STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 014001
COMMON CAUSE, *et al.* *Plaintiffs*, v. Representative DAVID R. LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, *et al.*, *Defendants*.	ORDER ON LEGISLATIVE DEFENDANTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM PLAINTIFF NORTH CAROLINA DEMOCRATIC PARTY

THIS MATTER comes before the undersigned three-judge panel upon Legislative Defendants' Motion to Compel the production of documents from Plaintiff North Carolina Democratic Party pursuant to Rules 26, 34, and 37 of the North Carolina Rules of Civil Procedure.

Procedural and Factual Background

In this litigation, Plaintiffs seek a declaration that the North Carolina Senate and House of Representative districts established by an act of the General Assembly in 2017, N.C. Sess. Laws 2017-207 (Senate Bill 691) and 2017-208 (House Bill 927), violate the rights of Plaintiffs, including the North Carolina Democratic Party, and all Democratic voters in North Carolina under the North Carolina Constitution. Plaintiffs seek to enjoin the future use of the 2017 legislative districts.

Plaintiffs assert three causes of action in their amended complaint, filed on December 7, 2018, alleging that the challenged legislative districts violate: 1) the North Carolina Constitution's equal protection clause, N.C. Const. art. I, § 19; 2) the North Carolina Constitution's free elections clause, N.C. Const. art. I, § 5; and, 3)

the North Carolina Constitution's rights of association clauses, namely freedom of speech and freedom of assembly, N.C. Const. art. I, §§ 12, 14. Plaintiffs' third cause of action is especially pertinent to the matters presented in Legislative Defendants' present motion.

On February 15, 2019, Legislative Defendants served discovery requests on Plaintiff North Carolina Democratic Party (hereinafter "Plaintiff NCDP") seeking, among other things, documents related to legislative redistricting and Plaintiffs' claims. At issue in the present motion is Legislative Defendants' Request for Production No. 12, which requests that Plaintiff NCDP produce "All documents in [Plaintiff NCDP's] possession, custody, or control containing District-by-District Analytics Reports, DNC support scores, and/or similar or related analyses for any North Carolina Legislative District . . . from January 1, 2009 to the present."

Plaintiff NCDP served its objections and responses to the discovery requests on March 18, 2019. In regard to Request for Production No. 12, Plaintiff NCDP produced "district snapshots" that include, among other data, expected "Democratic Performance Index" scores estimating the expected Democratic performance in each legislative district. Legislative Defendants filed their motion to compel on May 7, 2019. Plaintiff NCDP filed its brief in opposition to the motion on May 14, 2019, and Legislative Defendants filed a reply brief in support of the motion on May 21, 2019. A telephonic hearing on the motion was held on May 30, 2019, and the matter was taken under advisement.

After considering Legislative Defendants' motion to compel and the matters contained therein, as well as the parties' briefs, submissions, and arguments on the motion by those in attendance, and having reviewed the record proper, the Court, in its discretion, rules upon Legislative Defendants' motion as follows:

Legislative Defendants' Motion to Compel

As an initial matter, although Legislative Defendants' Request for Production No. 12 seeks three different types of documents—"District-by-District Analytics Reports, DNC support scores, and/or similar or related analyses for any North Carolina Legislative District"—it is the production of "DNC support scores" that is the heart of the matter in the present motion. Additionally, the Court notes that Legislative Defendants' request for "DNC support scores" could include, as Plaintiff NCDP contends, individual voter data; however, Legislative Defendants have since clarified that they seek only district-level data in summary format—not individual voter data—and do not seek any proprietary information as to how "support scores" are calculated. Even so, Plaintiff NCDP presents multiple arguments as to why it should not be compelled to produce, in any format, "support scores" in response to Legislative Defendants' Request for Production No. 12.

a. Agreement between Plaintiff NCDP and the DNC

Plaintiff NCDP contends that the sought-after data are not in its possession, custody, or control, but rather are controlled by the Democratic National Committee (hereinafter "the DNC")[1] and, importantly, contends an agreement (hereinafter "the

[1] Legislative Defendants have likewise sought to compel the production of similar and related documents through a subpoena to the DNC and the Democratic Congressional Campaign Committee

Agreement") between Plaintiff NCDP and the DNC forbids disclosure to third-parties of the sought-after data. In support of its position, Plaintiff NCDP has submitted an affidavit of its former Executive Director, Kimberly Reynolds (hereinafter "the Affidavit").

In regard to Plaintiff NCDP's contention that it does not have responsive materials in its possession, custody, or control, the Affidavit states that "[t]he DNC, not the NCDP, produces, maintains, and controls the 'VAN' database that contains support scores. The VAN database is not on a server owned or controlled by the NCDP[,]" (Reynolds Aff., ¶ 7). But the Affidavit also quotes from select portions of the Agreement which make it apparent that Plaintiff NCDP may transfer proprietary data covered by the Agreement when "permitted under [the] Agreement or separate explicit grant" or with "the express prior written approval of the DNC." (Reynolds Aff., ¶ 5).

Accordingly, even though the requested data may not be on a server in Plaintiff NCDP's actual possession, the data are sufficiently within Plaintiff NCDP's control and custody such that, pursuant to the terms of the Agreement, it can request and obtain the data on demand from the DNC. *See Lowd v. Reynolds*, 205 N.C. App. 208, 215, 695 S.E.2d 479, 484 (2010) (explaining that under Rule 34, documents are considered within the possession, custody, or control of a party if the party "has the legal right to obtain the documents on demand").

(DCCC). Legislative Defendants' motion to compel compliance with the subpoena is currently pending in the Superior Court of the District of Columbia.

Plaintiff NCDP also relies on the Affidavit in support of its contention that, even if it does have access to the requested data, the Agreement forbids disclosure of the data to third-parties, including Legislative Defendants. Along these lines, in addition to the aforementioned select portions of the Agreement, the Affidavit includes statements such as "[p]ursuant to my knowledge of this agreement and my experience as the Executive Director, support scores are included in this contract's definition of DNC Proprietary Data," and "[t]he prohibitions found in the contract with DNC specifically prohibit me and any other employee of the North Carolina Democratic Party from providing support scores or any work product reflecting or compiling the support scores to third parties, which would include parties in this litigation." (Reynolds Aff., ¶¶ 6, 8).

A party's assertion that documents sought in discovery are privileged from production must be supported by some "objective indicia of the existence of the privilege." *Miles v. Martin*, 147 N.C. App. 255, 260, 555 S.E.2d 361, 364 (2001). If the party claiming a privilege from production presents an affidavit in support of its asserted privilege, then the affidavit must "provide specific evidence that could serve as the basis of findings of fact or conclusions of law" as to that privilege. *Hammond v. Saini*, 367 N.C. 607, 611, 766 S.E.2d 590, 592 (2014). If the party's asserted privilege is based in contract, then that "party's personal interpretation of what [the] contract precludes without any showing as to the actual contents of the contract is not objective indicia, nor is it a sound legal basis for a privilege." *Taylor v. Perni*, No. COA18-602, slip op. at 7 (May 21, 2019) (noting in the context of a

third-party subpoena that relying on an affidavit instead of the actual agreement presents "no more than mere allegations that the . . . outside contract protected the information sought"). But the Court may, in its discretion, conduct *in camera* review of such a contract. *Lowd*, 205 N.C. App. at 214, 695 S.E.2d at 483.

The statements in the Affidavit describing the affiant's personal interpretation of the Agreement amount to no more than mere allegations as to the contents of the Agreement, and the selected quotes do not otherwise provide sufficient objective indicia for the Court to determine the existence of a privilege, if any, against production.

Plaintiff NCDP did not submit a copy of the entire agreement in its response to Legislative Defendants, nor has Plaintiff NCDP submitted a copy of the agreement to the Court for its own review; however, the easiest and most effective way for Plaintiff NCDP to demonstrate that the Agreement does indeed protect the requested data from production to Legislative Defendants is to submit the Agreement to the Court for *in camera* review.

Therefore, the Court, in its discretion, will require Plaintiff NCDP to submit the Agreement in its entirety to the Court for *in camera* review.

b. Discoverability of DNC Support Scores

Plaintiff NCDP also contends that Legislative Defendants' request for the sought-after data, even in district-level summary format, will not lead to the discovery of admissible evidence or relevant information, and that any compelled

production would be in violation of its First Amendment associational privilege from production.

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." N.C.G.S. § 1A-1, Rule 26(b)(1). "The test of relevance for discovery purposes only requires that information be 'reasonably calculated to lead to the discovery of admissible evidence.'" *Lowd*, 205 N.C. App. at 214, 695 S.E.2d at 483 (quoting N.C.G.S. § 1A-1, Rule 26(b)(1)). "[O]rders regarding discovery are within the discretion of the trial court," *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 448, 271 S.E.2d 522, 523 (1980), as is the trial court's decision to conduct *in camera* review, *Lowd*, 205 N.C. App. at 214, 695 S.E.2d at 483.

Plaintiff NCDP has squarely placed its associational rights at issue in this litigation. Indeed, Plaintiffs have alleged that the challenged legislative districts burden the associational rights—i.e., rights to join together in a political party and carry out the party's activities—of Plaintiffs, including the NCDP, by "making it more difficult for Plaintiffs and other Democratic voters, as well as the NCDP, to register voters, attract volunteers, raise money in gerrymandered districts, campaign, and turn out the vote, by reducing the total representation of the Democratic Party in the General Assembly, and by making it virtually impossible for Democrats to constitute a majority of either chamber of the General Assembly." (Amended Complaint, ¶ 219). Evidence before the Court demonstrates that that

data reflecting "support scores" used in carrying out core political activities during the course of an election under the challenged legislative districts are plainly relevant to the subject matter involved in the pending action. (*See* Deposition of Morgan Jackson, pp. 152-57 (subject to Protective Order of the Court)).

The Court, however, is keenly aware of the sensitive nature of individualized, voter-specific data, as well as the importance of protecting that data from improper or inadvertent disclosure. The Court also recognizes Plaintiff NCDP's desire to protect the proprietary nature of a tool that has been developed to aid a political party carry out its core functions—not just in North Carolina but also on a national scale. But in the context of this particular case in which Plaintiff NCDP has alleged that its right to carry out the party's activities, including its ability to turn out the vote, has been burdened, the Court is not convinced that district-level summary reports of "support scores" are not discoverable.

In this regard, the commentary to Rule 34, while not binding,[2] does provide helpful guidance in resolving the discovery dispute presently before the Court:

> If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it ordinarily is maintained or in a form or forms that are reasonably usable. In this regard, *the responding party should consider using the system on which the electronically stored information is housed to generate summary reports.* Such reports can be particularly helpful when they are the same kind of reports that the producing party uses in making decisions or tracking information. *Generating reports to meet the needs of the litigation also can be helpful. While a system of electronically*

[2] "Although the commentary is not binding when not enacted into law, where proper, it may be given substantial weight in discerning legislative intent." *State v. Rupe*, 109 N.C. App. 601, 613-14, 428 S.E.2d 480, 488 (1993).

> *stored information may not store information in precisely the fashion sought by a requesting party and, therefore, the responding party cannot be forced to produce information in exactly the fashion sought, it may be possible to use the same system to provide reports from existing information that will provide the information needed for the litigation even though not precisely in the fashion sought.*

N.C.G.S. § 1A-1, Rule 34 (Comment to the 2011 Amendment, Subsection (b)) (emphasis added).

While district-level summary reports may not be exactly the same kind of reports that Plaintiff NCDP typically uses in making decisions or tracking information from the "VAN" database, the Court agrees that the production of such reports in this case would be helpful to meet the needs of the litigation in light of the importance of the issues at stake in the litigation. As such, the Court does not find that the production of district-level summary reports from the "VAN" database would be unreasonably cumulative or duplicative or unduly burdensome, provided the generated summary reports reflect the "support score" data as it existed on or around the date on which voting began for the 2018 general election. Discovery of "support score" data during the entirety of the time period stated in Legislative Defendants' Request for Production No. 12 (January 1, 2009 to the present) would, on the other hand, be unduly burdensome considering the nature of the data and the needs of the case.

Furthermore, the Court does not find that Legislative Defendants have had ample opportunity by discovery to obtain the specific information sought. And because Legislative Defendants' subpoena remains pending in the Superior Court of

the District of Columbia, it is not necessarily certain that the requested data are obtainable from some other source that is more convenient, less burdensome, or less expensive.

Therefore, the Court, in its discretion, will require Plaintiff NCDP to submit district-level summary reports reflecting "support scores" to the Court for *in camera* review as follows:

- For each legislative district at issue, Plaintiff NCDP shall generate from the "VAN" database district-level summary reports of the data in its possession, custody, or control reflecting "support scores" for the North Carolina Democratic Party or, should such state party-related data not exist, the DNC.
- "Support scores" should demonstrate the probability that voters in the district would vote for or otherwise support a specific party in the 2018 general election.
- Plaintiff NCDP shall include with its summary reports a brief description of each level of "support score."
- The generated district-level summary reports should, if possible, reflect "support scores" as of October 17, 2018 (the date Early Voting began for the 2018 general election).
- Plaintiff NCDP shall submit to the Court for *in camera* review the generated summary reports and accompanying explanations by June 13, 2019.

The Court, upon its review of the Agreement and generated summary reports submitted for *in camera* review, will determine the proprietary nature and ultimate discoverability of the generated summary reports, including the applicability of any privilege already-asserted by Plaintiff NCDP. In the event the Court determines that the generated summary reports are not protected by the Agreement, are not privileged from production, and are otherwise discoverable, the generated summary reports shall be designated by Plaintiff NCDP as "HIGHLY CONFIDENTIAL/

OUTSIDE ATTORNEYS' EYES ONLY" pursuant to the parties' April 5, 2019, Consent Protective Order, prior to production.

Conclusion

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion, hereby ORDERS as follows:

1. Legislative Defendants' motion to compel is HELD IN ABEYANCE until such time as the Court reviews the district-level summary reports representing "support scores," in accordance with the terms of this Order.
   a. Plaintiff NCDP shall submit to the Court for *in camera* review the Agreement between Plaintiff NCDP and the DNC, in accordance with the terms of this Order.
   b. Plaintiff NCDP shall submit to the Court for *in camera* review district-level summaries of DNC support scores, in accordance with the terms of this Order.
   c. Plaintiff NCDP shall have until 11:59 p.m. on Thursday, June 13, 2019, to submit the Agreement and district-level summaries to the Court for *in camera* review.

SO ORDERED, this the 7th day of June, 2019.

Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite

Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton

Alma L. Hinton, Superior Court Judge

Certificate of Service

The undersigned certifies that the foregoing was served upon all parties by electronic mail, addressed as follows:

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This the 7th day of June, 2019.

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