

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

CAUSE NO. D-101-CV-2011-02942

BRAIN F. EGOLF, JR., HAKIM BELLAMY, MEL HOLGUIN, MAURILIO CASTRO and
ROXANE SPRUCE BLY, Plaintiffs,

-vs-

DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official capacity as New Mexico Governor, JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate, TIMOTHY Z. JENNINGS, in his official capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN SR., in his official capacity as Speaker of the New Mexico House of Representatives, Defendants.

CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-02944
CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-03016
CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-03099
CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-03107
CONSOLIDATED WITH CAUSE NO. D-101-CV-2011-02945
CONSOLIDATED WITH CAUSE NO. D-506-CV-2011-00913
CONSOLIDATED WITH CAUSE NO. D-202-CV-2011-09600

**SECRETARY OF STATE'S RESPONSE IN OPPOSITION TO LEGISLATIVE
DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

Dianna J. Duran, in her official capacity as New Mexico Secretary of State (hereinafter referred to as "Secretary of State"), by and through her attorneys, Doughty & West, P.A. (Robert M. Doughty III) hereby responds in opposition to Legislative Defendants' Motion for Protective Order and states the following in support.

Introduction

Executive Defendants properly served a Notice of Deposition Duces Tecum on Legislative Defendants' expert Brian Sanderoff on November 1, 2011 requesting information that is discoverable under Rule 1-026(B)(6).¹ Legislative Defendants argue that the requested

¹ Specifically, Legislative Defendants object to responding to the following requested information:

information is sought with the intent to annoy, embarrass, harass or oppress the Legislative Defendants and/or Sanderoff. This is simply not the case. The requested materials are probative of the assumptions and methodologies utilized by a testifying expert, Sanderoff, in advocating for the Legislative Defendants' maps. The requested materials also provide information as to bias and whether Sanderoff used principles common to other experts in his field. Specifically as to redistricting litigation, the materials and assumptions provide the basis for determining whether the failure to maintain exact population equality in the Legislative Defendants' plans is justified by any "legitimate state interests." See Larios v. Cox, 300 F. Supp. 2d 1320, 1337 (N.D. Ga. 2003), aff'd, Cox v. Larios, 542 U.S. 947 (2004) (stating "deviations from exact population equality may be allowed in some instances in order to further legitimate state interests such as making districts compact and contiguous, respecting political subdivisions, maintaining the cores of prior districts, and avoiding incumbent pairings").

Legislative Defendants also incorrectly assert that the requested materials are privileged and not discoverable under the Speech and Debate Clause, a legislative privilege or by statute. None of the protections asserted by Legislative Defendants are applicable because Legislative Defendants have waived any alleged privilege when they identified Sanderoff as a testifying expert witness in this redistricting litigation. Because the Notice of Deposition Duces Tecum was

1.a. Letters, memoranda, e-mail, notes of conversations or workpapers concerning requests from legislators, former legislators, or people working for legislators, for specific kinds of redistricting plans, or requests for plans which accomplish specific objectives (this request is limited to the current redistricting cycle and limited to the redistricting of Congress, the State House, the State Senate, and the PRC).

10. All correspondence, including emails, that you have received from any person or entity or sent to any person or entity, that relates in any manner to the lawsuit mentioned above, subject to the "Stipulation Regarding Discovery" filed in this case on November 8, 2011 (this request specifically includes communications with legislators).

properly served and the requested information is allowed under Rule 1-026 NMRA, Legislative Defendants' motion for protective order should be denied.

Arguments and Authorities

In addition to the simple fact that the requested materials are discoverable under the New Mexico Rules of Civil Procedure, precedent indicates that the information is relevant and that it is not privileged.

A. The Information Sought from Mr. Sanderoff is Relevant Per Larios v. Cox.

Testimony and documents regarding the legislative motives and purpose in developing redistricting plans is relevant in redistricting litigation to determine whether there is any legitimate state interest in deviations from "one person, one vote" requirements. Courts, including Larios v. Cox, 300 F.Supp.2d 1320 (N.D. Ga. 2004), have allowed extensive testimony of legislators and their aides regarding the motives and purposes behind redistricting plans to determine the constitutionality of the plans. The Larios court, for example, allowed extensive testimony of Senator Brown, Senator Johnson, legislative reapportionment staff member Linda Meggers, and Representative Westmoreland regarding the motives behind the reapportionment plans and concluded that there was no legitimate state interest in the state legislative plans deviating from the "one person, one vote" requirement. See Larios, 300 F.Supp.2d at 1325-30. Specifically, Senator Brown and Linda Meggers testified that the state plans did not consider traditional redistricting criteria. Id. at 1325. Senator Brown, Ms. Meggers and Senator Johnson testified that the only objectives that were considered when the plans were developed were: (1) "the protection of rural Georgia and inner-city Atlanta against a relative decline in their populations as compared with that of the rest of the state," and; (2) the protection of Democratic incumbents. Id. at 1325. The court also heard testimony from Ms. Meggers regarding her work

with an individual house member to draft the house plan and the specific desires of various Democratic incumbents to achieve the required number of votes to pass a plan. Id. at 1326. Meggers testified that various legislators insisted that plans be drawn to lead to a successful congressional campaign. Id. at 1335. Meggers testified that “Democratic incumbents negotiated with the plans’ drafters to draw them the safest possible districts.” Id. at 1330. Senator Brown testified that the plans’ drafters intentionally drew the state legislative plans to minimize the loss of districts in the dwindling population of southern Georgia. Id. at 1328. The court considered additional testimony from Senator Johnson regarding the fact that many legislators had aspirations of being elected to Congress and had an interest in crafting a district they considered politically desirable. Id. at 1326. Senator Johnson’s testimony regarding the lack of desire to avoid splitting counties or precincts, the lack of effort in keeping communities of interest together, and the lack of discussion regarding compact districts was also admitted. Id. The court found this testimony, the testimony of Ms. Meggers and testimony from the legislators and their aides necessary to determine that the motives behind the plans failed to support a legitimate state interest in deviating with “one person, one vote” requirements.

Executive Defendants are asking Sanderoff to produce materials in the same vein as those admitted into evidence in Larios to show the motives behind the redistricting plans submitted by the Legislative Defendants so the Executive Defendants, and this Court, can determine whether there are legitimate state interests in the proposed population deviations that are contained in the legislative plans before this Court.

B. The Information Sought from Mr. Sanderoff Is Not Protected By The Speech And Debate Clause.

The Legislative Defendants claim that, despite the relevancy of the requested documents, the Sanderoff-legislator communications are protected by the Speech and Debate Clause, NM

Const. art IV, §13. Legislative Defendants' assertion is incorrect. Similar to the Federal Speech and Debate Clause, the New Mexico Speech and Debate Clause ensures wide freedom of speech, debate and deliberation without threats or intimidation and protects members of the legislature against prosecutions that directly impinge or threaten the legislative process. See Gravel v. United States, 408 U.S. 606, 616 (1972).² However, the protections afforded by the clause may not be "extended beyond the legislative sphere." Id. at 625. See also Holmes v. Farmer, 475 A.2d 976 (R.I. 1984). "The speech and debate clause has two definite purposes: first, to preserve the constitutional structure of separate, coequal, and independent branches of government; and second, to protect individual legislators from executive and judicial oversight that realistically threatens to control his conduct as a legislator." Holmes, 475 A.2d at 985 (internal citations omitted). The Speech and Debate Clause provides protections from past legislative acts, not promises to do a future act like "deliver a speech, to vote, or to solicit other votes at some future date" or a "promise to introduce a bill." United States v. Helstoski, 442 U.S. 477, 489 (1979). Thus, because the information requested does not result in civil or criminal liability and does not relate to a past legislative act, the requested information is not protected under the Speech and Debate Clause. See Rodriguez v. Pataki, 280 F.Supp.2d 89, 94 (S.D.N.Y. 2003) (stating the Speech and Debate Clause provides immunity for senators and representatives from any award of damages or prospective relief and protects them against the burden of defending themselves.).

C. The Information Requested from Mr. Sanderoff Is Not Protected By Legislative Privilege

Although courts have recognized a legislative privilege, under the circumstances of this case, the privilege is not applicable to Mr. Sanderoff. Legislative privilege is a concept that is

² As stated by Legislative Defendants, New Mexico courts have not interpreted the New Mexico Speech and Debate Clause; however, decisions applying similar constitutional clauses are instructive, including the United States Speech or Debate Clause.

closely related to that of legislative immunity as provided for under the Speech and Debate clause. Id. at 95. Although it is often times used interchangeably with the legislative immunity provided for under the Speech and Debate Clause, it is not absolute. Id. at 95. See, e.g., Marylanders for Fair Representation v. Schaefer, 144 F.R.D. 292, 305 (D.Md. 1952) (referring to testimonial legislative immunity). Because legislative privilege is not absolute, courts have required legislators to produce documents and testify at depositions notwithstanding their immunity from suit. Rodriguez, 280 F.Supp.2d at 95, citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) and citing Carver v. Foerster, 102 F.3d 96 104 (3d Cir 1996) (stating “judicial inquiry of legislative motive is not per se forbidden.”).

New Mexico courts implemented a balancing test to determine if privileges protect disclosure of documents. In State ex rel. Attorney Gen. v. First Judicial Dist. Court, 96 N.M. 254 (1981), the court stated “[a] person, through judicial process, is generally required to disclose any information he may possess that is relevant to a case pending before a court of justice.” Id. at 257. The court noted that there are exceptions to this general rule of disclosure, including a privilege of non-disclosure that is recognized or required by the New Mexico Constitution. In that case, the court found that Article III of the New Mexico Constitution requires recognition of a legislative privilege. See id. The court stated that the legislative privilege is not an absolute privilege. See Id. at 258. The legislative privilege is a qualified privilege. Id. The court stated that a finding of an absolute privilege would “conflict with the constitutional duty of the courts to do justice in matters brought before it.” Id. The court stated that “when [a legislative] privilege comes into confrontation with other values or interests which are also protected by law, a balancing of the protected interests must be undertaken by the courts.” Id. Specifically, “the trial court must balance the public's interest in preserving confidentiality to promote intra-

governmental candor with the individual's need for disclosure of the particular information sought.” Id.

In this case, evidence showing motives in developing or advocating certain redistricting plans to ensure compliance with “one person, one vote” requirements outweighs any asserted legislative privilege.

Likewise, federal courts have implemented a similar balancing test to determine whether access to the information outweighs the desire to keep the information confidential. Rodriguez v. Pataki, 280 F.Supp.2d 89, 95 (S.D.N.Y. 2003) and In re Grand Jury, 821 F.2d 946, 957 (3d Cir. 1987). In determining whether a legislative privilege should be upheld a court must consider “(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.” Rodriguez, 280 F. Supp. 2d at 100-01. Courts have simplified this analysis and found that the only documents that are protected by a legislative privilege are those that were "created prior to the passage and implementation [of a bill] that involve opinions, recommendations or advice about legislative decisions between legislators or between legislators and their aides.” Id., Comm. For a Fair & Balanced Map v. Ill. State Bd., 2011 U.S. Dist. LEXIS 117656, *33 (N.D. Ill. 2011). **The privilege does not extend to documents containing factually based information used in the decision making process.** Id. (emphasis added).

Even under the federal balancing test, the Legislative Defendants assertion of privilege fails. The Legislative Defendants rely on a broad brush assertion that because they are legislators, any documents relating to the redistricting plans are by default protected by the

legislative privilege. However, the requested information does not seek any document that involves recommendations or advice about legislative decisions. To the contrary, the requested information seeks “factually based information used in the decision making process” regarding the drafting of maps that were passed by the Legislature. The materials requested by the Executive Defendants are not protected by legislative privilege. See Rodriguez, 280 F.Supp.2d at 95. A contrary ruling would allow any legislator, specifically the Legislative Defendants, to cloak any document with legislative privilege. See ACORN v. County of Nassau, 2007 U.S. Dist. LEXIS 71058, *19 (E.D.N.Y 2007) (stating legislative privilege does not extend to every communication).

D. The Requested Information Is Not Protected By NMSA 1978 §2-3-13

The Legislative Defendants also contend that the requested communications are protected by NMSA 1978 §2-3-13, which provides that any employee of the LCS must maintain the confidences of the members of the legislature. Again, the Legislative Defendants are incorrect. The requirement of confidentiality does not provide an absolute privilege from disclosure of evidence in this case. Estate of Romero v. City of Santa Fe, 2006-NMSC-028, ¶ 19, 139 N.M. 671, 137 P.3d 611. In Romero, the court stated that although some statutes require maintenance of confidentiality, the confidentiality is not absolute. Id. The court stated that the interests of both parties need to be balanced and that “the party seeking to preclude disclosure has the burden of proving the information sought to be protected is confidential under a policy interest as expressed in NMSA 1978 §14-2-1.” The court further stated that even if the material is deemed to be confidential, the documents may still be discoverable if “the information constitutes evidence which is critical to the cause of action or defense.” Id. (internal citations omitted). In this case, as stated above, the information requested goes directly to whether the redistricting

plans submitted by the Legislative Defendants meet the “one person, one vote” requirements and is critical to the comparison of the plans submitted by the parties.

Further, Legislative Defendants assertion places Sanderoff in a tenuous position. New Mexico Statute Annotated 1978 § 2-3-13 provides:

[n]either the director nor any employee of the council service shall reveal to any person outside of the service the contents or nature of any request or statement for service, except with the consent of the person making such request or statement. They shall not urge or oppose any legislation, nor give to any member of the legislature advice concerning the economic or social effect of any bill or proposed bill except upon the request of such member.

New Mexico Statute Annotated 1978 §2-3-3(F) provides, “ [i]t shall be the duty of the legislative council ... to refrain from advocating or opposing the introduction or passage of legislation.”

The Legislative Defendants assert that Sanderoff must maintain the confidentiality of information disclosed by any person during his work on the redistricting plans as required by NMSA 1978 §2-3-13, but at the same time and contrary to the language in both NMSA 1978 §§2-3-13 and 2-3-3, Legislative Defendants assert that Sanderoff can assist them in advocating for plans developed during the legislative session. If Sanderoff is bound by the confidentiality required by LCS in NMSA 1978 §2-3-13 he is also bound by NMSA 1978 §2-3-3 which requires that Sanderoff not advocate for any bill. Legislative Defendants cannot assert that Sanderoff is bound by one statute without admitting that he is bound by the other.

E. Material Relied Upon By Sanderoff In Forming His Opinions Is Discoverable

As stated above, Sanderoff was retained as an expert in this litigation by the Legislative Defendants and was properly served with a Notice of Deposition Duces Tecum requesting materials clearly discoverable under Rule 1-026(B)(6). As an expert, Sanderoff is offering opinions in this case related to (1) proposed redistricting plans; and, (2) reasons why his firm, Research and Polling, Inc. drafted certain plans. If he relied upon any of the information

requested by Executive Defendants in the formulation of his opinions or in formulating redistricting plans, the information is discoverable under Rule 1-026 NMRA. Furthermore, the information is discoverable pursuant to the Stipulated Order Regarding Discovery to which all parties, including Legislative Defendants, agreed.


Conclusion

The materials requested in numbers 1.a and 10 in the Notice of Deposition Duces Tecum are not protected by the Speech and Debate Clause, legislative privilege or by the confidentiality requirements of NMSA 1978 §2-8-13. Sanderoff is a testifying expert and should be required to produce the documents upon which he relied and identify and disclose all communications with legislators and legislative staff which are probative of the assumptions and methodologies he used in formulating his opinions in this case and formulating the redistricting maps that were passed by the Legislature.

WHEREFORE, the Executive Defendants request this Court deny the Legislative Defendants' motion and any such other relief deemed necessary and proper.

Respectfully submitted,

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Certificate of Service

I hereby certify that on November 22, 2011, I filed the foregoing pleading electronically through the tyler tech system, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

I hereby certify that on November 22, 2011 I e-mailed a copy of the foregoing submission to the following:

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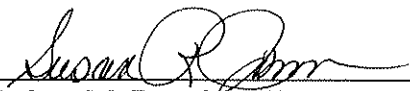
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