UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

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,

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

(caption continued on next page)

PLAINTIFFS' BRIEF IN RESPONSE TO LEGISLATURE'S ATTORNEY-CLIENT PRIVILEGE ASSERTION

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

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

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.

This latest discovery dispute involving the Legislature should be the last and not only because the Court has left little doubt about its tolerance for the parties' collective inability to resolve their differences. Rather, after three successive discovery orders, the Legislature has represented repeatedly that these 84 documents are *all* that remain unproduced after the *subpoenas duces tecum* directed at their consultants and employees. Not until the plaintiffs re-deposed Tad Ottman and Adam Foltz, in the wake of the Court's successive orders, did the existence of the materials and the Legislature's continued assertion of privilege come to light.

After an examination, the Court should order the materials produced. Either they already should have been produced, in response to the Court's orders, or any assertion of privilege was waived long ago. Finally, the documents' relevance is now even more apparent, and their status as "legal" advice is now even more in question.

I. THE COURT ALREADY HAS DECIDED THE ISSUE AGAINST THE LEGISLATURE.

No one should need a history lesson here. The plaintiffs began their efforts to learn what Joe Handrick, Mr. Foltz, and Mr. Ottman did—and why—just days after the Court entered its initial scheduling order. The plaintiffs did not direct their discovery at the Legislature's legal counsel as such or at legislators individually, precisely to try to avoid immunity questions and the privilege difficulties that have arisen. Rather, the plaintiffs sought information from the three people who, it is undisputed, drew the district lines.

The Legislature's initial motion sought a blanket privilege for Mr. Handrick, a non-lawyer, because he "assisted counsel...in the provision of legal advice...." "Civil L.R. 7(h) Expedited Motion to Quash the Subpoena Issued to Joseph Handrick," p. 2 (Dkt. No. 63). Six days later, a second motion asserted that "Mr. Ottman's actions...took place in the context of assisting legal counsel in the provision of legal advice...." "Civil L.R. 7(h) Expedited Motion to Quash the Subpoena Issued to Tad Ottman," p. 3 (Dkt. No. 72). It specifically asserted the attorney-client privilege and the work-product privilege. *Id*.

On December 8, 2011,the Court denied the motions, finding that the attorney-client privilege has "no application" to Mr. Handrick (Dkt. No. 74). The Court's subsequent decision, on the Legislature's request for reconsideration, reiterated its holding and applied the legal principle and precedent that remain pivotal here: "[D]ocuments concerning 'advice on political, strategic or policy issues, [although] valuable..., [are] not...shielded from disclosure by the attorney-client privilege." *Evans v. City of Chicago*, 231 F.R.D. 302, 312 (N.D. Ill. 2005) (quoting *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998); *see* Order at 6 (Dkt. No. 82).

To the extent the materials still being withheld involve communications *solely* between and among the lawyers retained by the Legislature--and no one else--they may well be

privileged, but if and only if they involve legal advice. In light of the Court's previous orders, however, any communication of any kind involving Mr. Handrick, Mr. Foltz, or Mr. Ottman--whether addressed directly to them, received directly from them, or on which they were copied--should be produced forthwith.

II. THE MATERIALS DO NOT CONSTITUTE LEGAL ADVICE THAT QUALIFIES FOR THE PRIVILEGE.

With each newly disclosed document and deposition in this litigation, it has become ever-clearer that the role of counsel in the redistricting process was not limited to providing legal advice. The parties now know, for example, that the Legislature's employees and consultants physically worked at a law firm—they were assigned offices there—maintaining their files and records there. Handrick Depo. (Dkt. 136) at 27:19-28:5; 30:7-32; 32:9-24; 41:15-43:20. Foltz Depo. (Dkt. 138) at 13:9-14:2; 32:2-36:2; Ottman Depo. (Dkt. 140) at 158:11-161:25. It is not a situation that suggests a bright line between legal advice and the advice on "political, strategic and policy" advice already addressed by this Court. Of course, the Legislature's employees and consultants were housed there, deposition testimony has disclosed, specifically to try to acquire the benefits of the lawyer-client privilege. *See, e.g.*, Handrick Depo. (Dkt. 136) at 84:9-86:1; 96:18-98:4; 124:19-125:2.

Deliberately or not, moreover, the defendants have acknowledged the central role provided by the Legislature's counsel in drafting the political boundaries in Act 43. (By contrast, there has been no mystery and no hide-and-seek in the process that led to the drafting of the Congressional boundaries in Act 44.) The defendants intend to introduce testimony at trial about the political support provided by an Hispanic-American group for the creation of what was to become Assembly Districts 8 and 9. Those districts are at the heart of the Voting Rights Act dispute here. Yet that support was solicited not only, or even, by the three staff members and

consultants but, in addition, by one of the Legislature's counsel. Handrick Depo. (Dkt. 136) at 227:21-229:6; Ottman Depo. (Dkt. 140) at 34:13-57:22.

Indeed, the privilege log submitted by the Legislature identifies a series of discrete communications focused on the Hispanic-American districts and the Voting Rights Act issue. Dkt. 132. Legislative aides have confirmed the central role of the Legislature's counsel and consultants in working hand-in-hand to configure African-American and Latino districts in Milwaukee to comply with Voting Rights Act requirements, citing meetings where the aides, legal counsel, and consultants conferred together on that very issue. Handrick Depo. (Dkt. 136) at 101:16-21; Ottman Depo. (Dkt. 140) at 83:2-84:13; 155:13-157:16. Moreover, as one of the Legislature's consultants testified at his deposition, the Legislature's counsel attended a meeting at which the consultant, legislative leadership, and the Legislature's counsel were presented with various options for legislative districts--with counsel making the final determination on the configuration of Assembly Districts 8 and 9 for the Legislature's approval. That is hardly "legal" advice. Handrick Depo. (Dkt. 136) at 154:17-155:5.

The plaintiffs' counsel have not seen the documents at issue. While they obviously were prepared to ask a magistrate to resolve the privilege issue after an *in camera* inspection, in the interests of saving the Court's time, the plaintiffs' counsel have listened carefully to the general description of the materials by the Legislature's counsel. If the materials were largely ministerial—scheduling meetings, for example—then they do not constitute legal advice. Nor, in the unique context of this case and these facts, can the "precedential" advantage or disadvantage of asserting or declining to assert the privilege be a persuasive factor.

It may sometimes be difficult to isolate legal advice from the political, strategic and policy choices inherent in any legislative enactment of any kind. Yet that burden cannot fall

anywhere else but on the Legislature's counsel and the Legislature itself--a public, elected body that, as this Court has noted, ought to be conducting its business in public. The difficulty of identifying truly privileged communications becomes even more difficult, moreover, when lawyers and legislative staff and consultants are working in the same space--all by design to try to shield their work and their communications from the public.

The Legislature's discussion of the magistrate's decision in *Doe v. Nebraska*, 788 F.Supp.2d 975 (2011), *see* Legislature's Brief at 5, provides no assistance. After an extended discussion of the legislative privilege, no longer an issue here, the decision addresses the attorney client and work product privileges in two sentences, concluding that the application of the privilege to all of the documents at issue was "highly unlikely. ...Asserting a blanket privilege for these documents simply is not sufficient." *Id*. at 986. Not incidentally, the decision provides a timely reminder that it is appropriate to explore "legislative motivations" and that "a number of cases, particularly those involving potential violations of constitutional rights, have allowed queries into legislators' motivations." *Id*. at 981.

The potential significance of the withheld documents on the Voting Rights Act claims cannot be overstated. The defendants have raised objections to the Court's authority to review claims involving state law and the state constitution, but they cannot object to the Court's authority to apply the Voting Rights Act to redistricted Hispanic-American neighborhoods and districts in Milwaukee. It is a federal statute central to the U.S. Supreme Court's latest redistricting decisions--and to this one.

III. THE LEGISLATURE HAS WAIVED THE PRIVILEGE.

Notably, the Legislature concedes that the "Court could view certain of the emails as falling outside the attorney-client privilege under the 'political, strategic or policy' exception." Legislature's Brief at 4. Putting aside the fact that the Legislature has never before made that

concession, it is precisely the point of this dispute. Those materials are not subject to any privilege. Whether or not this creates a "conundrum" for the Legislature, especially at this juncture, is not persuasive. The Legislature has had a series of opportunities to obtain the Court's guidance or to disclose what has long been withheld. Yet the Legislature now almost invites a decision by the Court compelling production: "if this Court were to order the production of certain communications as falling outside the scope of the attorney-client privilege, the issue of waiver would be alleviated." Legislature's Brief at 4.

The plaintiffs have twice deposed Mr. Handrick, Mr. Foltz, and Mr. Ottman. In the second deposition, the Legislature's counsel asserted the privilege, but the witnesses nevertheless answered—or partially answered—the questions asked. Foltz Depo. (Dkt. 138) at 78:25-80:1. Foltz Depo. (Dkt. 139) at 279:11-281:16; Ottman Depo. (Dkt. 141) at 362:9-366:21. In addition, throughout the entire redistricting process, the legislative leadership, legislative aides, the consultants, and the Legislature's legal counsel all participated, together, in meetings where redistricting decisions were made – including the provision of "legal advice" regarding some of the proposed assembly districts. That operated to waive any claim of privilege.

CONCLUSION

For the reasons stated above and in their prior briefs on the Legislature's serial motions, the plaintiffs ask that the Court order the Legislature to produce the withheld documents or, upon examination, as many of them that do not constitute bona fide legal advice tendered by the Legislature's counsel solely to its employees.

Dated: February 15, 2012.

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