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Legislative Privilege

Protecting Elected and Appointed Officials from
Compelled Testimony

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Legislative privilege implicates separation of powers

“Judicial inquiries into legislative **or** executive **motivation** represent a **substantial** intrusion into the workings of other branches of government.”

“Placing the decisionmaker on the stand is usually to be **avoided.**”

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 268 n.18 (1977).

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Separation of powers continued...

The difference between an inquiry into whether there was **any possible** rational basis for legislation and an inquiry into the **actual basis** of legislation is **significant**.

A court's assumption of the power to decide between competing legislative proposals or to require the state to prove the validity of its choice is quickly **the right to change the legislative process itself**.

Shelton v. City of College Station, 780 F.2d 475, 481 (5th Cir. 1986) (en banc).

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The scope of legislative privilege

“The scope of the legislative privilege is necessarily broad. [It] extends well beyond the act of voting for or against a particular piece of legislation. It covers material prepared for a legislator's understanding of legislation, lobbying conversations encouraging a vote on pending legislation, and even materials the legislator possesses related to potential legislation—*i.e.*, all aspects of the legislative process.”

League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 877 (W.D. Tex. 2023).

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Legislative privilege scope continued

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“The privilege also extends to material provided by or to third parties involved in the legislative process, because all of these actions occur within the regular course of the legislative process.

Primarily, this protection enables state legislators to focus on legislating rather than on motions practice in lawsuits. Therefore, the privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments.”

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Asserting legislative privilege

A legislative official meets her burden of proof in asserting the legislative privilege simply by pointing out that the purpose of the propounded discovery is to “further the inquiry into [a] lawmaker’s motivations.”

League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 877 (W.D. Tex. 2023).

Remember – the privilege belongs to the individual legislator. They must assert it or it is waived. (Aides can assert it if the legislator asserts it, but if the legislator waives it, their aides are foreclosed from asserting.)

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BUT... the privilege has limits

“[Legislative] privilege does not extend beyond the legislative process. To the extent the plaintiffs seek discovery over materials not part of the ‘proposal, formulation, and passage of legislation,’ that material is **not** protected by the privilege.”

League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 877 (W.D. Tex. 2023).

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Piercing the legislative privilege

The five-factor *Perez* test is used to determine whether legislative privilege protects individual municipal legislators from discovery:

(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the “seriousness” of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Perez v. Perry, SA-11-CV-360-OLG, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014)

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***Perez* first factor: relevance of evidence sought**

For example, when non-party members of council or a planning and zoning commission were subpoenaed to testify in a takings claim and Chapter 245 vested rights claim, the court held that the motives of individual legislators is not required to prove either claim; therefore, their testimony could not be compelled because it was not relevant to a claim or defense.

MC Trilogy Tex., LLC v. City of Heath, Tex., No. 3:22-CV-2154-D, 2023 WL 5918925, at *4 (N.D. Tex. Sept. 11, 2023).

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***Perez* second factor: availability of other evidence**

When publicly available documents such as agendas, minutes, and other public records like non-privileged correspondence, plus non-privileged testimony by city staff, for example, are available to establish the legislative action taken by a body, this too can help establish the necessity of maintaining legislative privilege.

MC Trilogy Tex., LLC v. City of Heath, Tex., No. 3:22-CV-2154-D, 2023 WL 5918925, at *4 (N.D. Tex. Sept. 11, 2023).

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***Perez* third factor: seriousness of litigation**

Though all litigation is serious to the individual litigants, courts consider this factor in the context of the nature of the alleged wrong. For example, alleged violations of civil rights based on a protected status such as race, disability, etc., raise more “substantial” concerns.

MC Trilogy Tex., LLC at *6 (citing *Swanston v. City of Plano*, 2020 WL 4732214, at *8 (E.D. Tex. Aug. 14, 2020)).

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***Perez* third factor continued ...**

However...

“The mere fact that ‘constitutional rights are at stake’ or that there is a ‘claim of unworthy purpose does not destroy the privilege.’ *Id.* ‘Even for allegations involving racial animus ... the Supreme Court has held that the legislative privilege stands fast.’”

La Union del Pueblo Entero v. Abbott, 93 F.4th 310, 323 (5th Cir. 2024).

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Perez fourth factor: role of the government in litigation

“The state and local government's exercise of its police power remains one of the most essential powers of government and is therefore the **least limitable.**”

MC Trilogy Tex., LLC at *6.

Thus, rational exercise of police power for protection of the public health and safety will be given more deference than other government acts that don't implicate the police power.

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Perez fifth factor: future timidity

Requiring disclosure of confidential documents concerning “intimate legislative activities should be avoided.”

Court proceedings that probe legislators' subjective intent in the legislative process is a “deterrent to the uninhibited discharge of their legislative duties.”

MC Trilogy Tex., LLC at *7 (citing *Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S. Ct. 783, 788, 95 L. Ed. 1019 (1951)).

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Legislative privilege extends to aids and appointed officials

Legislative privilege protects not only the legislative “work product” of legislators, but also their staff and aids so long as the communications sought are part of the legitimate exercise of legislative power.

League of United Latin Am. Citizens at *3; *Kay v. City of Rancho Palos Verdes*, CV 02-03922 MMM RZ, 2003 WL 25294710, at **10, 14 (C.D. Cal. Oct. 10, 2003).

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The legislative privilege extends to documents reviewed

“Thus, testimony or documentation that may indicate the legislator’s relative focus on some facts is privileged. For example, testimony such as “I don’t know” or “I don’t recall” is privileged insofar as it indicates that *the legislator* did not find certain material particularly relevant to the decision-making process. Similarly, material the legislator obtained, or declined to obtain, in the decision-making process is privileged too *insofar as it is sought from the legislator.*”

(or their aides)

League of United Latin Am. Citizens at 878.

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What is a legislative function?

Enactment of a zoning ordinance is “clearly legislative in nature.” *MC Trilogy I*, 662 F.Supp.3d at 697.

Plat approval also relates to a legislative function because it is “part and parcel” of modern zoning procedures. *MC Trilogy II*, at *3.

These are the easy ones ...

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The legislative function is broad

It also includes:

“communications ‘outside the legislature’ ” such as ‘private communications with advocacy groups’ [which are] ‘part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider.’”

La Union del Pueblo Entero v. Abbott, 93 F.4th 310, 321–22 (5th Cir. 2024).

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But fear not, plaintiffs' lawyers ...

“However, the *plaintiffs are right* that not all facts or documents are covered within the legislative privilege. For example, routine administrative and employment records are not protected because not all acts of a legislator are inherently legislative.”

League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 879 (W.D. Tex. 2023) (cleaned up).

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Yes, facts are discoverable

“Facts that would not inherently lead to the discovery of the legislator's mindset, opinion, or motive may be discoverable. However, the availability of the factual information elsewhere will typically indicate that such a discovery request is merely an attempt to reveal what the legislator considered—information which would be privileged.”

League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 879 (W.D. Tex. 2023) (cleaned up).

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But the privilege extends to “pre” legislation

“Necessarily, there are ‘actions in the proposal[and] formulation ... of legislation’ that predate the formal form of either. Legislative proposals do not materialize from thin air, and they do not address unidentified issues. Therefore, we reject any start date at which the legislative privilege applies. The legislative privilege attaches whenever someone makes an in-scope communication—regardless of any proposal.”

League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 881 (W.D. Tex. 2023).

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Role of the city attorney in legislative process

1. The city is the client. A city attorney does not represent any individual council member. Any advice we render to the “individuals” who make up the council or an appointed body or city staff must always be intended to protect the client – the city as a whole.
2. The city attorney acts as an advisor and should protect the interests of the city as a whole. In the context of legislative privilege, this counsel may impact a legislator’s thought processes, but our duty is to the city.

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Role of the city attorney in the legislative process continued ...

3. The city attorney only gives advice. Like my teenagers, my clients are free to, and occasionally do, disregard it. City attorneys are not decision-makers and should not step outside the role of (hopefully) trusted advisor—to the city as a whole.

4. The city attorney should advocate for “the client,” and help it achieve its goals, but should avoid “taking side” or even giving the appearance of partisanship.