

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ERIC W. PAYNE,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 10-679 (RWR)
)	
DISTRICT OF COLUMBIA, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

MEMORANDUM OPINION AND ORDER

Plaintiff Eric Payne’s pending amended complaint against defendants District of Columbia (“D.C.”) and Dr. Natwar Gandhi, D.C.’s Chief Financial Officer (“CFO”), alleges violations of the Fifth Amendment and the D.C. Whistleblower Protection Act (“WPA”), D.C. Code § 1-615.51, et seq., constitutional defamation, and wrongful termination. D.C. and Councilmembers Jack Evans and Jim Graham have filed objections to Magistrate Judge Deborah Robinson’s order denying their motions to preclude Payne from deposing former Chair of the D.C. Council and current Mayor Vincent Gray and the Councilmembers. The movants all argue that the D.C. Speech or Debate Clause, D.C. Code § 1-301.42, entitles them to absolute legislative immunity from providing deposition testimony and producing documents, since their communications with the CFO were integrally related to their statutorily-required review of a proposed lottery contract. Payne opposes, arguing that the Clause does not protect the

-2-

officials' attempts to influence the CFO or to facilitate Payne's termination. Because Payne has presented evidence that Gray and Graham engaged in political efforts to exhort the executive that were not protected under the Speech or Debate Clause, and because the Mayor has not shown that complying with the deposition subpoena would unduly burden him, the objections will be overruled in part. Because the officials' meetings with the CFO otherwise involved protected speech and Payne has not shown conduct by Evans that was not protected, the objections will be sustained in part.

BACKGROUND

In July or August of 2004, Payne was hired to serve as Assistant General Counsel for procurement in D.C.'s Office of the CFO. (Pl.'s Opp'n to Collective Mots. for Protective Orders ("Pl.'s Opp'n as to Prot. Orders"), Ex. 1, Aff. of Eric W. Payne ("Payne Aff.")¹ ¶ 1; Am. Compl. ¶ 5.) He later was promoted to Director of Contracts and, in that capacity, initiated the process of awarding to one of two bidders a contract to be the service provider for the D.C. lottery. (Payne Aff. ¶¶ 1-2; Am. Compl. ¶¶ 10, 26.) Following a fair, reasonable, and objective competition, Payne ultimately selected a company called W2I, a

¹ The Councilmembers "do not contest the factual assertions in Plaintiff's affidavit for purposes of the motion to quash." (Councilmembers' Obj'ns to the Magistrate Judge's Mem. Op. and Order Denying Councilmembers' Mot. to Quash Subpoenas ("Councilmembers' Obj'ns") at 18 n.1.)

-3-

joint venture comprised of W2Tech, LLC and Intralot, which apparently offered a technologically superior product at lower prices than its competition did. (Payne Aff. ¶¶ 2, 13; Am. Compl. ¶¶ 26-29, 58.) However, the proposed lottery contract was contingent upon the D.C. Council's review and approval.

(Councilmembers' Reply to Pl.'s Opp'n as to Prot. Orders ("Reply as to Prot. Orders") at 1 (citing D.C. Code § 1-204.51(c)); see also D.C.'s Obj'ns to Magistrate Judge's Mem. Op. and Order of October 31, 2011 Denying the District's Mot. for a Protective Order on Behalf of Mayor Gray ("D.C.'s Obj'ns") at 3 (stating that the Home Rule Act "requires D.C. Council approval for all multiyear contracts and for all contracts in excess of one million dollars").)²

According to Payne, Graham and Evans cajoled the CFO into withdrawing W2I's contract and caused Payne's wrongful termination.³ (See generally Payne Aff.) Payne alleges that he

² Payne's suggestion that the then-Councilmembers's role in reviewing the contract was an executive function is misplaced. (See Pl.'s Consolidated Opp'n to D.C.'s and Councilmembers's Obj'ns to Magistrate Judge's Mem. Op. and Order of October 31, 2011 Denying the District's Mot. for a Protective Order ("Pl.'s Consol. Opp'n") at 14.)

³ The Councilmembers first challenged the procurement process during a Council Roundtable held on April 7, 2008. (Am. Compl. ¶ 31; Payne Aff. ¶ 8.) They apparently "opposed the proposed contract because of the involvement of W2Tech." (Am. Compl. ¶ 31.) On April 9, 2008, during a hearing of the Council of the Whole Budget, Evans stated that he had convinced then-Mayor Fenty to withdraw W2I's contract and Graham "urged the CFO" to do the same. (Payne Aff. ¶ 8.) However, since Payne stated during the September 23, 2011 hearing before the magistrate judge

-4-

was "compelled to . . . participate in several highly unusual meetings" in April and May of 2008, "in which the CFO, certain city council members, [his] supervisors, and [he] met to specifically discuss the proposed lottery contract" and the involvement of Intralot minority partner Warren Williams, Jr. (Payne Aff. ¶ 7; see also Am. Compl. ¶ 43.) The Councilmembers never asked "about the technical proficiency[] . . . or price of the proposed lottery contract." (Payne Aff. ¶ 7.) Instead, Evans, who considered Williams to be "a slumlord," allegedly stated during one meeting⁴ that "people have a problem with" Williams and asked whether they could "just get rid of [him]." (Id.; Pl.'s Opp'n as to Prot. Orders at 8.) Graham referred Payne to a woman named Dottie Love Wade, who questioned Williams's "ability to handle the online gaming contract[] since Williams Sr. only previously [had] handled the Instant Tickets contract." (Payne Aff. ¶ 9; Pl.'s Opp'n as to Prot. Orders at 9.)

Payne told the Councilmembers that "forcibly removing [and replacing] a joint venturer . . . after [completing] the source selection process" would be illegal. (Payne Aff. ¶ 7.) Given

that he is "not interested in the communications in the legislative roundtable or the Council on the whole[,] "Payne v. D.C., 279 F.R.D. 1, 5 (D.D.C. 2011), those communications are not relevant here.

⁴ This meeting allegedly occurred on April 8, 2008, and included Evans, Gandhi, and others. (Pl.'s Consol. Opp'n at 7.)

-5-

this "mounting pressure to modify the awarded lottery contract award[,]" Payne filed his first complaint with the Office of Integrity and Oversight ("OIO") in the Office of the CFO ("OCFO") in April of 2008. (Id. ¶ 3; see also Am. Compl. ¶ 34.) He filed several additional complaints with OIO, addressing the same concerns, between May and July of that year. (Payne Aff. ¶ 3.) Payne also reported "the pressure that the CFO and others were applying to [him]" to the D.C. Office of Inspector General's ("OIG") audit and criminal investigative representatives. (Id. ¶ 6; see also Am. Compl. ¶¶ 39, 41.)

Payne allegedly met with Gray, Gandhi, and at least one unnamed elected official for the last time on May 5, 2008. (Payne Aff. ¶ 10; Am. Compl. ¶ 45.) Afterwards, "Gray asked Gandhi to remain behind" and meet privately. (Payne Aff. ¶ 10.) According to Payne, Gray then pressured Gandhi "to end the contract solicitation and to demote and/or terminate [Payne] in order to pave the way to re-bid the lottery contract." (Id.) After Gandhi emerged from this private meeting, he allegedly "repeatedly cajoled [Payne] to cancel the lottery contract and reopen the [procurement] process." (Id. (internal quotation marks omitted).) Graham also told Payne that "he had a bone to pick with [him]," that Graham "had discussed [the issue] with Gandhi" and that Gandhi would discuss it with Payne.⁵ (Id.

⁵ Payne's affidavit does not specify the date of the meeting, though he suggests that it took place sometime after

-6-

¶ 9.) On May 15, 2008, Gandhi met with Payne's supervisor, Paul Lundquist, and the OCFO's Director of Operations, Angell Jacobs in May of 2008. (Id. ¶¶ 3, 4, 6.) The CFO stated that Payne's "tenure within the OCFO needed 'to end as soon as practicable.'" (Id. ¶ 4.)

On July 1, 2008, Lundquist notified Payne that Gandhi planned to demote him. (Payne Aff. ¶ 12; Am. Compl. ¶ 53.) Lundquist and Jacobs met with Payne to demote him on July 7, 2008, and Payne recorded the conversation. (Payne Aff. ¶ 12; Am. Compl. ¶ 52.) By then, Payne had learned from W2I representatives who met with Gray and Graham that Gandhi assured Gray and Graham that Payne "would not be in [his] position much longer and that the contract . . . would be re-bid." (Payne Aff. ¶ 12.) Jacobs, however, told Payne that the OCFO had "absolutely no[]" concerns about the procurement process or Payne's role within it. (Id.) She added that "Graham is on a personal vendetta here and, you know, he thinks the way to get what he wants is to find a way to discredit the people [who] were involved in the process. . . . [F]or Gray and Graham, this is all personal. This is about their friends, or who is not their friends for Graham[.]" (Id.)

The D.C. Council voted to disapprove the W2I contract in December of 2008. (Id. ¶ 13; Am. Compl. ¶ 59.) On January 9,

April 9, 2008. (See Pl.'s Consolidated Opp'n at 8.)

-7-

2009, Payne was fired and escorted out of the building in the presence of "[t]he Human Resources ("HR") Director, . . . two armed security guards, the Deputy HR Director, [the] Deputy Logistics Director, Lundquist[,] and his assistant[.]" (Payne Aff. ¶ 14.)

After Payne served Mayor Gray and the Councilmembers with subpoenas, D.C. moved for a protective order barring Payne from taking the Mayor's deposition. It argued that the deposition would unduly burden the Mayor and that the information sought, which was protected by the Speech or Debate Clause, D.C. Code § 1-304.42, was in any event available from other sources.

(D.C.'s Mot. for a Protective Order on Behalf of Mayor Vincent C. Gray ("D.C.'s Mot. for Prot. Order") at 1; D.C.'s Mem. of P. & A. in Supp. of its Mot. for a Prot. Order ("D.C.'s Mem. of P. & A.") at 3-4.) Citing the same Speech or Debate privilege, Evans and Graham also moved under Federal Rule of Civil Procedure 45(c)(3)(A)(iii) to quash the subpoenas served upon them. (See generally Councilmembers' Mot. to Quash Subpoenas.) Payne's opposition proffered that he would seek deposition testimony as to political and personnel-related conversations between the Councilmembers and the CFO during the lottery contract review process. (Pl.'s Opp'n as to Prot. Orders at 16.) He argued that the information sought falls outside the legislative sphere and supports his claims for retaliation and wrongful termination. (Id.)

-8-

The motions were referred for decision to Magistrate Judge Robinson. At a hearing before her, the Councilmembers' counsel stated that Evans, Graham "and Defendant Gandhi had [had] conversations regarding the D.C. Lottery contract of the type described by Plaintiff in his affidavit." Payne v. D.C., 279 F.R.D. 1, 3 (D.D.C. 2011). However, the Councilmembers disputed that the meetings attended by Payne, his supervisors, the CFO, and Councilmembers were improper. (Councilmembers' Reply as to Prot. Orders at 3 n.1.) Magistrate Judge Robinson concluded that "the communications which are the subject of [Payne]'s discovery request are the current and former councilmembers' 'contact[s] [with] an executive agency in order to influence its conduct[.]'" Payne, 279 F.R.D. at 7 (quoting Jewish War Veterans v. Gates, 506 F. Supp. 2d 30, 54 (D.D.C. 2007)) (alteration in original). Accordingly, since "the communications at issue were no more than attempts to 'cajole' or 'exhort' Defendant Gandhi, a member of the District's executive branch," the magistrate held that "they are not 'legislative acts' for which the Speech or Debate Clause affords a shield from discovery." Id. The magistrate judge also rejected the argument that complying with Payne's subpoena would unduly burden Mayor Gray. Id. She stated that Gray had personal knowledge of the conversations Payne described and that the substance of Gray's testimony could not be obtained from any other source. Id. Her order required that the three depositions each be limited to three and one-half hours, and that they be

-9-

limited to "discussions with Defendant Gandhi regarding the D.C. Lottery Contract[.]" Id. at 8.

D.C. timely filed objections on behalf of Mayor Gray, challenging two of the magistrate judge's conclusions as contrary to law. (D.C.'s Obj'ns at 1-2.) D.C. argued that the magistrate "incorrectly found that the Mayor had information that could not be obtained from any other source" and "improperly determined that conversations between then-Chairman Gray and members of the executive branch regarding a contract pending before the [D.C.] Council for approval were not part of his legislative duties." (Id. at 1-2.) To support these arguments, D.C. newly proffered Mayor Gray's declaration that he could recall having attended only one "fairly large" meeting with the CFO and others, the purpose of which was "to inform [himself] and [his] staff about pending legislation so that [he] could determine how [he] would vote." (Gray Decl. ¶¶ 5-7.) Gray also stated that he did "not recall having a private meeting with the [CFO] on the lottery contract[,]" and denied any personal knowledge of or participation in the decisions to demote and terminate Payne. (Id. ¶¶ 6, 8-10.) Finally, D.C. reiterated that the Mayor's rank renders any deposition of him unduly burdensome. (Id. at 5.) The Councilmembers also objected to the magistrate judge's ruling, challenging its omission of "the Council's affirmative statutory duty . . . to review multiyear contracts," its conclusion that "the Councilmembers' inter-branch communications

-10-

. . . were unrelated to the Councilmembers' legislative activities," and its "improper[] consider[ation of] the purported motives of the Councilmembers in determining whether their conversations with the executive branch were protected." (Councilmembers' Obj'ns at 1-3.)

Payne opposed the objections, arguing that the Councilmembers sought to influence the OCFO's modification or cancellation of the lottery contract, that such political communications do not warrant Speech or Debate protection, and that Gray, alone, can testify about his own state of mind during his meetings with Gandhi. (See generally Pl.'s Consolidated Opp'n to D.C.'s and the Councilmembers' Objections ("Pl.'s Consol. Opp'n").) In addition, Payne notes that Gandhi admitted during a deposition post-dating the magistrate judge's opinion and order "to having the asserted private meeting with Gray following a meeting with Gray and Gandhi's staff." (Id. at 6.)

Magistrate Judge Robinson has stayed her order pending resolution of the movants' objections.

DISCUSSION

A magistrate judge's findings are "entitled to great deference," Page v. Pension Benefit Guar. Corp., 498 F. Supp. 2d 223, 225 (D.D.C. 2007), and may be modified or set aside only if "'found to be clearly erroneous or contrary to law[,]'" Poett v. United States, Civil Action No. 07-1374 (CKK), 2012 WL 698144, at *2 (D.D.C. Mar. 6, 2012) (quoting Local Civil Rule 72.2(c));

-11-

accord Moore v. Napolitano, 723 F. Supp. 2d 167, 170-71 (D.D.C. 2010). “[T]o find clear error, [a court] must be ‘left with the definite and firm conviction that a mistake has been committed.’” Am. Soc’y for Prevention of Cruelty to Animals v. Feld Entm’t, Inc., 659 F.3d 13, 22 (D.C. Cir. 2011) (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985)). A court “may not set aside [the magistrate’s] findings of fact ‘simply because [it is] convinced that [it] would have decided the case differently.’” Am. Soc’y, 659 F.3d at 22. The magistrate judge’s legal conclusions are reviewed *de novo*. PowerShare, Inc. v. Syntel, Inc., 597 F.3d 10, 15 (1st Cir. 2010) (“When[] . . . review of a non-dispositive motion . . . turns on a pure question of law, that review is plenary under the ‘contrary to law’” standard) (citation omitted); accord Am. Ctr. for Civil Justice v. Ambush, 794 F. Supp. 2d 123, 129 (D.D.C. 2011) (“The ‘contrary to law’ standard[] . . . permits *de novo* review of a magistrate judge’s legal conclusions.”); see also United States v. Renzi, 651 F.3d 1012, 1020 (9th Cir. 2011) (“Whether the [Speech or Debate] Clause precludes [deposition testimony] is a question of law[.]”)⁶

⁶ A litigant “must take before the magistrate[] not only [its] best shot, but all of [its] shots[,]” Klayman v. Judicial Watch, Inc., 628 F. Supp. 2d 84, 94-95 (D.D.C. 2009) (internal quotation marks and citation omitted), since any matter not previously raised may be deemed to have been waived. Smith v. Cafe Asia, 724 F. Supp. 2d 125, 127 (D.D.C. 2010). In their first filings about the magistrate judge’s ruling, both Gray and Payne submitted new evidence not presented to the magistrate

-12-

Federal Rule of Civil Procedure 45 enumerates circumstances under which a court "must quash or modify a subpoena." Fed. R. Civ. P. 45(c)(3)(A). For example, quashing or modifying is required if a subpoena "requires disclosure of privileged or other protected matter, if no exception or waiver applies; or . . . [if it] subjects a person to undue burden." Id. at 45(c)(3)(A)(iii)-(iv). A court should consider whether mere modification suffices to satisfy Rule 45, Educ. Fin. Council v. Oberq, Misc. Action No. 10-79 (JDB), 2010 WL 3719921, at *2 (D.D.C. Mar. 8, 2010), since "[t]he quashing of a subpoena is an extraordinary measure, and is usually inappropriate absent extraordinary circumstances[.]" Flanagan v. Wyndham Int'l, Inc., 231 F.R.D. 98, 102 (D.D.C. 2005). The movants bear the burden of demonstrating "that the subpoena violates Rule 45." Educ. Fin. Council, 2010 WL 3719921, at *2. Where a movant asserting undue burden "seeks to prevent a deposition entirely," his "burden of proof is particularly great[.]" Guantanamo Cigar Co. v.

judge. (See Gray Decl.; Pl.'s Consol. Opp'n at 6, 15-16 (referring to Gandhi's deposition).) The new evidence should not bear upon a review of the decision reached by the magistrate judge based upon the evidence she did have before her. Here, though, both parties injected new evidence and neither should be heard to complain. Moreover, given both parties' opportunity to discuss the new information in these first filings, Payne's chance -- if he were to lose now -- to seek anew to depose Gray based upon new evidence, and the importance to the parties going forward of finally resolving whether Gray can be deposed, this new evidence will not be disregarded. That accommodation will not be unlimited, however, and the later submissions of new evidence will not be accepted.

-13-

Corporacion Habanos, S.A., 263 F.R.D. 1, 8 (D.D.C. 2009) (citing Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762, 766 (D.C. Cir. 1965)).

A key question is whether the Speech or Debate Clause confers upon the Councilmembers and Mayor "a testimonial and non-disclosure privilege that prevents [them] from being compelled to answer questions about legislative activity[.]"⁷ Howard v. Office of Chief Admin. Officer of U.S. House of Representatives, 793 F. Supp. 2d 294, 299 (D.D.C. 2011). The Supreme Court has directed that the Speech or Debate Clause be read "broadly to effectuate its purposes." Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 (1975). However, "[t]he privilege is not designed to protect the reputations of [legislators.]" Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 419 (D.C. Cir. 1995). "[O]nly . . . those activities that are 'clearly a part of the . . . due functioning of the [legislative] process'" are privileged. Id. at 415 (quoting United States v. Brewster, 408 U.S. 501, 516 (1972)) (emphasis in original).

⁷ "[T]he legislative history and the case law interpreting [the D.C. Speech or Debate Clause] make clear that it is modeled on the Speech or Debate Clause of the United States Constitution." Williams v. Johnson, 597 F. Supp. 2d 107, 112 (D.D.C. 2009) (internal quotation marks and citation omitted). "In construing and applying the District's Speech or Debate statute, courts have . . . consistently turned to and relied upon precedent interpreting its analogous federal counterpart." Id. at 112-13.

-14-

“[I]n determining whether legislative immunity applies, [a court asks] whether the action at issue was undertaken within the ‘legislative sphere.’” Williams v. Johnson, 597 F. Supp. 2d 107, 113 (D.D.C. 2009) (citation omitted). “Once the legislative act test is met, [immunity] is absolute,” id. at 115 (quoting MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856, 862 (D.C. Cir. 1988)) -- even if “the[] [legislator’s] conduct, if performed in other . . . contexts, would . . . be unconstitutional or otherwise contrary to” law. Brown, 62 F.3d at 415 (quoting Doe v. McMillan, 412 U.S. 306, 312-13 (1973)). However, “only ‘purely legislative activities,’ United States v. Brewster, 408 U.S. 501, 512 (1972) - i.e., acts inherent in the legislative process[,]” are protected. Chastain v. Sundquist, 833 F.2d 311, 314 (D.C. Cir. 1987). Such acts “must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation[.]” Id. (quoting Gravel v. United States, 408 U.S. 606, 625 (1972)). Protected legislative acts include “delivering an opinion, uttering a speech, or haranguing in debate; proposing legislation; voting on legislation; making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas; holding hearings; and introducing material at Committee hearings.” Williams, 597 F. Supp. 2d at 113-114 (quoting Fields v. Office of

-15-

Eddie Bernice Johnson, 459 F.3d 1, 9 (D.C. Cir. 2006)). The Clause also protects “[a] legislature’s efforts to acquire information during formal committee investigations[.]” Id. at 114.

Neither the Supreme Court nor the D.C. Circuit has reached the issue of whether informal information-gathering falls “within the legislative sphere.” Id. At least two decisions in this district nonetheless have held that such information-gathering “is protected . . . ‘so long as the information is acquired in connection with or in aid of an activity that qualified as ‘legislative’ in nature.’” Id. (quoting Jewish War Veterans, 506 F. Supp. 2d at 57.) These opinions reason that “at the end of every protected [‘informal’] information-gathering venture is a [‘formal’] legislative act . . . [such as] a piece of draft legislation, [or] . . . a meeting to help push through a pending bill.” Jewish War Veterans, 506 F. Supp. 2d at 56-57; see also Williams, 597 F. Supp. 2d at 114. “[T]he acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly.” Jewish War Veterans, 506 F. Supp. 2d at 55 (quoting McSurely v. McClellan, 553 F.2d 1277, 1287 (D.C. Cir. 1976)).

“That [legislators] generally perform certain acts in their official capacity . . . does not necessarily make all such acts

-16-

legislative in nature." Gravel, 408 U.S. at 625. Legislators "may cajole, and exhort with respect to the administration of a federal statute - but such conduct, though generally done, is not protected legislative activity." Id. at 625; Hutchinson v. Proxmire, 443 U.S. 111, 122 n.10 ("Regardless of whether and to what extent the . . . Clause may protect calls to . . . agencies seeking information, it does not protect attempts to influence the conduct of executive agencies or libelous comments made during the conversations"); accord Williams, 597 F. Supp. 2d at 117 ("a legislator's efforts to cajole or influence an executive agency - as opposed to a legislator's information-gathering or investigative efforts - are not protected by legislative immunity[.]"). Neither does "the Speech or Debate Clause reach[.] . . . [an] attempt to influence [an executive agency] that is in no wise related to the due functioning of the legislative process." United States v. Johnson, 383 U.S. 169, 172 (1966); accord Jewish War Veterans, 506 F. Supp. 2d at 54. The D.C. Circuit also has held that "personnel actions regarding the management of congressional food services are too remote from the business of legislating to rank 'within the legislative sphere.'" Walker v. Jones, 733 F.2d 923, 928 (D.C. Cir. 1984). These political -- as distinct from legislative -- acts are "beyond the

-17-

coverage of the Speech or Debate Clause." Jewish War Veterans, 506 F. Supp. 2d at 53-54.⁸

I. OBJECTIONS TO SPEECH OR DEBATE ANALYSIS

Councilmembers Evans and Graham assert three objections to the magistrate judge's opinion and order. First, they argue that she "fail[ed] to acknowledge the Council's affirmative statutory duty under section 451 of the Home Rule Act to review multiyear contracts[.]" (Councilmembers's Obj'ns at 1-2, 6-7.) Second, they assign error to the magistrate's conclusion that the Councilmembers' communications with executive officials about the lottery contract did not relate to the Councilmembers' legislative activities. (Id. at 2.) Finally, they challenge the magistrate's consideration of the Councilmembers's "purported motives." (Id. at 2-3 ("It is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'") (quoting Tenney v. Brandhove, 341 U.S. 367, 377 (1951)).) D.C. likewise argues that Gray's communications were all protected by D.C.'s Speech or Debate Clause. (D.C.'s Obj'ns at 2, 9-12.) Payne opposes, arguing that certain of Gray's and

⁸ Other examples of political acts "'include a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress.'" Jewish War Veterans, 506 F. Supp. 2d at 53 (quoting Brewster, 408 U.S. at 512).

-18-

Graham's communications with the OCFO were personal efforts to have Payne fired. He also states that since Evans, Graham, and Gray all attempted to influence the executive to withdraw and re-bid the W2I contract, their communications as to the contract were political rather than protected. (Pl.'s Consol. Opp'n at 7-9, 11, 13-15.)

The Councilmembers argue that "it is incontestable that [their] review of the Lottery Contract was legislative in nature." (Councilmembers' Obj'ns at 10; see also D.C.'s Obj'ns at 10-11.) They note that "[a]t all times," their communications and information-gathering meetings with the OCFO "bore directly on whether the Councilmembers would support or not support" the lottery contract. (Councilmembers' Obj'ns at 10.) Payne argues that Gray and the Councilmembers "cajole[d], exhort[ed], or exert[ed] influence in order to modify or cancel an already awarded contract" (Pl.'s Consol. Opp'n at 14), and that they pursued a personal vendetta against Payne rather than "seeking information that would support or oppose the passage of the Lottery Contract." (Id. at 15.)

Certain of the movants' meetings with the OCFO were information-gathering missions that related directly to the pending lottery contract. Payne concedes that the Councilmembers and their associates expressed substantive concerns over the propriety of hiring Williams as a contractor. For example, Payne

-19-

"was repeatedly asked about Warren Williams['s] . . . other business dealings with the District[.]" (Payne Aff. ¶ 7.) During a meeting held on April 8, 2008, Evans stated that Williams was a slumlord and asked whether the OCFO could "just get rid of" him. (Payne Aff. ¶ 7; see also Am. Compl. ¶ 43.) When told that replacing Williams would be legally impermissible, Evans followed up by asking why. (Payne Aff. ¶ 7; Pl.'s Opp'n as to Prot. Orders at 8.) Further, Graham's associate, Dottie Love Wade, suggested that Williams was unfamiliar with online gaming, having only had prior experience with the "Instant Tickets" contract. (Payne Aff. ¶ 9; Pl.'s Opp'n as to Prot. Orders at 9.) Such communications were "'an integral part of the deliberative . . . processes by which [Councilmembers] . . . consider[ed] [the] passage or rejection of proposed legislation[.]" Chastain, 833 F.2d at 314 (quoting Gravel, 408 U.S. at 625), and "occur in the regular course of the legislative process." Fields, 459 F.3d at 10 (internal quotation marks and citation omitted). Legislative immunity shields these communications.

However, Payne has made a showing that other of Gray's and Graham's communications relating to Payne's termination had no bearing upon the merits of whether the lottery contract should be approved, and do not warrant Speech or Debate protection. Payne learned from W2I representatives that Gray and Graham discussed with Gandhi Payne's removal. Jacobs told Payne that Graham has a

-20-

vendetta and wants to discredit Payne, and that Gray's interest in Payne was unrelated to the merits of the contract. Graham allegedly told Gandhi of a bone Graham had to pick with Payne and told Payne he would hear from Gandhi about it. Payne states that Gray and Gandhi met privately on May 5, 2008, and alleges that Gray pressured Gandhi to fire Payne. Ten days later, Gandhi told Payne's supervisor that Payne needed to be removed. Payne was demoted in July and fired in January.

Legislative immunity does not attach to these communications because "the Speech or Debate Clause [does not] reach[] . . . [an] attempt to influence [an executive agency] that is in no wise related to the due functioning of the legislative process." Johnson, 383 U.S. at 172; Hutchinson, 443 U.S. at 122 n.10 (stating that the Clause "does not protect attempts to influence the conduct of executive agencies"). Payne produced sufficient evidence for the magistrate judge to find that Gray and Graham challenged Payne's employment in an effort to cajole Gandhi, not to pursue legislative business. See Fields, 459 F.3d at 17 ("Neither the history of the Clause nor Supreme Court precedent provides a basis on which to conclude that personnel decisions are 'legislative acts[.]'").⁹ The movants argue that even

⁹ There is no need to address the arguments that the magistrate judge improperly omitted citation to or discussion of the Home Rule Act, and improperly considered the movants' legislative motives. In any event, neither one is persuasive. In her opinion and order, Magistrate Judge Robinson noted Payne's

-21-

politically motivated or improper meetings with non-legislators that nevertheless were legislative in character are protected by the Clause. Asking the executive about personnel in a company slotted to win a contract the Council must approve is information-gathering within the legislative sphere. Cajoling the executive to fire the executive's own personnel is not.

Payne's termination or retention does not inform a legislative decision on the merits of the lottery contract and whether approval is in the best interests of District citizens.

Retention or termination of Payne might have affected the best interests of District citizens, but that decision is an executive one, not a legislative one. See Thillens, Inc. v. Cmty. Currency Exch. Ass'n of Ill., Inc., 729 F.2d 1128, 1130 (7th Cir. 1984)

(recognizing that the Supreme Court denied protection where

concession that "Council review, hearing consideration and approval [are] . . . protected by legislative immunity," Payne, 279 F.R.D. at 2, and articulated the Councilmembers' argument that "their actions [we]re so closely linked to their review of the lottery contract that the actions must still be protected." Id. at 3. Contrary to the movants' objection (see, e.g., Councilmembers' Obj'ns at 1-2, 6-7), and notwithstanding the lack of a specific citation to the Home Rule Act, the magistrate judge appears to have been aware that Councilmembers met with the CFO concerning a pending contract subject to Council review and approval. Further, in concluding that the "communications at issue were . . . attempts to 'cajole' . . . Gandhi," Payne, 279 F.R.D. at 7, the magistrate judge did not violate the edict to "examine . . . legislators' acts 'stripped of all considerations of intent and motive.'" Youngblood v. DeWeese, 352 F.3d 836, 840-41 (3rd Cir. 2003) (quoting Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998)). She merely tracked the analytical framework followed in precedent in this district. See Williams, 597 F. Supp. 2d at 117; Jewish War Veterans, 506 F. Supp. 2d at 58.

-22-

legislators "[acted] outside their legislative duties not simply because they were dealing with agencies apart from [the legislature], but because the activities did not concern any business of the legislature"). Because these communications concerning Payne's demotion and termination did not serve the purpose of gathering information to guide a legislative vote, the movants' objections to the magistrate judge's Speech or Debate Clause analysis therefore will be overruled as to communications concerning Payne's demotion and termination.¹⁰ The objections will be sustained as to the movants' communications concerning their review and approval of the lottery contract.

II. MAYOR'S ADDITIONAL OBJECTIONS

The Mayor argues that the information Payne seeks from him can be obtained from alternate sources, and that providing deposition testimony poses an undue burden. (D.C.'s Obj'ns at 7.) Payne counters that only Gray can address the substance of private conversations he had with Gandhi as to Payne, what "personal problem" Gray had with Payne, and why Gray asked Payne on April 9, 2008 whether Payne was "going to bring that [lottery contract]" up again. (Pl.'s Consolidated Opp'n at 15-16.) Payne also asserts that "extraordinary circumstances obviate any burden on Mayor Gray." (Id. at 16.)

¹⁰ As Payne made no showing of such communications by Evans, Evans's subpoena will be quashed.

-23-

A. Alternate sources

"[H]igh ranking government officials are generally not subject to depositions unless they have *some* personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere." Alexander v. FBI, 186 F.R.D. 1, 4 (D.D.C. 1998) (emphasis in original). The magistrate judge did not err in finding that Gray would have personal knowledge of his own conversations with Gandhi. Payne, 279 F.R.D. at 7. Gandhi establishes that he had one-on-one conversations with Gray but cannot remember what was said. (Pl.'s Consolidated Opp'n at 15.) Although Gray claims no recollection of such private conversations, that cannot bar Payne from deposing the only other party to the conversations with Gandhi and attempting to refresh Gray's memory of the conversations that Gandhi says happened. And, only Gray can explain what alleged "personal problem," if any, he had with Payne. Payne has met his burden to show that some of the information he seeks cannot be obtained elsewhere. This portion of the Mayor's objection therefore will be overruled in part. However, Payne has failed to demonstrate that Gray's question concerning the lottery contract exceeded the legislative sphere, and that no other individual can attest to Gray's comments during such larger meetings as Gray's May 5, 2008 meeting with Gandhi

-24-

and others, and his meeting with W2I. (Payne Aff. ¶¶ 10, 12.) This portion of the Mayor's objection will be sustained.

B. Undue burden

The magistrate judge also did not err in finding that requiring the Mayor to sit for a deposition is not an "unreasonable[] or oppressi[ve]" request" in light of all the evidence in the case. Flanagan, 231 F.R.D. at 102 (quoting Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 403 (D.C. Cir. 1984)) (alteration in original); see also Clinton v. Jones, 520 U.S. 681, 704-05 (1997).

Whether a subpoena subjects a witness to undue burden within the meaning of Rule 45(c)(3)(A)(iv) usually raises a question of the reasonableness of the subpoena. The determination of a subpoena's reasonableness requires a court to balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it; this process of weighing a subpoena's benefits and burdens calls upon the trial court to consider whether the information is necessary and whether it is available from any other source. It obviously is a highly case specific inquiry and entails an exercise of judicial discretion.

Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas, 262 F.R.D. 293, 299-300 (S.D.N.Y. 2009) (quoting 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2463.1 (3d ed. 2008)). On the one hand, the benefits of the subpoena include clarifying -- or correcting -- Jacobs's characterization of Gray's concerns with Payne and providing

-25-

Payne his sole remaining opportunity to discover what if anything Gray said about Payne in the private conversation with the CFO. Both benefits may be important to Payne's claim for wrongful termination. On the other hand, neither D.C.'s objections nor the Mayor's declaration details what burden a deposition deliberately limited in time and scope would impose upon Gray. Compare Clinton, 520 U.S. at 704 ("Sitting presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty."). The magistrate judge's order reduced by half the length of the deposition from the presumptive seven hours (see Fed. R. Civ. P. 30(d)(1); LCvR 26(b)(2)(A)), to three and one-half hours, and this opinion will restrict the scope of the questioning to communications about Payne's demotion and termination. Since the articulated benefits outweigh the unarticulated burdens, Gray must comply with the subpoena as modified.

CONCLUSION AND ORDER

Because the Mayor and Councilmember Graham have not met their heavy burden of demonstrating that Payne's subpoenas violate Rule 45, they must provide certain requested deposition testimony. It is hereby

-26-

ORDERED that D.C.'s and the Councilmembers' objections [45, 46] to the magistrate judge's ruling be, and hereby are, OVERRULED IN PART and SUSTAINED IN PART. The objections to the magistrate judge's analysis -- or lack thereof -- of the Home Rule Act, legislative motive, and undue burden are overruled. Payne may depose Councilmember Graham and Mayor Gray as to communications each had with the CFO relating to Payne's demotion and termination. D.C.'s objection to requiring the Mayor to provide deposition testimony as to his private conversation with Gandhi and any personal issues he had with Payne between April of 2008 and January of 2009 likewise is overruled. However, the objections to any deposition inquiry into the then-Councilmembers' review of the lottery contract, and Gray's April 9, 2008 comment to Payne, are sustained, and the subpoena to Councilmember Evans is quashed. It is further

ORDERED that the Councilmembers' Second Motion [78] to Quash be, and hereby is, DENIED as moot. It is further

ORDERED that Payne's motion and sealed motion [83, 90] to supplement the record with additional new evidence that was not first presented to the magistrate judge be, and hereby are, DENIED. It is further

ORDERED that Payne's unopposed motion [94] for a status hearing to set a pre-trial schedule be, and hereby is, DENIED as premature since discovery has not yet closed. The parties shall

-27-

confer and file a joint status report and proposed order within thirty days after Payne finishes taking the Councilmember's and Mayor's depositions.

SIGNED this 14th day of May, 2012.

/s/
RICHARD W. ROBERTS
United States District Judge