

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

)	
League of Women Voters of Pennsylvania,)	
)	
<i>et al.</i> ,)	
)	Civ. No. <u>261 MD 2017</u>
<i>Petitioners,</i>)	
)	
v.)	
)	
The Commonwealth of Pennsylvania,)	
)	
<i>et al.</i> ,)	
)	
<i>Respondents.</i>)	

ORDER

NOW, this ____ day of December, 2017, upon consideration of the Application of Legislative Respondents to Preclude Introduction of Privileged Evidence Otherwise Obtained in the *Agre* Case, it is hereby ordered that Petitioners are barred from filing, disclosing, or otherwise using in this Court any testimony or documents obtained in the *Agre* case that this Court has already held are protected from discovery based upon Legislative Respondents’ absolute immunity.

P. KEVIN BROBSON, Judge

BLANK ROME LLP
Brian S. Paszamant (PA #78410)
Jason A. Snyderman (PA #80239)
John P. Wixted (PA #309033)
130 North 18th Street
Philadelphia, PA 19103-6998
Phone: 215-569-5500
Facsimile: 215-569-5555
Counsel for Joseph B. Scarnati III

**HOLTZMAN VOGEL JOSEFIAK
TORCHINSKY PLLC**
Jason Torchinsky
Shawn Sheehy
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Phone: 540-341-8808
Facsimile: 540-341-8809
*Admitted Pro Hac Vice Counsel for
Michael C. Turzai and
Joseph B. Scarnati III*

CIPRIANI & WERNER, P.C.
Kathleen A. Gallagher (PA #37950)
Carolyn Batz McGee (PA #208815)
650 Washington Road, Suite 700
Pittsburgh, PA 15228
Phone: 412-563-2500
Facsimile: 412-563-2080
Counsel for Michael C. Turzai

BAKER & HOSTETLER LLP
Patrick L. Lewis
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114
Phone: 216-621-0200

Robert J. Tucker
200 Civic Center Drive, Suite 1200
Columbus, OH 43215
Phone: 614-462-2680
*Admitted Pro Hac Vice Counsel for
Michael C. Turzai*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, *et al.*,
Petitioners,
v.
The Commonwealth of Pennsylvania, *et al.*,
Respondents.

)
)
) Civ. No. 261 MD 2017
)
)
)
)
)
)
)
)

**APPLICATION OF LEGISLATIVE RESPONDENTS TO PRECLUDE
INTRODUCTION OF PRIVILEGED EVIDENCE OTHERWISE
OBTAINED IN THE AGRE CASE**

Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, in his official capacity as Senate President Pro Tempore (“Legislative Respondents”), move this Court for an order barring Petitioners from filing, disclosing, introducing or otherwise using in this Court any testimony or documents protected by the legislative or deliberative process privileges that were produced or provided in the matter of *Agre v. Wolf, et al.*, E.D. Pa. No. 2:17-cv-4392.

On November 22, 2017, this Court held that Pennsylvania’s Speech and Debate Clause, Article 2, Section 15 of the Pennsylvania Constitution, provides absolute legislative immunity to the Legislative Respondents for activities within the “sphere of legitimate legislative activity,” which includes the consideration and passage of Pennsylvania’s 2011 Congressional redistricting plan (the “Commonwealth Order”). Thus, it held that it lacked authority to compel testimony or the production of documents relative to the intentions, motivations, and activities of state legislators and their staff with respect to the 2011 Plan. (*Id.*, pg. 7). Moreover, this Court quashed a series of subpoenas issued to Legislative Defendants’ current and/or former employees, legislative aides, consultants, experts, and agents. (*Id.*, pgs. 7-8).

As this Court is well aware, the 2011 Plan is also being challenged in the United States District Court for the Eastern District of Pennsylvania, *Agre v. Wolf, et al.*, E.D. Pa. No. 2:17-cv-4392 (“*Agre*”). In *Agre*, Legislative Respondents likewise invoked the protections of the legislative and deliberative process privileges in response to discovery from the plaintiffs. The *Agre* Court, however, denied motions for a protective order finding that, under federal law, the legislative and deliberative process privileges are qualified, and that it did not see any reason to protect such information from discovery (the “Federal Court Orders”). (Attached as Exs. A & B). Legislative Respondents filed this Court’s order with the *Agre* Court. In response, the *Agre* Court stated as follows:

Although we have respect for the decision of the Commonwealth Court interpreting Pennsylvania law, we note that this is federal court, adjudicating a claim under the Constitution and laws of the United States, and pursuant to Fed. R. Evid. 501, we are guided by federal law in determining privilege issues.

(Ex. B at pg. 3). As such, Plaintiffs in the *Agre* case have been able to obtain discovery, including testimony and document productions from Legislative Respondents, that is protected from disclosure in this case.

The Commonwealth Order and the Federal Orders addressed the same issue, but came to opposite conclusions.¹ Yet, the reason for this outcome is clear. As this Court noted, unlike Pennsylvania state courts, “Federal courts are not compelled to honor state constitutional protections afforded to legislatures.” (Commonwealth Order, pg. 4; *see also* Ex. B, pg. 3).

This Court held that Legislative Respondents have absolute immunity under the legislative and deliberative process privileges, and that the Pennsylvania Speech and Debate Clause “must be construed broadly in order to protect legislators from *judicial interference* with their legitimate legislation activities.” (Commonwealth Order, pg. 2, quoting *Consumers Educ. and Prot. Ass’n v. Nolan*, 368 A.2d 675, 681 (Pa. 1977)). Allowing Petitioners to file, disclose, or otherwise use protected documents they obtained in the *Agre* case would violate the spirit, and arguably the letter, of the Commonwealth Order. If Petitioners are not precluded from filing, disclosing, or otherwise using the testimony and documents obtained in *Agre* that are protected from disclosure here, then the message to future litigants is clear: the Pennsylvania State Constitution can easily be circumvented by filing a collateral or related action in federal court. Such maneuvering would not only gut the privilege, but it would undermine the broad shield to “protect

¹Legislative Respondents respectfully disagree with the Federal Orders, and submit that the testimony provided and documents produced in response to the Federal Orders are privileged under state or federal law.

legislatures from judicial interference.” *Consumers Educ. and Prot. Ass’n v. Nolan*, 368 A.2d 675, 681 (Pa. 1977). Moreover, it would encourage forum shopping for discovery purposes. Where a party cannot obtain the discovery they need in one court, they can go to another court, specifically a federal court that may review legislative privilege matters under a less stringent standard. This concern is heightened by the fact that parallel litigation is often filed over redistricting plans, as it is here.²

Legislative Defendants’ concern that discovery obtained in *Agre* will be used in this case is well founded. Indeed, one of Petitioners’ experts in this case (who is not an expert in the *Agre* case) relies upon data produced in *Agre*, but that was not produced in this case. Legislative Respondents will be filing a motion in limine to exclude that portion of his report, but reference it here as justification for their concerns.

For the reasons outlined above, and out of an abundance of caution, Legislative Respondents move this Court for an order barring Petitioners’ from filing, disclosing, or otherwise using in this Court any testimony or documents

² Despite their objections, Legislative Respondents were ordered to submit to depositions and produce documents they asserted were protected by the legislative and deliberative process privileges in *Agre*. But that compelled production cannot be considered to have waived any privilege. *See Transamerica Computer Co. v. IBM*, 573 F.2d 646 (9th Cir. 1978) (attorney-client privilege not waived where party was compelled to produce privileged documents in earlier case); *see also Brown v. Parking Auth.*, No. 00-bk-5765, 2002 U.S. Dist. LEXIS 14585, at *15 (D.N.J. Bank. July 30, 2002) (production of documents ordered by a court is not a waiver of the privilege because such production is not voluntary).

obtained in the *Agre* case that this Court has already held are protected from discovery based upon Legislative Respondents' absolute immunity.

December 3, 2017

Respectfully Submitted

BLANK ROME LLP

/s/ Brian S. Paszamant
BRIAN S. PASZAMANT
JASON A. SNYDERMAN
JOHN P. WIXTED
One Logan Square
130 N. 18th Street
Philadelphia, Pennsylvania 19103
Phone: 215-569-5791
Facsimile: 215-832-5791
Email: paszamant@blankrome.com
snyderman@blankrome.com
jwixed@blankrome.com
*Attorneys for Respondent Senator
Joseph B. Scarnati III*

CIPRIANI & WERNER, P.C.

/s/ Kathleen A. Gallagher
KATHLEEN A. GALLAGHER
CAROLYN BATZ MCGEE
650 Washington Road, Suite 700
Pittsburgh, Pennsylvania 15228
Phone: 412-563-4978
Email: kgallagher@c-wlaw.com
cmcgee@c-wlaw.com
*Attorneys for Respondent
Representative Michael C. Turzai*

**HOLTZMAN VOGEL JOSEFIAK
TORCHINSKY PLLC**

/s/ Jason Torchinsky

JASON TORCHINSKY
(admitted *Pro Hac Vice*)
SHAWN SHEEHY
(admitted *Pro Hac Vice*)
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Facsimile: 540-341-8809
Email: jtorchinsky@hvjt.law
ssheehy@hvjt.law

*Attorneys for Respondents
Senator Joseph B. Scarnati III and
Representative Michael C. Turzai*

BAKER & HOSTETLER LLP

/s/ Patrick T. Lewis

PATRICK T. LEWIS
(admitted *Pro Hac Vice*)
Key Tower
127 Public Square
Suite 2000
Cleveland, Ohio 44114
Phone: 216-621-0200
Email: plewis@bakerlaw.com

ROBERT J. TUCKER
(admitted *Pro Hac Vice*)
200 Civic Center Drive, Suite 1200
Columbus, Ohio 43215
Phone: 614-462-2680
Email: rtucker@bakerlaw.com
*Attorneys for Legislative Respondent
Representative Michael C. Turzai*

CERTIFICATE OF SERVICE

I, Kathleen A. Gallagher, hereby certify that on December 3, 2017, a true and correct copy of the foregoing *Application of Legislative Respondents to Preclude Introduction of Privileged Evidence Otherwise Obtained in the Agre Case* was filed electronically via PACFile with the Court, which will send a notice to all counsel of record, and which service satisfies the requirements of Pa. R.A.P. 121.

Respectfully submitted,

/s/ Kathleen A. Gallagher
KATHLEEN A. GALLAGHER

EXHIBIT “A”

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p>LOUIS AGRE, <i>et al.</i></p> <p style="text-align: center;">v.</p> <p>THOMAS W. WOLF, Governor of Pennsylvania, ROBERT TORRES[*], Acting Secretary of State of Pennsylvania, JONATHAN MARKS, Commissioner of the Bureau of Elections – in their official capacities.</p>	<p>CIVIL ACTION</p> <p>NO. 17-4392</p>
---	--

ORDER

BEFORE: Smith, Chief Circuit Judge; Shwartz, Circuit Judge; Baylson, District Judge:

The Legislative Defendant, Michael C. Turzai, in his official capacity as Speaker of the Pennsylvania House of Representatives (the “Speaker”) has filed a Motion for Protective Order (ECF 87), contending that he should not be deposed at all, and if a deposition is allowed, that he can invoke legislative privilege barring any testimony about his deliberative process or subjective intent regarding the 2011 Congressional redistricting at issue in this case. Speaker’s Motion also extends to any information relating to fact finding, information gathering, and investigative activities in consideration of redistricting legislation, and would arguably extend to production of documents that this Court has previously ordered, including documents from third parties.

The Speaker’s Motion for Protective Order will be **DENIED**. There is no claim of privilege as to documents and communications with third parties. The Court does not recognize as authoritative any precedent that implies that the Speaker can refuse to answer questions about his own intent, motive, communications with the public or outside of the members and staff of

^{*} As of October 11, 2017, Robert Torres is the Acting Secretary of the Commonwealth of Pennsylvania and is hereby substituted as a defendant. *See* Fed. R. Civ. P. 25(d).

the legislature. The Court recognizes that some decisions have allowed for a “deliberative process privilege” extending to internal communications leading up to the passage of legislation. However, it appears that no court has ever held that this is an absolute privilege, but only a qualified privilege. Upon consideration of the important issues in this case, and the fact that the scope of discovery in this case is generally limited to a period of 2010-2012, i.e. at least five years old, and the fact that intent and/or motive are factors considering in gerrymandering cases, see, e.g., Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 797 (2017), the Court sees no reason to protect any of this information from discovery in this case. Therefore, it is on this 22nd day of November, 2017 ORDERED that the Speaker’s Motion for Protective Order [ECF No. 87] is **DENIED**

BY THE COURT:

/s/ **Michael M. Baylson**

11/22/2017

MICHAEL M. BAYLSON
United States District Court Judge

O:\CIVIL 17\17-4392 Agre v Wolf\17cv4392 order 11222017.docx

EXHIBIT “B”

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p>LOUIS AGRE, et al.</p> <p style="text-align:center">v.</p> <p>THOMAS W. WOLF, Governor of Pennsylvania, ROBERT TORRES*, Acting Secretary of State of Pennsylvania, JONATHAN MARKS, Commissioner of the Bureau of Elections – in their official capacities.</p>	<p>CIVIL ACTION</p> <p>NO. 17-4392</p>
--	--

**ORDER RE: ASSERTION OF LEGISLATIVE PRIVILEGE
AND DELIBERATIVE PRIVILEGE AND
“CONSENT” MOTION FOR PROTECTIVE ORDER**

BEFORE: Smith, Chief Circuit Judge; Shwartz, Circuit Judge; Baylson, District Judge:

Issues have been presented which relate to the assertion by the Legislative Intervenor Defendants of legislative privilege and deliberative privilege, and a Privilege Log by Speaker Turzai (ECF 118). This Court has previously entered an order denying Speaker Turzai’s Motion for a Protective Order based on these privileges (ECF 114). Counsel for Speaker Turzai have apparently interpreted that Order as extending only to Speaker Turzai’s deposition. The Court, however, intended it as a ruling on any assertion of legislative privilege or deliberative privilege. The Court notes that Senator Scarnati had filed a similar motion (ECF 111), but then counsel withdrew it (ECF 117). It appears from the documents that Speaker Turzai’s deposition is scheduled for Tuesday, November 28, 2017 and therefore this Court will rule promptly on pending motions related to this issue.

In addition, counsel for Plaintiffs and Speaker Turzai have entered into a “stipulated protective order” and filed a “Consent Motion for the Entry of Protective Order” (ECF 116),

* As of October 11, 2017, Robert Torres is the Acting Secretary of the Commonwealth of Pennsylvania and is hereby substituted as a defendant. *See* Fed. R. Civ. P. 25(d).

which would keep any privileged material “confidential,” with limited exceptions. However, the Executive Defendants, Governor Wolf, et al. did not consent and have asserted an opposition to the entry of this protective order, primarily citing Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994), which is the leading case in this Circuit limiting the designation of discovery materials, in a case of public interest, as confidential.

The Court has reviewed the “Joint Privilege Log Regarding Legislative Defendant Speaker Turzai’s Privilege Log” (ECF 118 and 123) which contains statements by both Plaintiffs and Speaker Turzai on the assertion of this privilege. The Court **OVERULES** all of the Speaker’s objections to producing documents based on legislative or deliberative privilege. The Court has considered the claims in the case and the contents of the privilege log and has again concluded that the information is relevant and may shed light on the intent/motivation for the map; the information is sought in a serious litigation that seeks to enforce public rights; the information sought provides information about legislative purpose that cannot be obtain from alternate sources, and prohibiting access to such information “could thus obscure important evidence of the purpose and intent of the legislative action.” Benisek v. Lamone, 241 F. Supp.3d 566, 575-76 (D. Md. 2017). We have considered whether ordering disclosure would have any chilling effect or future timidity on the part of the Legislature and have concluded that the serious issues in the case and the Legislature’s role in crafting the redistricting plan at issue and the fact that the Legislature is the only source of the evidence concerning its intent and motivation all outweigh this minimal potential effect.

The Court notes that both Legislative Defendants, Speaker Turzai and Senator Scarnati, have filed a Notice of Additional Authority (ECF 110), which cites to a decision of Judge Brobson of the Commonwealth Court in the pending “Pennsylvania” litigation, enforcing

Pennsylvania's absolute privilege against discovery into legislative activity. Although we have respect for the decision of the Commonwealth Court interpreting Pennsylvania law, we note that this is a federal court, adjudicating a claim under the Constitution and laws of the United States and pursuant to Fed. R. Evid. 501, we are guided by federal law in determining privilege issues.

This Court, on this 28th day of November, 2017, therefore **ORDERS** that Speaker Turzai shall produce all of the documents for which he has asserted legislative or deliberative privilege, prior to or during his deposition.

In addition, the Court will **DENY** the Consent Motion for Protective Order (ECF 116).

BY THE COURT:

/s/ Michael M. Baylson

11/28/2017

MICHAEL M. BAYLSON
United States District Court Judge

O:\CIVIL 17\17-4392 Agre v Wolf\17cv4392 order 3 - 11222017.docx