

Findings of Fact

1. At issue in this motion to compel is the question of whether privileged documents and communications are made public by the application of N.C. Gen. Stat. § 120-133, which states:

Notwithstanding any other provision of law, all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and become public records upon the act establishing the relevant district plan becoming law.

2. The term “legislative employee” in § 120-133 is defined in N.C. Gen. Stat. § 120-129(2) to include “consultants and counsel to members and committees of either house of the General Assembly or of legislative commissions who are paid by State funds.” The term “legislative employee” does not include “members of the Council of State.” *Id.*

3. The term “documents” is defined in N.C. Gen. Stat. § 120-129(1) to include “all records, papers, letters, maps . . . electronic data . . . or other documentary material regardless of physical form or characteristics.”

4. On November 8 and 17, 2011, Plaintiffs served Defendants with their First Requests for Production of Documents wherein Plaintiffs requested various documents in the possession of Defendants relating to redistricting the North Carolina General Assembly and Congressional districts

5. By way of example, in Request 9 of the *Dickson* Plaintiffs' First Request, Plaintiffs requested the following:

9. Documents, including electronic communications in the form of emails, texts and tweets, concerning or relating to redistricting the North Carolina State Senate or State House sent or presented to the President Pro Tem of the Senate, the House Redistricting Committee, any officer, member, agent, or representative of the House Redistricting Committee, the Senate Redistricting Committee, or any officer, member, agent or representative of the Senate Redistricting Committee by counsel to any committee or member of the General Assembly, including without limitation Thomas Farr, Michael Carvin, Jason Kay, Tracey Kimbrell, Brent Woodcox, Ericka Churchill, Brian Kreheley, Andrew Tripp and Gerry Cohen.

6. Defendants have objected to providing certain documents otherwise responsive to requests such as Request 9 above on the grounds that such documents are "protected by the attorney-client privilege or constitute trial preparation materials created or discussed in anticipation of litigation."

7. Some or all of the persons specifically named in these and other document requests are attorneys. For example, Thomas Farr is an attorney employed by the law firm of Ogletree, Deakins, Nash, Smoak & Stuart, PC. Michael Carvin is an attorney employed by the law firm of Jones Day. Jason Kay is an attorney employed as General Counsel for the Speaker of the House, Thom Tillis.

8. The law firm of Ogletree, Deakins, Nash, Smoak & Stuart, PC was retained on or about March 21, 2011 by Philip E. Berger, President Pro Tempore of the North Carolina Senate, Thom Tillis, Speaker of the North Carolina House, Bob

Rucho, Chair of the Senate Committee on Redistricting, and David Lewis, Chair of the House Committee on Redistricting, each of whom are members of the General Assembly and each of whom retained the firm in their official capacities.

9. The law firm of Ogletree, Deakins, Nash, Smoak & Stuart, PC was engaged to provide, and did provide, the aforementioned clients legal advice regarding 2011 Legislative and Congressional redistricting.

10. State funds were used to pay the law firm of Ogletree, Deakins, Nash, Smoak & Stuart, PC for legal advice provided to the clients identified in paragraph 8 above.

11. President Pro Tempore Berger, Senator Rucho, Speaker Tillis and Representative Lewis also retained the law firm of Jones Day on or about July 22, 2011.

12. The law firm of Jones Day was engaged to represent, and did represent (to the extent needed), the aforementioned clients in seeking preclearance under Section 5 of the Voting Rights Act before the Justice Department and/or a D.C. three-judge court, and any related appeals.

13. State funds were used to pay the law firm of Jones Day for legal advice provided to the clients identified in paragraph 11 above.

14. Staff attorneys employed directly by members of the North Carolina General Assembly or its committees are paid by state funds. These staff attorneys

include, but are not limited to, those persons filling the roles of the General Counsel for Speaker Tillis, the General Counsel for President Pro Tempore Berger, the Chief of Staff for the President Pro Tempore Berger, and the Redistricting Counsel for the President Pro Tempore and the Chairman of the Senate Redistricting Committee (hereinafter “Staff Attorneys”),

15. During the course of the consideration of the redistricting legislation, members of the North Carolina General Assembly also received legal advice and counsel from members of the North Carolina Attorney General’s staff, including attorneys Alexander McC. Peters and Tiare Smiley.

16. The Attorney General of North Carolina is a member of the Council of State. Attorneys serving on the Attorney General’s staff act on the Attorney General’s behalf when they provide legal advice and counsel to state agencies and the General Assembly.

17. The Senate redistricting plan enacted by the North Carolina General Assembly, 2011 S.L. 402, was ratified and became law on July 27, 2011. It was amended by 2011 S.L. 413 on November 11, 2011.

18. The House redistricting plan enacted by the North Carolina General Assembly, 2011 S.L. 404, was ratified and became law on July 28, 2011. It was amended by 2011 S.L. 416 on November 7, 2011.

19. The Congressional redistricting plan enacted by the North Carolina

General Assembly, 2011 S.L. 403, was ratified and became law on July 22, 2011. It was amended by 2011 S.L. 414 on November 7, 2011.

Conclusions of Law

20. Although certain communications by and between members of the General Assembly and legal counsel pertaining to redistricting plans may have originally been cloaked with privilege, the General Assembly, by enacting N.C. Gen. Stat. § 120-133, expressly waived any and all such privileges once those redistricting plans were enacted into law.

21. This waiver is clear and unambiguous; it is applicable “notwithstanding any other provision of law.” The waiver applies regardless of whether the privilege is claimed under a theory of attorney-client privilege, the work-product doctrine or legislative privilege.

22. Specifically, for the purposes of this motion to compel, N.C. Gen. Stat. § 120-133 declares that the following categories of documents “are no longer confidential” and “become public record:”

- a. All drafting and information requests concerning redistricting to legislative employees [i.e., *inter alia*, consultants and counsel to members and committees of either house of the General Assembly who are paid by State funds];
- b. Documents concerning redistricting prepared by legislative employees [i.e., *inter alia*, consultants and counsel to members and committees of either

house of the General Assembly who are paid by State funds] (emphasis added).

23. The waiver of confidentiality of drafting requests, information requests and documents became effective upon the ratification of 2011 S.L. 402, 2011 S.L. 403 and 2011 S.L. 404 in July 2011.

24. For the purposes of N.C. Gen. Stat. § 120-133, the law firms of Ogletree, Deakins, Nash, Smoak & Stuart, PC and Jones Day were “legislative employees” because they each served as “consultants and counsel” to members of either house of the General Assembly and were paid with State funds.

25. For the purposes of N.C. Gen. Stat., § 120-133, Staff Attorneys, as that term is defined above, were “legislative employees.”

26. Because the law firms of Ogletree, Deakins, Nash, Smoak & Stuart, PC and Jones Day were legislative employees for the purposes of N.C. Gen. Stat. §120-133, any and all drafting requests and information requests to these firms or their employees concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and are public record.

27. Because the law firms of Ogletree, Deakins, Nash, Smoak & Stuart, PC and Jones Day were legislative employees for the purposes of N.C. Gen. Stat. §120-133, any and all documents prepared by these firms or their employees for legislators concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and are public record.

28. Because Staff Attorneys were legislative employees for the purposes of N.C. Gen. Stat. §120-133, any and all drafting requests and information requests to them concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and are public record.

29. Because Staff Attorneys were legislative employees for the purposes of N.C. Gen. Stat. §120-133, any and all documents prepared by them for legislators concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and are public record.

30. The waiver of confidentiality in N.C. Gen. Stat. § 120-133 does not extend to documents or communications to or from attorneys who were, at the time the document or communication was made, members of the North Carolina Attorney General's staff because the Attorney General, being a member of the Council of State, is not a "legislative employee" and neither are his staff attorneys.

31. The Defendants have not waived their attorney-client privilege or their protection under the work-product doctrine with respect to documents or communications to or from members of the North Carolina Attorney General's staff.

Based upon the foregoing, it is ORDERED that the Plaintiffs' motion to compel is ALLOWED, and that:

A. All drafting requests and information requests from members of the General Assembly, committees of the General Assembly, or legislative staff

members acting on their behalf or at their direction relating to redistricting the North Carolina General Assembly or the Congressional Districts to the law firms of Ogletree, Deakins, Nash, Smoak & Stuart, PC or Jones Day, or any employee thereof, and

B. All documents prepared for legislators or legislative staff members acting on their behalf or at their direction concerning redistricting the North Carolina General Assembly or the Congressional Districts by the law firms of Ogletree, Deakins, Nash, Smoak & Stuart, PC or Jones Day, or any employee thereof, and

C. All drafting requests and information requests from members of the General Assembly, committees of the General Assembly, or legislative staff members acting on their behalf or at their direction relating to redistricting the North Carolina General Assembly or the Congressional Districts to Staff Attorneys of the North Carolina General Assembly or its members or committees, and

D. All documents prepared for legislators or legislative staff members acting on their behalf or at their direction concerning redistricting the North Carolina General Assembly or the Congressional Districts by Staff Attorneys of the North Carolina General Assembly or its members or committees,

shall not be withheld by the Defendants on the basis of any claim of privilege and must

be produced to the Plaintiffs no later than ten (10) days from the date of this Order.

The Court notes that the law firm of Ogletree, Deakins, Nash, Smoak & Stuart, PC has also been retained by members of the General Assembly to defend the legal challenges to the enacted redistricting plans and the firm is being compensated with State funds for these services. In the law firm's capacity as litigation counsel, the firm undoubtedly communicates through documents with its clients regarding, among other things, litigation strategy. While such litigation-related communications, under a literal reading of N.C. Gen. Stat. § 120-133, could be construed as "documents prepared by legislative employees for legislators concerning redistricting," the Court is of the opinion that a fair and reasonable construction of the text of § 120-133 would exclude documents prepared solely in connection with the *redistricting litigation*, and such documents would remain confidential under the attorney-client privilege or the work-product doctrine. However, because the record before the Court at this time does not permit the Court to rule with any specificity which documents might be excluded from the scope of § 120-133 on this basis, the Court can only suggest that the parties consider and agree among themselves a reasonable means of identifying categories of documents that ought to remain confidential (e.g., documents created after the litigation was commenced, or perhaps documents created after the final General Assembly and Congressional redistricting plans were pre-cleared by the United States Department of Justice).

It is further ORDERED that, in the event that in complying with this Order,

documents continue to be withheld by the Defendants pursuant to claims of privilege not addressed by this Order or pursuant to privilege(s) not deemed, by this Order, to have been waived by the operation of N.C. Gen. Stat. § 120-133, the Defendants shall within ten (10) days of this Order comply with Rule 26(b)(5)(A) and describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable Plaintiffs to assess the claim.

So ordered, this the 20th day of April, 2012.

/s/ Paul C. Ridgeway

Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite

Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton

Alma L. Hinton, Superior Court Judge

Certificate of Service

The undersigned certifies that the foregoing was served upon all parties by e-mail to the following:

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This the ___ day of April, 2012.
