

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 21 CVS 015426

NORTH CAROLINA LEAGUE, OF  
CONSERVATION VOTERS, INC., *et al.*,  
*Plaintiffs*

and

COMMON CAUSE,  
*Plaintiff-Intervenor,*

v.

REPRESENTATIVE DESTIN HALL, in  
his official capacity as Chair of the House  
Standing Committee on Redistricting, *et*  
*al.*,  
*Defendants.*

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STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 21 CVS 500085

REBECCA HARPER, *et al.*,  
*Plaintiffs*

v.

REPRESENTATIVE DESTIN HALL, in  
his official capacity as Chair of the House  
Standing Committee on Redistricting, *et*  
*al.*,  
*Defendants.*

**ORDER ON HARPER PLAINTIFFS' MOTION TO COMPEL ADEQUATE  
RESPONSES TO SECOND SET OF INTERROGATORIES AND FIRST SET OF  
REQUESTS FOR PRODUCTION**

THIS MATTER came before the undersigned three-judge panel upon Harper Plaintiffs' Motion to Compel submitted to the Court<sup>1</sup> on December 28, 2021, pursuant to Rule 37 of the North Carolina Rules of Civil Procedure.

Procedural and Factual Background

In this litigation, Plaintiffs seek a declaration that the North Carolina Congressional, North Carolina Senate, and North Carolina House of Representatives districts established by an act of the General Assembly in 2021, N.C. Sess. Laws 2021-174 (Senate Bill 750), 2021-173 (Senate Bill 739), and 2021-175 (House Bill 976) (collectively the "Enacted Plans"), violate the rights of Plaintiffs under the North Carolina Constitution. Plaintiffs seek to enjoin the future use of the 2021 congressional and state legislative districts.

On December 13, 2021, after receiving an order from the Supreme Court of North Carolina directing this Court to resolve all Plaintiffs' claims on the merits by January 11, 2022, this Court entered a Case Scheduling Order giving the parties until December 31, 2021, to complete discovery in advance of trial, which is set to commence on January 3, 2022.

On December 20, 2021, this Court entered an order clarifying that NCLCV Plaintiffs would be required to identify any and all persons who took part in drawing or participated in the computerized production of NCLCV Plaintiffs' Optimized Maps, that NCLCV Plaintiffs were to produce to Legislative Defendants the method and means by which the Optimized Maps were formulated and produced, including, but not limited to all source code, source data, input parameters, and all outputted data associated with the Optimized Maps, and that NCLCV Plaintiffs were to identify any and all persons who took part in drawing or participated in the computerized production of the Optimized Maps. On December 21, 2021, Harper Plaintiffs requested this same information from Legislative Defendants through

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<sup>1</sup> The Hon. A. Graham Shirley has accepted Plaintiffs Motion for filing on the 27<sup>th</sup> day of December, 2021, pursuant to Rule 5(e) of the North Carolina Rules of Civil Procedure.

interrogatories and requests for production of documents issued, respectively, pursuant to Rules 33 and 34 of the North Carolina Rules of Civil Procedure. Harper Plaintiffs specifically requested this information and documentation as it pertains to the Enacted Plans, including the identification of all persons who took part in the drawing of the Enacted Plans in any way as well as all documents or data relied upon by those involved in the map drawing process.

On December 24, 2021, this Court entered a Protective Order acknowledging assertions of legislative privilege by four of the named Legislative Defendants—President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Paul Newton, and Speaker Timothy K. Moore—and ordering that those four legislators not be called to testify at depositions noticed by Harper Plaintiffs. In that same Order, this Court noted that nothing in the Order should be construed as a limitation on the ability of Representative Hall or Senator Hise to waive their personal legislative privilege and testify at deposition or at trial. Representative Hall's deposition occurred on December 27, 2021, and Senator Hise's deposition occurred on December 28, 2021.

On December 27, 2021, Harper Plaintiffs filed their First Motion to Compel, and on that same date the Court entered an Order granting the Motion to Compel, ordering Legislative Defendants to respond to Harper Plaintiffs' second set of interrogatories and first set of requests for production by 9:00 AM EST on December 28, 2021. As this Court noted in its Order, the sought-after information and documentation pertaining to the Enacted Plans, including the identification of all persons who took part in the drawing of the Enacted Plans in any way *as well as all documents or data relied upon by those involved in the map drawing process*, goes to the heart of the dispute in this redistricting litigation.

On December 28, 2021, Harper Plaintiffs filed the present Motion to Compel, contending that, in light of testimony given by Representative Hall, Legislative Defendants' responses served in response to this Court's December 27, 2021, Order, are facially deficient

and are impeding access to key information that goes “to the heart of the dispute in this redistricting litigation.” Legislative Defendants thereafter submitted a written response to the Motion on December 29, 2021.

Harper Plaintiffs and Legislative Defendants have informed the Court of their respective positions on the Motion, and the matter is now ripe for resolution by the Court.

#### Harper Plaintiffs’ Motion to Compel

After considering the Motion and the responses to that motion, as well as the matters contained therein, the Court, in its discretion, rules upon Harper Plaintiffs’ Motion 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.” N.C.G.S. § 1A-1, Rule 26(b)(1). “The test for relevance for discovery purposes only requires that information be ‘reasonably’ calculated to lead to the discovery of admissible evidence.” *Lowd v. Reynolds*, 205 N.C. App. 208, 214, 695 S.E.2d 479, 483 (2010) (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).

Rule 34(a) of the North Carolina Rules of Civil Procedure expressly authorizes requests for matters “in the possession, custody or control of the party upon whom the request is served.” N.C.G.S. § 1A-1, Rule 34(a). Such documents and data “are deemed to be within the possession, custody or control of a party for purposes of Rule 34 if the party has actual possession, custody or control of the materials or has the legal right to obtain the documents on demand.” *Lowd*, 205 N.C. App. at 214 (quoting *Pugh v. Pugh*, 113 N.C.App. 375, 380–81, 438 S.E.2d 214, 218 (1994)).

Legislative Defendants’ position that they have fully responded to the discovery requests at issue largely rests upon the contention that they simply do not have possession

of any concept maps, documents, or other data that were utilized by Representative Hall, or others, during the map-drawing process—despite Representative Hall testifying that he frequently consulted in private with others during the map-drawing process, that he reviewed a number of concept maps during those discussions, and that he utilized maps previously prepared by those individuals for his own use when publicly drawing a number of the districts challenged in this litigation. Harper Plaintiffs in particular point to the role of legislative employee Dylan Reel—who served as Representative Hall’s general counsel for only a brief period of time during the redistricting process. Legislative Defendants contend that it is Mr. Reel who maintained possession of the concept maps and other data at issue in Harper Plaintiffs’ present Motion, and therefore there is simply nothing more they can do to locate and produce the requested information, documents, and data.

The Court finds unpersuasive Legislative Defendants’ contention that they do not have a duty to disclose the requested information, documents, and data—particularly as to any related to the “concept maps” reviewed and considered by Representative Hall—because it is not in their possession, custody, or control.

Notably in this redistricting litigation, “documents prepared by legislative employees for legislators concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and become public records upon the act establishing the relevant district plan becoming law. Present and former legislative employees may be required to disclose information otherwise protected by N.C.G.S. § 120-132 concerning redistricting the North Carolina General Assembly or the Congressional Districts upon the act establishing the relevant district plan becoming law.” N.C.G.S. § 120-133(a). As noted in this statute, even when information gleaned from the legislative process may be subject to protection, legislative employees can be compelled by court order to disclose information he or she acquired while serving as a legislative employee, subject to legislative

privilege and N.C.G.S. § 120-133, and provided that the presiding judge determines disclosure is necessary to a proper administration of justice. N.C.G.S. § 120-132.

The Court finds and concludes that although Mr. Dylan Reel is no longer an employee of Representative Hall, he is plainly a legislative employee, N.C.G.S. § 120-129(2), and the documents provided by Mr. Reel for Representative Hall were no longer confidential and become public records as of November 4, 2021, when S.L. 2021-175 (House Bill 976) was enacted, N.C.G.S. § 120-133(a).

Furthermore, even though the requested information, documents, and data may not be currently within the individual Legislative Defendants' actual possession, the information, documents, and data are sufficiently within, at the very least, Representative Hall's control and custody such that he can request and obtain the information, documents, and data from his former staffer on demand.

Finally, the Court finds that disclosure of the sought-after pre-enactment communications, information, documents, and data is necessary to the proper administration of justice, subject to *bona fide* assertions of attorney-client privilege or work product doctrine. See N.C.G.S. § 120-133(b); *Dickson v. Rucho*, 366 N.C. 332, 737 S.E.2d 362 (2013).


#### Conclusion

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

1. Harper Plaintiffs' Second Motion to Compel is **GRANTED** and Legislative Defendants shall fully respond to Harper Plaintiffs' interrogatories and requests for production at issue in the present Motion by 9:00 AM EST on December 30, 2021. Simply citing to the public record is insufficient.
2. Information, documents, and data not within the physical possession of Legislative Defendants shall be obtained by Legislative Defendants from legislative employees participating in the private discussions that guided the map-drawing process, including but not limited to Representative Hall's former legislative employee, Mr. Dylan Reel.

3. If the concept maps or any related information identified in Legislative Defendants' response to Interrogatory No. 2 have been lost or destroyed, Legislative Defendants shall identify the lost or destroyed material with specificity and certify to that loss or destruction.

SO ORDERED, this the 29 day of December, 2021.

  
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A. Graham Shirley, Superior Court Judge

/s/ Nathaniel J. Poovey

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Nathaniel J. Poovey, Superior Court Judge

/s/ Dawn M. Layton

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Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 09 day of December 2021.

/s/ Kellie Z. Myers   
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