

REPORT OF THE ATTORNEY GENERAL
ON THE
STATUS OF OPEN GOVERNMENT IN SOUTH DAKOTA

APPENDIX E

BONE SHIRT V. HAZELTINE
(DELIBERATIVE PROCESS ORDER)

JUNE 30, 2007

FILED

DEC 30 2003


CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

ALFRED BONE SHIRT; BELVA BLACK)	CIV. 01-3032-KES
LANCE; BONNIE HIGH BULL; and)	
GERMAINE MOVES CAMP,)	
)	
Plaintiffs,)	
)	
vs.)	ORDER DENYING PLAINTIFFS'
)	THIRD MOTION TO COMPEL
JOYCE HAZELTINE, in her official capacity)	
as Secretary of the State of South Dakota;)	
SCOTT ECCARIUS, in his official capacity as)	
Speaker of the South Dakota House of)	
Representatives; SOUTH DAKOTA HOUSE)	
OF REPRESENTATIVES; ARNOLD)	
BROWN, in his official capacity as President)	
of the South Dakota Senate; and SOUTH)	
DAKOTA SENATE,)	
)	
Defendants.)	

Plaintiffs move to compel a deponent to answer questions and for defendants to disclose certain documents. Defendants oppose the request.

BACKGROUND

Plaintiffs filed this action challenging a redistricting plan promulgated by the South Dakota legislature. Plaintiffs allege that the plan violates various federal laws and that it dilutes Native American voting power. In their first request for documents, plaintiffs requested "all documents related to any redistricting plan for the State Legislature using 2000 census data" that defendants or their agents reviewed. Defendants objected to this request, calling it irrelevant and invasive of the relationship between the Legislative Research Council and the legislators. Plaintiffs also requested all documents related to defendants' contention that Native

Americans in Districts 26 and 27 are not sufficiently numerous and geographically compact to create a majority in one or more districts.

Plaintiffs deposed the Chief Analyst at the Legislative Research Council (LRC), Reuben Bezpaletz, on August 12, 2003. Bezpaletz told plaintiffs that he prepared six maps when the legislature was considering whether to accept plaintiffs' settlement offer that would resolve the dispute within the boundaries of Districts 26 and 27. All six maps alter the configuration of Districts 26 and 27. When plaintiffs inquired further about the maps during Bezpaletz's deposition, defendants' attorney objected, claiming attorney-client privilege. Plaintiffs move to compel responses to their questions of Bezpaletz and to compel disclosure of the six maps. Defendants argue that the maps are not responsive to plaintiffs' request and that they timely objected. Defendants maintain that the maps are privileged and that plaintiffs have not shown sufficient need for the maps to overcome the privilege. Defendants also contend that the maps are not admissible as evidence of compromise negotiations under Rule 408.

DISCUSSION

1. Responsiveness and Objections

Defendants argue that they had no duty to disclose the six maps because they are not responsive to plaintiffs' discovery requests. Plaintiffs requested all documents relating to the redistricting plan for the State Legislature using 2000 census data and all documents related to the contention that Native Americans are not sufficiently numerous and geographically compact. These six maps are responsive to both requests. The first request is not limited to redistricting plans specifically intended for the state legislature. Rather, the first request references the state legislature to indicate that plaintiffs do not want redistricting plans

specifically drawn for cities or counties. Plaintiffs seek plans that relate to the state legislature's redistricting of state districts. Furthermore, the maps are responsive to plaintiffs' request for documents relating to the contention that Native Americans are neither numerous nor compact. Any alternative redistricting plans are directly relevant to proving or disproving this argument. Accordingly, the six maps are responsive to plaintiffs' requests and are not exempt from discovery on this basis.

The court also finds that defendants have not waived any exercise of privilege in this case by failing to object. Defendants' responses to plaintiffs' requests for documents contain objections, stating that the documents resulted from contacts between legislators and LRC staff. Defendants also repeatedly objected during Bezpaletz's deposition on the grounds of privilege. The court is satisfied that defendants sufficiently raised the issue of privilege.

2. Deliberative Process Privilege

Defendants contend that the maps are protected by the deliberative process privilege. The deliberative process privilege "allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997). "[T]he privilege serves to protect the deliberative process itself, not merely documents containing deliberative material." Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993). It protects against premature disclosure of proposed agency policies or decisions, F.T.C. v. Warner Comm., Inc., 742 F.2d 1156, 1161 (9th Cir. 1984), and prevents injury to the "quality of agency decisions by allowing government officials freedom to debate alternative approaches in private." In re Sealed Case, 121 F.3d at

737. See Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 884 (1st Cir. 1995) (privilege provides reasonable security to an agency's decision making process). The privilege protects advice and recommendations. Mapother, 3 F.3d at 1537. Factual material or past decisions are not protected "unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations. In re Sealed Case, 121 F.3d at 737.

For the privilege to apply, the material must be (1) predecisional, that is "antecedent to the adoption of agency policy, and (2) deliberative, that is actually related to the process by which policies are formulated." Texaco Puerto Rico, Inc., 60 F.3d at 884. A predecisional document reflects the personal opinions of the drafter rather than the policies of the agency. Missouri ex rel. Shorr v. United States Army Corps of Engineers, 147 F.3d 708 (8th Cir. 1998). The privilege is not absolute, and a sufficient showing of need will overcome it. Id. Four factors are relevant when determining whether the need for the material outweighs the government's interest in nondisclosure: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) "the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." F.T.C., 742 F.2d at 1161.

In the current case, the six maps were produced for a meeting of the Executive Board in response to plaintiffs' settlement proposal. The maps, therefore, preceded the LRC's decision of whether or not to accept plaintiffs' settlement proposal. See Hinckley v. United States, 140 F.3d 277, 284 (D.C. Cir. 1998) (proving a document as predecisional requires a court to "be able to pinpoint an agency decision or policy to which the document contributed"). Because

Bezpaletz produced the maps prior to the Board's decision regarding settlement, the maps are predecisional.

The maps are also deliberative. Generally maps only contain factual information that is outside of the deliberative process privilege; however, these maps encompass more than just raw factual data. The maps do not merely reflect the topography of South Dakota; they demonstrate different redistricting possibilities. Where the districts are drawn is inextricably intertwined with the Board's decision making process regarding the feasibility of creating an additional minority-majority district, the strength of the state's case, and the prudence of accepting plaintiffs' settlement proposal. The Board's deliberations centered around these hypothetical districts inherently reveal its opinions and directly relate to the Board's deliberative process and particular decision to reject plaintiffs' proposal. See Hinckley, 140 F.3d at 284 (deliberative process privilege protects individualized decisions rather than the development of generally applicable policy).

Rejecting this proposal, moreover, was not a routine decision. It involved precise consideration of the six maps. The nature and the number of alternative maps suggests the possibility of disagreement among Board members regarding whether to accept the proposal. This indicates that the meeting involved discussion and debate about the maps and the settlement. Accordingly, the particular nature of the maps, the number of maps, and the exercise of the Board's judgment invokes the privilege in this case. See Hinckley, 140 F.3d at 284-85 (privilege applies to decisions that are not routine and that require case-specific discussion and debate).

To overcome the privilege, plaintiffs must prove that their need for the maps outweighs defendants' interest in nondisclosure. First, the maps are relevant in demonstrating whether the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. Thornburg v. Gingles, 478 U.S. 30, 49, 106 S. Ct. 2752, 2766-67, 92 L. Ed. 2d 25 (1986). Maps drawn by the LRC that show alternative districts make this factor more or less probable. Second, plaintiffs cannot obtain similar evidence elsewhere. Indeed, defendants have consistently maintained the impossibility of redistricting alternatives and have not produced any other evidence demonstrating alternatives. These two factors support disclosure of the maps.

Third, because the government is the actual defendant in this case, it can assert the privilege to protect deliberations of its entities. First Eastern Corp. v. Mainwaring, 21 F.3d 465, 468 (D.C. Cir. 1994). The evidence does not reveal bad faith on behalf of the government. Rather, it demonstrates an attempt to prevent disclosure of their deliberative processes when rejecting the maps. Cf. In re Sealed Case, 121 F.3d at 738 (privilege generally denied where the documents shed light on government misconduct since shielding the deliberations does not serve the public's interest in honest, effective government). Nondisclosure of the maps serves the public's interest by facilitating settlements. Permitting private discussions promotes the possibility of reaching settlement agreements. This factor weighs in favor of nondisclosure.

Fourth, disclosure would hinder the frank and independent discussion regarding decisions contemplated by the Board. The Board and Bezpaletz were to assist legislators in redistricting after the 2000 census. Because the legislature had a special need for their opinions and recommendations, they "should be able to give their judgments freely without fear of

publicity.” Id. “[C]ompelled disclosure of the [maps] almost certainly injures the quality of agency decisions. It chills frank discussion and deliberation in the future among those responsible for making governmental decisions.” F.T.C., 742 F.2d at 1162. Disclosure may compromise future deliberations involving settlement offers. See Hinckley, 140 F.3d at 286 (access to internal deliberations “would seriously endanger the future candor of such discussions”). This factor favors nondisclosure of the maps.

After considering all the factors, the court finds that plaintiffs have failed to demonstrate that their need for the six maps outweighs the government’s interest in nondisclosure. Defendants have already provided plaintiffs with a multitude of evidence relating to the redistricting process after the 2000 census. Nondisclosure best serves the public’s interest in promoting settlements and the government’s interest in open, honest discussions. Applying the privilege ensures that the Board is judged by its decision rather than what it “considered before making up their minds.” Callaway Comm. Hosp. v. Sullivan, 1990 WL 125176 (W.D. Mo. 1990). Under these circumstances, the privilege applies and protects the maps from discovery.

Plaintiffs also move to compel deponent Bezpaletz to answer questions asked of him at his deposition. All the questions identified by plaintiffs are related to inquiries about the six maps. For the reasons stated previously, the court finds that the deliberative process privilege applies to this inquiry and plaintiffs’ motion to compel responses by a deponent is denied.

3. Rule 408

Defendants also contend that the maps are not discoverable under Rule 408 because they were created in response to plaintiffs’ offer of settlement. Rule 408 prohibits evidence of conduct or statements made during compromise negotiations. Fed. R. Evid. 408. “This rule is

designed to encourage settlements by fostering free and full discussion of the issues,” Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1106 (5th Cir. 1981), and furthers the public policy of promoting settlements. Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652, 654 (4th Cir. 1988). Rule 408 bars evidence of settlement attempts offered to prove liability. Breuer Electric Mfg. Co. v. Toronado Systems of America, Inc., 687 F.2d 182, 185 (7th Cir. 1982).

Rule 408 does not “require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations[,]” or evidence offered for another purpose, “such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.” Id. Thus, parties cannot “immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation.” Ramada Dev., 644 F.2d at 1107. Evidence of facts revealed during negotiations are also not inadmissible. United States v. Hauert, 40 F.3d 197, 200 (7th Cir. 1994).

In this case, Bezpaletz created the six maps in response to plaintiffs’ settlement proposal. Even though the maps were not presented during formal compromise negotiations between plaintiffs and defendants, the purpose of the Executive Board’s meeting was to discuss a possible settlement. See Trans Union Credit Info. Co. v. Assoc. Credit Services, Inc., 805 F.2d 188, 192 (6th Cir. 1986) (statements at a meeting designed to discuss the interpretation of the contract at issue and how they would proceed amounted to settlement talks, which prevented discovery of the statements). Thus, the maps and statements concerning them were intended as part of the negotiations for compromise. Fiberglass Insulators, 856 F.2d at 654. The maps were generated solely in response to plaintiffs’ offer and therefore, were “not used as

a device to thwart discovery by making existing documents unreachable.” Ramada Dev. Co., 644 F.2d at 1107. Accordingly, the maps are inadmissible under Rule 408. See id. (district court properly excluded report that was collection of statements made in an effort to compromise).

In Alexander v. City of Evansville, Ind., the plaintiffs offered a settlement agreement with the City to demonstrate the City’s interpretation of certain terms in the agreement. 120 F.3d 723, 728 (7th Cir. 1997). The Seventh Circuit upheld the district court’s exclusion of the evidence. Id. Because the interpretation of the agreement was the contested issue, plaintiffs were essentially offering the agreement to prove liability. Id. Likewise in this case, plaintiffs’ suggestion that the maps are admissible to prove the first Gingles factor amounts to admitting the maps to prove a factor necessary to demonstrate defendants’ liability. Rule 408 excludes such evidence. See Ramada Dev. Co., 644 F.2d at 1107 (admitting some evidence under Rule 408 “was not intended to completely undercut the policy behind the rule”).

Plaintiffs have not provided any other justification for admitting the maps. Although the maps need not be admissible to be discoverable, plaintiffs must demonstrate that the maps have some permissible evidentiary value before the court will issue an order to compel otherwise inadmissible material. See Bottaro v. Hatton Associates, 96 F.R.D. 158, 159 (E.D.N.Y. 1982). “Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusion,” a particularized showing of the likelihood of admissibility is necessary before revealing documents generated for settlement negotiations. Id. at 560. Without providing specific reasons that satisfy Rule 408, the court will not compel discovery of the maps. Cf. Hauert, 40 F.3d at 200 (evidence of

settlement agreement in tax case was admissible to show that defendant had knowledge of the law and his legal duties).

4. Work Product Doctrine

Because the court finds that the documents and responses to deposition questions are protected under the deliberative process privilege, the court need not reach the issue of whether the attorney work product doctrine applies.

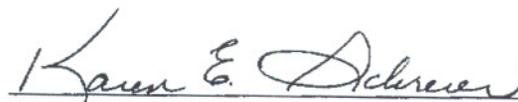
CONCLUSION

Although the six maps are responsive to plaintiffs' request for documents, the deliberative process privilege protects them from disclosure. The maps were produced in response to plaintiffs' settlement proposal, which further shields them from discovery. Accordingly, it is hereby

ORDERED that plaintiffs' third motion to compel (Docket 155) is denied.

Dated December 30, 2003.

BY THE COURT:



KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE