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CLERMONT COUNTY, OHIO

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO, EX REL. RACHEL RICHARDSON	:	
	:	**CASE NO. 2016 CVH 00234**
Relator	:	**Judge McBride**
vs.	:	**DECISION/ENTRY**
CITY OF MILFORD, ET AL.	:	
Respondents	:	

The Law Firm of Curt C. Hartman, Curt C. Hartman, 7394 Ridgepoint Drive, Suite 8, Cincinnati, Ohio 45230, and Finney Law Firm, LLC, Christopher P. Finney and Brian C. Shrive, 4270 Ivy Pointe Boulevard, Suite 225, Cincinnati, Ohio 45245, counsel for the relator State of Ohio ex rel. Rachel Richardson.

Schroeder, Maundrell, Barbiere & Powers, Lawrence E. Barbiere and Scott A. Sollmann, counsel for the respondents, City of Milford, Ohio, Laurie Howland, Amy L. Brewer, Lisa D. Evans, Edward L. Brady, Justin A. Bonnell, Sandra Kay Russell, and Edward J. Haskins, 5300 Socialville Foster Road, Suite 200, Mason, Ohio 45040.

This cause is before the court for consideration of the motion in limine and for protective order filed on October 17, 2016 by the respondents City of Milford, Ohio, Laurie Howland, Amy L. Brewer, Lisa D. Evans, Edward L. Brady, Justin A. Bonnell, Sandra Kay Russell, and Edward J. Haskins's. The court scheduled and held a hearing on the motion on December 5, 2016. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The instant case stems from alleged violations of the Ohio Meetings Act, R.C. 121.22. Rachel Richardson is a taxpayer in Milford, Ohio, and the individual respondents are members of the Milford City Council.

Between February 18, 2014 and January 5, 2016, the City Council allegedly entered into twelve executive sessions, which the relator claims were done in contravention of the Ohio Meetings Act. The City Council is alleged to have entered into executive sessions on the following dates: February 18, 2014, May 20, 2014, July 1, 2014, March 3, 2015, March 17, 2015, May 5, 2015, May 19, 2015, July 7, 2015, August 18, 2015, October 6, 2015, December 1, 2015, and January 5, 2016. The minutes of these meetings list two reasons for entering into executive sessions. On four dates, the official meeting minutes state that the City Council was entering into executive session to discuss personnel matters, and on seven other dates the minutes state that executive sessions were being entered into to discuss real estate. On one of these dates, February 18, 2014, the official meeting minutes do not state the listed purpose for entering into an executive session.

The relator alleges that these executive sessions were used to illegally discuss a zoning application as to a particular piece of property, 525 Main Street, Milford, Ohio,

and to eventually enter into a contract for the City of Milford to purchase the property from the Milford Exempted Village School District.

Michael Minniear, the law director for the City of Milford, attended all of the Milford City Council executive sessions at issue in this case except one held on February 18, 2014.[1] Mr. Minniear avers that the purpose of his attendance at the executive sessions was to provide legal advice and assistance to the City Council concerning the matters under discussion during executive sessions.[2]

On April 13, 2016, the relator filed an amended complaint alleging the following causes of action: (1) Open Meetings Violations – Conducting Official Business of the Milford City Council by Secret Ballots, (2) Open Meetings Violations – Illegal Executive Session Authorizing Execution of Contract, (3) Open Meetings Violations – Illegal Executive Sessions Result in Potential Purchase Contract, (4) Open Meetings Violations – Illegal Executive Sessions – Beyond the Scope Authorized for "Real Estate Matters," (5) Open Meetings Violations – Illegal Adjournments into Executive Session Under the Rubric of "Personnel," (6) Open Meetings Violations – February 18, 2014, and (7) Open Meetings Violation – February 18, 2014.

The relator has served the respondents with requests for admissions, interrogatories, and requests for production of documents.[3] Some of these discovery requests regard the City Council's discussions that occurred during the various executive sessions.[4] As to these requests the respondent objects on the basis that the

[1] Ex. C to Resp't's Mot., Aff. of M. Minniear.
[2] *Id.*.
[3] Ex. A to Resp't's Mot.
[4] *Id.*

conversations were protected under the executive session privilege and the attorney-client privilege.[5]

On October 17, 2016, the respondents filed a motion in limine and for protective order. The motion requests "a protective order to preclude Relator from inquiring into discussions held in the executive sessions of the Milford City Council during discovery or at trial and from introducing any evidence of executive session proceedings in motion practice or during the trial of this matter."[6] The respondents anticipate that in the requested depositions of the respondent Laurie Howland and of the City's Civ.R. 30(B)(5) representative, questions will arise concerning discussions that occurred during the executive sessions.[7]

The relator filed a response in opposition on November 7th, and the respondents filed their reply on November 28th. The court heard oral arguments as to the motion on December 5th, and at the conclusion of the arguments, the court took this matter under advisement. On December 8th, the respondents filed a supplemental memorandum in support of their motion. On December 9th, the relator filed a motion to strike the supplemental memorandum. On December 28th the relator moved the court for a new scheduling order upon resolving this pending motion, as the deadline for discovery was December 31, 2016.

[5] Ex. 5 to Relator's Resp.
[6] Resp't's Mot.
[7] Resp't's Mem., pg. 1.

LEGAL STANDARD

The scope of discovery is provided for in Civ.R. 26 as follows:

> "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. * * * It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[8]

Thus, under Civ.R. 26, the concept of relevancy for discovery is "not limited to the issues in the case, but to the subject matter of the action, the latter being broader than the former."[9] "Generally, a party may obtain discovery regarding any matter concerning the pending litigation."[10]

"The regulation of discovery is committed to the sound discretion of the trial court * * * ."[11] Civ.R. 26(C) permits the court to grant protective orders:

> "Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on

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[8] Civ.R. 26(B).

[9] *Nilavar v. Osborn*, 137 Ohio App.3d 469, 499, 738 N.E.2d 1271 (2d Dist. 2000), quoting Klein & Darling, Civil Practice (1997) 6, Section 26-1.

[10] *See Crosby v. Rose*, 4th Dist. Pike No. 97CA594, 1998 WL 51603, *5 (Feb. 11, 1998), citing Civ.R. 26(B)(1). *See First Bank of Marietta v. Mitchell*, 4th Dist. Washington No. 82 X 5, 82 X 14, 1983 WL 3307, *12 (Nov. 29, 1983) (Citation omitted.) ("The Civil Rules and the commentators are in unanimous agreement that the scope of discovery under Civ.R. 26(B)(1) is not limited to matters which are admissible into evidence, but extend to all matters not privileged, which is relevant to the subject matter involved in the pending action.").

[11] *Air-Ride, Inc. v. DHL Express (USA), Inc.*, 12th Dist. Clinton No. CA2008-01-001, 2008-Ohio-5669, ¶ 7, quoting *Henderson Elec. Co. of Ohio, Inc. v. Elan Constr. Mgt. Serv.* 92 Ohio App.3d 98, 101, 634 N.E.2d 267 (1st Dist. 1993). *See Nilavar*, 137 Ohio App.3d at 499, citing Klein & Darling, Civil Practice (1997) 6, Section 26-1.

> specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters * * *."[12]

"The decision whether to grant or deny the protective order is within the trial court's discretion * * *."[13]

Furthermore, Civ.R. 26(C) also requires the movant to make "a reasonable effort to resolve the matter through discussion with the attorney or unrepresented party seeking discovery."[14] In doing so, the motion for a protective order must "be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph."[15]

LEGAL ANALYSIS

As a threshold matter, the relator claims that the respondents did not satisfy Civ.R. 26(C) because they failed to engage in meaningful efforts to "address their assertion that privilege precluded" the relator's requested discovery of the executive sessions before filing the instant motion.[16] The respondents counter that they did make a reasonable effort to resolve the dispute.[17] In support, they highlight an email to the

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[12] Civ.R. 26(C).
[13] *Cargotec, Inc. v. Westchester Fire Ins. Co.*, 155 Ohio App.3d 653, 2003-Ohio-7257, 802 N.E.2d 732, ¶ 9 (6th Dist.), citing *Ruwe v. Springfield Twp. Bd. of Trustees*, 29 Ohio St.3d 59, 61, 505 N.E.2d 957 (1987).
[14] Civ.R. 26(C).
[15] *Id.*
[16] Relator's Resp., pg. 4.
[17] Resp't's Reply, pg. 2.

relator dated September 29, 2016 seeking to resolve the discovery dispute.[18] Although it is preferable for the moving party to make a more diligent effort in resolving discovery issues before moving for a protective order, the relator has not highlighted any case law demonstrating that the respondents' attempt to resolve the dispute via email was inadequate to satisfy Civ.R. 26(C). Therefore, the court declines to deny the motion on the basis that the respondents failed to satisfy the threshold requirements of Civ.R. 26(C).

A second preliminary matter is whether the court is to consider the respondents' supplemental memorandum filed in support of their motion, which was filed December 8, 2016. The relator has moved to strike it on the basis that it was filed after the motion had been fully briefed and argued to the court, the respondents did not have leave of court to file the supplemental memorandum, and the supplemental memorandum was filed outside of the dates set forth in the court's October 24, 2016 briefing order. The supplemental memorandum was not filed to apprise the court of a newly discovered fact or case law published after oral arguments concluded. Instead, the memorandum presented new arguments concerning the City of Milford's Charter as a basis for privilege. Given that the memorandum concerns new arguments, and it was filed outside of the briefing schedule and after oral arguments without leave of court, the court finds the relator's motion to strike the supplemental memorandum well-taken. Accordingly, the court will not consider the new arguments addressed in the respondents' supplemental memorandum.

[18] Ex. A to Resp't's Reply.

I. EXECUTIVE SESSION PRIVILEGE

As the party seeking protection under a privilege, the respondents carry "the burden of demonstrating that a privilege exists" as to them.[19] "Application of a privilege is not automatic."[20] Pursuant to Evid.R. 501, the "privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in the light of reason and experience."[21]

The respondents argue that two Ohio statutes, R.C. 121.22(G) and R.C. 102.03(B), when construed together, form the basis for the Ohio executive session privilege. "'It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law.'"[22]

The first statute, R.C. 121.22(G), known as the Ohio Meetings Act or "Ohio's Sunshine Law, * * * requires that public officials, when meeting to consider official business, conduct those meetings in public."[23] The statute "seeks to prevent public bodies from engaging in secret deliberations on public issues with no accountability to

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[19] *Novak v. Studebaker*, 9th Dist. Summit No. 24615, 2009-Ohio-5337, ¶ 19. *See Cargotec, Inc.*, 2003-Ohio-7257 at ¶ 9, citing *Lemley v. Kaiser*, 6 Ohio St.3d 258, 263-264, 452 N.E.2d 1304 (1983) ("In Ohio, the burden of showing that testimony or documents are confidential or privileged rests upon the party seeking to exclude them.").

[20] (Citation omitted.) *Chuparkoff v. Farmers Ins. Of Columbus, Inc.*, 9th Dist. Summit No. Civ.A.22083, 2004-Ohio-7185, ¶ 9.

[21] Evid.R. 501.

[22] *Spellman Outdoor Advertising Servs., LLC v. Ohio Turnpike & Infrastructure Commission*, 11th Dist. Portage No. 2015-P-0081, 2016-Ohio-7152, ¶ 56, quoting *State v. Moaning*, 76 Ohio St.3d 126, 128 (1996).

[23] *State ex rel. Ross v. Crawford Cty. Bd. of Elections*, 125 Ohio St.3d 438, 2010-Ohio-2167, 928 N.E.2d 1082, ¶ 20, quoting *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 542, 668 N.E.2d 903 (1996).

the public."[24] Meetings by the public body are "public meetings open to the public at all times."[25] Moreover, R.C. 121.22 explicitly states that it is to be "liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law."[26]

Notwithstanding the requirement of openness, "if specific procedures are followed, public officials may discuss certain sensitive information privately in an executive session."[27] Much of the underlying suit arises from the relator's contention that the respondents violated R.C. 121.22(G), governing executive sessions. Pertinent to the present motion, however, is the respondents' argument that R.C. 121.22(G) is one of two statutes that create an executive session privilege, thereby allowing them to prevent discovery of the conversations held in executive sessions.

R.C. 121.22(G) lists "seven matters that a public body may consider in executive session. The exceptions contained in R.C. 121.22(G) are to be strictly construed."[28] The exceptions "are distinct, separate exceptions that apply in specific situations."[29] R.C. 121.22(G) provides:

> "* * * [M]embers of a public body may hold an executive session only after a majority of quorum of the public body determines, by a roll call vote, to hold an executive session

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[24] *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 12th Dist. Clermont Nos. CA2011-05-045, CA2011-06-047, 2012-Ohio-2569, ¶ 14, citing *Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011-Ohio-703, 949 N.E.2d 1032 (1st Dist.).
[25] *State ex rel. Ross*, 2010-Ohio-2167 at ¶ 20, citing R.C. 122.22(C).
[26] R.C. 121.22(A).
[27] *State ex rel. Hardin*, 2012-Ohio-2569 at ¶ 16, citing *Tobacco Use Prevention & Control Found. Bd. Of Trustees v. Boyce*, 185 Ohio App.3d 717, 2009-Ohio-6993, 925 N.E.2d 641, ¶ 64 (10th Dist.).
[28] *State ex rel. Leslie*, 2005-Ohio-1767 at ¶ 15, citing *In re Removal of Keuehnle*, 161 Ohio App.3d 299, 2005-Ohio-2373, 830 N.E.2d 1173, ¶ 92 (12th Dist.).
[29] *State ex rel. Hardin*, 2012-Ohio-2569 at ¶ 78.

and only at a regular or special meeting for the sole purpose of the consideration of any of the following matters:

(1) To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing. Except as otherwise provided by law, no public body shall hold an executive session for the discipline of an elected official for conduct related to the performance of the elected official's official duties or for the elected official's removal from office. If a public body holds an executive session pursuant to division (G)(1) of this section, the motion and vote to hold that executive session shall state which one or more of the approved purposes listed in division (G)(1) of this section are the purposes for which the executive session is to be held, but need not include the name of any person to be considered at the meeting.

(2) To consider the purchase of property for public purposes, the sale of property at competitive bidding, or the sale or other disposition of unneeded, obsolete, or unfit-for-use property in accordance with section 505.10 of the Revised Code, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest. No member of a public body shall use division (G)(2) of this section as a subterfuge for providing covert information to prospective buyers or sellers. A purchase or sale of public property is void if the seller or buyer of the public property has received covert information from a member of a public body that has not been disclosed to the general public in sufficient time for other prospective buyers and sellers to prepare and submit offers. * * *

(3) Conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action * * *."[30]

The other statute that the respondents posit creates a privilege is R.C. 102.03. R.C. 102.03 governs the ethics of public employees.[31] R.C. 102.03 provides:

[30] R.C. 121.22(G).

> "(B) No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business."[32]

The only Ohio appellate case to deal with the existence of an executive session privilege is *Springfield Local School District Board of Education v. Ohio Association of Public School Employees, Local 530*, 106 Ohio App.3d 855, 667 N.E.2d 458 (9th Dist. 1995). In *Springfield*, a union counterclaimed against a board of education, claiming that the board violated R.C. 121.22 because the board made a resolution concerning labor during an illegal executive session.[33] The Ninth District Court of Appeals had to determine whether the trial court erred in granting a protective order based on a testimonial privilege for discussions made during an executive session.[34] The court held that "there is no absolute privilege to be accorded discussions held in executive session and that a trial court, in its discretion, may limit discovery * * *."[35]

Of note, unlike this case, the proponents of the protective order in *Springfield* did not cite to R.C. 121.22(G) or R.C. 102.03(B) as the basis for the executive session privilege. As such, the court noted that "[n]o person has a privilege to refuse to testify or produce a document upon request in a judicial proceeding unless the Constitution, a

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[31] *Marsh v. Lampert*, 129 Ohio App.3d 685, 718 N.E.2d 997 (12th Dist. 1998).
[32] R.C. 102.03(B).
[33] *Springfield Local School Dist. Bd. of Edn. v. Ohio Assn. of Public School Employees, Loc. 530*, 106 Ohio App.3d 855, 862, 667 N.E.2d 458 (9th Dist. 1995).
[34] Id. at 868.
[35] Id.

statute or case law provides otherwise."[36] Even so, the court reflected that privileges are "personal" rights "anchored in considerations of policy that exist independently of the usual evidentiary concerns with accuracy and reliability of evidence."[37] As such, the court decided that it could determine whether such a privilege may apply by balancing "the public's interest in confidentiality against the need for discovery in the efficient administration of justice."

In balancing these interests, the court noted the general interest in protecting the privacy of the collective bargaining process set forth in R.C. 4117.21 (collective bargaining was the subject of the executive session), and that R.C. 121.22(G) allows for an executive session for pending collective bargaining negotiations, after which the minutes to the executive session are not publically accessible.[38] Even so, these provisions did "not necessarily protect against disclosure in the course of litigation upon a proper discovery request, if the information is otherwise discoverable."[39] Ultimately, the court found that the trial court had the authority to fashion a protective order that acknowledged "the countervailing considerations between the union's need for disclosure of executive session discussion to enable it to prove the suspected violation of the Sunshine law and the board's need to maintain the secrecy of its ongoing discussions over labor negotiations."[40]

Unlike the *Springfield* Court, the Sixth Circuit Court of Appeals has ruled that there is an absolute executive session privilege in Ohio, "which makes confidential any

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[36] Id. at 868, citing Evid.R. 501.
[37] *Springfield*, 106 Ohio App.3d at 868.
[38] Id. at 869.
[39] Id.
[40] Id. at 870.

communications that occur during the executive sessions of political subdivisions."[41] In *Humphries v. Chicarelli*, 554 Fed.Appx. 401 (6th Cir. 2014), the Sixth Circuit found that "the privilege applies because the City Council was properly in executive session, and its members and members-elect were entitled to proceed in that way under Ohio law."[42] Although the court cited to R.C. 102.03(B) and R.C. 121.22(G), it unfortunately did not conduct any further analysis as to how these statutes create an executive session privilege, nor did it otherwise cite to Ohio authorities to explain the origin of this privilege.

In *University Estates, Inc. v. City of Athens, Ohio*, S.D. Ohio No. 2:09-cv-758, 2011 WL 796789 (Feb. 25, 2011), the United States District Court, Southern District of Ohio, ruled that the contents of executive sessions, that were properly entered into by the city council, should remain confidential.[43] In so finding, the court explained that R.C. 102.03(B) and R.C. 121.22(G)(2) were the core of the privilege.[44] As with the opinion of the Sixth Circuit Court of Appeals, the District Court did not examine Ohio case law discussing the privilege. Having found that the privilege applied, the court granted the city's motion for a protective order, thereby preventing the plaintiffs from inquiring into the discussions of the executive session.[45]

Most recently, the United States District Court, Northern District of Ohio, addressed the executive session privilege in *Kamenski v. Wellington Exempted Village Schools*, N.D. Ohio No. 1:14-cv-01589, 2016 WL 1732872 (May 2, 2016). Although the

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[41] *Humphries v. Chicarelli*, 554 Fed.Appx. 401, 402 (6th Cir. 2014), citing R.C. 102.03(B).
[42] Id. citing R.C. 121.22(G).
[43] *University Estates, Inc. v. City of Athens, Ohio*, S.D. Ohio No. 2:09-cv-758, 2011 WL 796789, *2 (Feb. 25, 2011),
[44] Id.
[45] Id. at *3.

court found that federal and not state law applied regarding privileges, the *Kamenski* Court examined the executive session privilege under Ohio law to determine if executive sessions were privileged.[46] The court ultimately concluded that the defendants "have not shown that O.R.C. § 102.03(B) in conjunction with O.R.C. § 121.22(G), which is part of the Ohio Open Meetings Act and/or Ohio Sunshine Law, establish, without exception, the existence of a privilege that protects any and all discussions occurring in executive session."[47]

Moreover, the court found that the defendants failed to show how, under R.C. 102.03(B), their discussions were "confidential because of statutory provisions," or "clearly designated" as confidential, or "that preserving the confidentiality of such discussions would be 'necessary to the proper conduct of government businesses.'"[48] In turning to R.C. 121.22(G), the court likewise found that the defendants' discussions did not fall squarely within the scope of R.C. 121.22(G) either.[49] Accordingly, the court denied the defendants' request for a protective order based on the Ohio executive session privilege to preclude discovery of the discussions held during an executive session.

This court examined whether an executive privilege existed in *Smith v. Pierce Township*, No. 2011 CVH 01952 (Oct. 15, 2012). The *Smith* case involved executive sessions that were entered into under R.C. 121.22(G)(1) and (G)(3) to discuss personnel matters and whether to dismiss a public employee.[50] In *Smith*, the court

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[46] *Kamenski v. Wellington Exempted Village Schools*, N.D. Ohio No. 1:14-cv-01589, 2016 WL 1732872, *2 (May 2, 2016).
[47] Id. at *3.
[48] Id., quoting R.C. 102.03(B).
[49] *Kamenski*, 2016 WL 1732872 at *4.
[50] *Smith v. Pierce Township*, No. 2011 CVH 01952, 2-4 (Oct. 15, 2012).

examined R.C. 102.03(B) and determined that it does not provide "a blanket privilege to the board members from having to testify regarding discussions held in executive session."[51] Instead, the court reasoned that the language in R.C. 102.03(B) was limited to rendering information privileged that:

> "is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business."

The court held that such confidential information, as discussed in R.C. 102.03(B), applied to matters in which the council was:

> "legally bound to keep from the public, such as records exempted from Ohio's Public Records Act (see R.C. 149.43), sealed records of criminal convictions (see R.C. 2953.35), information concerning an abortion without parental consent (see R.C. 2151.85[F]), results of HIV testing by the director of health (see R.C. 3701.241), and the like."[52]

For these same reasons, the court did not find persuasive the Southern District of Ohio case, *University Estates, Inc. v. City of Athens, Ohio*, discussed above, which had found an executive session privilege was created under R.C. 102.03(B).

However, upon examining R.C. 121.22(G) and *Springfield Local School District Board of Education v. Ohio Association of Public School Employees, Local 530*, discussed above, the court found that there is a testimonial privilege bestowed on public bodies for discussions occurring in executive sessions. This court concluded: "it agrees with the analysis set forth above in the *Springfield Local School Dist.* case that there is no absolute testimonial privilege conferred to members of a pubic body under R.C.

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[51] Id. at 5.
[52] Id., quoting *State ex rel. Cincinnati Enquirer*, 2002 WL 727923 at *5.

121.22(G) and that, instead, a court must weigh the competing interests in each case and circumstance."[53] The court balanced the need of the public body to discuss information that could lead to the dismissal or discipline of a public employee confidentially with the plaintiff's need to the same discussions, which went to the "heart" of the case.[54] The court determined that "the plaintiff may inquire generally into the topics discussed in executive sessions, but not as to the substance of those discussions."[55]

In turning to the present case, the respondents urge this court to adopt the decision in the Sixth Circuit case of *Humphries*, which found that all communications in a proper executive session are privileged. However, "[n]o federal court has the final say on what Ohio law means."[56] In spite of this new federal opinion issued after this court decided *Smith*, the most persuasive case interpreting the executive session privilege is still *Springfield*, as it remains the only appellate decision regarding the executive session privilege decided by an Ohio appellate court.

Moreover, the Sixth Circuit opinion in *Humphries* is not particularly persuasive because it does not contain any analysis explaining why, under Ohio law, there exists an absolute executive session privilege that prevents disclosure of any and all communications made during an executive session. "When the legislature does create an absolute privilege, it does so explicitly."[57] Neither R.C. 121.22 nor R.C. 102.03

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[53] *Smith*, No. 2011 CVH 01952 at 13.
[54] Id. at 13-14.
[55] Id. at 14.
[56] *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 472 (6th Cir. 2008).
[57] *Large v. Heartland-Lansing*, 995 N.E.2d 872, 2013-Ohio-2877, ¶ 19 (7th Dist.).

"unambiguously identif[y]" themselves as privileges, nor do they "define how the privilege may be asserted or defeated."[58]

This court still subscribes to the reasoning presented in *Smith*, which was drawn from the Ninth District Court of Appeals' decision in *Springfield*, that there is no absolute executive session privilege in Ohio. In examining the requirements for confidentiality under R.C. 102.03, the respondents here have failed to show that their discussions in executive sessions were "confidential because of statutory provisions," "clearly designated" as confidential, or that preserving the confidentiality of such discussions would be "necessary to the proper conduct of government businesses."[59]

In adopting the reasoning in *Springfield* and *Smith*, the court finds that the respondents do have an interest in keeping confidential those matters discussed while in executive session concerning personnel matters and the purchase of public property for a public purpose. Allowing the relator complete access to these conversations may have a chilling effect on the ability of the City Council to engage in meaningful discussion of these topics at future meetings.

At the same time, the conversations that occurred during the executive sessions are central to the relator's claims that the respondents violated the Ohio Meetings Act. Examining how the shifting burden of proof operates for Ohio Meetings Act claims helps illuminate the interests of the relator and respondents so that the court may balance them. Thus,

> "[I]n an action brought under R.C. 121.22, the plaintiff or relator initially carries his or her burden by showing that a meeting of the majority of the members of a public body occurred and that the general public was excluded from that

[58] Id.
[59] *See* R.C. 102.03.

> meeting. Once the plaintiff or relator demonstrates the above, the burden then shifts to the public body to produce or go forward with evidence that the challenged meeting fell under one of the exceptions in of R.C. 121.22(G). After the public body comes forward with such evidence, the burden then shifts to the plaintiff or relator to come forward with evidence that the exception claimed by the public body is not applicable or valid."[60]

In trying to balance the interests of the relator and respondents, the court first notes that the relator already has some access to evidence of the substance of the conversations that transpired at several of the meetings, as evidenced by multiple exhibits the relator attached to the amended complaint. The relator also has minutes from meetings showing that the respondents entered into executive sessions. Thus, it is not the case that applying the executive session privilege will effectively prevent the relator from satisfying her burden.

As the relator pointed out, the respondents will then bear the burden of showing that they entered into executive sessions properly once the relator has shown that a "meeting of the majority of the members of a public body occurred and that the general public was excluded from that meeting." The relator made this point to argue that the respondents cannot use this privilege as both a shield and a sword, to preclude discovery of the executive sessions and then selectively decide what they wish to reveal about the executive sessions to support their case.[61] The court agrees that the respondents' decision to assert this privilege to protect their conversations during

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[60] *State ex rel. Leslie*, 2005-Ohio-1767 at ¶ 25. *See State ex rel. Cincinnati Enquirer v. Hamilton County Com'rs*, 1st Dist. Hamilton No. C-010605, 2002 WL 727923, *3 (Apr. 26, 2002), citing *State ex rel. National Broadcasting Co. v. Cleveland*, 38 Ohio St.3d 79, 526 N.E.2d 786 (1988), paragraph two of the syllabus ("The burden is on the public body to justify the resort of executive session under one or more of the exceptions to the Sunshine Law found in R.C. 121.22(G).").

[61] Relator's Resp., pg. 6.

executive sessions is a strategic choice, and in doing so the respondents will not later be permitted to selectively choose which conversations they wish to reveal from those sessions. Thus, in applying the executive session privilege to this case, it not only limits the evidence available for the relator, but it also limits the evidence available to the respondents to satisfy their burden of showing that they properly entered into executive sessions.

Upon considering theses countervailing interests, the court finds that for those executive sessions entered into under R.C. 121.22(G)(1), regarding personnel matters, and (G)(2), regarding public property purchases, during depositions the relator may inquire into the topics discussed at these meetings, but not the substance of conversations that dealt with personnel matters or the purchase of property. If a deponent reveals that a topic was discussed that was not covered by either (G)(1) or (G)(2), then the relator may inquire into the substance of those conversations.

As to the executive session occurring on February 18, 2014, the official meeting minutes do not state the listed purpose for entering into an executive session under R.C. 121.22(G).[62] The cases regarding the executive session privilege, including the federal ones cited by the respondents, all state that the privilege applies only to those executive sessions that are properly entered into.[63] For sessions entered into under R.C. 121.22(G)(1), that subsection requires as follows: "If a public body holds an executive session pursuant to division (G)(1) of this section, the motion and vote to hold that executive session shall state which one or more of the approved purposes listed in division (G)(1) of this section are the purposes for which the executive session is to be

[62] Ex. N to Am. Compl.
[63] *See Humphries*, 554 Fed.Appx. at 402, citing R.C. 121.22(G); *University Estates, Inc.*, 2011 WL 796789 at *2.

held * * *."[64] For all other executive sessions, R.C. 121.22(G) requires: "If a public body holds an executive session to consider any of the matters listed in divisions (G)(2) to (8) of this section, the motion and vote to hold that executive session shall state which one or more of the approved matters listed in those divisions are to be considered at the executive session."[65]

Because the City Council went into executive session on February 18, 2014 without stating its purpose in doing so, it is clear that the executive session privilege should not apply to conversations held in that executive session. Furthermore, because the respondents have not indicated their purpose for adjourning into executive session on that date, the court cannot weigh the respondents' interests in keeping that session confidential against the relator's interest in discovering the substance of those conversations. Accordingly, the relator may inquire into the substance of conversations held in executive session on February 18, 2014.

Having found that the executive session privilege applies, the relator urges this court to find that the respondents waived their executive session privilege by failing to produce a privilege log. Civ.R. 26(B)(6)(a) requires that, when information subject to discovery is withheld, "the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim."[66] The court has reviewed the respondents' written responses to the relator's requests for production of

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[64](Emphasis added.) R.C. 121.22(G)(1).
[65] (Emphasis added.) R.C. 121.22(G)(8)(b).
[66] *Hartzell v. Breneman*, 7th Dist. Mahoning No. 10 MA 67, 2011-Ohio-2472, ¶ 9, citing Civ.R. 26(B)(6)(a).

documents.[67] Although the respondents raise the executive session privilege in several responses, they do not make the specific disclosures required in Civ.R. 26(B) so that the relator can determine what has not been produced to contest the claim of privilege.

In support of the argument for waiver, the relator highlights the case of *McPherson v. Goodyear Tire & Rubber Co.*, 146 Ohio App.3d 441, 2001-Ohio-1517, 755 N.E.2d 1015 (9th Dist.). In *McPherson*, the Ninth District Court of Appeals held that the document at issue was not privileged, but even if it was, the party responding to the document request would have waived its claim of privilege because it "did not satisfy its burden of showing the privileged nature of these documents and material in a timely fashion."[68] The relator argues that, in failing to provide a privilege log in a timely manner, the respondents likewise waived their claim of privilege.

However, the court declines to exercise its discretion in governing discovery to find that the respondents waived their executive session privilege by failing to produce a privilege log. A critique of the *McPherson* case by the Eighth District Court of Appeals in *Huntington National Bank v. Dixon*, 8th Dist. Cuyahoga No. 93604, 2010-Ohio-4668, adequately captures the court's concern in adopting such a position:

> "But the Eighth District has not adopted such a per se waiver rule and we decline to find waiver here. Failure to assert the privilege objection correctly can mean that the privilege is waived. Given that such a result could impose substantial and unjustified burdens on litigants, however, most decisions regarding waiver due to failure to provide an adequate privilege log tend to be very case-specific. While some courts have held the failure to provide a privilege log within the applicable time to constitute a waiver of the asserted privilege, other courts have specifically reject[ed] a per se waiver rule that deems a privilege waived if a privilege log is

[67] Relator's Ex. 5.
[68] *McPherson v. Goodyear Tire & Rubber Co.*, 146 Ohio App.3d 441, 2001-Ohio-1517, 755 N.E.2d 1015, ¶ 10 (9th Dist.).

> not produced. Indeed, in light of the harshness of a waiver sanction, many courts have reserved the sanction for those cases where the offending party committed unjustified delay in responding to discovery. Additionally, [m]inor procedural violations, good faith attempts at compliance, and other such mitigating circumstances militate against finding waiver."[69]

The relator has not cited any authority from the Twelfth District court of Appeals adopting a per se waiver rule, and as such the court declines to find that the respondents waived their executive session privilege by failing to produce a privilege log.[70]

Having dealt with how the executive session privilege will impact future depositions, the court must now determine how it impacts the rest of the relator's discovery inquiries into executive sessions. The respondents' motion generally requests that the court "preclude Relator from inquiring into discussions held in executive sessions * * *."[71] Thus, the respondents are not only asking the court for a protective order to prevent deposition inquiries into executive sessions, but for an order preventing all discovery inquiries into executive sessions. That would necessariliy include interrogatories and requests for the production of documents.

The discovery responses from the respondents demonstrate that they have asserted privilege under the executive session privilege in multiple instances to prevent producing documents and answering interrogatories.[72] The court has already found that

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[69] (Internal citations omitted.) *Huntington National Bank v. Dixon*, 8th Dist. Cuyahoga No. 93604, 2010-Ohio-4668, ¶24.

[70] Of note, Civ.R. 26(B)(6)(a) does not require a privilege log, but it does require that a claim of privilege "be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Thus, the respondents could have satisfied this requirement by producing this information in a form different from a privilege log or by producing a privilege log.

[71] Resp't's Mot.

[72] *See* Ex. 5 to Relator's Resp.

this privilege applies, but the relator is correct to assert that the respondents need to comply with Civ.R. 26(B)(6)(a), which requires that, when information subject to discovery is withheld, "the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim."[73]

As such, the respondents shall produce a privilege log to the relator for any documents that are withheld on the basis of the executive session privilege. The privilege log shall include the name of the document's author, the names of any recipients of the document, a general description of the document (e.g., email, memorandum, etc.), the document's date, and a general description of the document's subject matter. This will enable the relator to assess whether to contest the respondents' claims of privilege as to each withheld document.

Finally, the respondents motion is not only a motion for a protection order, but it is also a motion in limine seeking to prevent the relator from inquiring at trial into discussions held at executive sessions and from "introducing any evidence of executive session proceedings in motion practice or during the trial of this matter." The court finds that the same parameters set forth above for taking deposition testimony regarding executive sessions shall apply at trial. However, the respondents have not set forth a basis to exclude the relator's evidence of executive session proceedings generally from motion practice or trial. The court cannot find a reason that the relator should be barred from using non-privileged evidence regarding the executive sessions. As such the court denies this particular request in the respondents' motion in limine.

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[73] *Hartzell v. Breneman*, 7th Dist. Mahoning No. 10 MA 67, 2011-Ohio-2472, ¶ 9, citing Civ.R. 26(B)(6)(a).

II. ATTORNEY-CLIENT PRIVILEGE

In addition to the executive session privilege, the respondents also argue that the executive sessions are protected by the attorney-client privilege. The attorney-client privilege "is one of the oldest recognized privileges for confidential communications."[74] The attorney-client privilege is "intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."[75] As with other privileges, the "burden of showing that evidence ought to be excluded under the attorney-client privilege rests upon the party asserting the privilege."[76]

Ohio's attorney-client privilege is governed both by statute and common law.[77] The statute, R.C. 2317.02(A), "is a mere testimonial privilege precluding an attorney from testifying about confidential communications."[78] On the other hand, the common law privilege is broader and "protects against any dissemination of information obtained

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[74] *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 21, quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998).

[75] (Internal citation omitted.) *State ex rel. Toledo Blade*, 2009-Ohio-1767 at ¶ 21, quoting *Swidler*, 524 U.S. 399.

[76] *Maddox v. Greene Cty. Bd. of Commrs.*, 2d Dist. Greene No. 2013-CA-71, 2014-Ohio-1541, ¶ 5, quoting *MA Equip. Leasing, L.L.C. v. Tilton*, 980 N.E.2d 1072, 2012-Ohio-4668, ¶ 21 (10th Dist.). *See Shaffer v. OhioHealth Corp.*, 10th Dist. Franklin No. 03AP-102, 2004-Ohio-63, ¶ 8, quoting *Waldmann v. Waldmann*, 48 Ohio St.2d 176, 178, 358 N.E.2d 521 (1976) ("The burden of proof rests with the party asserting the existence of privilege.").

[77] *State ex rel. Toledo Blade*, 2009-Ohio-1767 at ¶ 24, quoting *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 900, ¶ 18.

[78] *State ex rel. Toledo Blade*, 2009-Ohio-1767 at ¶ 24, quoting *State ex rel. Leslie*, 2005-Ohio-1767 at ¶ 24. *See Maddox*, 2014-Ohio-1541 at ¶ 5, quoting *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, ¶ 7 ("On its face, R.C. 2317.02(A) involves a testimonial privilege and only precludes an attorney from testifying on matters covered by the attorney-client privilege.").

in the confidential relationship."[79] The attorney-client privilege protects both legal analysis and advice, as well as communications between an attorney and client that "that would facilitate the rendition of legal services or advice."[80]

"Under the attorney-client privilege, '(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived."[81] To determine whether the privilege applies, courts "must balance the public's interest in confidentiality against the need for discovery in the efficient administration of justice."[82]

In Ohio, the attorney-client privilege extends to government clients as well.[83] Only the client can waive this privilege.[84] In cases where government bodies are the client, a waiver by one individual does not waive the privilege for the body as a whole.[85]

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[79] *State ex rel. Toledo Blade*, 2009-Ohio-1767 at ¶ 24, quoting *State ex rel. Leslie*, 2005-Ohio-1767 at ¶ 24.
[80] *State ex rel. Toledo Blade*, 2009-Ohio-1767 at ¶ 27, quoting *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991).
[81] *State ex rel. Leslie*, 2005-Ohio-1767 at ¶ 21, quoting *Reed v. Baxter*, 134 F.3d. 351, 355-356 (6th Cir. 1998). *See Prefection Corp. v. Travelers Cas & Sur.*, 153 Ohio App.3d 28, 2003-Ohio-2750, 790 N.E.2d 817, ¶ 12 (8th Dist.), quoting *Fausek v. White*, 956 F.2d 126, 129 (6th Cir. 1992) ("(1) [w]here legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by his legal advisor, (8) except the protection be waived.").
[82] *Carver v. Deerfield Twp.*, 139 Ohio App.3d 64, 76, 742 N.E.2d 1182 (11th Dist. 2000), citing *Henneman v. Toledo*, 35 Ohio St.3d 241, 245-246, 520 N.E.2d 207 (1988).
[83] *State ex rel. Leslie*, 2005-Ohio-1767 at ¶ 30. *See State ex rel. Nix v. Cleveland*, 83 Ohio St.3d 379, 383, 700 N.E.2d 12 (1998) (stating that the attorney-client privilege applies to attorneys and their government clients).
[84] *State ex rel. Leslie*, 2005-Ohio-1767 at ¶ 21. *See Shaffer*, 2004-Ohio-63 at ¶ 10, citing *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 213, 744 N.E.2d 154 (2001) ("It is well-settled that the holder of the privilege is the client and not the attorney, and only the client has the right to invoke and waive the privilege.").
[85] *Carver*, 139 Ohio App.3d at 77.

In *Kamenski v. Wellington Exempted Village Schools*, N.D. Ohio No. 1:14-cv-01589, 2016 WL 1732872 (May 2, 2016), discussed above, the Northern District of Ohio considered whether discussions made in an executive session were protected by the attorney-client privilege.[86] The defendants, members of a board of education, argued the privilege applied to their discussions in executive session because they were discussing the plaintiff's pending EEOC charge and the upcoming mediation regarding that charge.[87] In response, the court first noted that "the mere presence of counsel 'in the room' is insufficient to invoke the attorney-client privilege."[88] The court then found that the privilege did not apply because the executive session was not made under R.C. 121.22(G)(3), which is purposed to discuss pending or imminent litigation.[89] Instead, the defendants went into an executive session under R.C. 121.22(G)(1), which regards personnel matters.[90] The court concluded:

> "Had the [board] adjourned into executive session under subsection (G)(3) and had Defendants submitted evidence that the primary purpose of the executive session was obtaining legal advice, further consideration of Defendants' assertion that the attorney-client privilege should apply to all discussions during the executive session * * * might be warranted."[91]

Ultimately, the court found that the attorney-client privilege did not apply to communications made during the executive session, and as such it denied the defendants' request for a protective order based on that privilege.[92]

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[86] *Kamenski*, 2016 WL 1732872 at *4.
[87] Id. at *5.
[88] Id. at *5, quoting *Maddox*, 2014-Ohio-1541.
[89] *Kamenski*, 2016 WL 1732872 at *5.
[90] Id.
[91] Id.
[92] Id. at *6. *Cf. Humphries v. Chicarelli*, S.D. Ohio No. 1:10-cv-749, 2012 WL 5930437, *3-4 (Nov. 27, 2012) (finding that the attorney-client privilege applied to conversations in an

This court also had the opportunity to contemplate the attorney-client privilege in the context of executive sessions in *Smith v. Pierce Township*, discussed above. The court reflected as follows:

> "* * * [T]he court would note that there is some case law, including within the Twelfth District of Appeals, which suggests that '[t]he General Assembly, in limiting the circumstances in which such discussion can be held in executive session, has required a partial waiver of the privilege by the client-public body.'"[93]

The court went on to state: "in this district, discussions between the members of a public body and their counsel are only *required* to be confidential if they occur in the context of discussing pending or imminent court action," as in the case of executive sessions entered into under R.C. 121.22(G)(3).[94]

In the instant case the respondents argue that the attorney-client privilege applies to all conversations held in the City Council's executive sessions. The court finds that this argument fails for two reasons. Firstly, as this court discussed in *Smith*, and as the case of *Kamenski* confirms, the attorney-client privilege only applies in executive sessions held to discuss pending or imminent litigation. The City Council adjourned into executive sessions under R.C. 121.22(G)(1), concerning personnel matters, and (G)(2), concerning the purchase of public property. None of the sessions at issue were entered into under (G)(3), which concerns pending or imminent litigation.

Even so, at oral argument the respondents argued that there was imminent litigation because discussions concerning the purchase of property often involve

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executive session where the session was entered into to discuss the legal implications of investigations and litigation threatened by the plaintiff, and the defendants showed that the attorney participated in the meeting as law director, explained the legal ramifications of the plaintiff's allegations, and offered legal advice to the city council).

[93] *Smith*, No. 2011 CVH 01952 at 9, citing *State ex rel. Hardin*, 2012-Ohio-2569 at ¶ 12.

[94] (Emphasis original.) Id.

ancillary legal concerns, which is why counsel was present. However, the term "imminent," as used in R.C. 121.22(G)(3), "is satisfied where a public body has committed itself to a litigative solution and assumed a litigative posture."[95] There is no evidence before this court demonstrating that the City Council had committed itself to litigative solution regarding its purchase of the property at issue. Accordingly, the court finds that the attorney-client privilege is inapplicable.[96]

Furthermore, the respondents have not met their burden of showing that all of the requirements of the attorney-client privilege have been satisfied. The respondents submitted the affidavit of Michael Minniear, the law director for the City of Milford, which established that he attended all but one of the executive sessions for the purpose of providing legal counsel in his professional capacity. However, the affidavit did not establish that the respondents actually sought any legal counsel during these sessions, nor did it establish whether the communications were made confidentially.[97] As such, the court concludes that the executive sessions are not afforded the attorney-client privilege.

III. LEGISLATIVE PRIVILEGE

Finally, the respondents argue that the legislative privilege applies, therefore preventing the relator from discovering the content of their communications during

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[95] *State ex rel. Cincinnati Enquirer*, 2002 WL 727923 at *4.
[96] *Cf. Village Square Nursing Center, Inc. v. Village of Orwell*, 11th Dist. Ashtabula No. 1265, 1986 WL 14948, *5 (Dec. 31, 1986) (finding that the attorney-client privilege applied to statements made in an executive session; the court does not identify which exception the executive session was made under, but refers to it as a session in which the council was in the process of discussing "possible litigation" with counsel).
[97] *State ex rel. Leslie*, 2005-Ohio-1767 at ¶ 21, quoting *Reed*, 134 F.3d. at 355-356.

executive sessions. "Ohio cases applying legislative privilege are primarily concerned with immunity from criminal prosecution or civil actions for defamation, rather than protection from compelled testimony or discovery."[98] Even so, "federal cases interpreting the comparable federal provision, Section 6, Article I, United States Constitution, make clear that the expression 'legislative privilege' embodies * * * an *evidentiary* privilege against the use of statements, discussions, and debate made in the course of the legislative process."[99]

Ohio has a constitutional counterpart to the federal Speech and Debate Clause, and interpretation of the Ohio provision "is most often guided by federal precedent."[100] Notably, for this case, the legislative privilege has been extended to apply to local governing bodies.[101]

The legislative privilege "must be strictly construed."[102] The legislative privilege applies to speeches made on the floor of the legislature and also extends to "meetings, processes, conversations, and documents that are 'an integral part of the deliberative and communicative processes' by which legislators participate in legislative or committee proceedings."[103] Although the privilege is broad, it fails to extend to "all conduct related to the legislative process."[104]

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[98] *Dublin v. State*, 138 Ohio App.3d 753, 758, 724 N.E.2d 232 (10th Dist. 2000).
[99] (Emphasis original.) Id., citing 26A Wright & Graham, Federal Practice and Procedure: Evidence, Section 5675.
[100] *Dublin*, 138 Ohio App.3d at 759.
[101] *Costanzo v. Gual*, 62 Ohio St.2d 106, 110, 403 N.E.2d 979 (1980).
[102] *Nashville Student Organizing Comm. v. Hargett*, 123 F.Supp.3d 967, 969 (M.D. Tenn. 2015), quoting *Comm. for a Fair & Balanced Mapp v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, *7 (N.D. Ill. Oct. 12, 2011).
[103] *Dublin*, 138 Ohio App.3d at 759, quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 126, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979)
[104] *Dublin*, 138 Ohio App.3d at 759.

"[A]ctions that are administrative or executive in nature are not afforded the protections of legislative immunity."[105] To determine if certain activities are privileged, courts first "focus on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are 'legislative facts,' such as 'generalizations concerning a policy or state of affairs,' then the decision is legislative."[106] Conversely, if "the facts used in the decisionmaking are more specific, such as those that relate to particular individuals or situations, then the decision is administrative."[107] A second test courts also employ "focuses on the 'particularity of the impact of the state action.' If the action involves establishment of a general policy, it is legislative; if the action single[s] out specific individuals and affect[s] them differently from others, it is administrative."[108]

Activities that courts have found to be legislative in nature include "holding investigative hearings, voting for an ordinance or introducing a budget and signing into law an ordinance, a legislative committee's 'deliberative and communicative processes,' and a city council's exercise of its 'investigatory power by presiding over a public comment period.'"[109] By contrast, the decision as to whether to "purchase a parcel of property" has been deemed an "administrative act."[110] Likewise, "[p]ersonnel decisions

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[105] *Smith*, No. 2011 CVH 01962 at 7, quoting *U.S. EEOC v. Washington Suburban Sanitary Com'n*, 666 F.Supp.2d 526, 531 (D. Md. 2009).
[106] *Bryan v. City of Madison, Miss.*, 213 F.3d 267, 273, (5th Cir. 2000), quoting *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984).
[107] *Bryan*, 213 F.3d at 273, quoting *Cutting*, 724 F.2d 259.
[108] *Bryan*, 213 F.3d at 273, quoting *Cutting*, 724 F.2d 259.
[109] *Williamson v. Scioto Tp. Trustees*, S.D. Ohio No. 2:13-CV-683, 2014 WL 4388266, *16 (Sep. 5, 2014), quoting *Guindon v. Twp. Of Dundee*, E.D. Mich., 2010 WL 5394992, *6 (Dec. 23, 2010).
[110] *Chicago Miracle Temple Church , Inc. v. Fox*, 901 F.Supp. 1333, 1344 (N.D. Ill. 1995). *See Bryan*, 213 F.3d at 273-274 (finding that a mayor's veto of a determination that a particular piece of property satisfied zoning ordinances was not a determination of policy, but specific to "one piece of property," and therefore the actions were non-legislative).

* * * have been characterized as anything but legislative."[111] Because the respondents' executive session discussions regarded non-legislative matters, those being the purchase of property and personnel matters, the court finds that the legislative privilege is inapplicable.

CONCLUSION

For the foregoing reasons, the court grants the respondents' motion in limine and for protective order in part and denies it in part. Regarding the respondents' motion for a protective order the court rules as follows:

- During depositions the relator may inquire into the topics discussed at executive sessions entered into under R.C. 121.22(G)(1), regarding personnel matters, and (G)(2), regarding public property purchases. However, the relator shall not inquire into the substance of conversations that dealt with personnel matters or the purchase of property during these executive sessions.
- At depositions the relator may inquire into the substance of conversations that fall outside of R.C. 121.22(G)(1) or (G)(2), which is to say they do not deal with personnel matters or the purchase of public property.
- At depositions the relator may inquire into the substance of conversations held in executive session on February 18, 2014.

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[111] *Smith*, No. 2011 CVH 01962 at 7, citing *Irvin v. McGee*, (D. Mass. 1993) 1993 WL 819906, *4.

- Regarding non-deposition discovery, the respondents shall produce a privilege log to the relator for any documents that are withheld on the basis of the executive session privilege. The privilege log shall include the name of the document's author, the names of any recipients of the document, a general description of the document (e.g., email, memorandum, etc.), the document's date, and a general description of the document's subject matter.

Regarding the respondents' motion in limine, the court rules as follows:

- During the questioning of respondents at trial, the relator shall follow the same parameters set forth above for taking deposition testimony regarding executive sessions.
- The court denies the respondents' request to exclude the relator's evidence of executive session proceedings generally from motion practice or trial proceedings.

A telephone status conference will be held on March 3, 2017 at 1:30 p.m. for the purposes of setting a new discovery deadline and amending the original case management order in other respects as appropriate.

IT IS SO ORDERED.

DATED: 2-21-17

Judge Jerry R. McBride