

SUPREME COURT OF NORTH CAROLINA

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MARGARET DICKSON, *et al.* )

*Plaintiffs,* )

v. )

From Wake County

ROBERT RUCHO, *et al.* )

*Defendants.* )

NORTH CAROLINA STATE )

CONFERENCE OF BRANCHES OF )

THE NAACP; *et al.* )

*Plaintiffs,* )

v. )

THE STATE OF NORTH CAROLINA, )

*et al.* )

*Defendants.* )

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LEGISLATIVE DEFENDANTS' REPLY BRIEF

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LEGISLATIVE DEFENDANTS' REPLY BRIEF

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## ARGUMENT

### **I. The Redistricting Statutes Are Acts Of The People Who Are Entitled To The Same Rights And Privileges Available To All Litigants.**

Plaintiffs attempt to cast the script of this case, but do so with the wrong characters. Plaintiffs cast themselves as the protagonists, the alleged “public” with a supposed right to review documents covered by the attorney-client privilege and work product doctrine. Plaintiffs cast the legislative defendants as the antagonists, allegedly attempting to “hide” information from the “public.” Plaintiffs have scripted this case backwards.

The people of North Carolina are represented in this case by the legislative defendants who, acting in their official capacity, constitute the “public,” not the plaintiffs. The plaintiffs, at best, are self-interested citizens pursuing a particular litigation outcome. On the other hand, acts of the legislative defendants are acts of the people of the State of North Carolina. *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). The legislative power rests “with the people and is exercised through the General Assembly, which functions as an arm of the electorate.” *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001). Moreover, any act of the people, through the General Assembly, “is presumed valid unless it conflicts with the Constitution.” *Id.*

The people of North Carolina, as represented by the legislative defendants, have a strong – and constitutionally protected – interest in seeing the redistricting statutes challenged by the plaintiffs declared valid absent proof by the plaintiffs that the statutes violate the federal or state constitutions. It is the plaintiffs, not the defendants, who are attempting to subvert the will of the people by advocating a position that would hinder the people’s representatives from defending their presumptively constitutional acts.<sup>1</sup> There is no evidence in N.C. Gen. Stat. § 120-133, or otherwise, that the people have hamstrung their representatives in the General Assembly from defending presumptively constitutional acts by stripping them of the attorney-client privilege or work product doctrine.

Indeed, on its face, plaintiffs’ position calls for an absurd construction of N.C. Gen. Stat. § 120-133. Plaintiffs would have this Court believe that a statute that does not even mention the attorney-client privilege or work product doctrine nonetheless waives those privileges, and gives politically motivated litigation actors an “unfair” litigation “[a]dvantage” over the people themselves. Restatement (Third) of the Law Governing Lawyers §

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<sup>1</sup> The people of North Carolina also have a strong interest in seeing the redistricting statutes declared valid in a timely manner. The discovery period concluded in this case on June 29, 2012, and summary judgment motions are due August 3, 2012. A ruling affirming the lower court’s order will by necessity require the re-opening of discovery and ultimately delay the resolution of this case.

74 cmt. b (2000). Plaintiffs seek this illogical interpretation despite decades in which N.C. Gen. Stat. § 120-133 has been administered as not waiving those privileges, and centuries of common law, never abrogated by the people, protecting those privileges for all litigants.<sup>2</sup>

## **II. Plaintiffs' Argument That Defendants Have Hidden Documents is Irresponsible.**

Plaintiffs attempt to inflame the Court against defendants by arguing that the legislative defendants are “hiding” documents. When did a party’s resistance to the production of attorney-client privileged information become equivalent to “hiding” documents? These arguments would be considered frivolous if they were made to compel the production of attorney-client or work product information from any other party. The legislative defendants have exercised rights and privileges available to all other litigants, and that were in fact exercised by counsel for the plaintiffs and their clients when they represented the legislature.

In fact, the 2011 General Assembly has been the most transparent legislature in modern history regarding its motives and criteria for the

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<sup>2</sup> To the extent plaintiffs *now* contend or imply that the attorney-client privilege or work product doctrine do not apply to government actors, they have failed to cite any authority denying the protection of those doctrines to government entities. It cannot be disputed that those privileges belong to all litigants in North Carolina courts, unless this Court holds otherwise. Defendants are not aware of any such contrary authority.

creation of new voting districts. During the discovery period in this case, hundreds of thousands of pages of documents have been requested and produced, requiring a herculean effort by legislative staff and counsel. Included within these documents are hundreds if not thousands of draft redistricting maps, information requests by legislators, and responses to information requests by staff. The few documents excluded are communications between clients and counsel regarding legal advice or documents prepared by counsel in preparation for federal preclearance litigation and in anticipation of lawsuits challenging the plans under state and federal law.

Moreover, the 2011 General Assembly's redistricting criteria has been disclosed to an unprecedented extent. Senator Rucho and Representative Lewis, the respective Chairs of the legislative redistricting committees, released five joint statements explaining the criteria they followed in drafting the redistricting plans.<sup>3</sup> These statements have long been available to the general public and the plaintiffs. (See <http://www.ncleg.net/representation/redistricting.aspx> under the section

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<sup>3</sup> These criteria were ratified by the entire General Assembly when it enacted the 2011 redistricting plans.

titled, "2011 Documents").<sup>4</sup> No previous legislative leaders have explained redistricting criteria adopted by the General Assembly to this extent.

In addition, Senator Rucho and Representative Lewis waived their testimonial legislative privilege during depositions conducted by the plaintiffs. They have both been fully examined on the criteria used to draw the redistricting plans and the legislative process. Further, all four individuals engaged by the 2011 General Assembly to draw maps on redistricting software have been deposed by the plaintiffs (Joel Raupe, John Morgan, Dale Oldham, and Dr. Thomas Hofeller).<sup>5</sup>

For these and other reasons, plaintiffs' citation to the decision in *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 2012 U.S. Dist. LEXIS 501 (E.D. Wis. Jan. 3, 2012) is irresponsible. Plaintiffs cite the Court to the second and third of three relevant orders issued by the federal district court in *Baldus*. On page 43 of their brief, plaintiffs quote a statement from the *Baldus* order of January 3, 2012, arguing that defendants in this case have hidden documents "behind a charade masking as a

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<sup>4</sup> Plaintiffs contend that the criteria explained in these statements fail to comply with the law. This being so, the issues presented by this case are issues of law for which attorney-client communications will have little if any relevance.

<sup>5</sup> Dr. Hofeller was deposed on June 29, 2012. Plaintiffs did not conclude the deposition and defendants have consented to continue this deposition on a mutually convenient date even though discovery is closed.

privilege.” Plaintiffs then cite the *Baldus* order of December 20, 2011, inferring that defendants have “misuse[d]” public funds by permitting their attorneys “hired with taxpayer money to conceal from the taxpayers themselves otherwise admissible evidence of allegedly unconstitutional motives . . . .” (Appellees’ Br. at 44).

Plaintiffs failed to provide the Court with the *Baldus* court’s initial order granting the *Baldus* plaintiffs’ motion to enforce their subpoena. See *Baldus v. Members of the Wis. Gov’t Accountability Bd.*, Case. No. 11-CV-562, 2011 U.S. Dist LEXIS 142338 (E.D. Wis. Dec. 8, 2011) (unpublished) (attached as Exhibit A in Addendum). A review of this order shows that the *Baldus* court fully endorsed a position nearly identical to defendants’ position in this case. In its original order, the *Baldus* court agreed that the public redistricting actor had the right to withhold documents covered by the attorney-client privilege. *Id.* at \*6. Thus, disclosure of communications between the public actor with “an attorney acting as an attorney” would not have been ordered to be disclosed by the *Baldus* court. *Id.* Instead, the *Baldus* court granted plaintiffs’ motion to enforce their subpoena because

the consultant in question acted as a redistricting consultant and not as an attorney. *Id.*<sup>6</sup>

In contrast to the *Baldus* defendants, the defendants in this case have disclosed all of the consultants engaged by them to draw maps or to provide other non-legal redistricting advice. Plaintiffs fully examined these witnesses on the instructions they received from the legislative leaders, criteria they followed in drawing redistricting maps, and any maps drawn by each consultant. There is no valid comparison between defendants' actions and the concealment of non-privileged information attempted by the *Baldus* defendants.

**III. Article 17 Does Not Expressly Waive Attorney-Client Privilege Or The Work Product Doctrine And The Court's Order Below Can Be Sustained Only If The Court Implies A Waiver In Contravention Of Its Precedent.**

Plaintiffs argue that N.C. Gen. Stat. § 120-133 is an express waiver of the attorney-client privilege and work product doctrine because of the various terms used in the statute, none of which mention those privileges. They are wrong. Nothing in N.C. Gen. Stat. § 120-133 expressly and unambiguously waives the attorney-client privilege or work product

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<sup>6</sup> In its original order, the *Baldus* court identified the consultant in question as an attorney. The *Baldus* court corrected its error in a subsequent order. *Baldus v. Members of the Wis. Gov't Accountability Bd.*, Case. No. 11-CV-562, 2011 U.S. Dist. LEXIS 146869, at \*4 (E.D. Wis. Dec. 20, 2011) (unpublished) (attached as Exhibit B in Addendum).

doctrine. Indeed, the *only* thing that is completely *unambiguous* about Article 17 in general and N.C. Gen. Stat. § 120-133 in particular is their *failure* to address the attorney-client privilege or work product doctrine.

Plaintiffs go to great lengths trying to demonstrate that the words in N.C. Gen. Stat. § 120-133 are unambiguous. (Appellees’ Br. at 14-18). While they are not correct about the terms they do address, plaintiffs also fail to address other terms in the statute. For instance, N.C. Gen. Stat. § 120-133 refers specifically to “drafting and information requests.” Plaintiffs do not address these terms. What is a “drafting request?” What is an “information request?” These undefined terms have a myriad of different possible interpretations.<sup>7</sup> Whatever these terms mean, they cannot reasonably be construed to include requests for or communications providing legal advice. Under this Court’s established precedent, it will not interpret these terms as covering other terms not expressly included therein,

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<sup>7</sup> Article 17 also makes it clear that the term “documents” in that Article is limited to documents regarding “information requests” and “drafting requests.” N.C. Gen. Stat. § 120-130(c) (“Any supporting documents submitted or caused to be submitted to a legislative employee by a legislator *in connection with* a drafting or information request are confidential.”) (emphasis added). Thus, to the extent that the term “document” is qualified by the undefined terms “drafting request” and “information request,” then the word “document” is equally ambiguous, and must also be strictly construed to avoid an implied abrogation of common law.

especially where to do so would abrogate a common law right. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E. 2d 620, 624 (2006).<sup>8</sup>

Similarly, in their cherry-picking of terms in N.C. Gen. Stat. § 120-133 that are allegedly “unambiguous,” plaintiffs claim that the word “notwithstanding” is clear. Yet plaintiffs completely neglect the end of that phrase -- “notwithstanding any other *provision of law*.” Black’s Law Dictionary states that the phrase “[p]rovided by law,” “when used in a constitution or statute generally means prescribed or provided by some statute.” Black’s Law Dictionary 1224 (6th ed. 1990); *see also*, *Machin v. Browning*, 170 W. Va. 779, 785, 296 S.E.2d 909, 915 (W. Va. 1982) (“the phrases ‘prescribed by law’ and ‘provided by law’ mean proscribed or provided by statute.”); *Brooks v. Northglenn Ass’n*, 76 S.W.3d 162, 167 (Tex. App. 2002) (stating that “[t]he phrase ‘unless otherwise provided’ or similar language, when used in a statute, usually refers to other statutes pertaining to the same subject matter”), *rev’d in part on other grounds*, 141 S.W.3d 158 (Tex. 2004). The phrase “notwithstanding any other provision of law” should therefore be read to mean “notwithstanding any other [statutory] provision of law.” Thus, for example, under this straightforward interpretation of Article 17, what the General Assembly codified as

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<sup>8</sup> Significantly, in their brief to this Court, plaintiffs did not address or attempt to distinguish this Court’s decision in *McCutchen*.

privileged under N.C. Gen. Stat. §§ 120-130, 131, loses its privilege under N.C. Gen. Stat. § 120-133. There is no reason to think that the phrase “other provision of law” is a reference to the common law in general or the attorney-client privilege and work product doctrine in particular. Again, this Court’s precedent demands that this language be read as narrowly as possible, without impacting a common law right, unless that right is expressly addressed in the statute. *McCutchen*, 360 N.C. at 285, 624 S.E. 2d at 624. The phrase “notwithstanding any other provision of law” must be read as not affecting the common law attorney-client privilege and work product doctrine otherwise applying to the General Assembly as a litigant in this case.

Finally, and significantly, plaintiffs argue that the word “confidential” in N.C. Gen. Stat. § 120-133 is unambiguous, yet concede that it can refer to multiple privileges, including the legislative privilege, attorney-client privilege, and work product doctrine. (Appellees’ Br. at 14, 28). Thus, by plaintiffs’ own admission, “confidential” is an ambiguous term. Under this Court’s precedent, that term must be strictly construed to waive only those “confidential” privileges expressly addressed by the statute. The only privilege expressly addressed by Article 17 is the legislative privilege, and no other privilege.

No matter how plaintiffs cast their argument, they are in reality asking this Court to *imply* a waiver of the attorney-client privilege and work product doctrine pursuant to a statute that is nearly thirty years old and which has never before been administered in the manner suggested by plaintiffs. The Court can only reach the decision sought by plaintiffs by implying that the General Assembly intended to define the terms cited by plaintiffs as including attorney-client and work product materials. Because none of these terms are in fact defined to include attorney-client or work product materials, the only correct interpretation is that attorney-client and work product communications are not waived by operation of N.C. Gen. Stat. § 120-133.

In supporting what is really an implied waiver argument, plaintiffs ask rhetorically in their Brief, “Why would ‘counsel’ be included in the definition of legislative employee if the attorney-client privilege is not waived?” (Appellees’ Br. at 29). The answer to that question is simple – “counsel” may perform both legal and non-legal functions, especially counsel serving on the staff of the General Assembly, who may be involved in tasks such as the drafting of legislation. In enacting N.C. Gen. Stat. § 120-133, the General Assembly clearly intended to preclude someone with a

law degree from being in a position to cloak materials with confidentiality that did not involve the provision of legal advice. *See Baldus, supra.*

Ironically, the fallacy of plaintiffs' argument is best demonstrated by the actions of legislative counsel in the case of *Cromartie v. Hunt*, 133 F. Supp. 2d 407, *rev'd in part sub. nom., Easley v. Cromartie*, 532 U.S. 234 (2001), a matter in which the current counsel for the *Dickson* plaintiffs served as lead counsel and counsel for the *NAACP* plaintiffs served as counsel for the Intervening Defendants.

During his deposition in the *Cromartie* case, Gerry Cohen, Director of Bill Drafting for the North Carolina General Assembly, explained that he served different roles during redistricting, including both legal roles *and* non-legal roles. His non-legal responsibilities included the drafting of redistricting plans. In performing this function he filled both "political science" and "technical" roles. These functions can be performed by a non-lawyer and therefore do not constitute the provision of legal advice. However, as the attorney for Redistricting Chairman Senator Roy Cooper and the Senate Redistricting Committee, Mr. Cohen also served in an exclusively legal capacity. (Defendants' Motion that the Court Take Judicial Notice, Cohen Dep. pp. 107-108).

During the course of his deposition, Mr. Cohen was allowed by the Attorney General to testify about his role in drafting redistricting plans and criteria communicated to him by Senator Cooper. This was consistent with his non-attorney “technical” role as a map drawer and adviser on political science. In contrast, both the Attorney General and Mr. Cohen refused to allow testimony by Mr. Cohen concerning his role as Senator Cooper’s attorney. The Attorney General instructed Mr. Cohen to decline to answer questions related to legal advice on at least three occasions. (*Id.*, Cohen Dep. pp. 29, 78, 143-45). On one occasion, Mr. Cohen himself asserted that he could not answer a question because of the attorney-client privilege. (*Id.*, Cohen Dep. pp. 143-45).

The position taken by the Attorney General in the Cohen deposition was repeated by the Attorney General in the *Cromartie* deposition of Linwood Jones. Mr. Jones was employed by the General Assembly as a staff attorney. (*Id.*, Jones Dep. pp. 5-6). In his deposition, the Attorney General allowed Mr. Jones to testify on matters relating to drafting and information requests. Just like the Attorney General’s position in the Cohen deposition, the Attorney General instructed Jones to decline to answer questions regarding advice he gave to the redistricting committee or to

individual legislators on the ground of attorney-client privilege. (*Id.*, Jones Dep. pp. 24-25).

By including the term “legislative counsel” under the definition of legislative employee, the General Assembly merely recognized that full-time staff legislative counsel are often involved in responding to drafting or information requests and that such responses are not protected from disclosure simply because they are prepared by an attorney.<sup>9</sup> There is no evidence (or court decision) that N.C. Gen. Stat. § 120-133 has ever been administered, at its inception or over the intervening time frame, as operating to waive attorney-client or work product privileges. In fact, the evidence clearly shows that legislators, staff, outside counsel, and members of the Attorney General’s office, including the *Dickson* plaintiffs’ counsel and the *NAACP* plaintiffs’ counsel, have not administered N.C. Gen. Stat. §

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<sup>9</sup> The language of Article 17 also suggests that it was adopted to address the unique position of the non-partisan staff at the General Assembly, who perform work for each member of the General Assembly, including members with conflicting interests or of different political parties. Article 17 was needed to clarify that a staff member’s conversation with representatives are confidential between the staff member and the representative, and that it would be a disciplinary violation to disclose conversations with one representative to another representative. See N.C. Gen. Stat. §§ 120-131.1(c) (“Violation of this section may be grounds for disciplinary action.”); 120-134 (“Violation of any provision of this Article shall be grounds for disciplinary action in the case of employees . . .”).

120-133 as waiving anything other than legislative privilege for pre-enactment redistricting communications.

Plaintiffs attempt to counter evidence regarding the way in which N.C. Gen. Stat. § 120-133 has been administered by submitting trial testimony by Senator Cooper during the *Cromartie* case and a section of the 2011 Legislator's Guide for Redistricting. Neither of these examples supports plaintiffs' position.

The testimony submitted by the plaintiffs is direct examination of Senator Cooper by his counsel, Tiare Smiley, of the Attorney General's office. (Response in Opposition to Legislative Defendants' Motion for the Court to Take Judicial Notice, Trial Transcript p. 356). Unsurprisingly, none of the questions asked by Ms. Smiley required her own witness, Senator Cooper, to disclose privileged attorney-client communications or legal advice he received from his counsel. Instead, all of the questions by Ms. Smiley relate to the drafting of the Congressional Plan challenged in *Cromartie* and how Mr. Cohen complied with the instructions he received from Senator Cooper. (*Id.* pp. 339-439). Thus, Ms. Smiley's questions—like the questions by plaintiffs' counsel allowed by the State in the *Cromartie*

depositions – ask only for the disclosure of drafting and information requests by Senator Cooper and Mr. Cohen’s responses to these requests.<sup>10</sup>

Plaintiffs also argue that the 2011 Legislator’s Redistricting Guide shows that the General Assembly staff who prepared this document interpreted Article 17 as waiving attorney-client privilege. Like Article 17, nothing in the Legislator’s Guide mentions the attorney-client privilege or the work product doctrine. Like plaintiffs’ strained statutory arguments, plaintiffs ask the Court to imply that staff intended to opine that Article 17 waives the attorney-client privilege even though nothing in the Legislator’s Guide states such an opinion. In fact, the language in the 2011 Legislator’s Guide simply parrots the language found in Article 17 – the Guide provides no opinion at all.

Further, the language regarding waiver found in the 2011 Redistricting Guide is essentially the same language found in the 1991 Redistricting Guide adopted by the General Assembly and in effect during the *Cromartie* litigation. (See 1991 Legislator’s Redistricting Guide,

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<sup>10</sup> Plaintiffs argue that defendants’ position is inconsistent because defendants released communications they received from staff counsel Erika Churchill and Walker Reagan. Defendants never established an attorney-client relationship with these staff attorneys during the 2011 redistricting process and therefore did not assert that communications from staff counsel fell within defendants’ attorney-client privilege.

excerpts attached as Exhibit C in Addendum).<sup>11</sup> As shown by the *Cromartie* depositions, General Assembly staff obviously have not administered Article 17 as waiving attorney-client privilege since staff affirmatively asserted attorney-client privilege during the time frame covered by the 1991 Redistricting Guide. Therefore, because the legislative immunity language found in the 1991 Redistricting Guide is nearly identical to the 2011 Redistricting Guide, it is specious for plaintiffs to argue that legislative staff, like Mr. Cohen or Mr. Jones, or the General Assembly ever administered Article 17 as waiving attorney-client or work product materials.<sup>12</sup> In fact, the opposite is clearly the case.

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<sup>11</sup> In our opening brief, defendants explained that a review of four depositions taken in *Cromartie* show that the *Cromartie* plaintiffs served comprehensive document requests that included any documents for which any legal privilege had been waived under N.C. Gen. Stat. § 120-133. (See Cohen Dep. 274-80, 290). In reviewing the exhibit list for each deposition, only *Cromartie* Exhibits 16, 28, and 41 could potentially include documents that might constitute legal advice or work product, and a review of the exhibits shows that none of them involved legal advice or documents prepared in anticipation of litigation. (Appellants' Br. at 30-33). Significantly, plaintiffs do not dispute this assertion by defendants.

<sup>12</sup> Indeed, the cover letter attached to the 1991 Legislator's Redistricting Guide notes that Linwood Jones was the principal author of the Guide and that it was reviewed by Gerry Cohen. As noted above, both Mr. Jones and Mr. Cohen were deposed in *Cromartie* and asserted objections to testifying about attorney-client privileged matters.

**IV. There Is No Basis For Using Cases Interpreting The Public Records Act In Support Of Plaintiffs’ Implied Waiver Argument Under Article 17.**

Plaintiffs cite numerous cases under the Public Records Act in support of their argument that the Court should imply a waiver of the attorney-client privilege and work product doctrine under Article 17. *See, e.g., News and Observer Publ’g Co. v. Pool*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992). These arguments are misplaced.

First, as in their analysis of the various terms in N.C. Gen. Stat. § 120-133, plaintiffs cherry-pick those aspects of the Public Records Act that seem helpful, but ignore key aspects that undermine their case. To the extent that plaintiffs seek to rely on the public policy reflected by the Public Records Act, then they must rely on the *entire* public policy reflected by that Act. While the Public Records Act provides an expansive definition of what constitutes a public record, that Act also expressly addresses and exempts certain attorney-client and work product materials from its reach. This is important for two reasons. First, the “public policy” embodied by the Public Records Act plainly includes the protection of attorney-client and work product materials. Second, the fact that the Public Records Act specifically addresses these privileges demonstrates that the legislature knows how to expressly abrogate common law privileges when it desires to do so. No such

similar language exists anywhere in Article 17 regarding the attorney-client privilege or work product doctrine.<sup>13</sup>

In any case, plaintiffs' arguments regarding "open disclosure" under the Public Records Act turn upside down the rationale for that principle as it applies to privileges. This is explained by the court's decision in *News and Observer Publ'g Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992). In *Poole*, the President of the University of North Carolina system established a

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<sup>13</sup> Moreover, the public policy reflected by the Public Records Act applies only to those state agencies or governmental bodies that are directly covered by the Public Records Act or matters covered by the Public Records Act. There is nothing in the Public Records Act indicating an express intent by the General Assembly to waive any of the General Assembly's common law privileges by virtue of the Public Records Act. Defendants have found no case construing the Public Records Act as applying to the General Assembly and plaintiffs have cited none. To the contrary, when enacting Article 17, the General Assembly elected to codify the principles established by the common law of legislative immunity and legislative privilege that the Public Records Act did not apply to communications between legislators and staff. *See* N.C. Gen. Stat. §§120-130(d), 131(b)(4).

Plaintiffs rely upon a Legislative Commission Report and an opinion by the Director of the Institute of Government to support their argument that the General Assembly intended for the Public Records Act to apply to itself even though there is nothing in the Public Records Act expressly stating that it applies to the General Assembly. (Appellees' Br. at 22, 23). However, the very report cited by plaintiffs discloses that the Legislative Services Office, and presumably their employers –i.e. the General Assembly –did *not* interpret the Public Records Act as being applicable to the General Assembly prior to 1983. It is therefore more reasonable to conclude that the General Assembly acted in 1983 to preclude any future litigant from pursuing an incorrect legal argument that the Public Records Act applied to legislatively privileged communications.

commission to investigate alleged improprieties relating to a men's basketball team. The plaintiff filed a lawsuit pursuant to the Public Records Act seeking the production of investigative reports prepared for the Commission by the SBI. Defendants argued that the reports were exempt from the Public Records Act. Defendants relied upon the court's decision in *News and Observer v. State ex. rel Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984), which held that records of criminal investigations conducted by the SBI at the request of a district attorney are exempt from disclosure because of a *specific statutory exception* established by N.C. Gen. Stat. § 114-15.

In this context, the court stated that "the legislature knows how to extend the scope of protection of confidential records beyond the confines of the agency which maintains them." *Poole*, 330 N.C. at 473-474, 412 S.E.2d at 12-13. Therefore, public records that do not enjoy a common law privilege are not exempt from disclosure unless the General Assembly creates a statutory privilege. In contrast, the General Assembly cannot make documents covered by a common law privilege subject to disclosure unless

the General Assembly expressly modifies or abrogates the common law privilege.<sup>14</sup>

The Court of Appeals has already understood the severe threat to the separation of powers doctrine resulting from an expansive application of the Public Records Act to records related to the Governor's constitutional authority in the area of clemency. *See News and Observer Publ'g Co. v. Easley*, 182 N.C. App. 14, 641 S.E.2d 698 (2007). In *Easley*, the court avoided a separation of powers crisis by following normal rules of statutory construction, and concluding that the Public Records Act did not mandate the production of clemency records from the Governor. The court refused to imply a waiver requiring the production of clemency records because nothing in the Public Records Act expressly includes such documents within the definition of public records. The same principle applies in this case because nothing in Article 17 shows an express intention by the legislature to deprive itself of the common law attorney-client privilege or work product doctrine.<sup>15</sup>

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<sup>14</sup> This is demonstrated by the General Assembly's decision to modify the common law principles for attorney-client communications and work product materials when it amended the Public Records Act.

<sup>15</sup> The expansive ruling sought by plaintiffs, if applied to either Article 17 or the Public Records Act, would expose draft opinions and other internal records of the superior and appellate courts to public disclosure under the Public Records Act. There is no substantive difference between these types

Plaintiffs' attempt to distinguish *Easley* and downplay the serious constitutional issues posed by their proposed construction of N.C. Gen. Stat. § 120-133 is without merit. While the Governor in *Easley* clearly had the exclusive constitutional right to grant or deny clemency, plaintiffs argue that the legislature does not have the exclusive power to redistrict because the courts have the authority to overturn redistricting acts. This argument is illogical. The legislature has the exclusive power to redistrict and the courts have the exclusive power to judge the constitutionality of such acts, as with any other act of the legislature. The court's power to overturn a redistricting act does not mean it has been assigned the duty to redistrict, any more than the court's power to interpret the legislature's enactments means that the court has the power to enact legislation.<sup>16</sup>

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of confidential documents relied upon by the courts to draft and issue final, published rulings, and legal advice to legislators or work product developed by their attorneys to give them legal advice. All of the same definitions relied upon by plaintiffs to imply a waiver of the General Assembly's common law rights logically apply to all internal documents generated by the courts. Any such interpretation of the Public Records Act would seriously jeopardize the ability of the courts to perform their constitutional functions. In the same way, plaintiffs' interpretation of Article 17 jeopardizes the ability of the legislature to perform its constitutional duties related to redistricting. As found by the court in *Easley*, there is no reason to walk this constitutionally precarious road by giving a disclosure statute an implied interpretation that is completely unsupported by the statute's express language.

<sup>16</sup> The courts have a very limited equitable authority to adopt an interim remedial redistricting plan if a plan enacted by the legislature is deemed

Moreover, plaintiffs fail to address the *Easley* court’s refusal to read the word “clemency” into the statute at issue in that case. Instead, plaintiffs argue that N.C. Gen. Stat. § 120-133 expressly refers to the matter of “redistricting.” (Appellees’ Br. at 41). This is beside the point. The issue in this matter is whether N.C. Gen. Stat. § 120-133 expressly addresses attorney-client privilege or the work product doctrine. Plainly, it does not, and, like the *Easley* court, this Court may sidestep any separation of powers issues by refusing to add words to the statute which the General Assembly chose not to include.<sup>17</sup>

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unconstitutional and there is not sufficient time for the legislature to correct any deficiencies. N.C. Gen. Stat. § 120-2.4. This authority derives from the court’s constitutional duty to provide remedies for constitutional violations, not because the court has been assigned the duty to redistrict in the state constitution.

<sup>17</sup> During the argument before the Superior Court, and in the response to defendants’ Petition for a Writ of Supersedeas, plaintiffs argued that defendants had waived their right to assert their attorney-client privilege or work product doctrine because of an alleged failure by the defendants to provide a “privilege log” in compliance with Rule 26(b)(5), N.C. R. Civ. P. (See R. p. 359). The Superior Court did not agree with plaintiff’s argument, plaintiffs did not appeal from this aspect of the Superior Court’s order, and, as a result, this issue is not currently before the Supreme Court. Rules 28(a), (b)(6), N.C. R. App. P.

Should the Court elect to consider this argument, it should be rejected for several reasons. Plaintiffs’ argument is peculiar since plaintiffs did not originally provide a privilege log in their responses to defendants’ discovery requests. (See R. pp. 545, 546, 559, 560). After defendants served their amended responses and objections to plaintiffs’ requests, the NAACP plaintiffs amended their responses with a “privilege log” that is identical, but

**CONCLUSION**

For the foregoing reasons, the decision of the Superior Court should be reversed, and an order should be entered by this Court directing the Superior Court to enter an order denying plaintiffs' motion to compel.

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less specific, than defendants' amended responses and objections (*See* R. pp. 504-505). If the plaintiffs truly believed that defendants' amended objections did not satisfy Rule 26(b)(5), why did they pattern their amended responses after defendants' objections?

Regardless, defendants' amended responses describe with sufficient particularity the documents that have been withheld, and the recipients of privileged communications. Defendants' only omission is a log showing the date of each of the privileged communications. There are no North Carolina decisions requiring that defendants provide the dates of each communication. This is because Rule 26(b)(5) simply requires that defendants make an express claim of privilege and describe the withheld documents in a manner that does not reveal protected information. Defendants more closely complied with Rule 26(b)(5) than either set of plaintiffs. This argument, if considered by the Court, should be rejected.

Respectfully submitted this 6<sup>th</sup> day of July, 2012.

OGLETREE, DEAKINS, NASH,  
SMOAK & STEWART, P.C.

Electronically submitted

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Legislative Defendants' Reply Brief has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope properly addressed to the following:

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This the 6<sup>th</sup> day of July, 2012.

By: /s/Thomas A. Farr  
Thomas A. Farr

12697795.1 (OGLETREE)

# **EXHIBIT A**



ALVIN BALDUS, CARLENE BECHEN, ELVIRA BUMPUS, RONALD BIENDSEIL, LESLIE W DAVIS, III, BRETT ECKSTEIN, GLORIA ROGERS, RICHARD KRESBACH, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN, CINDY BARBERA, RON BOONE, VERA BOONE, EVANJELINA CLEERMAN, SHEILA COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD LANGE, and GLADYS MANZANET, Plaintiffs, TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND, Intervenor-Plaintiffs, v. Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board, Defendants, F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY, Intervenor-Defendants. VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ, Plaintiffs, v. Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board, Defendants.

Case No. 11-CV-562 JPS-DPW-RMD, Case No. 11-CV-1011 JPS-DPW-RMD

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

2011 U.S. Dist. LEXIS 142338

December 8, 2011, Decided  
December 8, 2011, Filed

**SUBSEQUENT HISTORY:** Motion granted by, in part, Motion denied by, in part *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 2011 U.S. Dist. LEXIS 146869 (E.D. Wis., Dec. 20, 2011)

Reconsideration denied by, Sanctions allowed by, Costs and fees proceeding at *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 2012 U.S. Dist. LEXIS 501 (E.D. Wis., Jan. 3, 2012)

**PRIOR HISTORY:** *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 2011 U.S. Dist. LEXIS 138827 (E.D. Wis., Nov. 30, 2011)

**COUNSEL:** [\*1] For Alvin Baldus, Carlene Bechen, Elvira Bumpus, Ronald Biendseil, Leslie W Davis, III, Brett Eckstein, Gloria Rogers, Richard Kresbach, Ro-

chelle Moore, Amy Risseeuw, Judy Robson, Jeanne Sanchez-Bell, Cecelia Schliepp, Travis Thyssen, Cindy Barbera, Ron Boone, Vera Boone, Evanjelina Cleereman, Sheila Cochran, Maxine Hough, Clarence Johnson, Richard Lange, Gladys Manzanet (2:11-cv-00562-JPS-DPW-RMD), Plaintiffs: Douglas M Poland, LEAD ATTORNEY, Rebecca K Mason, Godfrey & Kahn SC, Milwaukee, WI; Dustin B Brown, LEAD ATTORNEY, Brady C Williamson, Godfrey & Kahn SC, Madison, WI.

For Voces De La Frontera Inc, Ramiro Vara, Olga Vara, Jose Perez, Erica Ramirez (2:11-cv-00562-JPS-DPW-RMD), Consolidated Plaintiffs: Jacqueline E Boynton, LEAD ATTORNEY, Law Offices of Jacqueline Boyn-

ton, Milwaukee, WI; Peter G Earle, Law Offices of Peter Earle LLC, Milwaukee, WI.

For Michael Brennan, Members of the Wisconsin Government Accountability Board, each only in his official capacity, David Deininger, Members of the Wisconsin Government Accountability Board, each only in his official capacity, Gerald Nichol, Members of the Wisconsin Government Accountability Board, each only in his official capacity, Thomas [\*2] Cane, Members of the Wisconsin Government Accountability Board, each only in his official capacity, Thomas Barland, Members of the Wisconsin Government Accountability Board, each only in his official capacity, Gordon Myse, Members of the Wisconsin Government Accountability Board, each only in his official capacity, Dr Kevin Kennedy, Director & General Counsel for the Wisconsin Government Accountability Board, Timothy L Vocke (2:11-cv-00562-JPS-DPW-RMD), Defendants: Colleen E Fielkow, Patrick J Hodan, LEAD ATTORNEYS, Daniel Kelly, Joseph W Voiland, Reinhart Boerner Van Deuren SC, Milwaukee, WI; Maria S Lazar, Wisconsin Department of Justice, Office of the Attorney General, Madison, WI.

For Tammy Baldwin, Ronald Kind, Gwendolynne S Moore (2:11-cv-00562-JPS-DPW-RMD), Intervenor Plaintiffs: Daniel S Lenz, LEAD ATTORNEY, P Scott Hassett, Lawton & Cates SC, Madison, WI.

For F James Sensenbrenner, Jr, Thomas E Petri, Paul D. Ryan, Jr., Reid J. Ribble, Sean P Duffy (2:11-cv-00562-JPS-DPW-RMD), Intervenor Defendants: Kellen C Kasper, Thomas L Shriner, Jr, Foley & Lardner LLP, Milwaukee, WI.

For Wisconsin State Senate by its Majority Leader Scott L Fitzgerald, Wisconsin State Assembly by its Speaker [\*3] Jeff Fitzgerald (2:11-cv-00562-JPS-DPW-RMD), Movants: Eric M McLeod, LEAD ATTORNEY, Michael Best & Friedrich LLP, Madison, WI; Joseph Louis Olson, LEAD ATTORNEY, Aaron H Kastens, Michael Best & Friedrich LLP, Milwaukee, WI.

For Voces De La Frontera Inc, Ramiro Vara, Olga Vara, Jose Perez, Erica Ramirez (2:11-cv-01011-JPS-DPW-RMD), Plaintiffs: Jacqueline E Boynton, Law Offices of Jacqueline Boynton, Milwaukee, WI; Peter G Earle, Law Offices of Peter Earle LLC, Milwaukee, WI.

For Michael Brennan, Members of the Wisconsin Government Accountability Board, each only in his official capacity, David Deininger, Members of the Wisconsin Government Accountability Board, each only in his official capacity, Gerald Nichol, Members of the Wisconsin Government Accountability Board, each only in his official capacity, Thomas Cane, Member of the Wisconsin Government Accountability Board, each only in his official capacity, Thomas Barland, Members of the Wisconsin Government Accountability Board, each only in his official capacity, Timothy Vocke, Members of the Wisconsin Government Accountability Board, each only in his official capacity, Dr Kevin Kennedy, Director and General Counsel for the Wisconsin [\*4] Government Accountability Board (2:11-cv-01011-JPS-DPW-RMD), Defendants: Mariawiscon S Lazar, Wisconsin Department of Justice, Office of the Attorney General, Madison, WI.

For F James Sensenbrenner, Jr, Thomas E Petri, Paul D. Ryan, Jr., Reid J. Ribble, Sean P Duffy (2:11-cv-01011-JPS-DPW-RMD), Movants: Kellen C Kasper, LEAD ATTORNEY, Thomas L Shriner, Jr, Foley & Lardner LLP, Milwaukee, WI.

**JUDGES:** J.P. Stadtmueller, United States District Judge. Before WOOD, Circuit Judge, DOW, District Judge, and STADTMUELLER, District Judge.

**OPINION BY:** J.P. Stadtmueller

## OPINION

## ORDER

This matter comes before the court on two separate motions (Docket #63, #72) to quash third-party subpoenas issued by plaintiffs to Joseph Handrick and Tad Ottman.

On November 28, 2011, Joseph Handrick was served with a subpoena from the plaintiffs calling for his testimony and production of documents, all related to ongoing pretrial discovery. Mr. Handrick is a lawyer employed with Michael Best & Friedrich, LLP, who was hired by the Wisconsin Legislature ("Legislature") as a consulting expert to provide legal advice related to the development of Wisconsin's redistricting plan, which is now being challenged in this case. In their subpoena, the plaintiffs [\*5] demand that Mr. Handrick: (1) produce "any and all documents used by you or members of the Legislature to draw the 2011 redistricting maps"; and (2) appear for a deposition on December 1, 2011. (Docket #64, Ex. 1).

Several days later, on December 4, 2011, Tad Ottman, a legislative aide to Wisconsin State Senate Majority Leader Scott L. Fitzgerald, was served with a subpoena by the plaintiffs. That subpoena requested: (1) "any and all documents, electronically stored information, and tangible things used by you or members of the Legislature to draw the 2011 redistricting maps"; and (2)

that Mr. Ottman appear for a deposition on December 7, 2011.

The Wisconsin Assembly and Senate (the "non-parties") have moved to quash both Mr. Handrick's and Mr. Ottman's respective subpoenas. Having received the plaintiffs' brief opposing the non-parties' motion to quash Mr. Handrick's subpoena, the Court believes it has received sufficient briefing to render its decision on both of the non-parties' motions. For the reasons which follow, the non-parties' motions to quash will be denied.

The information the plaintiffs seek from both Mr. Handrick and Mr. Ottman is relevant. In this case, the plaintiffs make [\*6] claims under both the Voting Rights Act and the *Equal Protection Clause*. (See Docket #12). And, as the plaintiffs correctly point out, proof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence in both types of claims. (Pl.'s Br. Opp. Mot. Quash, 2--3 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265--66, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11-CV-5065, 2011 U.S. Dist. LEXIS 117656, at \*11 (N.D. Ill. Oct. 12, 2011))). Thus, any documents or testimony relating to how the Legislature reached its decision on the 2011 redistricting maps are relevant to the plaintiffs' claims as proof of discriminatory intent.

From the record before the court, it is apparent that attorney-client privilege has no application to the communications between the Legislature and Mr. Handrick. To be sure, the attorney-client privilege protects communications made from a client to an attorney who is acting as an attorney, but does not cover communications seeking only consulting service. See *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 618 (7th Cir. 2009), *In re Grand Jury Proc.*, 220 F.3d 568, 571 (7th Cir. 2000). [\*7] Despite Mr. Handrick's being a lawyer, the defendants state that he performed consulting work in connection with the redistricting legislation. (Defs.' Mot. Quash Handrick, 2) (stating "Handrick provided consulting services in connection with the undersigned firm's representation of the State Senate and State Assembly."). Because, as the defendants acknowledge, Mr. Handrick acted as a consultant, the Court finds that his communications are not covered by attorney-client privilege.

Similarly, legislative privilege does not protect any documents or other items that were used by the Legislature in developing the redistricting plan. First, and most importantly, the Court finds it all but disingenuous for the Legislature to argue that these items be subject to privilege in a Court proceeding determining the constitutionality of the Legislature's actions, when the Legislature clearly did not concern itself with maintaining that

privilege when it hired outside consultants to help develop its plans. The Legislature has waived its legislative privilege to the extent that it relied on such outside experts for consulting services. *Comm. for a Fair & Balanced Map*, 2011 U.S. Dist. LEXIS 117656, at \*35. [\*8] And, even without that waiver, the Court would still find that legislative privilege does not apply in this case. Legislative privilege is a qualified privilege that can be overcome by a showing of need. *Id.*, at \*24--\*25. Allowing the plaintiffs access to these items may have some minimal future "chilling effect" on the Legislature, but that fact is outweighed by the highly relevant and potentially unique nature of the evidence. *Id.*, at \*25--\*26. Additionally, given the serious nature of the issues in this case and the government's role in crafting the challenged redistricting plans, the Court finds that legislative privilege simply does not apply to the documents and other items the plaintiffs seek in the subpoenas they have issued. *Id.*

The remainder of the non-parties' arguments, all of which are procedural, fail or can easily be cured. As the plaintiffs correctly note, Mr. Handrick was not employed by a party to this case, but instead by the Legislature, and he is, therefore, not excused from testifying under *Rule 26(b)(4)(D)*. *Fed. R. Civ. P. 26(b)(4)(D)* (limiting a party's ability to depose "an expert who has been retained or specifically employed by another party in anticipation [\*9] of litigation...").

Next, while the initial subpoenas provided a potentially-inadequate time to comply under *Rule 45(c)(2)(B)*, that problem has been substantially cured by the Court's delay while awaiting briefs. Having missed both requested deposition dates, the plaintiffs will now have to reschedule those depositions for a later time. Given the expedited schedule in this case, it is important for the parties to have a shortened turnaround between the issuance of a subpoena and the requested date for production and deposition. The Court notes that three days may be an excessively quick turnaround, however, in the future--except in an extraordinary circumstance--it will not find a *five-day* compliance interim to be unreasonable. The Court also adds that it is apparent that the Legislature has had a hand in causing the three-day interims by apparently refusing to accept service on behalf of its staff and consultants. Considering the need for a quick turnaround in this case, the Court fully expects that the Legislature and its staff, consultants, and members, will cooperate with the efforts of the Court and the parties to expeditiously complete discovery.

Finally, the plaintiffs' overly-broad [\*10] production requests and failure to include a recording method may easily be cured. Perhaps as a result of oversight, the plaintiffs may have omitted phrases limiting their discovery requests to documents in Mr. Handrick's and Mr. Ottman's "possession, custody, or control." Accordingly,

the Court would suggest that they modify their subpoenas so as to limit their requests and, at the same time, modify the subpoenas to specify the recording method for taking depositions.

Provided the plaintiffs make those changes, the Court finds no reason to quash the subpoenas the plaintiffs have issued to Mr. Handrick and Mr. Ottman. Therefore, the non-parties' motions to quash will be denied.

The Court also recommends that all parties (and non-parties) who consider filing motions to quash read very carefully *Committee for a Fair & Balanced Map*, which the Court has cited extensively in this order. The opinion and order in that case addresses head-on many of the issues raised by the non-parties in their motions to quash. Had the non-parties been aware of that case, perhaps they would not have filed their motions to quash or may have tailored their arguments more effectively. Thus, in this instance the [\*11] Court will not grant costs and attorneys' fees to the plaintiffs for their defense against these motions.

However, having now brought that case to the non-parties' attention, it should go without saying that the Court will not hesitate to award costs together with actual attorneys' fees related to defending future motions to

quash, if the Court deems those motions frivolous or otherwise made in bad faith.

Accordingly,

**IT IS ORDERED** that the non-party movants' motion to quash the plaintiffs' subpoena issued to Joseph Handrick (Docket #63) be and the same is hereby **DENIED**;

**IT IS FURTHER ORDERED** that the non-party movants' motion to quash the plaintiffs' subpoena issued to Tad Ottman (Docket #72) be and the same is hereby **DENIED**, and

**IT IS FURTHER ORDERED** that the plaintiffs shall redraft and reissue subpoenas to Joseph Handrick and Tad Ottman which correct any issues related to the overbreadth or recording method attendant to their discovery requests.

Dated at Milwaukee, Wisconsin, this 8th day of December, 2011.

BY THE COURT:

/s/ J.P. Stadtmueller

J.P. Stadtmueller

U.S. District Judge

# **EXHIBIT B**



ALVIN BALDUS, CARLENE BECHEN, ELVIRA BUMPUS, RONALD BIENDSEIL, LESLIE W DAVIS, III, BRETT ECKSTEIN, GLORIA ROGERS, RICHARD KRESBACH, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN, CINDY BARBERA, RON BOONE, VERA BOONE, EVANJELINA CLEERMAN, SHEILA COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD LANGE, and GLADYS MANZANET, Plaintiffs, TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND, Intervenor-Plaintiffs, v. Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board, Defendants, F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY, Intervenor-Defendants. VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ, Plaintiffs, v. Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board, Defendants.

Case No. 11-CV-562 JPS-DPW-RMD, Case No. 11-CV-1011 JPS-DPW-RMD

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

2011 U.S. Dist. LEXIS 146869

December 20, 2011, Decided  
December 20, 2011, Filed

**SUBSEQUENT HISTORY:** Reconsideration denied by, Sanctions allowed by, Costs and fees proceeding at *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 2012 U.S. Dist. LEXIS 501 (E.D. Wis., Jan. 3, 2012)

**PRIOR HISTORY:** *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 2011 U.S. Dist. LEXIS 142338 (E.D. Wis., Dec. 8, 2011)

**COUNSEL:** [\*1] For Alvin Baldus, Carlene Bechen, Elvira Bumpus, Ronald Biendseil, Leslie W Davis, III, Brett Eckstein, Gloria Rogers, Richard Kresbach, Rochelle Moore, Amy Risseeuw, Judy Robson, Jeanne Sanchez-Bell, Cecelia Schliepp, Travis Thyssen, Cindy Barbera, Ron Boone, Vera Boone, Evanjelina Cleerman, Sheila Cochran, Maxine Hough, Clarence Johnson,

Richard Lange, Gladys Manzanet (2:11-cv-00562), Plaintiffs: Douglas M Poland, LEAD ATTORNEY, Rebecca K Mason, Godfrey & Kahn SC, Milwaukee, WI; Dustin B Brown, LEAD ATTORNEY, Brady C Williamson, Godfrey & Kahn SC, Madison, WI.

For Voces De La Frontera Inc, Ramiro Vara, Olga Vara, Jose Perez, Erica Ramirez (2:11-cv-00562), Consolidated Plaintiffs: Jacqueline E Boynton, LEAD ATTORNEY, Law Offices of Jacqueline Boynton, Milwaukee, WI; Peter G Earle, Law Offices of Peter Earle LLC, Milwaukee, WI.

For Michael Brennan, Members of the Wisconsin Government Accountability Board, each only in his official capacity, David G Deininger, Members of the Wisconsin

Government Accountability Board, each only in his official capacity, Gerald Nichol, Members of the Wisconsin Government Accountability Board, each only in his official capacity, Thomas Cane, Members of [\*2] the Wisconsin Government Accountability Board, each only in his official capacity, Thomas Barland, Members of the Wisconsin Government Accountability Board, each only in his official capacity, Gordon Myse, Members of the Wisconsin Government Accountability Board, each only in his official capacity, Dr Kevin Kennedy, Director & General Counsel for the Wisconsin Government Accountability Board, Timothy L Vocke (2:11-cv-00562), Defendants: Colleen E Fielkow, Patrick J Hodan, LEAD ATTORNEYS, Daniel Kelly, Joseph W Voiland, Reinhart Boerner Van Deuren SC, Milwaukee, WI; Maria S Lazar, Wisconsin Department of Justice, Office of the Attorney General, Madison, WI.

For Tammy Baldwin, Ronald Kind Gwendolynne S Moore (2:11-cv-00562), Intervenor Plaintiffs: Daniel S Lenz, LEAD ATTORNEY, P Scott Hassett, Lawton & Cates SC, Madison, WI.

For F James Sensenbrenner, Jr, Thomas E Petri, Paul D Ryan, Jr, Reid J Ribble, Sean P Duffy (2:11-cv-00562), Intervenor Defendants: Kellen C Kasper, Thomas L Shriner, Jr, Foley & Lardner LLP, Milwaukee, WI.

For Wisconsin State Senate by its Majority Leader Scott L Fitzgerald, Wisconsin State Assembly by its Speaker Jeff Fitzgerald (2:11-cv-00562), Movants: Eric M McLeod, [\*3] LEAD ATTORNEY, Michael Best & Friedrich LLP, Madison, WI; Joseph Louis Olson, LEAD ATTORNEY, Aaron H Kastens, Michael Best & Friedrich LLP, Milwaukee, WI.

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General Counsel for the Wisconsin Government Accountability Board (2:11-cv-01011), Defendants: Maria S Lazar, Wisconsin [\*4] Department of Justice, Office of the Attorney General, Madison, WI.

For F James Sensenbrenner, Jr, Thomas E Petri, Paul D Ryan, Jr, Reid J Ribble, Sean P Duffy (2:11-cv-01011), Movants: Kellen C Kasper, LEAD ATTORNEY, Thomas L Shriner, Jr, Foley & Lardner LLP, Milwaukee, WI.

**JUDGES:** Before WOOD, Circuit Judge, DOW, District Judge, and STADTMUELLER, District Judge.

**OPINION BY:** J.P. Stadtmueller

## OPINION

### ORDER

Before WOOD, *Circuit Judge*, DOW, *District Judge*, and STADTMUELLER, *District Judge*

The Wisconsin State Assembly and Senate ("the Legislature") moved this Court, on December 13, 2011, to clarify its prior December 8, 2011 Order, which denied the Legislature's motion to quash the plaintiffs' subpoena of Mr. Joseph Handrick. (Docket #63, #74, #77). In seeking clarification, the Legislature points out that Mr. Handrick is not an attorney; the Court had misidentified Mr. Handrick as an attorney in its December 8, 2011 Order. (Docket #74). In fact, Mr. Handrick is a "Government Relations Specialist," working for the law firm Reinhart Boerner Van Deuren, S.C. ("Reinhart"), who was hired by the Legislature through the law firm Michael Best & Friedrich, LLP ("Michael Best"), which acts as outside counsel to the Legislature. [\*5] (Docket #77). While the Court appreciates having the benefit of this clarification, it does not change the Court's analysis. Privilege does not protect Mr. Handrick, items he possesses, or discussions he had with the Legislature's outside counsel, from the plaintiffs' discovery request.

In their motion to clarify, perhaps better described as a motion for reconsideration, the Legislature argues that the Court incorrectly denied Mr. Handrick's entitlement to privilege. First, the Legislature argues that Michael Best retained Mr. Handrick in anticipation of litigation, and thus his opinions and conclusions should be considered work product. (Non-Parties' Mot. to Clarify, 3 (citing *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 303 (D. Md. 1992))). Next, the Legislature argues that any of Mr. Handrick's communications with the Legislature's outside counsel is privileged (Non-Parties' Mot. to Clarify, 3-4 (citing *Estate of Chopper v. R. J. Reynolds Tobacco Co.*, 195 F.R.D. 648, 651-52 (N.D. Iowa 2000))).

There are several issues that the Court looks to in resolving these competing matters. First, the Court finds that Mr. Handrick was consulted by the Legislature independently [\*6] and, therefore, the attorney-client privilege does not apply. "Where a client consults an expert independently, then [attorney-client] privilege will not apply." *Marylanders*, 144 F.R.D. at 303. The Court finds that the Legislature hired Mr. Handrick and, therefore, consulted him independently, as opposed to Michael Best having consulted him. In the engagement letter sent by Reinhart to Michael Best, Reinhart states that it is the firm's understanding that Mr. Handrick's "clients are the Wisconsin State Senate . . . and State Assembly." (Docket #78, Ex. 2). And, in an email sent to Reinhart, Michael Best acknowledges that "the sole responsibility for payment of amounts due to you rests with the Client [the Legislature]." (Docket #78, Ex. 1). So, in fact, the Legislature--with the benefit of taxpayer money--hired Mr. Handrick and paid him \$5,000 per month for his services. (Docket #78, Ex. 2). The Legislature may not shield the opinions and conclusions of an individual hired with taxpayer money, simply by funneling the hiring of that individual through outside counsel. If the Legislature was the client paying Mr. Handrick--a non-lawyer--then his opinions and conclusions are not subject to [\*7] any work-product or attorney-client privilege. See *Marylanders*, 144 F.R.D. at 303. As such, having found the Legislature to be Mr. Handrick's client, the Court finds that attorney-client privilege does not apply to Mr. Handrick's opinions and conclusions.

Next, the Court concludes that Mr. Handrick's work-product is not privileged. If the Legislature did not retain Mr. Handrick in anticipation of litigation, then his work-product is not privileged. *Id.* While the Legislature may have reasonably believed that litigation would result from its redistricting efforts, the Court declines to hold that Mr. Handrick's work-product is privileged. To do so would be a slap in the face to Wisconsin's citizens: essentially, the Court would be saying that the Legislature could shield all of its actions from any discovery. The Legislature could *always* have a reasonable belief that *any* of its enactments would result in litigation. That is the nature of the legislative process: it often involves contentious issues that the public may challenge as being unconstitutional. As such, if the Legislature wished to obscure its legislative actions from the public eye then, conceivably, all it would need to do [\*8] would be to retain counsel or other agent that it termed to be "in anticipation of litigation." The Court is unwilling to travel that road, for it would "be both unseemly and a misuse of public assets" to permit an individual hired with taxpayer money "to conceal from the taxpayers themselves otherwise admissible evidence" of allegedly unconstitutional motives affecting their voting rights. See *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289,

293 (7th Cir. 2002) (discussing a state lawyer's refusal to discuss an officeholder's wrongdoing in a criminal case; while the comparison of Mr. Handrick to a state lawyer is not exact, the Court finds it close enough to reach the seed of the court's concern in *In Re Witness*). Thus, the Court relies on a principle widely accepted in insurance law (another context in which litigation could reasonably be anticipated at nearly any point): "[m]aterials prepared in the ordinary course of a party's business,"--here, the Legislature enacting laws--"even if prepared at a time when litigation was reasonably anticipated, are not work product." *Continental Cas. Co. v. Marsh*, No.01-0160, 2004 U.S. Dist. LEXIS 76, 2004 WL 42364, at \*8 (N.D. Ill. Jan. 6, 2004) (citing [\*9] *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 661 (S.D. Ind. 1991)); see also *Dawson v. New York Life Ins. Co.*, 901 F.Supp. 1362 (N.D. Ill. 1995), *Sec. Exch. Comm'n v. Credit Bancorp, Ltd.*, No. 99-CIV-113951RWS, 2002 U.S. Dist. LEXIS 627, 2002 WL 59418, at \*2 (S.D.N.Y. Jan. 16, 2002). Because the Legislature can always anticipate litigation, and the Court will not act to conceal the Legislature's actions from the public, the Court finds that Mr. Handrick's work product is not protected by privilege.

Finally, the Court finds that privilege does not afford protection to Mr. Handrick's communications with the Legislature's outside counsel. The Legislature argues that Mr. Handrick's communications with Michael Best are not discoverable. (Non-Parties' Mot. to Clarify, 3-4 (citing *Estate of Chopper*, 195 F.R.D. at 651-52)). As a threshold matter, the Court notes that the case cited by the Legislature for the very broad assertion that Mr. Handrick's communications with outside counsel are privileged is but marginally applicable to the case at hand. The case cited by the Legislature deals only with work product given by a party's attorneys to an expert retained in preparation of litigation. *Estate of Chopper*, 195 F.R.D. at 650-51. [\*10] Thus, there are two incongruities between *Estate of Chopper* and the case at hand: (1) here, the asserted privilege would cover the work product of a non-party's attorneys, as opposed to a party's attorneys; and (2) as discussed above, the Court has found that Mr. Handrick was not retained in anticipation of litigation. Further, the Legislature relies on *Estate of Chopper*--a case decided by a district court of the Eighth Circuit--for a contention that has been resolved in an opposite way by one of the Seventh Circuit's own district courts: in *Karn v. Ingersoll-Rand Co.*, our sister court held that *Rule 26(a)(2)* "trumps" any assertion of work product or privilege, and thus "all materials given to an expert should be disclosed." *Compare Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (citing Michael E. Plunkett, *Discoverability of Attorney Work Product Reviewed by Expert Witnesses: Have the 1993 Revisions to the Federal Rules of Civil Procedure Changed Anything?*, 69 Temple L.Rev. 451, 479 (1996)),

with *Estate of Chopper*, 195 F.R.D. at 651-52 (decision of Northern District of Iowa, a district court in the Eighth Circuit). Thus, to the limited extent *Estate of Chopper* may [\*11] apply to this case, there is contrary--and undisclosed--case law that exists in this Circuit that the Court finds more persuasive.

Going even further, a district court in this Circuit has held that "documents concerning 'advice on political, strategic or policy issues...would not be shielded from disclosure by the attorney-client privilege.'" *Evans v. City of Chicago*, 231 F.R.D. 302, 312 (N.D. Ill. 2005) (citing *In re Lindsey*, 148 F.3d 1100, 1106, 331 U.S. App. D.C. 246 (D.C. Cir. 1998), *Republican Party of North Carolina v. Martin*, 136 F.R.D. 421, 426 (E.D.N.C. 1991)). So, even if *Estate of Chopper* did apply, it does not appear to cover any documents passed between Mr. Handrick and the Legislature's outside counsel that concerned advice on political, strategic, or policy issues. Considering Mr. Handrick's lack of any legal qualifications, the Court is unsure why he would be offered any documents other than those containing such advice.

All told, the Legislature has presented no compelling legal reason why the discussions between Mr. Handrick and Michael Best's attorneys should be privileged. Likewise, in the Court's own research, it has not identified any reason to extend privilege to that information. Accordingly, [\*12] the Court holds that privilege does not protect the communications between Mr. Handrick and outside counsel hired by the Legislature.

One additional factor also supports the Court's ultimate conclusion that no privilege applies to protect Mr. Handrick, his opinion and conclusion, or his communications with the state's outside counsel. "Certainly, if...[a consulting expert] was an active participant in the events which form the subject matter of this litigation, they are entitled to whatever discovery of him they may deem

appropriate." *Marylanders*, 144 F.R.D. at 303. While the Court remains uncertain of the full extent to which Mr. Handrick participated in development of the redistricting legislation that underlies this litigation, evidence seems to make clear that he participated as a lobbyist and was thus an active participant in the redistricting. Mr. Handrick does not have a law degree or any degree in political science or statistics; his only qualifications appear to be his prior service as a member of the State Assembly. As such, the Court finds it likely that Mr. Handrick was an active lobbying participant in the redistricting, entitling the plaintiffs to whatever discovery of [\*13] him they may deem appropriate under the rules of evidence. *Id.*

Accordingly,

**IT IS ORDERED** that the motion of the Wisconsin State Assembly and the Wisconsin State Senate to clarify (Docket #77) be and the same is **GRANTED** in part, to clarify the fact that Mr. Handrick is not an attorney and is employed by Reinhart Boerner Van Deuren, S.C.;

**IT IS FURTHER ORDERED** that the motion of the Wisconsin State Assembly and the Wisconsin State Senate to clarify (Docket #77) be and the same is **DE-NIED** in part, to the extent that those parties seek application of privilege to shield Mr. Handrick from discovery; as discussed above, privilege does not apply to Mr. Handrick, his work product, or his discussions with the outside counsel of the State Assembly and State Senate.

Dated at Milwaukee, Wisconsin, this 20th day of December, 2011.

BY THE COURT:

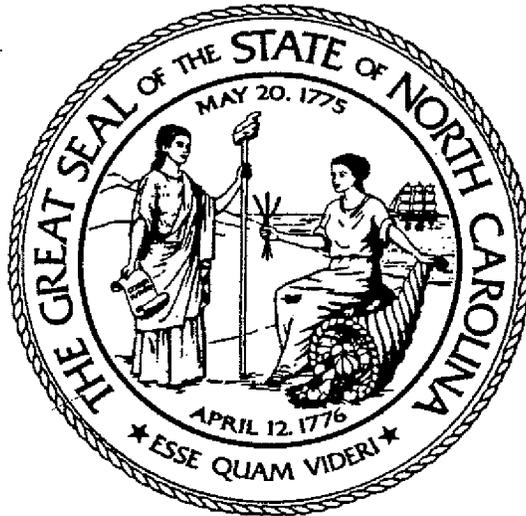
/s/ J.P. Stadtmueller

J.P. Stadtmueller

U.S. District Judge

# **EXHIBIT C**

# REDISTRICTING 1991



## LEGISLATOR'S GUIDE TO NORTH CAROLINA LEGISLATIVE AND CONGRESSIONAL REDISTRICTING

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February, 1991

After the release of federal census data this year, the General Assembly will redraw North Carolina's congressional districts, state Senate districts, and state House districts. North Carolina's population has increased approximately thirteen percent since the last census in 1980, but the increases did not occur evenly throughout the State, and in some areas, the population has decreased. As a result, many districts are either overpopulated or underpopulated and must be redrawn so that they are again substantially equal in population.

Since the origin of the one person-one vote decisions in the early 1960s, state and local redistricting plans have been subject to increasing scrutiny and litigation nationwide. The early redistricting lawsuits of the 1960s and 1970s focused on malapportionment cases in which the failure to redraw grossly overpopulated urban districts had led to substantial underrepresentation of urban residents. The 1980s witnessed an explosion of minority vote dilution cases and objections by the Department of Justice under the Voting Rights Act. The Supreme Court has also recently ruled that partisan gerrymandering claims may be heard by the courts.

It is important to understand these legal developments and how they impact the General Assembly's 1991 redistricting effort. This manual briefly reviews these legal issues, census data issues, the current legislative and congressional districts, historical perspectives on redistricting, and the computer technology that will be available. It is intended to provide only basic information about redistricting. For a more thorough discussion of federal constitutional principles and the Voting Rights Act, please consult *Reapportionment Law: The 1990s*, published by the National Conference of State Legislatures and available for review in the Legislative Library.

This manual was prepared by Linwood Jones of the General Assembly's Research Division. Bill Gilkeson of the Research Division contributed the chronological chart of the 1980s redistricting. Terry Sullivan, Director of Research; Gerry Cohen, Director of Legislative Drafting; Glenn Newkirk, Director of Legislative Automated Systems; and Giles Perry and Carolyn Johnson of the Research Division reviewed and commented on the issues discussed in the manual. Philip Rose, a legislative intern, provided most of the statistical data in the manual. Ann Munn of the Legislative Automated Systems Division also assisted in the preparation of this manual.

Questions about the manual or redistricting legal issues may be directed to the Research Division. Questions about redistricting technology may be directed to the Legislative Automated Systems Division.

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## LEGISLATIVE CONFIDENTIALITY

Most legislators are aware of the legislative confidentiality statutes. These statutes protect legislators' bill requests and information requests from being disclosed to anyone else (including other legislators) without the consent of the requesting legislator. Even when a legislator makes a bill draft public by introducing it, the documents and information used to develop the draft remain confidential.

Requests relating to redistricting are treated quite differently. Under G.S. §120-133, all drafting and information requests to legislative employees about redistricting and all documents prepared by the legislative staff about redistricting are confidential *only* until the final redistricting plan is enacted. Once the General Assembly enacts the final redistricting plan, all information in the possession of the legislative staff regarding that plan becomes a public record.

For example, if a Senator works with a legislative employee on an amendment to remove a county from his district, that information is confidential. Once the final Senate redistricting plan is enacted, however, the amendment and all documentation and records relating to the amendment in the possession of the legislative employee become public records, regardless of whether the amendment was ever made public during the deliberations on the plan. In addition, the legislative employee may be required by a court to testify about the amendment and any discussions with the requesting legislator about the amendment.

The special provision for redistricting communications allows the State to meet its obligations under Section 5 of the Voting Rights Act of 1965. In the Section 5 review process, the State has the burden of proving that its new redistricting plans do not have the purpose or effect of abridging the right of minorities to vote. To meet this burden, substantial information about the plans must be submitted to the Department of Justice. This information includes not only the final redistricting legislation and maps, but also information leading to the creation of these plans.

The Department of Justice has broad investigative powers and is authorized by federal regulations to conduct any inquiry or investigation appropriate in making its Section 5 determination (28 C.F.R. §51.38). Legislators and legislative staff members may be requested to provide to the Department documents, statements, correspondence or other materials relating to redistricting.