an order not otherwise appealable." The Secretary has not identified a legitimate "controlling questions of law." In any event, the statutory requirements for such an order are difficult to meet and certainly do not exist here, where there is no substantial difference of opinion regarding this Court's order. Far from promising to "materially advance the ultimate termination of the litigation," permitting an immediate appeal will only delay it.[2] *See* 28 U.S.C. § 1292(b); *see also Okoro v. Pablos*, No. 1:18-CV-401-RP, 2018 WL 2708757, at *2 (W.D. Tex. June 5, 2018) (denying motion for relief pursuant to 28 U.S.C. § 1292(b) when neither statutory prong is met); *Coats v. Brazoria Cty.*, 919 F. Supp. 2d 863, 866 (S.D. Tex. 2013) (noting that appeals under 28 U.S.C. § 1292(b) "represent a rarely used exception to the strong judicial policy disfavoring piecemeal appeals") (citation omitted). The Secretary's request for interlocutory review here should be denied.

B. The Court should order a date for production of the improperly-withheld documents and a date for the continued deposition before the end of July.

This Court possesses broad inherent authority to "manage its proceedings, vindicate its authority, and effectuate its decrees." *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994). Further, the Court possesses authority under Fed. R. Civ. P. 37(b)(2)(A) to "issue

[2] Indeed, certifying an interlocutory appeal could well preclude even the possibility that Plaintiffs could obtain relief in advance of the 2020 General Election.

further just orders" where a party fails to comply with its orders compelling discovery. There is no reason for the Court to permit the Secretary to further delay in complying with its order and in providing Plaintiffs documents to which they have been rightly entitled since their initial document request nearly 8 months ago, regardless of the Secretary's unacceptable attempts to avoid the order.

The Secretary's motion for reconsideration or interlocutory appeal should not permit her to further delay providing the requested documents or scheduling her representative's deposition. There is no justifiable reason for the Secretary to flaunt the Court's order. District court orders "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Salomon v. Wells Fargo Bank, N.A.*, No. EP-10-CV-106-KC, 2010 WL 2900783, at *2 (W.D. Tex. July 22, 2010). Given the time-sensitive nature of these proceedings, the Secretary's delay could preclude Plaintiffs' access to relief in advance of the coming election. The Secretary should be compelled to immediately comply with this Court's order.

C. The Court should unseal the documents previously entered under seal.

Consistent with its Order finding that Defendants; invocations of legislative and deliberative process privilege were improper, the Court should unseal ECF Nos. 84-2, 84-3, 84-4, and 84-5 as there is no longer any legitimate contention that those documents are privileged. *See* Order at 6-7.

III. CONCLUSION

For these reasons, this Court should order that the Secretary turn over the requested documents by 5:00 p.m. C.D.T. on July 21 and, by that same deadline, provide her representative's availability for a deposition to take place during the week of July 27——or face escalating penalties

under Fed. R. Civ. P. 37. The Court should also unseal the documents previously entered under seal as there is no longer any disputed claim that they are privileged.

Dated: July 20, 2020.

Respectfully submitted,

/s/ *John M. Geise*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 20, 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