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

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

ORDER

Before the Court[1] is the January 2, 2024 Motion of non-party Office of Legal Services ("OLS") to quash Plaintiff Pamela Moses's subpoena *duces tecum* directed to it. OLS seeks a protective order relieving it from compliance with the directives of the subpoena because all of OLS's activities fall within legitimate legislative activity protected by Article II, Section 13 of the Tennessee Constitution. OLS further argues that the materials sought by Plaintiff all concern the legislature's subjective motivations for passing specific legislation. Such requests, it maintains, touch upon the core area protected of legislative immunity and must be quashed.

Plaintiff responds, however, that OLS fails to distinguish between legislative immunity and legislative privilege. According to Plaintiff, legislative privilege does not provide grounds to withhold documentary evidence. Further, Tennessee courts have only discussed Article II, Section 13 in the context of immunity from liability. Thus, according to Plaintiff, the Court should afford no weight to the federal cases that extend the protections of the Speech and Debate Clause. In the alternative, Plaintiff argues that even should the Court hold that Article II, Section 13 applies in

[1] Presiding over this matter is a three-judge panel appointed by the Tennessee Supreme Court pursuant to Tenn. Code Ann. §§ 20-18-101 *et seq.* and Supreme Court Rule 54.

this instance, the Court should nevertheless deny the motion to quash because OLS has asserted a blanket privilege without explaining what it seeks to protect and why it seeks to protect it. Plaintiff points to the decisions of federal trial courts that have required the production of a privilege log.

Defendants counter that privilege and immunity are used interchangeably by the courts in reference to legislative activities and that, regardless of what it is called, OLS provides legal services to the General Assembly only within the context of protected legislative activities. Further, federal courts have held a privilege log is unnecessary when the requested documents are clearly protected by the legislative privilege.

We agree with Defendants. Based on Article II, Section 13 of the Tennessee Constitution, OLS's Motion to Quash must be, and therefore, is **GRANTED.**

BACKGROUND

In December 2023, Plaintiff served a subpoena *duces tecum* on OLS demanding the production of "[a]ll memoranda, presentations, notes, research, communications, audio recordings, video recordings, or other documents related to the ineligibility of persons to register and/or vote by virtue of being convicted of a felony" or "related to the drafting, debate, and/or passage of" a number of bills that comprise the legislative history of the statutes challenged by Plaintiff in this action. OLS was created by the General Assembly in 1977. *See* Tenn. Code Ann. §§ 3-12-101, *et seq.* It has ten specific duties outlined by law:

> (1) Provide summaries and abstracts of proposed legislation;
> (2) Prepare and assist in the preparation of proposed legislation and amendments;
> (3) Give legal opinions upon request of members of the general assembly;
> (4) Inform the speaker of the senate, the speaker of the house of representatives, and appropriate committees of either house of developments which have affected or may affect state law or which may require legislative action, together with appropriate recommendations;
> (5) Review all proposed legislation as to form and style, prior to its introduction;
> (6) Conduct a continuing review of the Tennessee Code Annotated and uncodified public chapters and advise the general assembly as to legislation deemed necessary

> to remove defective or anachronistic laws in light of the common law and judicial decisions;
> (7) Advise the general assembly of proposals for the reform or betterment of the law recommended by the Uniform Law Commission, the National Conference of State Legislatures, the Council of State Governments, the American Law Institute, any bar association or other learned body;
> (8) Receive and consider suggestions from legislators, judges, public officials, lawyers, and the public as to defects and anachronisms in the law and, if deemed appropriate, prepare legislation to remove such defects or anachronisms;
> (9) Inform the general assembly of all provisions of the Tennessee Code Annotated which have been repealed by implication or which have been held unconstitutional by the Tennessee Supreme Court or by the United States Supreme Court; and
> (10) Provide other legal services requested by the committee, the speakers, or the general assembly.

Tenn. Code Ann. § 3-12-101.

LEGAL STANDARD

As a general matter, "[a] subpoena may command a person to produce and permit inspection, copying, testing, or sampling of designated books, papers, documents, electronically stored information, or tangible things, or inspection of premises with or without commanding the person to appear in person at the place of production or inspection." Tenn. R. Civ. P. 45.02.

> When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Tenn. R. Civ. 45.08(2)(A). "Upon motion," however, "the court may quash or modify a subpoena duces tecum if it is unreasonable or oppressive . . . ." Tenn. R. Civ. P. 45.02, cmt.

ANALYSIS

The Tennessee Court of Appeals has described legislative immunity as "perhaps the most sweeping and absolute" of all the immunities enjoyed by government officials." *Mayhew v. Wilder*, 46 S.W.3d 760, 774 (Tenn. Ct. App. 2001). "[F]or any Speech or Debate in either House, [legislators] shall not be questioned in any other place." Tenn. Const. art. II, § 13. In Tennessee,

there is little development of this provision. Perhaps for this reason, the Court of Appeals noted that the words of Article II, Section 13 of our state Constitution "are almost identical to the second sentence in Article I, Section 6 [1] of the United States Constitution. Therefore, the cases interpreting Article I, Section 6[1] are particularly helpful." The United States Supreme Court has explained: "Two interrelated rationales underlie the Speech or Debate Clause: first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence." *United States v. Gillock*, 445 U.S. 360, 360 (1980). "It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972); *see also Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The holding of this Court . . . that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned."). The United States Court of Appeals for the Fourth Circuit described the protection against the production of evidence in these terms:

> Legislative privilege against compulsory evidentiary process exists to safeguard this legislative immunity and to further encourage the republican values it promotes. "Absolute immunity enables legislators to be free, not only from 'the consequences of litigation's results, but also from the burden of defending themselves.'" Because litigation's costs do not fall on named parties alone, this privilege applies whether or not the legislators themselves have been sued.

E.E.O.C. v. Wash. Suburban Sanitary Comm'n, 631 F.3d 174, 181 (4th Cir. 2011) (citations omitted) (alterations in original). Legislative immunity thus protects those who work for the legislature as well as the legislators themselves. *See Gravel v. United States*, 408 U.S. 606, 621–22 (1972). "[I]t does not matter to the existence of the legislative privilege that the . . . lawmakers were not parties to [the] lawsuit." *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015).

As Plaintiff argues, however, some federal courts have applied a five-factor test to determine whether the legislative privilege ought to yield to an important interest. *See, e.g.*, *Church v. Montgomery Cnty.*, 335 F.3d 758, 767 (D. Md. 2018) (citations omitted) ("As stated in Bethune-Hill and Benisek, the Court looks to five factors, namely: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the seriousness of the litigation and the issues involved; 4) the role of government; and 5) the purpose of the privilege . . . ."). And some courts have required the production of a privilege log to make this determination. *See, e.g.*, *South Carolina State Conference of NAACP v. McMaster*, 584 F. Supp. 3d 152, 165–67 (D.S.C. 2022) (citation omitted) ("Especially where the court may already need to ascertain whether the documents at issue are 'legislative in nature' before the legislative privilege can be invoked, 'some degree of documentary review is necessary for the privilege to be claimed in the first place.'"). A review of the invocation of the legislative privilege is unnecessary and inappropriate when the plaintiff's claims seek review of the motivation behind the legislation at-issue. *In re Hubbard*, 803 F.3d at 1311. Not even the vindication of constitutional rights permits an examination of the legislature's subjective motives. *Id.* at 1312.

Here, the duties outlined by Tenn. Code Ann. § 3-12-101, as well as the Declarations of Anastasia Campbell and Karen Garrett, demonstrate OLS acts at the behest of the General Assembly and within the sphere of legislative activities protected by Article II, Section 13. Plaintiff's remaining claims allege willful discrimination on the basis of race, manipulation of the electorate, and an arbitrary, conscience-shocking abuse of state power. Thus, Plaintiff's subpoena is inherently aimed at gathering evidence of the subjective motivations behind the challenged legislation. This, the caselaw makes clear, she cannot do. Accordingly, we hold that the subpoena

at issue seeks privileged materials and would thus be unduly oppressive by infringing upon the legislative immunity of the General Assembly. OLS's Motion to Quash is hereby **GRANTED**.

It is so ORDERED.

/S/JUDGE FELICIA CORBIN-JOHNSON, CHIEF JUDGE

/S/JUDGE SUZANNE COOK

/S/JUDGE BARRY TIDWELL