

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 21 CVS 015426
No. 21 CVS 500085

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

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL
CAPACITY AS SENIOR CHAIR OF THE HOUSE
STANDING COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL
CAPACITY AS SENIOR CHAIR OF THE HOUSE
STANDING COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

COMMON CAUSE,

Plaintiff,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL
CAPACITY AS SENIOR CHAIR OF THE HOUSE
STANDING COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

**HARPER PLAINTIFFS'
MOTION TO COMPEL
ADEQUATE RESPONSES
TO SECOND SET OF
INTERROGATORIES AND
FIRST SET OF REQUESTS
FOR PRODUCTION, AND
FOR OTHER
APPROPRIATE RELIEF**

Pursuant to North Carolina Rule of Civil Procedure 37, *Harper* Plaintiffs move to compel adequate responses to their Second Set of Interrogatories and their First Set of Requests for Production to Legislative Defendants. Legislative Defendants' responses, served this morning in response to this Court's December 27 order, are facially deficient and are impeding access to key information that goes "to the heart of the dispute in this redistricting litigation." Order on Mot. Compel 4. Plaintiffs request that the Court order Legislative Defendants to provide adequate responses by December 29 at 12 p.m. If the requested materials have been lost or destroyed, or if Legislative Defendants otherwise continue to refuse to produce them, Legislative Defendants should be required to certify that loss or destruction, and to show cause why appropriate sanctions should not issue for spoliation and/or failure to comply with the Court's December 27 order.

BACKGROUND

A. *Harper* Plaintiffs' Discovery Requests and Motion to Compel

In its December 20, 2021 order on Legislative Defendants' motion for reconsideration, this Court ordered *NCLCV* plaintiffs to "identify any and all persons who took part in drawing or participated in the computerized production of the Optimized Maps," and 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." 12/20/21 Order at 4. The next morning, *Harper* Plaintiffs served discovery requests seeking comparable information about the enacted 2021 Plans. *See* Exs. A, B. *Harper* Plaintiffs' interrogatories asked Legislative Defendants to identify all persons who took part in drawing the 2021 Plans in any way, including by advising Legislative Defendants on those plans, and including "legislative staff members" and "outside consultants of any kind." Ex. A at 4. *Harper* Plaintiffs also sought all documents or data that

Legislative Defendants or others who participated in the mapdrawing relied on, including “draft redistricting plans (whether partial or complete)” and “analysis of or relating to the 2021 Plans or drafts thereof.” Ex. A at 4 (interrogatory requesting identification of such material); Ex. B at 4 (request for production of such material).

Legislative Defendants failed to respond by the December 23 deadline set out in the requests. On December 24, in response to *Harper* Plaintiffs’ inquiry, Legislative Defendants responded that their responses were not due until 30 days after service, and that in any event the “information requested in the discovery requests is publicly available” on the General Assembly’s website and YouTube. Ex. C at 4.

On the morning of December 27, *Harper* Plaintiffs moved to compel responses to their requests. In opposition, Legislative Defendants doubled down on their assertion that all information Plaintiffs requested was publicly available. They contended that the motion to compel was “wholly unnecessary because the information sought by the written discovery” was “available through other means,” namely, “publicly available at www.ncleg.gov and YouTube (NCGA Redistricting—YouTube.” Opp. at 5. Legislative Defendants asserted that because they had “provided Plaintiffs’ counsel with hyperlinks to those resources,” the parties “share[d] the same relative access to the information.” *Id.* at 5-6.

Yesterday, the Court granted *Harper* Plaintiffs motion to compel, finding that the information and documents sought “goes to the heart of the dispute in this redistricting matter.” Order on Mot. Compel 4. The Court ordered Legislative Defendants to respond by 9 a.m. this morning. *Id.* at 5.

B. Representative Hall’s Deposition Testimony

Meanwhile, as Legislative Defendants were preparing and serving their opposition, one Legislative Defendant—Representative Destin Hall—was testifying in his deposition that the information *Harper* Plaintiffs requested was *not* “publicly available.” Ex. D at 115:10-159:6 [156-208], 205:11-221:21 [Exhibit PDF page 262-81] (Rough Transcript of Rep. Hall Deposition).¹ Representative Hall testified that he personally drew nearly all of the House map enacted as House Bill 976, and that he did so over multiple days at an official computer terminal. *Id.* at 102:21-103:1 [141], 112:18-113:12 [152-53]. But Representative Hall also testified that, between his sessions at the public terminal, he repeatedly met with his then-General Counsel, Dylan Reel, and others for “strategy sessions” about the mapdrawing in a private room adjacent to the public map-drawing room. *Id.* at 133:20-134:20 [177-78].

In several of these strategy sessions, Representative Hall, Mr. Reel, and in some cases Speaker Moore’s Chief of Staff Neil Inman (and potentially others) reviewed “concept maps” of several county groupings for the House map. *Id.* at 118:4-7 [159]. Representative Hall would study these “concept maps” in the private room, and then rely on them to draw district lines for that particular county cluster on the public terminal. *Id.* at 122:4-123:15 [164-65]. In at least “a couple” of instances, Mr. Reel accompanied Representative Hall into the public map-drawing room and displayed an image of a “concept map” on his smartphone while Representative Hall drew the district lines on the public terminal. *Id.* at 212-19-213:16 [270-71]. Representative Hall testified that, to the best of his recollection, he relied on these concept maps for “around five” House county clusters in total, including Wake County, Pitt County, the Forsyth-Stokes

¹ The attached exhibits contain a rough transcript of Representative Hall’s deposition provided by the court reporter yesterday as a .txt file. Because the original transcript page numbers do not correspond with the page numbers of the PDF of attached exhibits, Plaintiffs have also provided the PDF page number in brackets.

county cluster, and (potentially) Mecklenburg County, and possibly others. *Id.* at 125:1-129:21 [167-72].

All of the private “concept maps” were drawn by Mr. Reel. *Id.* at 117:15-18 [158]. From August 2021 until this December, Mr. Reel was General Counsel to Representative Hall as Chair of the Rules Committee and Redistricting Committee; he is now a lobbyist and consultant at McGuire Woods. *Id.* at 214:21-215:4 [272-73]. Mr. Reel did not use the public computer terminals set up in the House Committee room to draw the “concept maps.” *Id.* at 117:21-25 [158-59]. Representative Hall did not know which redistricting software Mr. Reel used to draw the “concept maps.” *Id.* at 142:24-145:24 [177-92]. Representative Hall acknowledged that some popular map-drawing software comes pre-loaded with election data and racial data, and he testified that could not be sure whether the “concept maps” were drawn using that type of software. *Id.* Yet Representative Hall made no effort to verify that the “concept maps” had not been drawn using election data or racial data—or indeed to verify more broadly that his staff had not consulted election or racial data. *Id.* at 114:20-115:9 [155-56]. Representative Hall, Mr. Reel, and Mr. Inman viewed these “concept maps” on a laptop computer in their private meeting room, outside of the public map-drawing room and away from the videocameras set up to record and livestream the map-drawing process. *Id.* at 140:21-25 [185-86]. Representative Hall did not know whose computer was being used to create and display the “concept maps,” but he “assume[d]” it was Mr. Reel’s. *Id.* at 140:11-20 [185].

Representative Hall testified that, unlike maps drawn on the public terminals, these “concept maps” *are not publicly available.* *Id.* at 150:9-20 [197]. There is no public information—no video, no audio, no meeting notes, no list of attendees, nothing—about Representative Hall’s and Mr. Reel’s “strategy sessions” during which these “concept maps”

were developed and discussed, or about the “concept maps” themselves. *Id.* at 145:25-146:8, 150:9-15, 151:19 [191-98]. These strategy sessions were ad hoc, not “scheduled at all.” *Id.* at 124:14-17 [166].

Yesterday evening—following Representative Hall’s deposition and after this Court granted Plaintiffs’ motion to compel—counsel for *Harper* Plaintiffs emailed Legislative Defendants’ counsel to clarify that their first interrogatory “encompasses every person who participated in any way in Representative Hall’s meetings with Dylan Reed and/or others outside the official mapdrawing room during the period Representative Hall was working on the House plan, as well as anyone who assisted in any way or provided input, directly or indirectly, to any such person regarding districts in the 2021 Plans.” Ex. C at 1. Likewise, *Harper* Plaintiffs clarified that their second Interrogatory and first Request for Production encompassed “any electronic or hard copy documents related to any such meetings, including all records of what Rep. Hall described today as ‘concept maps’ and any information or data related to such maps. This would include, without limitation, copies of all files or data or images on the computer(s) and/or smartphone(s) used in connection with those meetings, including any partisan or racial data, and any electronic records of any analysis of any concept maps, other draft maps, or the enacted House map.” *Id.*

C. Legislative Defendants’ Inadequate Discovery Responses

Legislative Defendants served responses this morning. Notwithstanding their assertion in an email to Plaintiffs and in a filing with this Court that all the information sought by Plaintiffs was “publicly available,” Legislative Defendants identified a number of third parties, other than legislators, who participated in drawing maps and whose participation was not publicly available. Ex. E at 5. In their response to *Harper* Plaintiffs’ interrogatories, Legislative Defendants acknowledged that Representative Hall relied on “concept maps” of certain House county

groupings during the map-drawing period. Ex. E at 6. Legislative Defendants asserted that “no partisan or racial data was used or relied upon by Defendants,” but that they “cannot speak for ... the ... third parties identified above,” such as Mr. Reel and Mr. Inman. *Id.* In response to the same interrogatory, however, Legislative Defendants also asserted that “Defendant Hall and Mr. Reel did not use any racial or political data in preparing these concept maps.” *Id.* But according to Legislative Defendants, “[n]either Defendant Hall nor the other Legislative Defendants have copies of these concept maps or any information or data related to such maps.” *Id.* at 6-7 (emphasis added).

This response does not make clear whether Mr. Reel (as opposed to Legislative Defendants themselves) still has the “concept maps,” or any record of them, or any information or data related to them, on either a computer or a smartphone or both. And Legislative Defendants provided no other explanation for their failure to produce this information in response to *Harper* Plaintiffs’ requests, as the Court ordered. Likewise, in response to Plaintiffs’ request for production of documents, Legislative Defendants provided only a bullet-point list of “publicly available documents/data,” including files on the General Assembly website and videos of public hearings on YouTube. Ex. F at 4. They did not produce or even mention any “concept maps” or any information or data related to such maps.

ARGUMENT

Legislative Defendants have refused to produce “concept maps” and associated data that were prepared by a member of Representative Hall’s staff, using an unknown computer and unknown redistricting software, reviewed during private “strategy sessions” with Representative Hall and others, and then used by Representative Hall in formulating the enacted 2021 House plan. Legislative Defendants have done so despite Plaintiffs’ issuance of discovery requests that

clearly encompass those “concept maps” and any related data or information, and despite the Court’s December 27 order directing Legislative Defendants to provide responses earlier today. Legislative Defendants’ incomplete and inadequate discovery responses are impeding access to highly probative information that, as this Court has explained, “goes to the heart of the dispute in this redistricting litigation.” Order on Mot. Compel 4. Legislative Defendants should be ordered to provide adequate responses. To the extent they fail to do so promptly, sanctions such as adverse inferences, preclusion of testimony or evidence, and other remedies are warranted.

In particular, Legislative Defendants have not disputed that the “concept maps” prepared by Mr. Reel and considered and relied upon by Representative Hall, as well as all related data and information, are relevant to Plaintiffs’ claims, or that they fall within the category of information Plaintiffs requested. Instead, Legislative Defendants’ sole apparent reason for refusing to produce this information is that “[n]either Defendant Hall nor the other Legislative Defendants *have* copies of these concept maps or any information or data related to such maps.” Ex. E at 6 (emphasis added).

That response is plainly inadequate under Rule 34. Legislative Defendants must produce the “concept maps” and related data because these materials are in Legislative Defendants’ “*possession, custody or control.*” Ex. B at 3 (defining “Document”). That is true even if Legislative Defendants do not presently “have” physical custody of these materials. Rule 34(a) expressly authorizes requests for matters “in the possession, custody or control of the party upon whom the request is served.” And it is blackletter law that “‘documents 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 v. Reynolds*, 205 N.C. App. 208, 214 (2010) (emphasis added) (quoting *Pugh*

v. Pugh, 113 N.C.App. 375, 380–81, 438 S.E.2d 214, 218 (1994)). For example, if a party creates tapes and transcripts, and then gives them to an attorney for review, “the tapes and the transcripts, though not in [party]’s actual possession, were within her control and custody, such that she could have obtained them from her attorney.” *Pugh*, 113 N.C.App. at 381. “Any other result would encourage clients to hide otherwise discoverable items with their attorneys in an effort to frustrate discovery.” *Id.*

Courts applying the broad standard for “possession, custody or control” frequently require employers to produce current and former employees’ work-related documents and communications stored in personal accounts or on personal devices—for example, “e-mails contained within [an employee’s] personal Gmail account.” *Chevron Corp. v. Salazar*, 275 F.R.D. 437, 448 (S.D.N.Y. 2011), *objections overruled*, 2011 WL 13243797 (S.D.N.Y. Aug. 16, 2011); *see also, e.g., Montesa v. Schwartz*, 2015 WL 13173164, at *1 (S.D.N.Y. Feb. 20, 2015) (“The Defendant District must search its employees’ official email accounts and any employee’s personal email account and personal device used to conduct the school district’s business.”).

Under these established principles, the “concept maps” and any data or information related to them is plainly within Legislative Defendants’ legal custody or control. These concept maps undisputedly were drawn by Mr. Reel while he was working as General Counsel for Representative Hall. Mr. Reel served in that position during the entire redistricting period, from August until earlier this month. Representative Hall viewed the “concept maps” on a laptop inside a legislative office, just outside the public map-drawing room, in the middle of Representative Hall’s various sessions drawing the House map at a public terminal, and Mr. Reel had images of at least some of the concept maps on his smartphone. These “concept maps” and any accompanying data are legislative records, developed and considered during “strategy

sessions” among legislators and their staff, no matter whose device they were on. That is obviously true if the maps were drawn or stored on an electronic device issued by the legislature (which may have been the case, though it is unclear because Representative Hall did not know whose computer it was). But even if created or stored on Mr. Reel’s personal device, Legislative Defendants must produce these materials because—as is clear from Representative Hall’s testimony—Mr. Reel used that device for work-related purposes. Rule 34 does not permit Legislative Defendants to say that they lack possession and call it quits.

If the reason underlying Legislative Defendants’ refusal is instead that this critically important information has been *lost or destroyed*, Legislative Defendants should be required to certify to that effect and to provide an explanation for the loss or destruction. If any of this information has been lost or destroyed, or if Legislative Defendants otherwise continue to refuse to produce it, Legislative Defendants should further be required to show cause why appropriate sanctions should not issue for spoliation and/or failure to comply with the Court’s order compelling responses to *Harper* Plaintiffs’ discovery requests. Such sanctions could include, without limitation, an adverse inference regarding the contents of the requested information and an order precluding Legislative Defendants from offering testimony or evidence about the creation of the enacted House plan and what data were or were not used to draw it. *See, e.g., McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 186 (2000) (requiring adverse-inference instruction based on employer’s destruction of logbook); *In re Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.*, 2013 WL 6486921, at *19 (S.D. Ill. Dec. 9, 2013), *rescinded on other grounds*, 745 F.3d 216 (7th Cir. 2014) (sanctions where company “failed to ensure that the auto delete feature of their employee cell phones, company owned and personal, was disengaged for the purpose of preserving text messages”).

* * *

In addition to the issues described above, only two of the Legislative Defendants—Representative Hall and Senator Hise—have verified the interrogatory responses. Earlier today, *Harper* Plaintiffs asked Legislative Defendants to confirm that the other four Legislative Defendants were not providing verifications because they objected to the requests and refused to answer them on the basis of legislative privilege, and that the representations in the interrogatory responses accordingly were being provided solely as to Representative Hall and Senator Hise. Ex. G. For instance, *Harper* Plaintiffs sought confirmation that the representation, “Defendants state that no partisan or racial data was used or relied upon by Defendants,” described only Representative Hall and Senator Hise, and that the other four Legislative Defendants were making no such representation. *Id.* As *Harper* Plaintiffs explained, to the extent the other four Legislative Defendants are making representations about what data they did or did not consider in the mapdrawing process, they have waived legislative privilege as to such information, contrary to the position they took previously to block their depositions. *Id.*

As of the filing of this motion, Legislative Defendants have not responded to *Harper* Plaintiffs’ inquiry. Accordingly, in light of the failure of the other four Legislative Defendants to provide verifications, the Court should order that the responses Legislative Defendants served today constitute representations only of Representative Hall and Senator Hise, and that none of the responses should be understood as making representations about any of the other four Legislative Defendants. Absent such relief, Legislative Defendants would be using legislative privilege as a shield (to block discovery from four of them) and a sword (to permit Representative Hall and Senator Hise to represent what data those other four did or did not consider in the mapmaking process).

CONCLUSION

Plaintiffs respectfully request that the Court order Legislative Defendants to fully respond to the interrogatories and document requests by December 29 at 12 p.m. If the concept maps or any related information identified in Legislative Defendants' response to Interrogatory No. 2 have been lost or destroyed, Legislative Defendants should be required to identify the lost or destroyed material with specificity and certify to that loss or destruction, and to show cause why appropriate sanctions should not issue, by December 29 at 12 p.m. The Court should further order that Legislative Defendants' responses served today constitute representations only of Representative Hall and Senator Hise, and not of the other Legislative Defendants, who have not provided verifications.

Respectfully submitted, this the 28th day of December, 2021.

By: /s/ Narendra K. Ghosh

PATTERSON HARKAVY LLP

Burton Craige, NC Bar No. 9180
Narendra K. Ghosh, NC Bar No. 37649
Paul E. Smith, NC Bar No. 45014
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
(919) 942-5200
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com

Counsel for Harper Plaintiffs

ELIAS LAW GROUP LLP

Abha Khanna*
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Phone: (206) 656-0177
Facsimile: (206) 656-0180
AKhanna@elias.law

Lalitha D. Madduri*
Jacob D. Shelly*
Graham W. White
10 G Street NE, Suite 600
Washington, D.C. 20002
Phone: (202) 968-4490
Facsimile: (202) 968-4498
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law

**ARNOLD AND PORTER
KAYE SCHOLER LLP**

Elisabeth S. Theodore
R. Stanton Jones*
Samuel F. Callahan
601 Massachusetts Avenue NW
Washington, DC 20001-3743
(202) 954-5000
elisabeth.theodore@arnoldporter.com

Counsel for Harper Plaintiffs
**Pro hac vice motion pending*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to counsel for all other parties.

This the 28th day of December, 2021.

/s/ Narendra K. Ghosh
Narendra K. Ghosh, NC Bar No. 37649