

# Redistricting Records and Privileges

Redistricting Committee  
August 2021

# Balancing Redistricting Duties

Redistricting entities have to balance:



Keeping an open record  
of their process; and

Protecting the  
deliberative process.



# If someone requests records under open records laws...

- House Bill No. 1397 states draft plans created by a legislator or the Legislative Council are exempt until presented or distributed to a legislative committee or the Legislative Assembly.
- North Dakota Century Code Section 44-04-18.6 protects legislators' communications with other individuals, Legislative Council work product, and Legislative Council-client communications from disclosure under the open records laws.
- Other statutes may protect the requested records from disclosure.

# If there is a lawsuit...

- Individuals may have to appear for a deposition.
- Individuals may have to answer questions (interrogatories) in writing.
- Records may have to be produced to the other party.



# Which records may have to be disclosed?

Records related to redistricting, including:

- Emails (even if you use your personal email address)
- Text messages (even if you use your personal cell phone)
- Notes (even if you keep them on your personal computer)
- Consultant reports
- Draft maps
- Others?

# Sources of Possible Protection from Discovery in a Lawsuit

- North Dakota Constitution / Legislative Privilege
- Attorney-client privilege
- Work-product privilege
- Confidentiality statutes
- BUT: Courts may determine the protections do not apply.



# Privileges have limits.

- Privileges generally have definitions that must be met or are applied based on results of multi-factor tests.
- For example, one test for whether legislative privilege applies to records or testimony considers:
  - The relevance of the evidence sought to be protected;
  - The availability of other evidence;
  - The seriousness of the litigation and the issues involved;
  - The role of government in the litigation; and
  - The purposes of the privilege.





# Examples of Past Cases

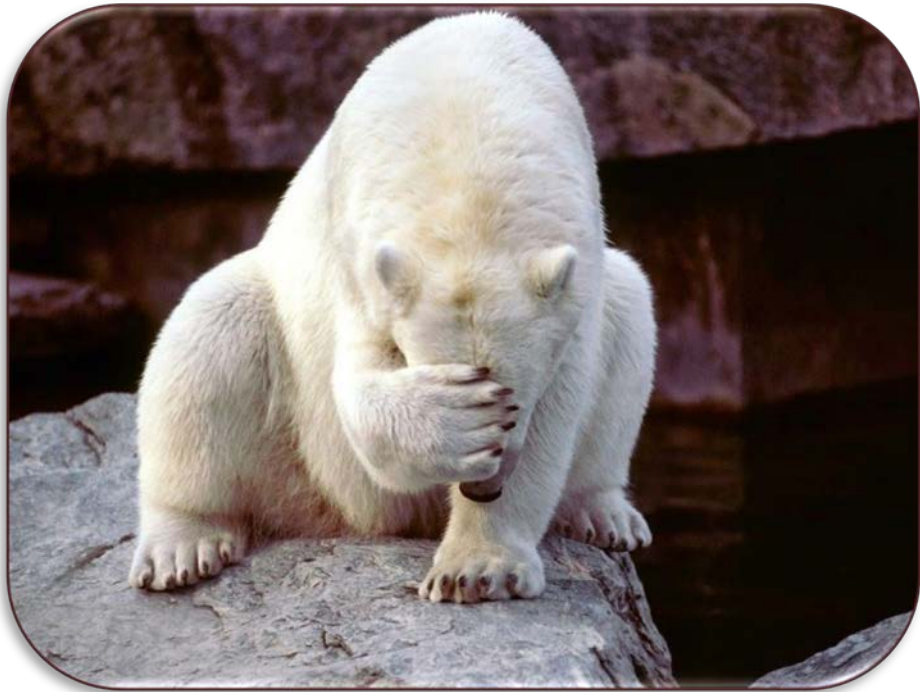
- Supreme Court of Florida
  - The court required legislators to testify and allowed the other party to obtain draft apportionment plans and supporting documents.
  - “We conclude that there is no unbending right for legislators and legislative staff members to hide behind a broad assertion of legislative privilege to prevent the discovery of relevant evidence necessary to vindicate the explicit state constitutional prohibition against unconstitutional partisan political gerrymandering and improper discriminatory intent.”



# Examples of Past Cases

- United States District Court, Eastern District of Virginia
  - The court required legislators' consultant to provide evidence in the redistricting case.
  - The consultant was:
    - An independent contractor;
    - Paid by a political party; and
    - Engaged in map drawing and redistricting strategy and communications.

# Which of these are real emails made public?



1. “In a glorious way that makes it easier to cram ALL of the *[political party]* garbage in \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ counties into only four districts...”
2. “Perfect. It’s giving the finger to *[legislator name]*. I love it.”
3. Including a census question about citizenship would be “advantageous to *[political party]* and Non-Hispanic Whites.”
4. A part of town that consistently votes for the other party is “dog meat voting territory.”
5. “We will accommodate whatever Dave wants in his district.”

# Headlines

## Deposition questions partisan emails of redistricting plaintiffs

By MATT DIXON | 12/09/2015 08:49 PM EST

## Legislators say redistricting emails, other info protected from public scrutiny

By Margaret Moffett  
Jun 7, 2016 Updated Jun 7, 2016

Judges will allow Robin Vos deposition in redistricting case.

## Florida Legislature's 'shadow' redistricting process revealed by depositions, emails

## Court releases redistricting docs - - this time relating to role of consultants in Senate maps



By Mary Ellen Klas

## Lawsuit Seeks Sununu Staff Emails With National Redistricting Group

New Hampshire Public Radio | By Josh Rogers

# Best Practices

## DO

- Create districts for lawful reasons.
- Document the reasons, criteria, and process carefully.
- Have a conversation in person or on the phone if possible to avoid misunderstandings or misinterpretations.

## DON'T

- Create districts for unlawful reasons.
- Discuss creating districts for unlawful reasons.
- Create confusion or send messages subject to misinterpretation.
- Send a “joke” about improper or unlawful redistricting.