

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

O. JOHN BENISEK, *et al.*,

Plaintiffs,

v.

LINDA H. LAMONE, *et al.*,

Defendants.

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Case No. 13-cv-3233

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**MOTION FOR PROTECTIVE ORDER AND TO QUASH
NON-PARTY DEPOSITION SUBPOENA SERVED ON
FORMER GOVERNOR MARTIN O’MALLEY AND FOR STAY**

Former Governor Martin O’Malley, through counsel, moves for a protective order and to quash the non-party deposition subpoena served on him by the Plaintiffs, and further seeks a stay of compliance with the subpoena pending review by the three-judge Court of other non-parties’ assertions of legislative privilege against compelled testimony in this case. In support of this motion, Governor O’Malley states the following:

(1) On February 8, 2017, the Plaintiffs served former Governor O’Malley with a subpoena to testify at deposition in this matter on March 3, 2017. Ex. 1, subpoena.

(2) On February 9, 2017, the three-judge Court granted a motion filed by other non-parties, including former members of the Governor’s Redistricting Advisory Committee (“GRAC”), seeking review by the three-judge Court of the orders of a single judge compelling their testimony at depositions in this matter and denying their motions for protective order on grounds of legislative privilege. ECF No. 140. The three-judge Court

also granted the non-parties' motion for a stay of the single judge's orders pending review by the three-judge Court.

(3) Governor O'Malley moves to quash the deposition subpoena served on him based on the same legislative privilege grounds advanced by the former GRAC members, in that his legislative testimonial privilege protects him from being compelled to testify in this matter about his legislative activity in preparing and proposing legislation concerning Maryland's 2011 congressional redistricting or related communications with his aides. Governor O'Malley incorporates by reference the memorandum accompanying the non-parties' Motion for Review by Three-Judge Court and for Stay (ECF No. 139-1).

(4) To the extent the three-judge Court determines that the legislative privilege against compelled testimony yields in this case, Governor O'Malley moves, in the alternative, for a protective order on executive privilege grounds, to protect Governor O'Malley from being compelled to testify about any predecisional deliberations on policy matters ancillary to the legislative activity of preparing or proposing congressional redistricting legislation. *See Jones v. Murphy*, 256 F.R.D. 510, 515-16 (D. Md. 2008) (explaining that the executive privilege "exists to protect the governmental decision-making process" and "protects from disclosure advice, opinions and recommendations that are part of the decision-making process; the goal is 'to prevent injury to the quality of agency decisions'" (quoting *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975))), *aff'd*, No. CIV. CCB-05-1287, 2009 WL 604937 (D. Md. Feb. 23, 2009).

(5) Because the three-judge Court may not complete its review by March 3, Governor O'Malley further seeks a stay of any compliance with the deposition subpoena served on

him pending resolution of the other non-parties' motion for review by the three-judge Court.

A proposed order is attached.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

Dated: February 14, 2017

 /s/ Jennifer L. Katz
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EXHIBIT 1

UNITED STATES DISTRICT COURT

for the
District of Maryland

O. John Benisek, et al.

Plaintiff

v.

Linda Lamone, et al.

Defendant

Civil Action No. JKB-13-3233

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Martin O'Malley c/o Sarah Rice, Esq., Assistant Attorney General, Office of the Attorney General, 200 St. Paul Place, 20th Floor, Baltimore, MD 21202

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (Lerch, Early & Brewer, Chtd, 3 Bethesda Metro Center, Suite 460, Bethesda, MD 20814) and Date and Time (03/03/2017 9:00 am)

The deposition will be recorded by this method: Stenography; audio and/or video

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 02/08/2017

CLERK OF COURT

OR

/s/ Stephen M. Medlock

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) O. John Benisek, et al., who issues or requests this subpoena, are:

Stephen M. Medlock, Esq.; Mayer Brown LLP, 1999 K Street NW, Washington, DC 20006; 202-263-3221; smedlock@mayerbrown.com

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. JKB-13-3233

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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v.

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Case No. 13-cv-3233

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ORDER

Upon consideration of the motion for protective order and to quash the non-party deposition subpoena served on former Governor Martin O’Malley, and opposition thereto, it is this _____ day of _____, 2017, ORDERED:

That the motion for protective order is GRANTED, and

That the subpoena for deposition served on non-party Martin O’Malley is QUASHED.

United States District Judge
James K. Bredar