VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-00427

Patrick Cashman v. Brian Cina

DECISION ON MOTION

Appellant Patrick Cashman appeals the decision by Representative Brian Cina to withhold two documents from his response to Mr. Cashman's public records request. Mr. Cashman challenges Mr. Cina's claim of "legislative privilege." Mr. Cina moves to dismiss. The court grants the motion.

The court notes at the outset that V.R.C.P 12(b)(6), pursuant to which Mr. Cina brought his motion, may not be the appropriate vehicle for Mr. Cina's challenge to Mr. Cashman's appeal. Under the Public Records Act, the burden falls on the "public agency"—here, Mr. Cina—to sustain its action. 1 V.S.A. § 319(a). Nevertheless, the parties agree that the issue here—whether "legislative privilege" exists and falls within one of the exceptions to the Public Records Act—is a pure question of law. Thus, whether the court views the motion as one to dismiss, for judgment on the pleadings, or for summary judgment, the question is properly before the court.

The underlying facts are not in dispute. On January 4, 2021, Mr. Cina attended a virtual meeting of the Burlington City Council to urge the Council to override the mayor's veto of a proposed change to the City's charter. After the meeting, Mr. Cashman sent an email to the Office of Legislative Counsel and Mr. Cina requesting production of all communications to Mr. Cina "regarding the 1/4/2021 Burlington City Council meeting" at which Mr. Cina had spoken. Complaint, Encl. 2. Legislative Counsel, on behalf of Mr. Cina, provided responsive records, yet also informed Mr. Cashman that it withheld two records "as exempt from public inspection and copying pursuant to 1 V.S.A. § 317(c)(1) (records designated as confidential under the constitutional legislative privilege of Vt. Const. Ch. I, art. 14) as well as under 1 V.S.A. § 317(c)(4) (legislative privilege)." Complaint, Encl. 3; *see also* Defendant's Motion to Dismiss, Exh. B. When Mr. Cashman appealed the withholding of the two documents, Mr. Cina denied the appeal and again invoked legislative privilege. Mr. Cashman then requested judicial review pursuant to 1 V.S.A. § 319(a).

Discussion

Vermont's Public Records Act (PRA) provides generally that any person may inspect or copy any public record of a public agency. 1 V.S.A. § 316(a). The PRA defines a public record as "any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business." 1 V.S.A. § 317(b). The act also includes a litany of exemptions from public access, including "[r]ecords which by law are designated confidential or by a similar term" and "[r]ecords which, if made public pursuant to this subchapter, would cause the custodian to violate any statutory or common law privilege other than the common law deliberative process privilege as it applies to the General Assembly and the Executive Branch agencies of the State of Vermont." 1 V.S.A § 317(c)(1) and (4). When a party appeals a denial of its request for public records, "the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in section 317 of this title, and the burden of proof shall be on the public agency to sustain its action." 1 V.S.A. § 319(a).

Mr. Cina argues that to the extent that the two communications at issue are public records, they relate to his consideration of future legislation. *See* 17 V.S.A. § 2645(d) (charter changes become effective upon enactment by the General Assembly). The court, having reviewed the documents in camera per 1 V.S.A. § 319(a), agrees with this characterization. It notes in this regard that Mr. Cashman was lead sponsor of H. 448, a bill introduced in the 2021 session related to the charter change that was the subject of the January 4 City council meeting.

Mr. Cina argues that legislative privilege in Vermont is grounded in the Vermont Constitution and the common law. The Vermont Constitution provides that "[t]he freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." Vt. Const. Ch. I, Art. XIV. This court has invoked Article 14 when it dismissed a complaint that sought the court's intervention by disqualifying members of the Vermont legislature from a vote upon which they had previously placed bets. *Brady et al. v. Dean et al.*, No. 308-5-00WNCV, 2000 WL 35440515 (Vt. Super. Oct. 24, 2000) (Katz, J.). That case differs from this in that any relief granted by the court there would have amounted to interference by the judicial branch in the outcome of legislative processes. Here, Mr. Cashman seeks only the production of text messages and so does not ask the court to usurp the validity of legislative acts.

Neither party has cited, nor has this court found, any Vermont case that addresses the application of legislative privilege derived from Article 14 or the common law to the question of document requests

under the Public Records Act. Mr. Cashman argues that Article 14 is not self-executing and therefore confers no privilege. In this regard, our Supreme Court has observed: "The lack of a specific remedy should not itself defeat the contention that a constitutional provision is self-executing. . . . [T]he law will provide a remedy for any right amenable to legal enforcement." *Shields v. Gerhart*, 163 Vt. 219, 225 (1995) "A constitutional provision is self-executing if it 'supplies a sufficient rule by means of which the right given may be enjoyed and protected.' " *Stevens v. Stearns*, 2003 VT 74, ¶ 18, 175 Vt. 428 (quoting *Shields*, 163 Vt. at 224).

> In making this determination, we examine whether the constitutional provision describes the right in detail, including the means for its enjoyment and protection; whether it contains a directive to the legislature for further action; whether the legislative history indicates the provision's intended operation; and whether a conclusion that a provision is or is not self-executing would be consistent with the scheme of rights established in the constitution as a whole.

Id.

Examination of Article 14 through this lens makes clear that it is self-executing. The article plainly describes the right at issue here: "freedom of deliberation, speech, and debate, in the Legislature." Equally, it describes the means for the right's protection: exercise of the right "cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." The expression of the right and its means of protection are so clear as to require no further legislative act to specify its application. *Cf. In re Town Highway No. 20*, 2012 VT 17, ¶¶ 31–33, 191 Vt. 231 (concluding that Article 7, with language far less definite than Article 14, is self-executing).

The Supreme Court's decision in *Shields* reinforces this conclusion. There, the Court examined whether either Article 1, providing "[t]hat all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights," or Article 13, providing "[t]hat the people have a right to freedom of speech," was self-executing. 163 Vt. at 224–27. The The Court held that the former was not self-executing, *id.* at 226, while the latter was, *id.* at 227. In reaching these conclusions, the Court made several observations that are pertinent to this court's inquiry. First, with respect to Article 1, the Court observed that the provision "expresses fundamental, general principles" that include "the right to possess and protect property," but "does not establish an enforceable property right, but merely lists it to flesh out philosophical truisms." *Id.* at 224–25. In contrast, with respect to Article 13, it observed that "it unequivocally expresses more than general principles alone. It sets forth a single, specific right of the people to make themselves heard, a fundamental characteristic of democratic government." *Id.* at 227. The court observed further, "[s]ince Article 13 establishes a specific free

speech right, the absence of a legislative directive supports a conclusion that the provision is self-executing."

So too with Article 14. The right described is specific. So, too, is its means of protection: its exercise "cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." Thus, the absence of direction to the legislature reinforces rather than undercuts the conclusion that it is self-executing. Moreover, the conclusion that legislators cannot be hauled into court to account for their speech related to legislative processes is consistent with the concept of separation of powers in the Vermont Constitution. Vt. Const. Ch. II, § 5 ("The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."). In sum, no legislation is necessary to give Article 14 effect; it is self-executing.

The conclusion that the privilege recognized in Article 14 is self-executing does not fully answer the question this case presents. At least by its express terms, the Public Records Act does not exempt documents that are protected by a constitutional privilege. Instead, the exception applies to "any statutory or common law privilege other than the common law deliberative process privilege as it applies to the legislature and the executive." 1 V.S.A. 317(c)(4).[1, 2] The court need not determine, however, whether the statutory exception extends implicitly to matters of constitutional privilege. Examination of the history of the legislative privilege makes clear that the privilege long predates the Vermont Constitution and instead has its roots in common law; in short, it is both a constitutional and common law privilege.

The legislative privilege finds its roots in the tensions between Parliament and the King of England. *See Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) ("In 1689, the Bill of Rights declared in unequivocal language: 'That the Freedom of Speech, and Debates or Proceedings in Parliament, ought

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[1] The court notes that Mr. Cina asserts that "legislative privilege" falls within the exceptions provided in both § 317(c)(1) ("[r]ecords which by law are designated confidential or by a similar term") and § 317(c)(4) (records subject to "any statutory or common law privilege"). It is questionable whether recognition of a privilege is tantamount to a "designation" by law as "confidential or . . . a similar term." The court's determination with respect to the scope of § 317(c)(4) obviates any need to resolve this question.

[2] It bears emphasis here that the deliberative process privilege is distinct from legislative or executive privilege. *See Favors v. Cuomo*, 285 F.R.D. 187, 207 (E.D.N.Y. 2012) (describing the three privileges as "related, but distinct). Another Vermont trial court has noted that "[e]xecutive privilege also differs meaningfully from the deliberative process privilege that was expressly excluded from the group of exempt privileges under 1 V.S.A. § 317(c)(4)." *Browning v. State*, No. 272-5-14 Wncv, 2014 WL 10321350, at *2 (Vt. Super. Dec. 10, 2014) (Teachout, J.). "The deliberative process privilege, at common law, shields from disclosure agency records that are pre-decisional and deliberative in nature, but not those that are post-decisional or factual in nature." *Id.* (citing *New Eng. Coal. for Energy Efficiency and Env't v. Office of Governor*, 164 Vt. 337, 341 (1995)). While there may in some cases be a degree of overlap between the legislative and deliberative process privileges, that does not mean that the legislature's waiver of one, as in § 317(c)(4), effects a waiver of the other.

not to be impeached or questioned in any Court or Place out of Parliament.' ") (quoting 1 Wm. & Mary, Sess. 2, c. II). Versions of this language existed in the Articles of Confederation as well as several early state constitutions. *Id.* at 373. Indeed, Article 14, which was adopted in 1786, is nearly identical to clauses from the Massachusetts Constitution, adopted in 1780, and the New Hampshire Constitution, adopted in 1784. *See* Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221, 236-37 (2003) (noting that "Massachusetts, New Hampshire, and Vermont . . . continue to employ a 'deliberation, speech and debate' formulation of the privilege that . . . shortly predates the federal model"). The Speech and Debate Clause of the Constitution of the United States also reflects the contemporary concern that legislative speech could be chilled or curtailed by recourse to litigation. U.S. Const. art. I, § 6, cl. ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."). In this historical context, it is clear that the privilege enshrined in Article 14 was not an invention or creation of the framers of the Vermont constitution, but instead a codification of a preexisting common law privilege.

Consideration of the historical context informs not only the conclusion that the legislative privilege is a creature of common law, but also the scope of the privilege. *See State v. Misch*, 2021 VT 10, ¶ 9 (stating that when construing the Vermont constitution, "we begin with the text of the provision, understood in its historical context, and we consider our own case law, the construction of similar provisions in other state constitutions, and empirical evidence if relevant"). Thus, it is instructive that in 1808, the Massachusetts Supreme Judicial Court opined that "[t]hese [legislative] privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal." *Coffin v. Coffin*, 4 Mass. 1, 27 (Mass. 1808). *Coffin* construed the analogous provision of the Massachusetts Constitution liberally to include not only debate within the actual legislative body but also "to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and . . . the article . . . secur[es] to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules." *Id.* Thus, not surprisingly, courts have interpreted the reach of legislative privilege to include virtually all manner of action by a legislator taken in connection with legislative duties. *See, e.g., Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) ("Once it is determined that Members of congress are

acting within the 'legitimate legislative sphere' the Speech or Debate clause is an absolute bar to interference."); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995) ("Documentary evidence can certainly be as revealing as oral communications[.]"); *In re McLean*, No. 2:18-CV-201, 2019 WL 2353453, at *5 (D. Vt. June 4, 2019) ("Courts have extended [legislative] privilege to block disclosure of documents sought by a subpoena, so long as the document request constitutes an inquiry into legislative acts."). This sets up something of a tautology: if the communications at issue are public records at all, it is because they relate to Mr. Cina's consideration of future legislation; if they relate to his consideration of future legislation, however, they clearly relate to "deliberation," within the ambit of Article 14. Accordingly, they are subject to the privilege.[3]

ORDER

The court grants the motion. Judgment will enter for Mr. Cina.

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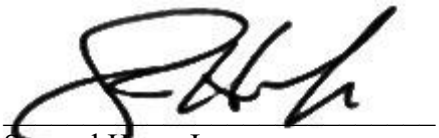

Samuel Hoar, Jr.
Superior Court Judge

[3] The court notes that in some jurisdictions, the legislative privilege is qualified, much like deliberative process privilege, and that courts consider a variety of factors when determining whether a legislator must produce otherwise privileged materials. "Among the factors that a court should consider in arriving at such a determination are: (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." *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100–01 (S.D.N.Y.), aff'd, 293 F. Supp. 2d 302 (S.D.N.Y. 2003) (quotation omitted).

Here, the court need not decide whether the legislative privilege is qualified. Neither party addressed this issue in his motion papers.

Having had the opportunity to review the two documents *in camera*, the court is hard-pressed to believe that a conclusion that the privilege is qualified would lead to a different result in this case. Mr. Cashman's motion papers make clear that there was a video record of Mr. Cina's public comments at the City Council meeting (held the same day as the communications); these are far more informative and relevant to his subsequent legislative action than anything in the withheld communications. There is no litigation, involving the government or otherwise, in which these communications would be relevant. Although transparency of government in general remains an important goal of the Public Records Act and a virtue toward which Vermont government properly strives, the Act also clearly recognizes privileged materials as an exception to its reach. Finally, the chilling effect of shining a bright light on the confidential conversations that legislators conduct with each other or with individual experts or constituents in forming their opinions regarding legislation would cause great harm to the public good that is served by our legislative system and the separation of powers within which our government functions. Thus, the court concludes that even if the legislative privilege is qualified, it would not order production of the communications at issue here.