

August 5, 2021

Via email and regular mail
jsweeneylaw@comcast.netHon. John A. Sweeney, A.J.S.C. (Ret.)
State of New Jersey
Council on Local Mandates
P.O. Box 627
Trenton, NJ 08625-0627**RE: In re Complaint Filed by the Franklin Township Board of Education**
Regarding P.L. 2020, Chapter 44**In re Complaint Filed by the Gloucester City Board of Education**
Regarding P.L. 2020, Chapter 44**In re Complaint Filed by the Lower Township Elementary Board of Education**
Regarding P.L. 2020, Chapter 44**COLM-0001-21 (Consolidated Action)****Letter-brief of Respondents Senate President Stephen M. Sweeney and Assembly Speaker Craig J. Coughlin in opposition to Claimants' motion to compel document discovery**

Dear Judge Sweeney:

As you know, this office represents Respondents Senate President Stephen M. Sweeney and Assembly Speaker Craig J. Coughlin (hereafter collectively "the Presiding Officers") in the above-captioned consolidated action. Presently pending before the Council is Claimants' motion to compel document discovery directed at the Presiding Officers. Please accept this informal letter-brief, in lieu of a more formal submission, in opposition to the Claimants' motion to compel discovery directed

application for preliminary injunctive relief.

Claimants' document requests directed to the Presiding Officers consist of the following:

1. Please produce any and all studies, surveys, and/or reports commissioned and/or relied on by Respondents regarding Chapter 44. This includes any and all studies, surveys, and/or reports commissioned and/or relied on by Respondents after the enactment of Chapter 44 on July 1, 2020 to the present.
2. Please produce any and all information submitted to Respondents by any and all Boards of Education throughout New Jersey regarding the fiscal impact of Chapter 44.
3. Please produce any and all correspondence regarding Chapter 44, between Respondents and anyone associated with Milliman from January 1, 2018 to the present.
4. Please produce any and all correspondence regarding Chapter 44, between Respondents and representatives of the New Jersey Education Association from January 1, 2018 to the present.

As fully set forth herein, the Presiding Officers – as members of the Legislature – are subject to complete legislative immunity from discovery in civil and criminal litigation and other official proceedings pursuant to Article IV, section 9 paragraph 4 of the New Jersey Constitution (hereafter “the Speech or Debate Clause”). Because of the constitutional shield of legislative immunity, the Presiding Officers are under no obligation to respond to Claimants' document demands. Consequently, Claimants' motion to compel discovery against the Presiding Officers should be denied in its entirety.

LEGAL ARGUMENT

POINT I

CLAIMANTS' MOTION TO COMPEL DISCOVERY AGAINST THE PRESIDING OFFICERS SHOULD BE DENIED IN ITS ENTIRETY, BECAUSE THE PRESIDING OFFICERS – AS MEMBERS OF THE LEGISLATURE – ARE SUBJECT TO COMPLETE LEGISLATIVE IMMUNITY FROM DISCOVERY IN CIVIL AND CRIMINAL LITIGATION AND OTHER OFFICIAL PROCEEDINGS PURSUANT TO ARTICLE IV, SECTION 9 PARAGRAPH 4 OF THE NEW JERSEY CONSTITUTION

The Speech or Debate Clause of the New Jersey Constitution provides that:

Members of the Senate and General Assembly shall, in all cases except for treason and high misdemeanor, be privileged from arrest during their attendance at the sitting of their respective houses, and in going to and returning from the same; and for any statement, speech or debate in either house or at any meeting of a legislative committee, they shall not be questioned in any other place.

[N.J. Const. art. IV, § 4, ¶ 9.]

As the Appellate Division has observed, “legislative immunity guaranteed by the Speech or Debate Clause assures that the speech and conduct of legislators acting within the sphere of legitimate legislative activity will not be made the basis for a civil judgment.” Teamsters Local 97 v. State, 434 N.J. Super. 393, 428 (App. Div. 2014) (citing Gilbert v. Gladden, 87 N.J. 275, 292-93, (Pashman, J., and Schreiber, J., dissenting) (using the United States Supreme Court's interpretation of the Federal Speech and Debate Clause in analyzing New Jersey's Speech or Debate Clause).

The protections afforded by the Clause are sweeping: legislative immunity “protect[s] legislators not only from the results of criminal and civil litigation, but also from the burden of defending themselves.” State v. Gregorio, 186 N.J. Super. 138, 151–52 (Law. Div. 1982) (citing Dombrowski v. Eastland, 387 U.S. 82, 85 (1967)). Moreover, because the Speech or Debate Clause “is a function of the separation of powers designed to preserve the constitutional structure of separate, coequal, and independent branches of government, the ordinary rules for waiver such as intentional

relinquishment or abandonment of a known right or privilege do not apply.” State v. Twp. of Lyndhurst, 278 N.J. Super. 192, 200 (Ch. Div. 1994) (citing United States v. Helstoski, 442 U.S. 477, 489-92 (1979); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

Hence, discovery in private civil litigation -- seeking to compel production of documents used in connection with the preparation of legislation -- is precluded under the broad grant of legislative immunity. This is so because “a private civil action, ... creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.” Eastland v. U. S. Servicemen's Fund, 421 U.S. 491, 503 (1975). See Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 421 (D.C. Cir. 1995) (holding that “[a] party is no more entitled to compel congressional testimony -- **or production of documents** -- than it is to sue congressmen”); United States v. Rayburn House Office Bldg., 497 F.3d 654, 660 (D.C. Cir. 2007) (holding that “a key purpose of the privilege is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put. **The bar on compelled disclosure is absolute.**”) (citing Eastland, 421 U.S. at 503) (emphasis added).

In a 2020 Law Division decision involving an OPRA request made to the New Jersey Senate, Judge Jacobson principally considered and applied a statutory exemption from OPRA disclosure (known as the “legislative records exemption” authorized by N.J.S.A. 47:1A-1.1) as a ground for denying the plaintiff’s OPRA request for legislative documents. However, the Judge also considered the application of legislative immunity conferred by the Speech or Debate Clause – in light of the fact that the plaintiff in that case *also* sought ancillary litigation discovery in addition to the OPRA request itself. (Such ancillary litigation discovery would not be literally subject to the statutory OPRA

exclusion under N.J.S.A. 47:1A-1.1 -- since the discovery request arises under the Court Rules rather than under OPRA). As to this ancillary litigation discovery request, the Judge Jacobson held:

There's not much case law on the Speech and Debate Clause in the New Jersey Constitution and it's close to the wording of the Speech and Debate Clause in the United States Constitution.... There was a case State v. Lyndhurst, 278 New Jersey, Super. 192, a Chancery Division case from 1994, and it did discuss the United States Supreme Court cases... And [the] U.S. Supreme Court case has ... held that **legislative privilege prevents discovery into legislative activities**... And so there is a legislative privilege that also would have barred -- likely barred the discovery here and supports the Court's ruling in that regard.

But the -- you know, the main -- the main issue for decisions here is whether the documents requested by plaintiff fall within [the statutory] legislative records exemption [under OPRA].

[Komuves v. NJEFPWG, New Jersey Superior Court, Law Division, Mercer County, Docket No. L-421-20, Decision of Judge Jacobson granting the New Jersey Senate's Motion to Dismiss, July 9, 2020, at 20-21 (emphasis added)]¹

Here, the Presiding Officers already have disclosed to Claimants the following *public* legislative documents: (1) of the Statement of the Assembly Appropriations Committee dated June 26, 2020 regarding S. 2273 (later enacted as L. 2020, c. 44) (annexed to the Certification of Leon J. Sokol, Esq., dated April 23, 2021 in opposition to Claimants' application for preliminary injunctive relief); and (2) report of the Milliman actuarial firm dated April 21, 2021 ((annexed to the Certification of Kevin Drennan dated April 22, 2021 in opposition to Claimants' application for preliminary injunctive relief). The foregoing public documents of the Legislature (previously provided to Claimants) are responsive to Claimants' Document Request. All other potentially responsive documents of the Legislature are subject to the absolute protection from disclosure under

¹ A copy of the pertinent excerpt of Judge Jacobson's decision in Komuves v. NJEFPWG is attached as Exhibit "A" to this letter-brief.

legislative immunity conferred by the Speech or Debate Clause.

POINT II

CONTRARY TO CLAIMANTS' CONTENTION, THE LEGISLATIVE IMMUNITY CONFERRED BY THE SPEECH OR DEBATE CLAUSE APPLIES TO A PROCEEDING BEFORE THE COUNCIL ON LOCAL MANDATES TO THE SAME EXTENT AS IT APPLIES TO CIVIL OR CRIMINAL JUDICIAL PROCEEDINGS

Although Claimants concede that that the Presiding Officers may properly assert legislative immunity in any civil or criminal judicial proceeding, Claimants nevertheless contend that legislative immunity somehow does not extend to a proceeding before the Council on Local Mandates ("Council"). For several reasons Claimants' contention is properly rejected.

First, under the plain terms of the New Jersey Constitution's Speech or Debate Clause, legislative immunity extends to all types of official proceedings. The Clause provides:

Members of the Senate and General Assembly shall, in all cases except for treason and high misdemeanor, be privileged from arrest during their attendance at the sitting of their respective houses, and in going to and returning from the same; and for any statement, speech or debate in either house or at any meeting of a legislative committee, they shall not be questioned **in any other place**.

[N.J. Const. art. IV, § 4, ¶ 9 (emphasis added).]

Note the above language placed in boldface. By its terms, the legislative immunity conferred by the Speech or Debate Clause admits of no exception for any particular type of forum or proceeding. Thus, the preclusionary effect of the Clause applies just as much to the proceedings before the Council as it does to civil or criminal judicial proceedings.

Second, nothing in the Unfunded Mandate Amendment of the New Jersey Constitution modifies or amends the scope of application of the Speech or Debate Clause. See N.J. Const. Art. VIII, § 2, ¶ 5. Indeed, the Unfunded Mandate Amendment mentions not one word regarding the sweeping legislative immunity conferred by the Speech or Debate Clause. In light of this, there is no

basis whatsoever that would support Claimants' apparent contention that a conflict exists as between the Unfunded Mandate Amendment and the Speech or Debate Clause – let alone to contend that the former takes precedence over the latter. There being no conflict whatsoever between the Unfunded Mandate Amendment and the Speech or Debate Clause, each constitutional provision must be given effect in accordance with its terms. Applying the Speech or Debate Clause, the Presiding Officers are subject to complete legislative immunity in this proceeding.

Third, the constitutional scheme underlying the Unfunded Mandate Amendment and the Local Mandate Act did not even contemplate that the Senate President or the Assembly Speaker could be direct parties to a Council proceeding. Although the Rules of the Council do allow the Presiding Officers to be Respondents if they so choose (which is what occurred in this case), the participation of these Officers in a Council proceeding is by no means intrinsic to the constitutional or statutory scheme. That fact further undercuts Claimants' argument that legislative immunity conferred by the Speech or Debate Clause was somehow modified or limited by the Unfunded Mandate Amendment.

In short, contrary to Claimants' contention, the legislative immunity conferred by the Speech or Debate Clause applies to a proceeding before the Council on Local Mandates to the same extent as it applies to civil or criminal judicial proceedings.

POINT III

CONTRARY TO CLAIMANTS' CONTENTION, THE MERE FACT THAT THE PRESIDING OFFICERS PRODUCED TWO LEGISLATIVE DOCUMENTS TO THE COUNCIL IN PRIOR PROCEEDINGS DOES NOT AMOUNT TO A "WAIVER" OF THE LEGISLATIVE IMMUNITY CONFERRED BY THE SPEECH OR DEBATE CLAUSE

Claimants also contend that the Presiding Officers waived their legislative immunity by virtue of having previously submitted to the Council (the following *public* legislative documents: (1) of the

Statement of the Assembly Appropriations Committee dated June 26, 2020 regarding S. 2273 (later enacted as L. 2020, c. 44) (annexed to the Certification of Leon J. Sokol, Esq., dated April 23, 2021 in opposition to Claimants' application for preliminary injunctive relief); and (2) report of the Milliman actuarial firm dated April 21, 2021 ((annexed to the Certification of Kevin Drennan dated April 22, 2021 in opposition to Claimants' application for preliminary injunctive relief). However, for two reasons, Claimants' contention of "waiver" is properly rejected.

First, there was no waiver because the foregoing documents are public documents. The Statement of the Assembly Appropriations Committee is posted on the Legislature's public website. If the Legislature's posting of legislative history on its own website were to amount to a waiver of legislative immunity, then little would be left of the constitutional protections afforded by the Speech or Debate Clause. Obviously, that is an absurd result and is properly rejected. The same is true of the public release of the Milliman April 21 letter. The Legislature can and does release to the public various documents pertaining to pending or enacted legislation. Here again, the public release of a particular legislative document pertaining to an act of the Legislature does not imply a waiver of all confidential internal documents pertaining to the same legislative act. That would have the perverse effect of requiring the Legislature to keep confidential all legislative documents in order to preserve legislative privilege – which would obviously be antithetical to the public interest and to the proper functioning of the Legislature.

Second, under settled law, the ordinary doctrine of waiver is entirely inapplicable to the legislative immunity conferred by the Speech or Debate Clause. As previously noted, because the Speech or Debate Clause "is a function of the separation of powers designed to preserve the constitutional structure of separate, coequal, and independent branches of government, *the ordinary*

rules for waiver such as intentional relinquishment or abandonment of a known right or privilege do not apply.” State v. Twp. of Lyndhurst, 278 N.J. Super. 192, 200 (Ch. Div. 1994) (citing United States v. Helstoski, 442 U.S. 477, 489-92 (1979); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis added)). As explained by the Chancery Division in Township of Lyndhurst:

In Helstoski, *supra*, the Supreme Court of the United States held that a former congressman who was charged with a conspiracy to violate a bribery statute did not waive the protection of the Speech or Debate Clause in testifying before a grand jury and voluntarily producing documentary evidence. **Such a waiver may occur, if ever, only after explicit and unequivocal renunciation of the protection.**

Under the extraordinarily high standard set out in Helstoski, this court finds that the actions of the ... members [of the Legislature], while constituting waivers for limited purposes, do not amount to an “explicit and unequivocal waiver” of the protection provided by the Speech or Debate Clause. First, [the] members [of the Legislature] participated and allowed various aides to participate in a criminal investigation conducted by the Division of Criminal Justice and the New Jersey State Police. This waiver, almost identical to the limited waiver which occurred in Helstoski, does not amount to an “explicit and unequivocal waiver.”

Additionally, the... members [of the Legislature] submitted affidavits in the present case concerning the legislative functions at issue. These actions, although they would constitute a waiver of other testimonial privileges, do not constitute a waiver of the protection of the Speech or Debate Clause. Standing alone, the filing of affidavits, or even testimony before a grand jury, without an “explicit and unequivocal” waiver is no waiver at all.

[State v. Twp. of Lyndhurst, *supra*, 278 N.J. Super. at 200-01 (emphasis added)]

Thus, under the Lyndhurst/Helstoski doctrine, even if the Presiding Officers’ presentation to the Council of the two aforementioned legislative documents could possibly be viewed as a “waiver” under ordinary waiver principles (which it is not), a waiver for purposes of legislative immunity plainly did not occur here – because “ordinary rules for waiver... do not apply” to the legislative immunity conferred by the Speech or Debate Clause. *Id.* at 200. Rather, waiver under the Speech or Debate Clause requires “explicit and unequivocal” waiver of legislative immunity. *Ibid.* That did

not occur here. Indeed, there was no waiver whatsoever.

In short -- for either or both of the above-referenced reasons -- the mere fact that the Presiding Officers produced two legislative documents to the Council in prior proceedings does not amount to a “waiver” of the legislative immunity conferred by the Speech or Debate Clause

POINT IV

IN THE ALTERNATIVE, CLAIMANTS’ MOTION TO COMPEL DISCOVERY AGAINST THE PRESIDING OFFICERS SHOULD BE DENIED BY OPERATION OF THE DELIBERATIVE PROCESS PRIVILEGE

In the alternative, the Presiding Officers also assert privilege arising under the common law Deliberative Process Privilege. That Privilege bars the “disclosure of proposed policies before they have been fully vetted and adopted by a government agency,” thereby ensuring that an agency is not judged by a policy that was merely considered. Education Law Center v. N.J. Dept. of Education, 198 N.J. 274, 286 (2009). The Privilege also “avoids the confusion that could result from the release of information concerning matters that do not bear on an agency’s chosen course.” Ciesla v. N.J. Dept. of Health & Senior Services, 429 N.J. Super. 127, 138 (App. Div. 2012). The scope of the Deliberative Process Privilege extends to “documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which [its] decisions and policies are formulated.” In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000).

In light of the foregoing, all non-public documents of the Legislature are necessarily protected by: (1) the Deliberative Process Privilege; and (2) legislative immunity conferred by the Speech or Debate Clause.

CONCLUSION

For the reasons set forth above, Claimants' motion to compel discovery against the Presiding Officers should be denied in its entirety.

Respectfully,

Cullen and Dykman LLP
Attorneys for Respondents Senate President
Stephen M. Sweeney and Assembly Speaker
Craig J. Coughlin

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EXHIBIT A

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY
DOCKET NO. L-421-20
A.D.# _____

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FLAVIO KOMUVES,)
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Plaintiff,)
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vs.)
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NEW JERSEY ECONOMIC & FISCAL)
POLICY WORK GROUP, D/B/A PATH)
TO PROGRESS NJ AND ALISON)
ACCETTOLA, CUSTODIAN OF)
RECORDS,)
)
Defendant.)

TRANSCRIPT
OF
DECISION

Place: Mercer County
(Heard Via Zoom)

Date: July 9, 2020

BEFORE:
HONORABLE MARY C. JACOBSON, J.S.C.

TRANSCRIPT ORDERED BY:
LEON J. SOKOL, ESQ. (Cullen and Dykman)

Transcriber, Sherry M. Bachmann
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Sound Recorded
Recording Operator,

1 attorney/client privilege, the legislative privilege is
2 absolute. And so a need for documents is not enough,
3 which is clear in HAWKINS V. HARRIS, 141 N.J. 207, New
4 Jersey Supreme Court case from 1995.

5 There's not much case law on the Speech and
6 Debate Clause in the New Jersey Constitution and it's
7 close to the wording of the Speech and Debate Clause in
8 the United States Constitution. But the New Jersey
9 Constitution extends the protection to any statements
10 at any meeting of a legislative committee and the
11 Congress Speech and Debate Clause provides that for any
12 speech or debate, in either, as the members of Congress
13 shall not be questioned in any other place.

14 And there is a Law Review article that
15 discusses legislative privilege, it's called the
16 neglected value of the legislative privilege in State
17 legislators, 45 (indiscernible) Law Review at Page 221
18 from 2003.

19 There was a case that was cited in the papers
20 I reviewed, STATE V. ANGELA LYNDHURST, 278 New Jersey
21 Super. 192, a Chancery Division case from 1994, and it
22 did discuss the United States Supreme Court cases and
23 it's one of the few cases that mentioned the New Jersey
24 Speech or Debate Laws.

25 And U.S. Supreme Court case has -- has held

1 that legislative privilege prevents discovery into
2 legislative activities, which arose in SUPREME COURT OF
3 VIRGINIA V. CONSUMERS UNION OF THE UNITED STATES, 446
4 U.S. 710 from 1980. And so there is a legislative
5 privilege that also would have barred -- likely barred
6 the discovery here and supports the Court's ruling in
7 that regard.

8 But the -- you know, the main -- the main
9 issue for decisions here is whether the documents
10 requested by plaintiff fall within legislative records
11 exemption. I mentioned earlier that the exemption is
12 broadly written to cover any memorandum,
13 correspondence, notes, report, or other communication
14 and then, here, is the language that has been disputed
15 by the parties, prepared by or for the specific use of
16 a member of the Legislature in the course of the
17 member's official duties, except that this provision
18 shall not apply to an otherwise publicly accessible
19 report, which is required by law to be submitted to the
20 Legislature or its members.

21 So this Court used the exemption as a
22 broadline, broader than the plaintiff argues, and that
23 the language prepared by or for the specific use of a
24 member of the Legislature, to me, it means that
25 prepared by anyone. If there isn't any limitation on