UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JULIE CONTRERAS, IRVIN FUENTES, ABRAHAM MARTINEZ, IRENE PADILLA, ROSE TORRES, LAURA MURPHY, CRISTINA FLORES, JOSE ALCALA, TROY HERNANDEZ, GABRIEL PEREZ, IVAN MEDINA, ALFREDO CALIXTO, HISPANIC LAWYERS ASSOCIATION OF ILLINOIS, and PUERTO RICAN BAR ASSOCIATION OF ILLINOIS,

Plaintiffs,

v.

ILLINOIS STATE BOARD OF ELECTIONS, IAN K. LINNABARY , WILLIAM J. CADIGAN, LAURA K. DONAHUE, WILLIAM M. MCGUFFAGE, KATHERINE S. MCCROY, RICK S. TERVEN, SR. and CASANDRA B. WATSON, in their official capacities as members of the Illinois State Board of Elections, DON HARMON, in his official capacity as President of the Illinois Senate, THE OFFICE OF THE PRESIDENT OF THE ILLINOIS SENATE, EMANUEL CHRISTOPHER WELCH, in his official capacity as Speaker of the Illinois House of Representatives, and THE OFFICE OF SPEAKER OF THE ILLINOIS HOUSE OF REPRESENTATIVES,

Defendants.

No. 21-CV-3139

Three-Judge Court Pursuant to 28 U.S.C. § 2284(a)

Circuit Judge Michael B. Brennan
Chief District Judge Jon E. DeGuilio
District Judge Robert M. Dow, Jr.

Magistrate Judge Beth W. Jantz

ORDER

For the reasons discussed below, Plaintiffs' Motion to Compel Legislative Defendants to Respond to Plaintiffs' Discovery Requests [94] is denied.

STATEMENT

Plaintiffs are registered voters of Latino/Latina descent and certain associations promoting Latino/Latina interests. Plaintiffs' First Amended Complaint alleged that in the absence of U.S. Census data, the Illinois General Assembly had improperly relied on American Community Survey ("ACS") and other data to draw a malapportioned legislative redistricting plan, which was passed by the Illinois General Assembly and later signed into law by Illinois Governor J.B. Pritzker in June 2021 (hereinafter, "the June Redistricting Plan"). [Dkt. 37, First Am. Compl.] Plaintiffs brought claims for declaratory and injunctive relief against Defendants Illinois State Board of Elections, its individual members in their official capacities, Emmanuel Christopher Welch, in his official capacity as Speaker of the Illinois House of Representatives, the Office of the Speaker of the Illinois House of Representatives, Don Harmon in his official capacity as President of the Illinois Senate, and the Office of the President of the Illinois Senate. [*Id.* ¶¶ 15-27.]

While the case was proceeding, the U.S. Census Bureau released the 2020 decennial census data, and on the same day that Plaintiffs moved for summary judgment on their First Amended Complaint, the Illinois General Assembly announced its intent to amend the Redistricting Plan. [*See* Dkt 57-1, Joint Proclamation; dkt. 83, Pls.' Summ. J. Mot.] In light of this development, and given the necessarily expedited schedule of this litigation, the three-judge panel set a schedule that allowed for simultaneous briefing on Plaintiffs' summary judgment motion as well as expedited discovery and amending of the complaint to reflect Plaintiffs' challenge(s) to the anticipated new map. [*See* dkt. 72, Sept. 2, 2021 Order; dkt. 75, Sept. 8, 2021 Order.] Accordingly, on September 13, 2021, Plaintiffs served a set of discovery requests on Defendants Welch, the Office of the Speaker of the Illinois House of Representatives, Harmon, and the Office of the President of the Illinois Senate (the "Legislative Defendants"), to which the Legislative Defendants timely responded on September 20, 2021. [*See* dkt 94-2, Herrera Decl. Supp. Pls.' Mot. ¶ 2, Ex. A.] The parties thereafter met and conferred as to certain discovery disagreements, the Legislative Defendants supplemented their responses, and the parties otherwise resolved most of the issues about which they initially had disagreed. [Dkt. 100, Defs.' Resp. at 5; dkt. 100-1 Yandell Decl. Supp. Defs.' Resp. ¶ 2, Ex. A, B.]

Despite their best efforts, the parties were unable to reach an accord as to Plaintiffs' request for draft maps and the Legislative Defendants' corresponding objection that certain documents responsive to Plaintiffs' request are protected from discovery by the legislative privilege.[1] The documents at issue are files created by the Legislative Defendants' Autobound software, a program used in legislative redistricting. The Legislative Defendants assert (and Plaintiffs do not disagree) that, unlike some other software programs, the Autobound program automatically creates separate files every time the user "saves" the map with which the user is working, whether, as the Legislative Defendants put it, because "the day was over, it was time to leave for lunch, or just to be careful." [*See* Defs.' Resp. at 2; dkt. 102, Pls.' Reply.] The Legislative Defendants identify 30 such files on their privilege log, describing them as "pre-decisional, incomplete version[s] of geographic area[s] of partial map[s] drawn by staff." [Herrera Decl., Ex. F.] On September 30, 2021, Plaintiffs filed the instant motion to compel seeking production of these Autobound files.

[1] Specifically, Plaintiffs requested: "All documents relating to the development, creation, revision, or purpose of previous drafts of the S.B. 927 plans." [Herrera Decl., Ex. B at Req. No. 6.]

[Dkt. 94, Pls.' Mot.] The Legislative Defendants subsequently filed a response, and the Plaintiffs filed a reply, all of which this Court has considered.

Meanwhile, the Illinois General Assembly passed a new redistricting plan in late August 2021, which Governor Pritzker signed into law the following month (the "August Redistricting Plan" or the "August Map"). [*See* dkt 91, Pls.' Status Report.] Accordingly, the day after Plaintiffs filed their motion to compel, they filed their Second Amended Complaint, alleging that the Illinois General Assembly violated the Fourteenth Amendment by using ACS data to draw malapportioned districts in the June Redistricting Plan, and by engaging in racial gerrymandering in the use of race as a predominant factor in allocating Latino/Latina voters into certain districts drawn in the August Redistricting Plan. [*See* dkt. 98, Pls.' Second Am. Compl. ¶¶ 107-119]. Plaintiffs further allege that the August Redistricting Plan violates Section Two of the Voting Rights Act of 1965, 52 U.S.C. § 10101, *et seq.*, by denying or abridging Plaintiffs' votes based on race, color, or ethnicity, and diluting their voting strength as minorities (the "Section Two claim"). [*Id.* ¶¶ 120-122.] It is in the context of Plaintiffs' Second Amended Complaint that the current motion is considered.

General Principles

A party may file a motion to compel under Federal Rule of Civil Procedure 37 whenever another party fails to respond to a discovery request or when its response is insufficient. FED. R. CIV. P. 37(a). In ruling on a motion to compel, the discovery standard set forth in Rule 26(b) applies. Rule 26(b)(1) provides, "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." FED. R. CIV. P. 26(b)(1).

The party requesting discovery bears the initial burden of establishing its relevancy and proportionality to the needs of the case. *See, e.g., Sols. Team v. Oak St. Health, Mso, LLC*, No. 17 CV 1879, 2021 WL 3022324, at *3 (N.D. Ill. July 16, 2021); *Eternity Mart, Inc. v. Nature's Sources, LLC*, No. 19-CV-02436, 2019 WL 6052366, at *2 (N.D. Ill. Nov. 15, 2019). "If the discovery appears relevant, the party objecting to the discovery request bears the burden of showing why that request is improper." *Eternity Mart*, 2019 WL 6052366, at *2 (quoting *Trading Technologies Intern., Inc. v. eSpeed, Inc.*, No. 04 C 5312, 2005 WL 1300778, at *1 (N.D. Ill. Apr. 28, 2005)); *Doe v. Loyola Univ. of Chi.*, No. 18 CV 7335, 2020 WL 406771, *2 (N.D. Ill. Jan. 24, 2020). The resolution of discovery disputes is committed to the court's broad discretion. *Fields v. City of Chicago*, 981 F.3d 534, 550-51 (7th Cir. 2020); *Thermal Design, Inc. v. Am. Soc'y of Heating, Refrigerating & Air-Conditioning Eng'rs, Inc.*, 755 F.3d 832, 837 (7th Cir. 2014).

Plaintiffs' Motion to Compel

Plaintiffs' motion presents a single issue for resolution: whether the Autobound files are subject to production or whether they are shielded from discovery by legislative privilege. Plaintiffs contend that the files are draft maps providing a clear record of the iterative step-by-step process through which the August Redistricting Plan was enacted. [Pls.' Mot. at 2.] As a result,

Plaintiffs say, the files are directly relevant to Plaintiffs' claims. [*Id.*] According to the Legislative Defendants, on the other hand, the files are not draft maps but instead are only partial, incomplete drafts representing Legislative staffers' thought processes and opinions as they worked to create the August Map, and they therefore are protected from discovery by legislative privilege. [Defs.' Resp. at 2.]

The parties agree that that resolution of their dispute is governed by application of the balancing test articulated in *Committee for a Fair & Balanced Map v. Illinois State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *7-10 (N.D. Ill. Oct. 12, 2011). [*See* Pls.' Mot. at 6-7; Defs.' Resp. at 9-10.] The decision in *Committee for a Fair & Balanced Map* is on point because it considered a claim of legislative privilege as applied to similar evidence, *i.e.*, draft maps, in the context of the same types of claims as are at issue here. *See Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *1. This Court agrees with the parties that *Committee for a Fair & Balanced Map* is especially instructive, and adopts its sound reasoning in concluding that the legislative privilege is a qualified one arising out of federal law that "shields from disclosure pre-decisional, non-factual communications that contain opinions, recommendations or advice about public policies or possible legislation. It does not protect facts or information available to lawmakers at the time of their decision." *Id.* at *7, 10.

"[I]n determining whether and to what extent a state lawmaker may invoke legislative privilege, the court will consider the following factors: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *Id.* at *7 (collecting cases). "In considering these factors, the court's goal is to determine whether the need for disclosure and accurate fact finding outweighs the legislature's 'need to act free of worry about inquiry into [its] deliberations.'" *Id.* (quoting *ACORN v. County of Nassau*, No.05-2301, 2009 WL 2923435, at *2 (E.D.N.Y. Sept.10, 2009)).

For the reasons that follow, and as the court did in *Committee for a Fair & Balanced Map*, this Court concludes upon consideration of these factors that the need for disclosure does not overcome the legislature's interests in confidentiality, and the Court accordingly upholds the legislative privilege as applied here. *See Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *2, 8-10, n.2 (regarding "information concerning the . . . plans . . . and/or procedures used by lawmakers to draw the 2011 Map . . . the need for [this] information is outweighed by the purposes of the qualified privilege[,]. . . . [which included in that case:] 6. Any draft drawings of any Districts of the 2011 Map").

The Relevance of the Evidence

According to Plaintiffs, the Autobound files are highly relevant evidence in that they reflect the Legislative Defendants' step-by-step process in creating the August Plan. [Pls' Mot. at 1-2, 4, 7-8.] Specifically, Plaintiffs say, the files reflect additional documentation about alternate plans considered by legislators that could have provided minorities with an opportunity to elect candidates of their choice and the kind of data that may have been considered in drafting such plans. [*Id.* at 7-8; Reply at 2.] Even the very file names reflect their relevance, Plaintiffs contend,

emphasizing: (1) a file named "Senate Nests," which Plaintiffs understand to be a reference to "nesting," or the delimitation of voting districts for one elected body in order to define the voting districts for another body, and (2) two files named "fix[es]" of specific districts, including one that is adjacent to a district Plaintiffs identify in their Section Two claim and which Plaintiffs say is significant, since they assert that changes in the nesting of House Districts within Senate Districts may have prevented the creation of one or more Latino/Latina-opportunity Senate Districts. [*Id.* at 4-5.]

The Legislative Defendants see things differently, however, asserting first, that the Autobound files are not "draft maps" in the redistricting sense of completed alternate versions of a challenged map, but rather, are incomplete *portions* of maps that only exist because their software program creates new files when the user clicks "save," rather than saving over old ones. [Defs.' Resp at 7.] As a result, the Legislative Defendants say, unlike in Plaintiffs' cited authorities, the incomplete partial maps at issue here could not serve as support for Plaintiffs' vote dilution claim since Plaintiffs could not point to the drafts as viable Constitutional alternatives. [*Id.*] To the contrary, the Legislative Defendants say, because the draft partial maps reflect the work product of legislative staffers, they are pre-decisional, non-factual materials prepared in the process of working to draw the August Map. [*Id.*] What's more, the Legislative Defendants say, they already have produced the two complete draft alternate maps that they created and the corresponding shape and block equivalency files, as well as any other proposed alternate maps that had been submitted for consideration. [*Id.* at 8.]

Plaintiffs do not disagree in reply that incomplete maps may not serve as Constitutional alternatives, arguing rather that they cannot take the Legislative Defendants at their word, and that they should be able to determine for themselves whether the files are complete draft maps and/or whether they contradict what legislators publicly stated in conjunction with the process of enacting the August Redistricting Plan. [Pls.' Reply at 2-3.]

Although this Court has no reason to doubt the Legislative Defendants' description, if the Autobound files are complete draft maps as Plaintiffs suppose, the files *may be* relevant to Plaintiffs' Section Two claim because they may shed light on the sequence of considerations leading up to the enactment of the challenged map. If, on the other hand, they are incomplete versions of the map as the Legislative Defendants say, their relevance is substantially less. Significantly, Plaintiffs provide no sound reason to doubt the accuracy of the Legislative Defendants' description. Defendants described the files as partial drafts in their opposition to the motion to compel. [*See* Defs.' Resp. at 2 (noting the files "are not completed drafts," but are rather "partial, incomplete versions of the map").] By providing that factual description in a signed submission to the Court, counsel for the Legislative Defendants have certified that to the best of their "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . the[ir] factual contentions have evidentiary support." FED. R. CIV. P. 11(b)(3). "Because Rule 11 imposes on attorneys a duty to conduct an 'inquiry reasonable under the circumstances' before they attest to 'knowledge, information, and belief' supporting their filings, even honest mistakes can be sanctionable." *E.g.*, *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 935 F.3d 573, 584 (7th Cir. 2019). The threat of Rule 11 sanctions, combined with the lack of any asserted facts that challenge the Legislative Defendants' description should provide Plaintiffs with the assurance that they need that the files are indeed partial maps. That being said,

however, the Court need not resolve this issue,[2] because even if the files contained draft maps more potentially relevant to Plaintiffs' claims than partial ones, that greater relevance still would not be strong enough to sway this factor in Plaintiffs' favor.

That is because, while Plaintiffs correctly observe that the court in *Committee for a Fair & Balanced Map* concluded that draft plans considered by legislators may be relevant to a Section Two claim, that court ultimately concluded that such evidence "was not central to the outcome" because "the most important events . . . are those undertaken by the legislative body, such as public hearings, committee meetings and floor debates. The deliberations of individual lawmakers, even those *who helped draw* the 2011 Map, are less probative of the totality of the circumstances test." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *4 (emphasis added). The same analysis applies here too because information considered by lawmakers in drawing the map "say[s] little as to whether the overall effect of the [challenged map] is discriminatory." *Id.* at *4. "Lawmakers may have considered a lot of facts and drawn a discriminatory map, or considered no facts and drawn a perfectly constitutional map. The proof, so they say, is in the pudding; and the pudding is the . . . Map." *Id.* Because the files are not sufficiently probative under the totality of the circumstances test, the relevance factor weighs against disclosure. *See id.* at *2 n.3, 8.

The Availability of Other Evidence

Plaintiffs argue that this factor sways in their favor because the evidence is unavailable elsewhere. [Pls.' Mot. at 8.] As Plaintiffs contend, because the process of finalizing the August Plan was so rushed, there are less materials in the public record than might otherwise be the case in the context of redistricting. [*Id.*] Moreover, Plaintiffs say, materials in the public record only tell a portion of the story, and this fact should militate in favor of disclosure. [*Id.*]

This Court finds, however, that the second balancing factor also weighs against disclosure. The operative question is not whether the sought-after evidence exists elsewhere, but instead, whether *other* evidence is available elsewhere that Plaintiffs may use to sustain their claims. *See Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8. As the Legislative Defendants itemize in their submission, Plaintiffs already have access to a great deal of evidence regarding the drafting process that resulted in the August Redistricting Plan, including but not limited to shape files and block equivalency files that comprise the August Map, additional precinct shape files used to disaggregate from the precinct to the block level, a list of elections that were used to create Plaintiffs' priority districts in the August Map, proposed map submissions from redistricting hearing witnesses, any analysis related to racially polarized voting, and all data that the Legislative Defendants provided to their consultants related either to racially polarized voting or the August Map. [*See* Defs.' Resp. at 5-6.] Because Plaintiffs already have so much information available to them, this factor also weighs against disclosure.

[2] For all of these reasons, the Court has not done an *in camera* review of the Autobound files at issue, which in any event was not requested by any of the parties.

The Seriousness of the Litigation & the Issues Involved, and the Role of the Government in the Litigation

Both the seriousness of the litigation and the role of the government are factors weighing in favor of disclosure. The state government's role in the events giving rise to the litigation is central to Plaintiffs' claims which "raise profound questions about the legitimacy of the redistricting process and the viability" of a redistricting plan. *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8. "[I]t is indisputable that racial and malapportionment claims in redistricting cases 'raise serious charges about the fairness and impartiality of some of the central institutions of our state government,' and thus counsel in favor of allowing discovery." *See Favors v. Cuomo*, 285 F.R.D. 187, 219 (E.D.N.Y. 2012) (quoting *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 102 (S.D.N.Y.), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003)).

The Possibility of Future Timidity by Government Employees

The final factor, the possibility of future timidity by government employees, counsels against disclosure. According to Plaintiffs, this concern is largely absent here because the files they seek are not likely to reveal the opinions of any individual legislator or staffer since they are not attributable to particular people. [Pls' Mot. at 2, 9.] As the Legislative Defendants correctly observe, however, as working drafts of a contested map, the Autobound files necessarily contain and/or reflect legislative staffers' opinions, and as a result, disclosure would have a chilling effect regardless of whether the author is identifiable. [Defs.' Resp. at 2, 8-9.] This Court agrees with the Legislative Defendants' argument on this point.

It is not only the identity of an author or an opinion's owner that is protected by the legislative privilege, but more fundamentally, it is the *exchange* of opinions and ideas amongst the relevant legislators and their staff. "The need for confidentiality between lawmakers and their staff is of utmost importance." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *9. "Legislators face competing demands from constituents, lobbyists, party leaders, special interest groups and others. They must be able to confer with one another without fear of public disclosure." *Id.* at *9. In the context of legislative redistricting, in particular, "full public disclosure would hinder the ability of party leaders to synthesize competing interests of constituents, special interest groups and lawmakers, and draw a map that has enough support to become law." *Id.*

This is so despite Plaintiffs' emphasis on the small volume of material at issue or the relative rarity of legislative redistricting, because neither factor mitigates the chilling effect resulting from compelled disclosure. Redistricting evolves "from the same legislative process as any other law"—*i.e.*, legislators negotiate in private, and debate in public. *Id.* The working drafts comprising the Autobound files are part of that private negotiation. The saved Autobound files may reflect an iterative step-by-step roadmap for how the August Map was ultimately drawn, and as such, they may reflect the "earnest discussion within governmental walls" that must be carefully protected by application of legislative privilege. *Id.* at *9 (quoting *Doe v. Nebraska*, 788 F. Supp. 2d 975, 984 (D. Neb. 2011)). Those performing redistricting work need to know that their drafts may be saved without fear of disclosure as they balance competing interests and negotiate their way to defining a final map. "[T]he need to encourage frank and honest discussion among

lawmakers," and the possibility of future timidity, therefore, favor nondisclosure in this instance, as well. *See id.* at * 8.

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In sum, the seriousness of the litigation and the role of the government are factors that weigh toward disclosure, but the relevance of the evidence sought, the availability of a significant amount of other evidence, and the potentially chilling impact disclosure would have on the critical work of lawmakers all weigh in favor of application of the privilege and against compelled disclosure. The Autobound files are not like objective facts available to lawmakers at the time that the August Map was passed, but rather are like pre-decisional, non-factual information that contain opinions or recommendations about redistricting. Upon due consideration of all of the factors above, therefore, the Court concludes that Plaintiffs' need for the information is outweighed by the purpose of the qualified privilege. Accordingly, Plaintiffs' motion to compel is denied.

CONCLUSION

For these reasons, Plaintiffs' Motion to Compel Legislative Defendants to Respond to Discovery Requests [44] is denied.

Dated: 10/14/21

Beth W. Jantz

BETH W. JANTZ
United States Magistrate Judge