

**IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS**

PAMELA MOSES,)	
)	
Plaintiff,)	
)	
v.)	No. CT-1579-19
)	Division I
)	
)	Judge Felicia Corbin-Johnson
MARK GOINS, TRE HARGETT, and)	Judge Suzanne Cooke
JONATHAN SKRMETTI, in their official)	Judge Barry Tidwell
capacities,)	
)	
Defendants.)	

MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY OFFICE OF LEGAL SERVICES’ MOTION TO QUASH AND FOR A PROTECTIVE ORDER

Pursuant to Tenn. R. Civ. P. 26.03 and 45.07, non-party Office of Legal Services (“OLS”) moves to quash Plaintiff Pamela Moses’ subpoena *duces tecum* directed to it and for the Court to enter a protective order relieving OLS from compliance with the directives of the subpoena. OLS serves as the legal office of the General Assembly regarding the formulation, proposal, and enactment of legislation in Tennessee. And, as addressed more fully below, all of OLS’ activities fall within legitimate legislative activity protected by Article II, § 13 of the Tennessee Constitution. Therefore, the Court should quash Plaintiff’s subpoena and issue the protective order.

BACKGROUND

OLS Generally

OLS serves as the General Assembly’s legal staff office. *See* Tenn. Code Ann. § 3-12-101. Generally, OLS is tasked with providing the General Assembly with summaries and abstracts of proposed legislation, preparing and assisting in the preparation of proposed legislation and

amendments, drafting legal opinions upon request to members of the General Assembly, reviewing proposed legislation as to form and style before its introduction, advising the General Assembly of developments that have or may affect Tennessee law and proposing appropriate recommendations, and providing legal services as requested by and for the General Assembly. *Id.* at § -101(1)-(10); (Ex. 1 (“Campbell Decl.”), ¶¶ 3-5; Ex. 2 (“Garrett Decl.”), ¶¶ 3-5). In providing legal services to General Assembly members, OLS is required to “maintain the attorney-client relationship with each member of the” General Assembly with regard to communications between the member and the attorney, “except as otherwise provided by” the rules of either House of the General Assembly; by default, any materials arising from the relationship are prohibited from public disclosure. Tenn. Code Ann. § 3-12-106(a)-(b); (Campbell Decl., ¶¶ 3-5; Garrett Decl., ¶¶ 3-5).

OLS is only authorized to provide legal services that aid General Assembly members in the discharge of their official, legislative duties. (Campbell Decl., ¶ 4; Garrett Decl., ¶ 4.) Such services include providing research on federal and state case law, writing legal opinions, drafting bills, resolutions, proclamations, and amendments, and providing legal services for legislative committees. (Campbell Decl., ¶¶ 4-5; Garrett Decl., ¶¶ 4-5.) OLS is not authorized to provide General Assembly members or their staff with legal services concerning personal legal issues, such as writing press releases, speeches, or talking points, compiling voting records, transcribing legislative proceedings, or performing secretarial services. (Campbell Decl., ¶¶ 6-7; Garrett Decl., ¶¶ 6-7.) Nor is OLS authorized to provide legal services to constituents. (Campbell Decl., ¶¶ 6, 8; Garrett Decl., ¶¶ 6, 8.)

The General Assembly’s Joint Legislative Services Committee,¹ with the approval of the Speakers of each House of the General Assembly, appoints a Director of OLS for each House “to perform the duties of the office.” Tenn. Code Ann. § 3-12-102; (Campbell Decl., ¶¶ 2-3; Garrett Decl., ¶¶ 2-3). Other OLS personnel may be employed upon recommendation of the Director and with the approval of the Speakers. Tenn. Code Ann. § 3-12-102. The Committee “determines the compensation of the [D]irector,” and, upon recommendation of the Director, determines “the compensation of other [OLS] personnel.” *Id.*

Plaintiff’s Subpoena *Duces Tecum*

On December 12, 2023, Plaintiff served a subpoena *duces tecum* on OLS. (Ex. 3.) Plaintiff requested OLS to produce “all” documents “related to the ineligibility of persons to register and/or vote by virtue of being convicted of a felony,” “all” documents relating to enactments of various Public Acts and statutes from 1972 through 2011, “[a]ll communications” regarding a person’s ineligibility to register or vote due to a felony conviction, “[a]ll documents” reflecting research, studies, and analysis “conducted or considered by the Tennessee General Assembly” regarding the “impact of voting eligibility and/or ineligibility on offender outcomes, recidivism, and/or public safety,” “[a]ll” documents “related to the interpretation of statutes and the Tennessee Constitution,” and “[a]ll communications” regarding Plaintiff. (Ex. 3 at 5-7.)² To date, Plaintiff has not filed a return of service regarding service of the subpoena *duces tecum*.

¹ The Joint Legislative Services Committee is composed of ten members of the General Assembly: the speakers of each House, two members from each House of the majority party, and two members from each House of the minority party. Tenn. Code Ann. § 3-10-101(a)-(b). The Committee makes “recommendations on management, policies, and procedures to be employed in providing services” to the General Assembly as a whole or as to one House. *Id.* at § -104.

² In the “Instructions” section, Plaintiff requests OLS to provide both a privilege log and supplement production pursuant to Rule 26 of the Tennessee Rules of Civil Procedure. (Ex. 3 at

ARGUMENT

The Court Should Grant Non-Party OLS' Motion to Quash and for a Protective Order.

The Tennessee Constitution provides legislative immunity to the General Assembly's members for their "speech or debate." Tenn. Const. art. II, § 13. In interpreting similar provisions under the United States Constitution and other states' constitutions, courts have uniformly held that "speech or debate" protections extend to both legitimate legislative acts and to non-legislators performing such acts. This immunity is absolute and applies to discovery requests, such as Plaintiff's subpoena *duces tecum*.

OLS' actions fall squarely within Tenn. Const. art. II, § 13's protections. OLS provides legal services to General Assembly members in their official, legislative capacities regarding the formulation, proposal, and enactment of legislation. And OLS performs these actions within an attorney-client relationship with members of the General Assembly. Thus, legislative immunity under Tenn. Const. art. II, § 13 attaches to OLS, and the Court should quash Plaintiff's subpoena and enter a protective order.

A. Standards governing motions to quash and for protective orders.

The issuance and service of subpoenas in civil cases is governed by Tenn. R. Civ. P. 45. A court "clerk shall issue a subpoena . . . for the production of documentary evidence . . . to a party requesting it." Tenn. R. Civ. P. 45.01. Service of the subpoena is complete if it is "made by delivering or offering to deliver a copy thereof to the person to whom it is directed." Tenn. R. Civ.

4-5.) The relevant provisions of Rule 26, however, only apply to a "party," not non-parties such as OLS. *See* Tenn. R. Civ. P. 26.02(5) ("When a *party* withholds information otherwise discoverable . . . by claiming that it is privileged . . ." (emphasis added)); Tenn. R. Civ. P. 26.05 ("A *party* who has responded to a request for discovery . . ." (emphasis added)).

P. 45.03. The subpoena may “command a person to produce and permit inspection” of documents. Tenn. R. Civ. P. 45.02.

The party responsible for issuing and serving a subpoena “must take reasonable steps to avoid imposing an undue burden or expense” on a nonparty. Tenn. R. Civ. P. 45.07(1). Rule 45.07 “allows a trial court to quash a subpoena if it is unreasonable and oppressive.” *Artist Bldg. Partners v. Auto-Owners Mut. Ins. Co.*, 435 S.W.3d 202, 220-21 (Tenn. Ct. App. 2013). Further, a trial court may, for good cause shown, grant a motion for a protective order when “the person from whom discovery is sought” demonstrates that compliance with the subpoena would result in “annoyance, embarrassment, oppression, or undue burden or expense.” Tenn. R. Civ. P. 26.03.

Both the grant of a motion to quash and for a protective order are within the trial court’s discretion. *Artist Bldg.*, 435 S.W.3d at 220; *Summers v. Cherokee Children & Fam. Servs., Inc.*, 112 S.W.3d 486, 530 (Tenn. Ct. App. 2002). A trial court abuses its discretion if it: “(1) applies an incorrect legal standard, (2) reaches an illogical or unreasonable decision, or (3) bases its decision on a clearly erroneous assessment of the evidence.” *State v. Mangrum*, 403 S.W.3d 152, 166 (Tenn. 2013).

B. Article II, § 13’s grant of legislative immunity attaches to OLS.

“Of all the immunities enjoyed by government officials[,] the legislative immunity is perhaps the most sweeping and absolute.” *Mayhew v. Wilder*, 46 S.W.3d 760, 774 (Tenn. Ct. App. 2001). Article II, § 13 of the Tennessee Constitution provides:

Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

Article II, Section 13’s “speech or debate” provision embodies the same “concept of absolute of privilege” afforded to members of Congress under the United States Constitution’s Speech or Debate Clause. *Cornett v. Fetzer*, 604 S.W.2d 62, 63 (Tenn. Ct. App. 1980); *see also* U.S. Const. art. 1, § 6, cl. 1 (“[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.”). Since both constitutional provisions are “almost identical,” cases interpreting the Speech or Debate Clause “are particularly helpful” in construing Article II, § 13 of the Tennessee Constitution. *Mayhew*, 46 S.W.3d at 774. And other jurisdictions’ interpretations of similar constitutional speech or debate provisions are also “particularly persuasive.” *See Arutanoff v. Metro. Gov’t of Nashville & Davidson Cnty.*, 448 S.W.2d 408, 411 (Tenn. 1969); *see also Cornett*, 604 S.W.2d at 62-63 (relying on “several well-reasoned authorities from other jurisdictions” in interpreting Tenn. Const. art. II, § 13).

The Supreme Court has read the “speech or debate” protection “broadly to effectuate its purposes.” *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 501 (1975). Those purposes include the “need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch” and “the desire to protect legislative independence.” *United States v. Gillock*, 445 U.S. 360, 369 (1980). Thus, a constitutional provision protecting a legislator’s “speech or debate” is “not confine[d] . . . to delivering an opinion, uttering a speech, or haranguing in debate, but . . . extend[s] . . . to the giving of a vote, the making of a written report, and to every other act resulting from the nature and in the execution of the office.” *Kilbourn v. Thomas*, 103 U.S. 168, 203 (1880) (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)). That is, legislative immunity “attaches to all actions taken ‘in the sphere of legitimate legislative activity.’” *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

While the “heart” of the activity protected “is speech or debate,” “courts have extended the privilege to matters beyond pure speech or debate . . . when necessary to prevent indirect impairment of such deliberations.” *Gravel v. United States*, 408 U.S. 606, 625 (1972) (internal quotation marks omitted). Those activities include “fact-finding, information gathering, and investigative activities,” *Gov’t of Virgin Islands v. Lee*, 775 F.2d 514, 521 (3d Cir. 1985), as well as voting on bills, holding committee hearings, issuing subpoenas, making budgetary decisions, and other tasks that are “integral” to legislators’ deliberative and communicative processes, *Kent v. Ohio House of Representatives Democratic Caucus*, 33 F.4th 359, 365 (6th Cir. 2022) (internal quotation marks omitted). Further, legislative immunity “turns on the nature of the act, rather than on the motive or intent” of the legislator, because “it simply is not consonant with our scheme of government for a court to inquire into the motives of legislators.” *Bogan*, 523 U.S. at 55 (internal quotation marks omitted). “In short,” legislative immunity applies “to things generally done in a session of the House by one of its members in relation to the business before it.” *Kilbourn*, 103 U.S. at 204; *see also Kent*, 33 F.4th at 364 (finding that numerous state courts “echo[] the refrain that [legislative] privilege sweeps as broadly as the scope of a representative’s legislative duties”); *Stivers v. Beshear*, 659 S.W.3d 313, 320 (Ky. 2022)³ (noting that “most states have broadly applied the terms ‘speech’ or ‘debate’ to cover a broad scope of legislative activity”).

When legislative immunity applies, it serves as an “absolute bar to interference.” *Eastland*, 421 U.S. at 503; *see also Cornett*, 604 S.W.2d at 63-64. “The degree of intrusion is not material; any probing of legislative acts is sufficient to trigger the immunity.” *In re North Dakota*

³ In construing the Kentucky Constitution’s “speech or debate” provision, the Kentucky Supreme Court relied on “persuasive federal authority” interpreting the United States Constitution. *Stivers*, 659 S.W.3d at 319.

Legislative Assembly, 70 F.4th 460, 463 (8th Cir. 2023) (internal quotation marks omitted). The immunity protects legislators “not only from the consequences of litigation’s results but also from the burden of defending themselves.” *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). In other words, once legislative immunity applies, it protects against both compulsory testimony and compulsory production of evidence. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995); *see also id.* at 418 (concluding that “[d]iscovery procedures can prove just as intrusive” as naming legislators as parties (internal quotation marks omitted)).

Courts have interpreted their constitutions’ “speech or debate” provisions to apply to legislators’ staff, aides, and other “alter egos.” *Gravel*, 408 U.S. at 616-17; *see also League of Women Voters of Penn. v. Pennsylvania*, 177 A.3d 1000, 1003 (Pa. Cmwlth. 2017)⁴ (“It is also now well-settled that the protections of the Speech and Debate Clause extend to legislative staff.”). Because legislative immunity is designed to protect “the legislative process itself,” its protections extend to all persons involved “in the proposal, formulation, and passage of legislation.” *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015). To determine whether a non-legislator is “acting as ‘one’ with the legislator” and “functioning in a legislative capacity,” courts consider “the individual’s relationship with the legislator, the individual’s identity, and the source or terms of

⁴ Pennsylvania courts have long concluded that the Pennsylvania Constitution’s speech or debate provision is indistinguishable “from that of the federal clause applicable to members of Congress.” *Consumers Educ. & Prot. Ass’n v. Nolan*, 368 A.2d 675, 681 (Pa. 1977). The Tennessee Supreme Court has interpreted the Tennessee Constitution’s provisions consistently with identical provisions contained in the Pennsylvania Constitution. *State v. Marshall*, 859 S.W.2d 289, 292-94 (Tenn. 1993) (noting that portions of the Tennessee Constitution were modeled after the Pennsylvania Constitution and relying on Pennsylvania court decisions); *see also Mayhew*, 46 S.W.3d at 775 (citing *Consumers Educ. & Prot. Ass’n*).

the individual's pay, if any.” *Edwards v. Vesilind*, 790 S.E.2d 469, 532-33 (Va. 2016)⁵ (quoting *Gravel*, 408 U.S. at 616-17).

Here, legislative immunity granted under Tenn. Const. art. II, § 13 attaches to OLS. First, OLS's activities fall within the “sphere of legitimate legislative activity.” *See Bogan*, 523 U.S. at 54 (internal quotations omitted). By statute, OLS provides the General Assembly with information and assists in the preparation of “proposed legislation,” provides legal opinions upon a General Assembly member's request, advises the General Assembly of developments “which may require legislative action,” reviews “all proposed legislation,” and provides “other legal services [as] requested” by the General Assembly's members. Tenn. Code Ann. § 3-12-101(1)-(10). OLS provides these services to aid General Assembly members in their official, legislative duties. (Campbell Decl., ¶¶ 4-5; Garrett Decl., ¶¶ 4-5); *see Edwards*, 790 S.E.2d at 533 (noting that a division of legal services employee “is likely to perform legislative functions on behalf of the legislator”). And OLS is required to “maintain the attorney-client relationship with each member” of the General Assembly regarding “communications between the member and the attorney”; by default, none of the “materials arising out of” the relationship are subject to disclosure as “public records.” Tenn. Code Ann. § 3-12-106(a)-(b). Additionally, other courts have concluded that legislative immunity attaches to entities similar to OLS. *See Stivers*, 659 S.W.3d at 322-23 (concluding that an agency “operat[ing] as the administrative and research arm of the [Kentucky] General Assembly” and its staff “enjoy[] the protection[s] of legislative immunity”); *Edwards*, 790 S.E.2d at 536 (holding that the circuit court erred in concluding that the Virginia legislature's

⁵ In *Edwards*, the Virginia Supreme Court concluded that the Virginia Constitution's speech or debate provision should be interpreted consistently with the U.S. Constitution's similar provision. 790 S.E.2d at 522-24.

Division of Legal Services was “not protected by the legislative privilege enshrined” in the Virginia Constitution).

OLS also satisfies the identity factor. Attorneys working for the legislative branch are “more likely to be working the legislative sphere” than, for instance, a person “who specializes in information technology.” *See Edwards*, 790 S.E.2d at 533. OLS’ legal services to General Assembly members fall *within* the legislative sphere, such as providing members with research on case law, writing legal opinions, drafting bills, resolutions, proclamations, and amendments, and providing legal services for legislative committees. (Campbell Decl., ¶¶ 4-5; Garrett Decl., ¶¶ 4-5); *see Kent*, 33 F.4th at 365. By contrast, OLS does not provide services that would fall *outside* of legitimate legislative activity, such as providing legal advice to General Assembly members or their staff in their personal capacities or to constituents, writing press releases, speeches, or talking points, compiling voting records, transcribing legislative proceedings, or performing secretarial services for the General Assembly. (Campbell Decl., ¶¶ 6-8; Garrett Decl., ¶¶ 6-8); *see Gravel*, 408 U.S. at 625 (concluding that a senator’s private publications with a publishing company “was in no way essential to the deliberations of the Senate”).

Finally, the compensation factor also favors finding that OLS has legislative immunity. The General Assembly’s Joint Legislative Services Committee “determine[s] the compensation of” the Directors and, upon recommendation of the Directors, approves the “compensation of other [OLS] personnel.” Tenn. Code Ann. § 3-12-102; (Campbell Decl., ¶¶ 2-3; Garrett Decl., ¶¶ 2-3).

In addition to the above factors, legislative immunity should also attach to OLS because the purpose of Plaintiff’s subpoena *duces tecum* strikes at the essence of the need for Tenn. Const. art. II, § 13 in the first place. The “factual heart” of Plaintiff’s asserted claims involve “the subjective motivations” of the General Assembly. *See In re Hubbard*, 803 F.3d at 1311

(concluding that legislative immunity prevented a subpoena inquiring into “the subjective motivation that lawmakers had in passing legislation”). Plaintiff claims that the General Assembly enacted statutes prohibiting infamous criminals convicted of enumerated crimes from seeking restoration of their voting rights to “intentionally . . . disenfranchise Black Tennesseans” and to “manipulat[e] the eligible electorate.” (Joint Notice of Filing, Ex. A, pp. at 30 ¶¶ 92-93; 32, ¶ 102; 36, ¶123; 39, ¶ 141.) But legislative immunity applies regardless of “the motive or intent” of the person acting within the legislative sphere. *See Bogan*, 523 U.S. at 54-55. In any event, the formulation, proposal, and enactment of legislation clearly falls within the legitimate legislative activity that Tenn. Const. art. II, § 13 protects, and all of the services OLS provides are in aid of the General Assembly member’s official, legislative duties. (Campbell Decl., ¶¶ 4-5; Garrett Decl., ¶¶ 4-5); *see Mayhew*, 46 S.W.3d at 774-76; *see also Bogan*, 523 U.S. at 55 (holding that acts that are “integral steps in the legislative process” are entitled to immunity).

In sum, because the activities of OLS fall within the legitimate legislative activity protected by Tenn. Const. art. II, §13, legislative immunity attaches to OLS.

CONCLUSION

For the reasons stated herein, the Court should grant non-party OLS’ Motion to Quash and for a Protective Order.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter

/s/ Robert W. Wilson
Robert W. Wilson, BPR #34492
Senior Assistant Attorney General
Office of the Attorney General and Reporter
40 South Main Street, Suite 1014
Memphis, TN 38103-1877
(901) 543-9031
Robert.Wilson@ag.tn.gov

*Counsel for Non-Party
Office of Legal Services*

CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of January, 2024, a true and exact copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing report. Parties may access this filing through the Court's electronic filing system. Additionally, a copy of the foregoing has been electronically mailed to the following:

John E. Haubenreich
The Protect Democracy Project
2020 Pennsylvania Avenue NW, #163
Washington, DC 20006
John.Haubenreich@protectdemocracy.org

Counsel for Plaintiff

/s/ Robert W. Wilson
Robert W. Wilson
Senior Assistant Attorney General