

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE GEORGIA SENATE BILL 202	Master Case No.: 1:21-MI-55555-JPB
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CONSOLIDATED/JOINT DISCOVERY STATEMENT

I. Background

Plaintiffs served discovery requests on Georgia GOP (“GAGOP”) on March 4, 2022, and over the past year, the parties have been engaged in a discovery dispute, including several unsuccessful meet and confers, over GAGOP’s assertions of attorney-client privilege. Relatedly, Plaintiffs served a deposition subpoena on Brad Carver, the appointed chair of the GAGOP Election Confidence Task Force (“Task Force”). The parties will address Mr. Carver’s subpoena in a separate statement, but their disagreement over that subpoena turns in large part on the resolution of this privilege issue. The parties thus seek guidance from the Court to address the privilege dispute.

A. Plaintiffs’ Position

Plaintiffs seek documents and communications from GAGOP related to election reform proposals or recommendations it provided to Georgia legislators. Documents obtained through discovery indicate that GAGOP, its Task Force, and Mr. Carver, assisted in drafting SB 202. Documents and communications related to these activities are highly relevant, but were improperly withheld under the attorney-client privilege—the main privilege GAGOP has asserted in this case.¹ These documents consist of: (1)

¹ GAGOP also appears to assert work-product protection over approximately two dozen documents, all of which pre-date this lawsuit, but fails to explain how such documents could have been prepared in anticipation of litigation. And GAGOP never asserted First Amendment privilege in its privilege log, or at any point before submitting this joint statement, as to the documents in Exhibit A.

communications with third parties; and (2) communications made to facilitate lobbying activities or purposes other than providing legal advice.

While GAGOP claims attorney-client privilege over hundreds of communications “between attorneys retained by the Georgia GOP and party leaders,” Ex. A, Rows 1-375, they have yet to provide Plaintiffs with sufficient information to ascertain who is a “party leader,” and whether attorney-client relationships existed with these individuals or the dozens, if not hundreds, of other recipients jointly copied across these emails, *see e.g., id.* Rows 305-338 (communications each copying more than a dozen individuals). *See United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir. 1991) (party invoking attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the communications were confidential).

Additionally, many communications that GAGOP has withheld on the basis of attorney-client privilege appear to be made not for the purpose of providing legal advice, but for lobbying activities.² It is GAGOP’s burden to show that “the primary purpose of the communication was to relay, request or transmit legal advice.” *United States v. Davita, Inc.*, 301 F.R.D. 676, 682 (N.D. Ga. 2014). “[S]tandard lobbying . . . is inadequate to invoke the attorney-client privilege,” especially where “there is no apparent legal advice sought or given.” *Brantley Cnty. Dev. Partners, LLC v. Brantley*

² In many instances, there is also insufficient information to determine the purpose of the communication. *See, e.g.,* Ex. A, Rows 240, 242.

Cnty., No. 6:05-02152, 2021 WL 2678197, at *2 (S.D. Ga. June 29, 2021); *see also* *BCD, LLC v. BMW Mfg. Co., LLC*, No. 5:19-cv-109, 2006 WL 8443166, at *3 (D.S.C. June 30, 2006) (ordering production of attorney communications that “more closely relate to lobbying strategies”).³ Here, many of the withheld communications are related to GAGOP’s involvement in drafting legislation or consideration of bills, which constitute lobbying and are not privileged. *See, e.g.*, Ex. A, Rows 28, 32 (emails between Mr. Carver and GAGOP leaders titled “Re: Suggested Changes to SB202”); Rows 406-410 (communications related to “language” or “substance” of senate bills); O.C.G.A. § 21-5-70(5)(A) (defining lobbying as “undertaking to promote or oppose the passage of any legislation by the General Assembly”). Finally, GAGOP broadly asserts that Mr. Carver’s communications related to the Task Force should be withheld because he acted as an attorney for the group.⁴ But in Mr. Carver’s produced emails,

³ The non-binding cases cited by Intervenor are not to the contrary. Those cases confirm that lobbying-related communications are only privileged if they “rise to the level of legal advice.” *Robinson v. Texas Auto. Dealers Ass’n*, 214 F.R.D. 432, 445 (E.D. Tex. 2003). *See also id.* at 445 (advice “characterized as merely political, rather than legal” is not privileged); *Weissman v. Fruchtmann*, No. 83 CIV. 8958 (PKL), 1986 WL 15669, at *15 (S.D.N.Y. Oct. 31, 1986) (concluding after *in camera* review that communications were privileged because it sought legal advice on pending legislation); *In re Grand Jury Subpoenas dated Mar. 9, 2001*, 179 F. Supp. 2d 270, 285 (S.D.N.Y. 2001) (concluding attorneys acted primarily as lobbyists, and thus attorney-client privilege did not apply).

⁴ Plaintiffs do not seek any documents created after the enactment of SB 202 that might be related to Mr. Carver’s representation of GAGOP in this case. *See* ECF Nos. 120-1 at §§ II.B-C; 122 (ESI Orders).

he explains that “in [his] party capacity,” he chaired the Task Force which provided “recommendations” about election issues to the legislature. GAGOP_0002307. This describes lobbying activity rather than giving legal advice. Given Mr. Carver’s mixed role, the privilege log’s “boilerplate assertions regarding the subject matter of the documents” are insufficient for Plaintiffs to determine whether a communication is privileged legal advice, or non-privileged general lobbying strategy. *Meade v. Gen. Motors, LLC*, 250 F. Supp. 3d 1387, 1396 (N.D. Ga. 2017). Thus, all documents in Exhibit A that are withheld or redacted on the basis of Mr. Carver’s representation of the Task Force should be produced.

B. Intervenor’s Position

Plaintiffs complain that GAGOP has asserted the attorney-client privilege over hundreds of documents. So have they.⁵ And Intervenor Defendants have produced over 1,300 documents. GAGOP has objected to the production of additional documents and to deposition testimony from Brad Carver on several grounds: relevance (*e.g.*, many are outside the relevant time frame, which for the GAGOP is the date when the Election Confidence Task Force was formed (January 6, 2021) through the signing of SB 202 (March 25, 2021); 1st Amendment Privilege (documents or communications related to

⁵ For comparison purposes, various Plaintiffs have also objected to the production of “hundreds” of documents on the grounds of privilege. For example:

- Georgia Muslim Voter Project – 185 documents; and
- The ARC of the United States – 111 documents.

the associational plans or strategies of the GAGOP, the disclosure of which would impact its members' political activities); and attorney-client privilege (documents or communications between Mr. Carver or other Intervenor-Defendant attorneys and party leaders made for purposes of requesting or providing legal advice).

Plaintiffs claim that the GAGOP asserts privilege over communications with “hundreds” of individuals. This is false. There are four categories of emails over which the privilege has been asserted: (1) internal Hall Booth Smith emails; (2) emails involving only attorneys and GAGOP staff; (3) emails involving only members of the initial Task Force (as identified in its report); and (4) emails involving only members of the expanded Task Force, which was expanded after SB 202 was signed. Plaintiffs' revision of the GAGOP's privilege log – attached as Exhibit A – appears to concede that certain of these communications are in fact privileged. The primary issue appears to be the communications with members of the Task Force, which Plaintiffs attempt to differentiate as lobbying, rather than a legal effort. Without conceding that point, a lawyer can be both “acting as a lobbyist and having privileged communications with a client who is seeking legal advice.” *In re Grand Jury Subpoenas*, 179 F.Supp.2d 270, 285 (S.D.N.Y.2001). Even when lobbying, the attorney-client privilege protects communications regarding legal advice, like legal analysis of legislation and interpretation or application of the legislation to fact scenarios. *Robinson v. Texas Auto.*

Dealers Ass'n, 214 F.R.D. 432, 446 (E.D.Tex.2003), *vacated in other part*, 2003 WL 21911333, at *1 (5th Cir. July 25, 2003); *see also Weissman v. Fruchtmann*, 1986 WL 15669, at *15 (S.D.N.Y. Oct. 31, 1986) (finding attorney-client privilege properly invoked where client sought legal advice on pending legislation).

Absent some other objection or privilege, GAGOP has produced all relevant communications related to traditional lobbying. GAGOP has asserted the attorney-client privilege over some of the communications between Mr. Carver and other attorneys and GAGOP staff and Task Force members because those communications related to the request for or provision of legal advice. Drafting the provisions of a law, interpreting those provisions, and addressing the potential impact of them are all activities that inherently involve the type of advice and analysis performed by an attorney. Because these activities involve the request for or provision of legal services, Mr. Carver's communications pertained to providing legal advice are privileged.

Plaintiffs also bemoan GA GOP's privilege log and descriptions. For each entry, GA GOP's privilege log includes the parties to the documents or communication, the date it was created or sent, the subject, the author, and a description. *See* Exhibit B – Privilege Log. As can be seen by Exhibit A, GAGOP's log is comparable to Plaintiffs', and in many cases, is more robust.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document has been prepared in accordance with the font type and margin requirements of L.R. 5.1, using font type of Times New Roman and a point size of 14.

Dated: February 24, 2023

/s/ Uzoma N. Nkwonta

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2023, I electronically filed this document with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

Dated: February 24, 2023

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