

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN THE MATTER OF THE SEARCH OF
THE FORENSIC COPY OF THE CELL
PHONE OF REPRESENTATIVE SCOTT
PERRY

Case No. 22-sc-2144 (BAH)

Chief Judge Beryl A. Howell

UNDER SEAL

MEMORANDUM OPINION AND ORDER

Representative Scott Perry (“Rep. Perry”) seeks to stay the disclosure of 2,055 records on his personal cell phone to the government, pending his appeal of this Court’s Order and Memorandum Opinion, both issued on December 28, 2022 (“Dec. 2022 Order” and “Dec. 2022 Decision,” respectively), ECF Nos. 24 and 25. *See* Rep. Perry’s Emergency Mot. to Stay (“Perry Mot.”), ECF No. 27; *see also* Rep. Perry’s Mem. re Emergency Mot. to Stay (“Perry Mem.”), ECF No. 27-1. The December 2022 Order permitted Rep. Perry to withhold from the government 161 records in whole and three records in part that he claimed were privileged under the Speech or Debate Clause (“Clause”), while rejecting Rep. Perry’s claims of privilege with respect to 2,055 additional records that he does not dispute are responsive to a search warrant issued by this Court (“D.D.C. Warrant”). *See generally* Dec. 2022 Order. Upon review, Rep. Perry does not meet the high bar for the extraordinary relief that a stay confers. His motion is thus denied.¹

¹ In the alternative, Rep. Perry requests the issuance of “a temporary stay” of the December 2022 Order “to allow the D.C. Circuit an opportunity to consider his appeal . . . by extend[ing] the date [] he is directed to provide documents to the Government . . . to Friday, January 6, 2023.” Perry Reply at 9. His alternative request for a temporary stay of the December 2022 Order by an additional day is granted solely to allow Rep. Perry to file his emergency motion with the D.C. Circuit.

I. BACKGROUND

A detailed description of the factual and procedural history preceding this motion is set out in the December 2022 Decision, at 4–10, and is thus incorporated by reference here.

Specific to this motion, on December 28, 2022, the Court granted in part and denied in part Rep. Perry’s motion for non-disclosure, holding that 2,055 of the 2,219 responsive records withheld by Rep. Perry are not privileged under the Clause, while 161 records were properly withheld in full and three records in part. *See* Dec. 2022 Order; Dec. 2022 Decision. The December 2022 Order disclosed redacted versions of the three partially privileged records and required Rep. Perry to disclose the remaining 2,055 responsive records not covered by the Clause to the government by January 5, 2023. Dec. 2022 Order at 1.

Rep. Perry then filed the instant motion for stay pending appeal on December 30, 2022, *see* Perry Mot, and an accompanying notice of appeal, *see* Rep. Perry’s Notice of Appeal, ECF No. 26. Notably, though this matter relates to an ongoing grand jury investigation, Rep. Perry’s notice of appeal does not ask for expedited consideration by the D.C. Circuit, under D.C. Cir. R. 2 and 27(f). Pursuant to an expedited briefing schedule entered by this Court, the government responded to Rep. Perry’s motion on January 3, 2022, *see* Gov’t’s Opp’n to Mot. for Stay Pending Appeal (“Gov’t’s Opp’n”), ECF No. 29, and Rep. Perry filed a reply by January 4, 2022, *see* Rep. Perry’s Reply re Emergency Mot. to Stay (“Perry Reply”), ECF No. 30. *See also* Scheduling Order (Dec. 31, 2022). Briefing on this pending motion is complete and thus the motion is now ripe for resolution.

II. LEGAL STANDARD

“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). “A stay is not a matter of

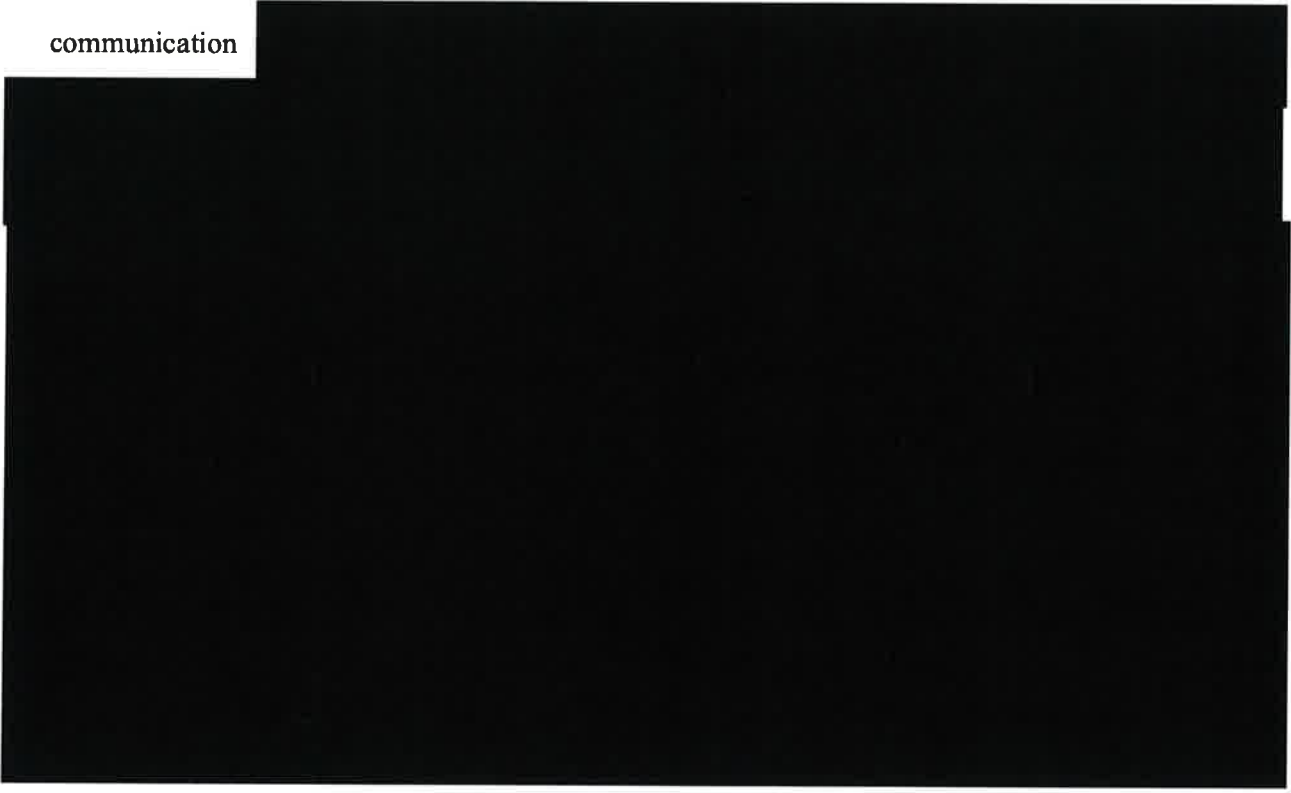
right, even if irreparable injury might otherwise result,” *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)), and “[a] stay pending appeal is always an extraordinary remedy,” *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. Nat’l Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966); see also *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 904 F.3d 1014, 1017 (D.C. Cir. 2018) (per curiam) (“CREW”) (describing a stay pending appeal as “extraordinary relief”).

Courts considering a stay request pending an appeal must “weigh competing interests,” *Belize Soc. Dev. Ltd. v. Gov’t of Belize*, 668 F.3d 724, 732 (D.C. Cir. 2012) (quoting *Landis*, 299 U.S. at 254–55), by balancing the following factors as applied to the specific facts of the case: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies,” *Nken*, 556 U.S. at 434 (quotation marks omitted). The first and second factors are the “most critical” to determining whether a stay is warranted, *CREW*, 904 F.3d at 1017 (quoting *Nken*, 556 U.S. at 434), while the third and fourth factors “merge” when the stay applicant so moves against the government. *Nken*, 556 U.S. at 435. The party seeking the stay bears the burden of “mak[ing] out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.” *Landis*, 299 U.S. at 255.


III. DISCUSSION

Rep. Perry’s motion is denied because all four of the stringent *Nken* factors weigh against granting a stay. First and foremost, Rep. Perry is unlikely to succeed on the merits for the reasons

fully explicated in the December 2022 Decision.² The vast majority of the records at issue—which records were recovered, pursuant to a search warrant issued by the U.S. District Court for the Middle District of Pennsylvania, from Rep. Perry’s personal cell phone and are indisputably responsive to the D.D.C. Warrant—are not entitled to Clause protection because they do not contain communications “that are ‘integral’ to [his] participation in ‘the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.’” Dec. 2022 Decision at 17 (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)). Rep. Perry counters that these responsive records are protected “[l]egislative information gathering” efforts under the Clause because they contain his communication



² The government argues that the first *Nken* factor of likelihood of success on the merits cannot be met because the December 2022 Order was not a final decision on the merits, and, therefore, Rep. Perry is not entitled to bring an appeal challenging the denial of his assertion of the Clause since no exception under the collateral order doctrine permitting interlocutory review applies. Gov’t’s Opp’n at 6–11. Rep. Perry disagrees. Rep. Perry Reply at 1–4 (arguing that the Dec. 2022 Order is appealable under the collateral order doctrine). Regardless of whether the December 2022 Order is appealable, none of the *Nken* factors militate in favor of a stay and, consequently, the merits of the dispute over the appealability of the December 2022 Order need not be reached.



The December 2022 Decision, however, explained at length why Rep. Perry’s “efforts as an individual Member either to obtain or relay information from or to others to be used to defeat or delay certification of the ECA vote and President-elect Joseph R. Biden’s victory in the 2020 election,” Dec. 2022 Decision at 27, were not protected under the Clause, and why his characterization of these efforts as “informal fact-finding” activities fell short of pulling the Clause’s cloak of protection over those communications, under a straight-forward reading of binding Supreme Court and D.C. Circuit precedent, which require for proper invocation of the Clause that an “investigative step is fully and unambiguously authorized for a legislative purpose,” *id.* at 21-22 (citing, *e.g.*, *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 506 (1975) and *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995)).

Consistent with this precedent, under *McSurely v. McClellan*, 553 F.2d 1277, 1286 (D.C. Cir. 1976) (en banc), to qualify for protection under the Clause, a Member’s fact-finding efforts must be performed in a sufficiently procedurally regular manner, with formal congressional sanction or authorization, to constitute legitimate legislative activity. *See* Dec. 2022 Decision at 32–38; *see also id.* at 22 (explaining *McSurely*’s requirement that an informal investigation be congressionally authorized). To the extent that Rep. Perry believes that *McSurely* created no requirement that a Member’s informal field investigations must be congressionally authorized, *see* Perry Mem. at 7–8, he is wrong for the reasons outlined in the December 2022 Decision.

None of the 2,055 responsive records that Rep. Perry has withheld as privileged contain communications relating to legislative-fact-finding efforts sanctioned or otherwise authorized in a

procedurally regular manner by any congressional entity. Rather, in large part, the communications illustrat

In short,

Rep. Perry provides no reason why these communications reflect anything more than activities that are “casually or incidentally related to legislative affairs but not a part of the legislative process itself.” *United States v. Brewster*, 408 U.S. 501, 528 (1972).

Rep. Perry also fails to grapple with the line-drawing problem of distinguishing between privileged and non-privileged communications that his theory of legislative privilege would create. In discussing the congressional authorization requirement, the December 2022 Decision explained how applying Rep. Perry’s theory of Clause privilege to “informal fact-finding efforts untethered from a formal legislative inquiry” would be “both unwise in principle and unworkable in practice[,]” “assuredly ‘create considerable confusion’ as to whether the Clause applies[,] and invite inconsistent applications of the legislative privilege[,]” particularly considering, in the context of an *in camera* document review, “the full context of any given communication may not be discernible.” Dec. 2022 Decision at 38–39 (quoting *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1207 (D.C. Cir. 2009) (Kavanaugh, J., concurring)). Rep. Perry ignores this issue and the December 2022 Decision’s analysis of this problem, which further undermines his contention that he will likely succeed on the merits on appeal.

Rep. Perry’s focus on protection of his informal fact-finding efforts also elides the fact that a significant number of responsive records are communications that could not plausibly be related to fact-finding activities

These

communications largely reflect his efforts to relay information to other persons rather than trying to obtain, understand, or assess information



None of these communications appear to be remotely linked to fact-finding efforts, contrary to Rep. Perry's general description. Finally, the December 2022 Decision explained that the majority of communications that Rep. Perry received from Executive Branch officials "demonstrate that he welcomed, rather than resisted, and indeed often initiated these communications to relay information or urge consideration of a strategy by the White House or specific action to be taken by the White House, the Trump Campaign, or [the Department of Justice]." *Id.* at 49. "Given the Clause's purpose to protect congressional Members from untoward interference from the Executive Branch with legislative matters," the Court held that "Rep. Perry's reliance on the Clause to shield his multi-pronged push for Executive Branch officials to take more aggressive action is not only ironic but also must fail as beyond the scope of the Clause." *Id.* Rep. Perry does not even attempt to explain how the Clause likely applies to these records in his motion, so he cannot satisfy the first *Nken* factor.

Next up is irreparable injury, which militates strongly against granting a stay. Although Rep. Perry is technically right that once the 2,055 responsive records are disclosed to the government, they cannot be undisclosed to the government, *see* Perry Mem. at 10, his argument that his constitutional rights would be violated by disclosing the records misses the mark because he still maintains the core protections available under the Clause. Specifically, Rep. Perry would retain criminal immunity for his legislative acts, the right to object to the use as evidence of his

legislative acts, and the right to avoid being compelled to testify about his legislative acts. *Howard v. Off. of Chief Admin. Officer of U.S. House of Representatives*, 720 F.3d 939, 946 (D.C. Cir. 2013); *see also* Dec. 2022 Decision at 14–16. Nonetheless, Rep. Perry counters that the December 2022 Order and Decision “imperil[] [his] ability to object to the use of the material by the Government and his privilege against compelled testimony.” Perry Reply at 5. This is inaccurate. The December 2022 Order was limited to the issue of non-disclosure, *see* Dec. 2022 Order at 1 (ordering Rep. Perry to disclose 2,055 responsive records in whole or in part to the government), leaving Rep. Perry free, at a minimum, to assert the Clause’s privileges in the future if the government uses any of the 2,055 records against him in a criminal prosecution or tries to compel him to testify about his communications contained in these responsive records.

The potential injury that Rep. Perry may face by denial of a stay pending appeal, arising from disclosure to the government of the withheld responsive records, is accordingly far less damaging than the harm he would face if the protections outlined in the Supreme Court’s Clause jurisprudence—protection from criminal and civil liability, testimonial privilege and nonevidentiary use privilege—were violated. *See In re Grand Jury Investigation*, 587 F.2d 589, 597 (3d Cir. 1978) (“But to the extent that the Speech or Debate Clause creates a Testimonial privilege as well as a Use immunity, it does so only for the purpose of protecting the legislator and those intimately associated with him in the legislative process from the harassment of hostile questioning. It is not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited toleration for secrecy.”); *United States v. Renzi*, 651 F.3d 1012, 1020 (9th Cir. 2011) (rejecting the contention “that there exists some grandiose, yet apparently shy, privilege of non-disclosure that the Supreme Court has not thought fit to recognize”). Given that Rep. Perry retains these critical protections under the Clause, his claim that he will be irreparably injured absent a stay is overblown.

Additionally, should the D.C. Circuit find, on appeal, that any or all of the 2,055 responsive records are in fact privileged under the Clause, the government points out that a partial remedy could be issued “by ordering the Government to destroy or return any and all copies [of the records] it may have in its possession.” Gov’t’s Opp’n at 14 (quoting *Church of Scientology of California v. United States*, 506 U.S. 9, 12–13 (1992)). In any event, significantly undercutting Rep. Perry’s claim of irreparable injury is his concession that the government has already obtained or certainly could access “most if not all, of the communications at issue here by other means.” Perry Mem. at 11. Indeed, most of the 2,055 withheld responsive records that this Court has ordered disclosed are communications between Rep. Perry and other individuals, most of whom are not fellow congressional Members or staff. Assuming Rep. Perry is correct about the government already obtaining these same communications as part of the ongoing investigation from the individuals with whom Rep. Perry was communicating, requiring disclosure here will cause no harm to Rep. Perry at all since they are already in the government’s possession. In short, Rep. Perry cannot demonstrate that an injury would be “certain and great,” such that the second *Nken* factor weighs against granting a stay. See *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).³

Finally, the interests of the government and the public weigh against a stay. Just as the grand jury is required to look “into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred[.]” *United States v.*

³ In reply, Rep. Perry says that he would face harm by disclosing the responsive records at issue because such disclosure “would provide the Government with information that it could use and make derivative use of in its consideration of filing criminal charges in a highly charged political environment.” Perry Reply at 5. Rep. Perry’s argument is flawed for two reasons. First, Rep. Perry retains civil and criminal immunity, a testimonial privilege, and a nonevidentiary use privilege for his legislative acts, so the government’s use of any privileged records against Rep. Perry in a criminal prosecution would be prohibited under the Clause. Dec. 2022 Decision at 14–16. Second, the D.C. Circuit, in *United States v. Rayburn House Off. Bldg.*, 497 F.3d 654 (D.C. Cir. 2007) (“*Rayburn*”), never held that derivative use of a legislative record is privileged under the Clause but described the harm as limited to the “chill” that compelled disclosure of legislative records would cause. See *id.* at 661 (“This compelled disclosure clearly tends to disrupt the legislative process: exchanges between a Member of Congress and the Member’s staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity.”). Any derivative use of Rep. Perry’s privileged records is, thus, not a harm that the Clause contemplates or recognizes.

R. Enterprises, Inc., 498 U.S. 292, 297 (1991), and has a substantial interest in avoiding “delays and detours” that “would assuredly impede its investigation and frustrate the public’s interest in the fair and expeditious administration of the criminal laws,” *id.* at 298–99 (quotation marks omitted), the government also has a significant interest in moving forward expeditiously with the criminal investigation into those potentially involved in alleged criminal efforts to overturn the 2020 election. Rep. Perry has diligently pursued his claims of legislative privilege, with the concomitant result that over four months after issuance of the D.D.C. Warrant, the government has yet to review a significant number of responsive records. A prolonged appeal would only further delay disclosure of those responsive records. The government and the public have a strong interest in reviewing expeditiously the records responsive to the search warrant since “in criminal cases[,] encouragement of delay is fatal to the vindication of the criminal law.” *Khadr v. United States*, 529 F.3d 1112, 1117 (D.C. Cir. 2008) (cleaned up).⁴

None of Rep. Perry’s alternative considerations outweigh the government and the public’s interest in an expedient investigation. For starters, pointing to the fact that the government has obtained 12,944 records from his cell phone and communications from others, like former Assistant Attorney General Jeffrey Clark and Trump Campaign attorney John Eastman, Perry Mem. at 11, is a misfire. Even assuming he is correct about the government’s access to others’ records, this neither defeats nor deflects the government’s interest in responsive records held on Rep. Perry’s cell phone. Instead, as already noted, to the extent that the 2,055 responsive records at issue overlap with communications already in the government’s position, Rep. Perry only undermines his argument that he would be irreparably injured if a stay were not entered. Next,

⁴ Rep. Perry’s reliance on *Jewish War Veterans of U.S., Inc. v. Gates*, 522 F. Supp. 2d 73 (D.D.C. 2007), Perry Mem. at 12, is misplaced. In that case, a partial stay in production of potentially privileged records under the Clause was granted because “the Court conclude[d] that the Members have raised a serious legal question on appeal,” *id.* at 80, but no such persuasive argument is made here. Moreover, since that case involved a civil dispute, the court had no necessity to consider the weighty public interest of impeding a significant criminal investigation. *Id.* at 82–83.

Rep. Perry contends that “[h]is constituents also have an interest in ensuring that he is able on their behalf to investigate facts that are central to his legislative activity without fear of reprisal.” *Id.* at 12. Nothing about the December 2022 Order, however, prevents Rep. Perry from engaging in legislative fact-finding inquiries; it solely requires him to disclose records that are not privileged under the Clause. Also unavailing is his argument that he must be afforded time to solicit amicus participation, through the General Counsel of the House of Representatives, after Congress meets and “the new Speaker is elected.” Perry Mem. at 12–13. During all the months this case has been pending, however, Rep. Perry has thus far failed to “request that the Court grant access to the sealed proceedings in this case so that the General Counsel of the House of Representatives may directly represent Congress’ institutional prerogatives.” *Id.*; *cf. Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) (noting that the “last-minute nature of an application” or an applicant’s “attempt at manipulation” of the judicial process may be grounds for denial of a stay). Any further delay in allowing the government’s investigation to proceed only weighs against a stay.

Ultimately, Rep. Perry concedes that the December 2022 Decision was “thorough and detailed[,]” and he simply “disagrees with the Court’s legal conclusions[.]” Perry Reply at 6. Having considered these disagreements again, this Court is not persuaded that his claims of legislative privilege were incorrectly evaluated in the December 2022 Decision, that he would be irreparably injured absent a stay pending appeal, and that the public interest favors granting the requested stay pending appeal.

Based on the foregoing analysis, Rep. Perry’s motion to stay the December 2022 Order and Decision pending appeal is denied.

IV. ORDER

For the foregoing reasons, it is hereby

ORDERED that Rep. Perry's Emergency Motion to Stay, ECF No. 27, is **DENIED**; it is further

ORDERED that the December 2022 Order be **TEMPORARILY STAYED** until January 6, 2023, at 5:00 PM, to allow Rep. Perry the opportunity to file an Emergency Motion to Stay with the United States Court of Appeals for the District of Columbia Circuit; it is further

ORDERED that Rep. Perry comply with the December 2022 Order by no later than January 6, 2023, at 5:00 PM.

SO ORDERED.

Date: January 4, 2023



Beryl A. Howell

BERYL A. HOWELL
Chief Judge