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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-007344 12/07/2015

HON. ROGER E. BRODMAN

CLERK OF THE COURT
D. Harding
Deputy

VINCE LEACH, et al.

BRETT W JOHNSON

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, et al.

MARY R O'GRADY

BRIAN M BERGIN
PAULA S BICKETT
JOSHUA CARDEN
BROCK J HEATHCOTTE
ADRIANE J HOFMEYR
KRISTIN L WINDTBERG
BRIAN SCHULMAN
JAMES DRISCOLL-MACEACHRON
KARA MARIE KARLSON
COLIN F CAMPBELL
ROOPALI HARDIN DESAI
PAUL K CHARLTON

UNDER ADVISEMENT RULING
ON DISCOVERY MOTIONS

The Court has reviewed Defendant Arizona Independent Redistricting Commission's Motion for Protective Order, Plaintiffs' Motion to Compel, Plaintiffs' Cross-Motion for Protective Order and the various responses and replies. The Court held oral argument on December 4, 2015.

The parties presented the Court with various disputed discovery issues. In many instances, the arguments made in the cross-motions are interrelated. The parties seek prompt resolution given that depositions are scheduled for December 10-11, 2015.

Commissioners Freeman and Stertz (the "waiving Commissioners") have waived the legislative privilege. Commissioners Mathis, McNulty and former Commissioner Herrera (the "non-waiving Commissioners") have not. There is no question that the legislative privilege extends to IRC commissioners. The issue, of course, is the extent of the privilege and the extent of the waiver.

The issues raised by the parties in the competing motions to fall into eight categories. Each of these issues is addressed below.

1. May the IRC obtain a blanket protective order to prevent the depositions of non-waiving Commissioners?

The IRC first asks for a protective order preventing the non-waiving Commissioners from being deposed because they are protected by the legislative privilege. This request, at least in part, is not controversial. Arizona law is clear that IRC commissioners have legislative privilege when formulating a redistricting plan. Arizona Independent Redistricting Commission v. Fields, 206 Ariz. 130, 139-40 (App. 2003). In fact, plaintiffs state that they "are not interested in individual deliberative processes." Plaintiffs' Motion to Compel at 4:5.

But not all actions taken by the IRC are subject to legislative privilege. The legislative privilege does not apply to application of existing policies, administrative acts or the hiring of mapping consultants. Montgomery v. Mathis, 231 Ariz. 103, 123-124 (App.2012). The Court rejects IRC's request for a blanket protective order preventing the depositions of non-waiving Commissioners. The Court believes the appropriate process is to go forward with the depositions. In the event the non-waiving Commissioners refuse to testify on the grounds of privilege and plaintiffs contest the claim, the parties can submit disputes to the Court after a record is developed.

IT IS ORDERED that the IRC's request for a blanket protective order for the non-waiving Commissioners is denied, and the non-waiving Commissioners may be deposed on non-privileged, relevant topics.

2. Should a protective order be entered to prevent the Commissioners from being deposed on the grounds that the depositions would be oppressive and duplicative?

The IRC next argues that the Commissioners have already been deposed in the Harris matter and any additional depositions are duplicative, unnecessary, oppressive and burdensome. The IRC states that the Commissioners have already dedicated hundreds of hours to the

redistricting process and should not have to participate in time-consuming, costly and unnecessarily redundant depositions.

The Court appreciates the extraordinary time commitments by the Commissioners. But redistricting is an important political issue and the Court agrees with Commissioner Stertz that the process must be clear and transparent. See Notice of Commissioner Stertz's Position on Pending Motions at 2:14-15. The Harris case involved federal law and federal issues, and the opinion in Harris specifically stated that by earlier order the court had limited discovery in that case and that the court did not permit "discovery that is not central to the federal claims or any other inappropriate burden under the Federal Rule of Civil Procedure 26(c)." Harris v. Arizona Independent Redistricting Commission, 993 F.Supp.2d 1042, 1071 (D.Ariz. 2014). The federal court did not address issues under Arizona's Open Meeting Law. This is a different case with different parties and some different issues. The Court agrees with plaintiffs that the IRC has failed to demonstrate good cause for a protective order.

IT IS ORDERED that the IRC's motion for a protective order is denied.

3. May the Commissioners who have invoked the legislative privilege prevent a Commissioner who has waived the privilege from testifying about certain issues?

Plaintiffs seek an order compelling the IRC to respond to written discovery requests. Plaintiffs also argue that the IRC has taken an overly broad view of the legislative privilege. In order to address the disputes over discovery responses, the Court first must address the effect and scope of the waiving Commissioners' waiver of the legislative privilege.

The IRC argues that "a Commissioner who is not asserting legislative privilege may not testify on matters otherwise protected by another Commissioner's legislative privilege." IRC's Response at 10:23-25. The IRC has objected to certain discovery on the grounds that the waiving Commissioners cannot waive the legislative privilege for the non-waiving Commissioners.

The legislative privilege is an individual privilege that belongs to the individual legislator. In Fields, the court held that: "the holder of a legislative privilege can waive the privilege on his or her own behalf or for aides. Thus, just as an IRC commissioner can waive the privilege concerning a subject by electing to testify about it, the commissioner can waive the privilege attaching to communications about that subject with a consultant by designating that consultant as a testifying expert." 206 Ariz. at 144, ¶48 (Citations omitted.) See also Marylanders For Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 298 (D.Md. 1992) (the "privilege is a personal one and may be waived or asserted by each individual legislator"). Thus,

the cases demonstrate that the legislative privilege is an individual privilege held by the individual legislator. It is not a privilege held by the institution.

Although there is authority demonstrating that a legislator may use the legislative privilege to prevent his or her aide from testifying, the Court was presented with no persuasive authority that one legislator can prevent another legislator from testifying under the guise of legislative privilege. The closest case on point cited by either party appears to be State v. Cano, 193 F.Supp.2d 1177, 1179 (C.D.Cal. 2002), where the court held that an individual legislator could waive the privilege over the objections of a majority of his or her peers, and may testify as to his or her own legislative acts and motivations, his or her opinions regarding the motivation of the body as a whole and the information on which the body acted. The majority of the Cano court held that the legislator could not testify as to legislative acts of legislators who had invoked the privilege.

The case of United States v. Renzi, 769 F.3d 731, 749 (9th Cir. 2014), presents an interesting overview of the legislative privilege but is distinguishable. In that case, Congressman Kolbe asserted the legislative privilege to prevent Kolbe's chief of staff from testifying about conversations between Kolbe and Congressman Renzi. Kolbe did not waive the legislative privilege, and the Ninth Circuit held that the privilege prevented Kolbe's aide from testifying in Renzi's defense. Nothing in that decision, however, suggests that Kolbe could have used the privilege to prevent Renzi from testifying about conversations between Kolbe and Renzi. Indeed, the Court has a hard time imagining a situation in which one congressman could prevent another congressman from testifying about joint communications. See United States Football League v. National Football League, 842 F.2d 1335, 1374-75 (2nd Cir. 1996) (legislative privilege did not prevent Sen. D'Amato from testifying about his own experiences with the NFL's lobbying efforts after formation of the USFL but he could not testify about hearsay statements made to other members of Congress); United States v. McDade, 28 F.3d 283, 294-5 (3rd Cir. 1994) (the constitutional protection against being questioned for his legislative acts does not prevent a member of Congress from offering such acts in his own defense, even though he thereby subjects himself to cross examination). The notion that one legislator could, by legislative privilege, stop a whistleblowing colleague from exposing improper behavior does not comport with sound public policy.

Moreover, the Court believes that the legislative privilege should be narrowly construed in this case. First, the Commissioners are not elected public officials. In Harris, the federal court found that the privilege asserted on behalf of elected officials was not a persuasive reason for extending the privilege to appointed citizen commissioners. Harris, 993 F.Supp.2d at 1069-1070. Although Harris involved federal law and did not discuss Arizona privilege, the Court does not believe Harris is wholly irrelevant. Arizona courts have looked to federal cases to help define the scope of the privilege. See Fields, 206 Ariz. at 137, n. 4 ("cases construing the federal Speech

and Debate Clause and the federal common law are persuasive in interpreting the scope of the immunity and privilege afforded by the Arizona Constitution").

Second, the redistricting process was intended to be more transparent than typical elected legislative actions. The Arizona Constitution expressly provides that the IRC must conduct its business in public. Ariz. Const. art. 4, pt. 2, section 1(12). See also Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission, 220 Ariz. 587, 591 (2009) ("To ensure transparency, the Commission must conduct its business in meetings open to the public, with 48 or more hours public notice required").

In short, the legislative privilege belongs to each individual Commissioner. The three non-waiving Commissioners cannot prevent waiving Commissioners Freeman and Stertz from testifying about legislative actions once Freeman and Stertz have voluntarily waived the legislative privilege. Of course, the privilege belongs to each individual Commissioner and nothing in this ruling requires the non-waiving Commissioners to testify about matters protected by their own legislative privilege.

IT IS ORDERED for those Commissioners who have voluntarily waived their individual legislative privilege and for Commission staff or retained consultants providing services directly for those waiving Commissioners, the scope of the depositions or discovery will not be limited by the legislative privilege.

4. Does the legislative privilege prevent inquiry into the mapping consultants' communications with the waiving Commissioners?

The IRC hired Strategic Telemetry as the IRC's mapping consultant. There is no question that the legislative privilege can extend to consultants. In Fields, the court held that "to the extent the IRC engaged [the mapping consultant] to perform acts that would be privileged if performed by the commissioners themselves, these acts are protected by legislative privilege." Id. at 140, ¶30. This privilege extends to documents created by the consultants. Id. at ¶32. The doctrine is "less absolute" when applied to staff members, officers, or other employees. Marylanders for Fair Representation, supra, 144 F.R.D. at 298, citing Dombrowski v. Eastland, 387 U.S. 82, 85 (1967).

Nevertheless, as noted above, a "commissioner can waive the privilege attaching to communications about that subject with a consultant." Fields, 206 Ariz. at 144, ¶48. Assuming Freeman and Stertz have waived the privilege, any communications between the consultant and Freeman or Stertz are not protected by the legislative privilege. If Freeman and Stertz have waived the legislative privilege and choose to testify about their legislative acts, they can waive

the privilege based on documents they relied upon in making their decisions – including reports prepared by the consultants and submitted to the entire Commission.

Given that the legislative privilege is to protect legislators (not consultants) from the burden of defending themselves, and given that the privilege is "less absolute" as applied staff and consultants, the Court finds that the legislative privilege should be narrowly construed as applied to the consultants. As a result, the consultant can testify about communications and documents sent to the waiving Commissioners. The consultant cannot be made to testify about communications relating to legislative matters made exclusively to non-waiving Commissioners.

IT IS ORDERED that the legislative privilege does not prevent inquiry into any communications between Strategic Telemetry and the waiving Commissioners. Similarly, the legislative privilege does not prevent inquiry into any communications between commission staff members and the waiving Commissioners. Accordingly, the IRC may not withhold as privileged any documents provided to Commissioners Freeman and Stertz (provided, of course, that Freeman and Stertz have waived the privilege).

5. Should a protective order be entered on plaintiffs' cross-motion?

Plaintiffs seek a protective order preventing the non-waiving Commissioners' counsel from attending or interfering with the depositions of non-commissioners and third parties. The IRC objects to the protective order, but agrees that "their role should be limited to making objections to protect the legislative privilege of the Commissioners they represent." Response at 2:14-15.

Plaintiffs failed to demonstrate that the Commissioners' counsel will be "obstructionist." The Court finds that the Commissioners' separate counsel should be permitted to attend the depositions of third-party witnesses for the purpose of asserting legislative privilege. The Court has outlined the parameters of the legislative privilege and the Court expects the Commissioners' attorneys to follow this Court's ruling or obtain relief from a higher authority.

IT IS ORDERED that plaintiffs' motion for a protective order is denied without prejudice. The Commissioners' counsel may attend the depositions, but their role is limited to making objections to protect the Commissioners they represent. If later events demonstrate "obstructionist" behaviors, the issue can be re-addressed by the Court.

6. Does the legislative privilege bar inquiry into the testimony of third parties who are not Commission aides or employees?

Plaintiffs allege that IRC has asserted legislative privilege objections to third parties who are not employed by the IRC and who do not serve as aides to the Commissioners.

The legislative privilege is an individual privilege, not a privilege governing the communication. It protects non-waiving legislators from testifying about any communications with third parties if such communications were part of a discretionary policymaking decision that may have prospective implications (i.e., legislative acts). The Court agrees with the IRC that, by itself, a legislator's speaking to or communicating with a third party does not waive the legislative privilege. (Speaking to third parties -- including constituents -- is what legislators do.) On the other hand, the legislative privilege applies only to the legislator and his or her aides. It does not apply to third parties who are not employed by the IRC and who are not the Commissioners' aides. See Cano, supra, 193 F.Supp.2d at 1179 (legislative privilege does not prevent a third party non-legislator from testifying to conversations with legislators and their staffs).

As a result, the IRC may assert the legislative privilege to prevent disclosure of IRC records or non-waiving Commissioner's testimony concerning any third parties who communicated with non-waiving Commissioners about legislative acts, but the IRC may not use the legislative privilege to prevent third parties themselves from disclosing or testifying about communications with any Commissioners.

IT IS ORDERED that the IRC may assert the legislative privilege over IRC records related to third party communications with non-waiving Commissioners, but only for communications that are part of or related to legislative acts. Similarly, non-waiving Commissioners may assert the legislative privilege to avoid testifying about communications with third parties related to legislative acts.

IT IS FURTHER ORDERED that the IRC cannot prevent third parties who are neither aides nor employed by the Commission from testifying under the guise of the legislative privilege.

7. Scope of non-waiving Commissioners', aides' and third parties' depositions.

By denying the IRC's request for a protective order, the Court has ruled that the depositions of the non-waiving Commissioners are not overly broad and burdensome and should go forward. The Court has also observed that non-waiving Commissioners may assert the legislative privilege concerning deliberative/legislative acts.

The Court suspects that these rulings will not end all debate on the scope of the legislative privilege. All parties seek the Court's guidance. Unfortunately, one cannot define the legislative privilege with a bright line standard. As explained in Fields:

> [W]hether an act is "legislative" depends on the nature of the act. An act is legislative in nature when it bears the "hallmarks of traditional legislation" by reflecting a discretionary policymaking decision that may have prospective implications, as distinguished from an application of existing policies . . . Further, a legislative act occurs in "a field where legislators traditionally have power to act."

206 Ariz. at 138, ¶21 (citations omitted). The legislative privilege does not "extend to cloak all things in any way related to the legislative process." Fields, cited in Montgomery, 231 Ariz. at 122, ¶75. Of course, the court of appeals has already determined that the "IRC's deliberations about whether to hire a particular mapping consultant are not cloaked by legislative privilege." Id. at 123, ¶80.

This Court does not believe issues related to compliance with the Open Meetings Law should be cloaked in legislative privilege. Issues related to OML compliance, like the decision to hire a mapping consultant, "cannot be said to have the 'force of law' with 'prospective application.'" Montgomery, 231 Ariz. 123, ¶80.

Plaintiffs seek an order "to compel AIRC to cease legislative privilege objections to questions regarding administrative and non-privileged factual material to be posed at depositions . . ." Plaintiffs' Motion to Compel at 2:5-7. This Court has expressed the view that OML issues are not protected by the legislative privilege. Beyond that generic statement, the Court will not, in the abstract, engage in advisory opinions or pre-deposition determinations of what is legislatively privileged and what is not. The Court expects all counsel to behave reasonably and in good faith during depositions and make legally appropriate objections. To the extent discovery disputes arise, the parties can bring the matter to the Court's attention after the issue becomes ripe and an appropriate record supports the issues in dispute.

IT IS ORDERED that plaintiffs' request that the Court "define the scope of any depositions in advance of such testimony" is denied to the extent this Order does not resolve the issue.

For the same reason, the Court declines to rule on issues related to Mr. Mathis' deposition. The issue is not yet ripe. Mr. Mathis is a third party and the Court is unaware of any motion to quash a subpoena for his deposition. Although Mr. Mathis may not assert the legislative privilege, there appear to be issues involving the two types of marital privileges. The

Court will not issue a pre-deposition advisory ruling on what is or is not covered by the marital privilege. The Court can rule on the issues once the record is developed.

8. Other Orders

The Court made several findings concerning the scope and applicability of the legislative privilege. These rulings, of course, apply to written discovery.

IT IS ORDERED that, within 14 days of the date of this Order, the IRC supplement any answers to discovery in accordance with the rulings set forth in this Order.