

Legislative Privilege: Protections and Cautions

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Open meetings and the transparency of council deliberations are hallmarks of local government functions in Texas and across the United States. Indeed, the Texas Public Information Act and Open Meetings Act contain requirements to ensure that the meetings and actions of councils and boards (and resulting actions) are open and available to the public. As such, it may seem strange to assert a privilege over the discussions and deliberations that take place in such meetings. However, this important discovery exception can be useful in litigation contexts where a local government is a defendant or third party discovery respondent.

The legislative privilege is rooted in the Texas Constitution and its Speech and Debate clause, providing that “no member shall be questioned in any other place for words spoken in either house.”¹ The legislative privilege protects the integrity of the deliberative process by allowing legislators at all levels to conduct their work without fear of judicial consequences/potential distortions.

As provided below, the legislative privilege has been examined by courts in Texas and in other federal/state contexts. Because the issue is not regularly before Texas courts, litigants seeking the protections of the privilege may be required to reference supportive case law found in other jurisdictions.

When invoking the legislative privilege, it is critical to be aware of its scope and limitations. Common pitfalls in asserting legislative privilege are (1) asserting legislative privilege over information that is not actually protected by the privilege; (2) asserting legislative privilege over witnesses to legislative deliberation who do not qualify as legislative alter egos; (3) invoking the legislative privilege when it is overcome by competing interest; and (4) unknowingly waiving legislative privilege.

I. Who is covered by legislative privilege?

Federal, state, and local legislators all hold legislative privilege under the United States Constitution’s Speech and Debate Clause.² State and local legislators in Texas also hold legislative privilege through the Texas Constitution’s Speech and Debate Clause.³ Such protections extend to members of tribal legislative bodies and legislators representing Indian Tribes or Tribal Subdivisions.⁴ The legislative privilege protects legislators from all questioning, even when the lawmaker is not a named party in a law suit.⁵

The legislative privilege is held by individual legislators and extends to their legislative “alter egos.”⁶ If a non-legislator is functioning in a legislative capacity on behalf of and at the direction of a

¹ Tex. Const. art. III, § 21.

² *Cunningham v. Chapel Hill, ISD*, 438 F.Supp.2d 718, 722 (E.D. Tex. 2006).

³ Tex. Const. art. III, § 21; *Clear Lake City Water Auth. v. Salazar*, 781 S.W.2d 347, 349-50 (Tex. App.—Houston [14th Dist.] 1989, no writ).

⁴ *Tohono O’odham Nation v. Duecy*, 2016 WL 3402391, *3-4 (D. Ariz. June 21, 2016).

⁵ *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015).

⁶ *Edwards v. Vesilind*, 790 S.E.2d 469, 481 (Va. 2016).

legislator, then the non-legislator is acting as a legislative alter ego and may invoke the legislator's privilege.⁷ Conversely, a legislator can invoke legislative privilege to prevent an alter ego from disclosing information.⁸ Factors to be considered when determining whether a person is an alter ego include the individual's relationship with the legislator and the individual's identity.⁹ Common alter egos are legislative staff, aides, and experts.¹⁰ Third parties and consultants can be alter egos if the nature of their communications is within the legislative sphere and the legislator has requested their assistance.¹¹ However, communications between legislators and outsiders, such as lobbyists, are typically not covered by legislative privilege.¹²

II. What functions are covered by legislative privilege?

The legislative privilege covers the "legislative" process itself and does not apply to executive or administrative actions.¹³ The legislative process includes any statement made during an official legislative proceeding (including committee meetings), regardless of the location of that proceeding, and a legislator's actions in the proposal, formulation, and passage of legislation.¹⁴ Statements that are merely casually or incidentally related to the legislative process are not covered by legislative privilege.¹⁵ When determining whether the legislative privilege applies, courts consider a variety of factors, including: whether the act involves ad hoc decision making, or the formulation of policy; whether the communication was to individuals, or the public at large; whether the act is in a formal legislative format; and whether the act bears other hallmarks of traditional legislation.¹⁶ Examples of legislative acts are: floor debates and speeches; votes; issuance of subpoenas to appear before Congressional committees; committee meetings and reports; proposed changes to statutory language; decision making; deliberation with aides, experts, and other legislators regarding possible legislation; consideration of public proposals; e-mails forwarding information to staff from legislators; and materials prepared in connection with these activities.¹⁷

Although legislators often perform political acts in the course of their work, these acts are merely incidental to the legislative process and are not covered by legislative privilege.¹⁸ The critical inquiry in determining whether an act is legislative or merely political is whether the communication was intended as a means of informing those outside the legislative forum.¹⁹ If the communication was intended to inform constituents and members of the general public, it is political and not legislative.²⁰ Examples of political acts are: making appointments with government agencies; assisting local businesses in securing government contracts; preparing newsletters to constituents; issuing news releases; giving speeches outside of the legislative hall; preparing documents for litigation; and taking bribes.²¹ If the distinction between a legislative and political action is blurred, courts err on the side of applying legislative privilege.²²

⁷ *Id.*

⁸ *Id.* at 481 n. 10.

⁹ *Id.* at 482.

¹⁰ *Id.* at 482-83.

¹¹ *Id.* at 483.

¹² *Favors v. Cuomo*, 2015 WL 7075960, 5 (E.D.N.Y. Feb. 8, 2015).

¹³ *Hubbard*, 803 F.3d at 1308; *Tohono*, 2016 WL 3402391, at *4.

¹⁴ *Edwards*, 790 S.E.2d at 479; *Hubbard*, 803 F.3d at 1308.

¹⁵ *Com. v. Ori*, 88 A.3d 983, 1012 (Pa. Super. Ct. 2014).

¹⁶ *Tohono*, 2016 WL 3402391, at *4.

¹⁷ *Favors*, 2015 WL 7075960, at *6-8.

¹⁸ *Id.* at *5.

¹⁹ *Id.* at *6-8.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at *8.

III. Can legislative privilege be overcome?

Protection under the federal legislative privilege (pursuant to the U.S. Constitution) is qualified for state and local legislators.²³ When determining whether federal legislative privilege prevents questioning, a court must undergo a two-step analysis.²⁴ First, a court must ask if the action was legislative in nature.²⁵ If not, legislative privilege does not apply.²⁶ If the action was legislative in nature, then a plaintiff may seek a further ruling by the court to overcome the legislative privilege.²⁷ Courts implement a five-factor balancing test to determine whether legislative documents must be disclosed even though they fall within the scope of legislative privilege (regardless of whether the privilege is federal or state in nature).²⁸ The five factors are: (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.²⁹

Courts vary by jurisdiction when interpreting whether a state legislative privilege can be overcome. In Florida, state legislative privilege provided by the Florida Constitution's Speech and Debate Clause can be overcome by a compelling, competing interest.³⁰ When determining whether the competing interest overcomes state legislative privilege, Florida courts implement a test similar to the five-factor balancing test for federal legislative privilege.³¹ Conversely, in Virginia, once a court determines that state legislative privilege covers certain information, the privilege is absolute and cannot be overcome.³² Texas courts have not ruled on this issue in the context of the Texas Constitution's Speech and Debate Clause; however, they have stated that federal legislative privilege can be overcome.³³

IV. What constitutes a waiver of legislative privilege?

Legislative privilege is held by individual legislators; thus, it cannot be waived or asserted by anyone but the legislator who holds it.³⁴ The Governor, Secretary of State, or State of Texas cannot waive or assert legislative privilege on a legislator's behalf.³⁵ If two legislators draft a bill and one waives his or her legislative privilege regarding the bill's development, the other legislator retains the right to assert legislative privilege and protect the information.³⁶

²³ *Veasey v. Perry*, 2014 WL 1340077, *1 (S.D. Tex. Apr. 3, 2014); *See also Perez v. Perry*, 2014 WL 106927, *2 (W.D. Tex. Jan. 8, 2014); *Hall v. La.*, 2014 WL 1652791, *8 (M.D. La. Apr. 23, 2014); *N.C. State Conference v. McCrory*, 2015 WL 12683665, *6 (M.D.N.C. Feb. 4, 2015); *Favors*, 2015 WL 7075960, at *4; *BBC Baymeadows, LLC v. City of Ridgeland, Miss.*, 2015 WL 5943250, *5 (S.D. Miss. Oct. 13, 2015); *Harding v. Cty. of Dallas, Tex.*, 2016 WL 7426127, *3 (N.D. Tex. Dec. 23, 2016).

²⁴ *Baymeadows*, 2015 WL 5943250, at *5.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Veasey*, 2014 WL 1340077, at *2.

²⁹ *Id.*

³⁰ *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So.3d 135, 146 (Fla. 2013).

³¹ *Id.* at 147.

³² *Edwards*, 790 S.E.2d at 477.

³³ *Veasey*, 2014 WL 1340077, at *1.

³⁴ *Perez*, 2014 WL 106927, at *1; *Edwards*, 790 S.E.2d at 481.

³⁵ *Perez*, 2014 WL 106927, at *1.

³⁶ *Edwards*, 790 S.E.2d at 481 n. 9.

Legislators should be cautious of inadvertently waiving the legislative privilege by communicating the information to an outsider.³⁷ Communications with, or in the presence of, outsiders to the legislative process, such as lobbyists, constitute a waiver of legislative privilege.³⁸ Communication to legislative alter egos such as staff, however, does not constitute a waiver.³⁹

V. How should legislative privilege be asserted?

Legislative privilege must be asserted over a particular piece of information requested in discovery or a line of questioning.⁴⁰ To determine whether legislative privilege is properly applied, there must be an analysis of the specific scope of the privilege.⁴¹ A blanket assertion of legislative privilege to all information is disfavored by courts.⁴² Any legislator asserting the privilege bears the burden of proving that the privilege applies.⁴³ The legislator must provide enough factual information for a court to determine whether the information sought falls within the scope of the privilege.⁴⁴

The legislative privilege applies broadly to the deliberative process; however, courts do not allow it to be used as a shield to prevent disclosure of documents and deliberations subject to transparency laws such as the Texas Public Information Act (open records) or Texas Open Meetings Act (open meetings).⁴⁵

VI. Conclusion

Local governments may invoke the legislative privilege if litigation discovery seeks motives, deliberative comments, or other background behind a legislative act. The protections afforded by this privilege can shield local governments from collateral attacks on legislative activity when the government's decision/act should speak for itself as a matter of law. Of course, counsel for cities and other local governments should balance the litigation needs of a defendant-government against public relations realities, and should counsel legislators accordingly. The legislative privilege is a powerful tool – rooted in Constitutional separation-of-powers principles – that can be employed to protect certain thought processes, deliberations, and comments as “off-limits” from judicial inquiry.

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³⁷ *Favors*, 2015 WL 7075960, at *9.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *In Re TXU Elec. Co.*, 2001 WL 688128, *2 (Tex.App—Dallas June, 20, 2001, no pet.); *See also Perez*, 2014 WL 106927, at *2; *U.S. v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir.1982).

⁴¹ *TXU*, 2001 WL 688128, at *2.

⁴² *Id.* at *1.

⁴³ *Perez*, 2014 WL 106927, at *2.

⁴⁴ *Perez*, 2014 WL 106927, at *2.

⁴⁵ *Vining v. Council of D.C.*, 140 A.3d 439, 448-49 (D.C. 2016); *City of Leon Valley v. Wm. Rancher Estates Joint Venture*, 2015 WL 2405475, *6 (Tex. App.—San Antonio, May 20, 2015).