

FOR IMMEDIATE RELEASE:

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Attorney General Statement on Compelling Legislative Disclosure in Senator Griego Case

Santa Fe, NM - This morning, Attorney General Hector Balderas released the following statement after the Office of the Attorney General responded to Legislative Council Service's motion to quash or modify subpoenas:

“As public servants we have an obligation to taxpayers and the citizens of New Mexico to be transparent and accountable, and the Legislative Council Service's attempt to assert a blanket privilege on behalf of all legislators in this matter is obstructive to the administration of justice and the transparency that all New Mexicans deserve.”

Please see attached for the OAG response.

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JUN 13 2016

Santa Fe, Rio Arriba &
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STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

No. D-101-CR-2016-109
AGO: 201504-00072
Judge: Brett R. Loveless

STATE OF NEW MEXICO,

Plaintiff,

v.

PHIL A. GRIEGO,

Defendant.

**STATE'S RESPONSE TO LEGISLATIVE COUNCIL SERVICE'S
MOTION TO QUASH OR MODIFY SUBPOENAS**

The State of New Mexico, through Deputy Attorney General Sharon Pino and Assistant Attorneys General Clara Moran and Zach Jones, hereby submits this response to the Legislative Council Service's Motion to Quash or Modify, filed with the Court on June 8, 2016. The State asks this Court to deny the motion, and in support, states:

Argument

I. The Speech or Debate Clause does not exempt legislators and their aides from the rules that apply to everyone else.

The State of New Mexico seeks to prosecute former Senator Phil A. Griego for financial abuse in a position of public trust. To that end, the State of New Mexico makes two requests of every witness: First, show up to the hearing. Second, tell the truth about what you know.

Most of the witnesses, including both private citizens and state employees, make no objection to these simple requests. The Legislative Council Service (LCS), however, takes a categorical stance, allegedly on behalf of unnamed legislators: We will not testify. Quash all subpoenas.

This absolutist position sacrifices justice on an altar of secrecy. It runs deeply contrary to the rule of law, the public interest, and United States Supreme Court precedent. According to the Supreme Court, the Constitution embodies “the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons.” *Gravel v. United States*, 408 U.S. 606, 614-15 (1972).

Prosecuting financial abuse does nothing to interfere with the legitimate acts of the legislature. *United States v. Brewster*, 408 U.S. 501, 524-26 (1972); *United States v. Rose*, 28 F.3d 181, 188 (D.D.C. 1994). Instead, the Speech or Debate clause was designed to be “narrow enough to guard against the excesses of those who would corrupt the process by corrupting” the legislative branch. *Brewster*, 408 U.S. at 525. The State seeks only the equal participation of all witnesses in guarding “against the excesses” of corruption. *Id.*

II. The motion should be denied because counsel for LCS refuses to name the individuals who are asserting a privilege.

Apparently not satisfied with seeking to quash subpoenas wholesale, LCS absurdly refuses to even name the individuals it wants to prevent from testifying.

On June 8, 2016, LCS filed its motion, stating the motion was filed “on behalf of the members of the New Mexico Legislature and their Staff who have been subpoenaed to testify at the preliminary hearing.”

The State cannot properly evaluate and respond to assertions of privilege if it does not know who specifically asserts the privilege. The State therefore emailed counsel for LSC, asking for the identities of the represented individuals.

Counsel for LCS responded, “[W]e represent, through the LCS, all legislators and staff who have been served with testimonial subpoenas.” A follow-up request for the names of the represented persons went unanswered.

The State then sent another email asking for the names of the legislators who had consented to be represented and the names of the legislators who concurred in the position taken in the motion to quash or modify.

Counsel for LCS replied, “I am not responding to that email. I have told you that we represent, through the LCS, all legislators who we know have been served with subpoenas.”

The problem with this response is that at the time LCS filed its motion, many prospective witnesses, including several legislators, had not yet been served. Who then is covered by LCS’s motion? Does LCS seek to gain additional clients as they are served? And if counsel for LCS properly sought the input of their alleged clients prior to the filing the motion, why do they refuse to state who those clients are? *Cf.* Rule 16-102 NMRA (“[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by

which they are to be pursued.”); Rule 16-104(B) NMRA (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

Counsel for LCS offer no reason—let alone a good reason—why they are unable or unwilling to name their clients. The State has a right to know which prospective witnesses are represented by counsel, asserting a privilege, or both. The public has a right to know which officials want to avoid testifying in a case involving financial abuse.

LCS’s failure to name the witnesses at issue is by itself grounds to deny the motion outright. Rule 5-120 NMRA (“All motions . . . shall state with particularity the grounds and the relief sought.”).

III. Because legislative aides cannot prevent legislators from testifying, LCS lacks standing.

LCS seeks an order quashing or modifying “subpoenas issued in this case to legislators and legislative staff.” Motion p. 4. LCS does not name the legislators, and nothing shows that it sought their concurrence in the motion.

This tactic is problematic for several reasons. First, the legislators, not their aides, are the true holders of the privilege. *Gravel v. United States*, 408 U.S. 606, 621-22 (1972). Second, it is crucial to know which specific witnesses are asserting the privilege and whether they agree with LCS’s absolutist interpretation.

Further, it is unclear why legislative aides to seek to prevent their superiors from testifying. As the holders of the privilege, the legislators may invoke the

privilege (if it applies) or waive it as they see fit. If a legislator wishes to testify, LCS should not and cannot prevent him or her from doing so.

Any ruling to the contrary would turn privilege on its head. For example, a patient may prevent a doctor from disclosing confidential information. Rule 11-504 NMRA. But the doctor cannot prevent the testimony of a patient who wishes to testify.

As the party asserting privilege, LCS has the burden of showing that a privilege actually applies. *See Breen v. State Taxation and Revenue Dept.*, 2012–NMCA–101, ¶ 21, 287 P.3d 379 (“The party claiming privilege has the burden of establishing that a communication is protected.”). Because LCS provides no authority that would allow it to prevent individual legislators from testifying, its attempt to do so must fail.

IV. The Speech or Debate clause does not provide immunity from subpoenas to appear at a hearing.

LCS provides no authority for the idea that a subpoena for attendance at a hearing should be quashed simply because a witness allegedly possesses some confidential information. In general, even if a privilege protects some information, other topics may be fair game. *Cf.* Rule 11-501 NMRA; *State v. Brown*, 1998–NMSC–037, ¶ 61, 126 N.M. 338 (Courts “have the inherent power to compel the attendance and non-privileged testimony of witnesses.”). In this case, as discussed below, the State may pursue several lines of relevant questioning without implicating the narrow protections of the Speech or Debate clause.

Further, if the Speech or Debate clause applies at all, it provides an evidentiary privilege, not immunity from attendance at hearings. As the Supreme Court put it, the constitution does not “confer immunity on a [legislator] from service of process . . . as a witness in a criminal case.” *Gravel*, 408 U.S. at 614-15 (internal citation omitted); *see also* Kenneth W. Graham, 26A Fed. Prac. & Proc. Evid. § 5675 (1st ed.) (April 2016 update) (“It is clear that the Speech or Debate Clause does not provide a witness privilege that would allow the legislator or his aides to refuse to testify. . .”).

V. LCS’s objections are speculative, premature, and misconstrue the scope of permissible questioning.

LCS does not identify any objectionable questions because nobody has yet asked any questions. Instead, LCS makes blanket assertions of privilege based on what it believes the State is “likely” to ask. Motion p. 3. Of course, LCS is not privy to the State’s plans for the preliminary hearing. The motion is based purely on speculation.

Contrary to LCS’s conjecture, there is a wide range of questions that the State may put to both legislators and LCS staff without invading the Speech or Debate privilege. For example, the State may inquire into:

- Contact and communications with persons outside the legislature. *Gravel*, 408 U.S. at 625-27; *Hutchinson v. Proxmire*, 443 U.S. 111, 130-33 (1979).

- Promises, negotiations, and solicitations in preparation for legislative acts. *United States v. Helstoski*, 442 U.S. 477, 490 (1979); *United States v. Renzi*, 651 F.3d 1012, 1023 (9th Cir. 2011).
- A legislator’s financial arrangements, disclosures, or abuses. *United States v. Brewster*, 408 U.S. 501, 524-26 (1972); *United States v. Rose*, 28 F.3d 181, 188 (D.D.C. 1994).
- Any conduct that in itself constitutes an element of a crime. *Brewster*, 408 U.S. at 524-26 (“Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act.”); *Gravel*, 408 U.S. at 626-27; *Renzi*, 651 F.3d at 1023-24.

Given the scope of permissible questioning and LCS’s lack of specificity, there are no grounds to quash or modify the subpoenas under the Speech or Debate clause.

Further, LCS provides no authority for any distinction between “limited” and “unlimited” subpoenas to appear at hearing. Motion p. 2. Counsel for the State is not aware of any rule that requires a party to indicate proposed testimony on a subpoena for appearance.

Nor does LCS provide any authority for limiting the “scope” of a subpoena for appearance. Witnesses either show up or they do not. If anyone asserts a privilege at the hearing, this Court is perfectly capable of ruling based on the actual question asked.

VI. LCS's position undermines the rule of law generally and the Government Conduct Act specifically.

As the Supreme Court stated, the Speech or Debate clause must be “narrow enough to guard against the excesses of those who would corrupt the process by corrupting” the legislative branch. *Brewster*, 408 U.S. at 525.

The principal tool for guarding against the excesses of corruption is the Governmental Conduct Act, which former Senator Griego stands accused of violating. NMSA 1978, § 10-16-1 through -18 (2011). The Act states that, “The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.” NMSA 1978, § 10-16-3 (2011).

Yet LCS's absolutist position undermines these principles. Enforcing the Act depends on those who witness misconduct testifying truthfully to what they know.

The Supreme Court writes, “Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish [financial abuses] . . . is unlikely to enhance legislative independence.” *Brewster*, 408 U.S. at 524-25. Indeed, if the Government Conduct Act is neutered by overbroad privileges, the legislative independence will suffer under the “excesses of those who would corrupt the process.” *Id.* at 525.

VII. LCS has not shown any potential violation of the attorney-client privilege.

At the end of its motion, LCS tacks on a reference to the attorney-client privilege, asserting that “the testimony sought also may invade” that privilege.

Motion p.4 ¶ 9. Again, this is speculative, and LCS neither identifies any privileged information or explains why it “may” be sought. Lacking any specificity, this assertion must fail. If questioning at the hearing implicates the attorney-client privilege, this Court may make an appropriate ruling at that time.

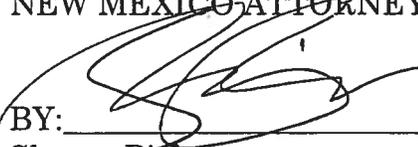
VIII. Conclusion

As the party asserting privilege, LCS has the burden of establishing it by a preponderance of the evidence. *Government of Virgin Islands v. Lee*, 775 F.2d 514, 524 (3rd Cir. 1985); *see also Breen*, 2012–NMCA–101, ¶ 21. LCS cannot meet this burden with blanket, speculative assertions regarding unnamed clients. LCS has not provided any grounds to quash the subpoenas or to limit them in any way.

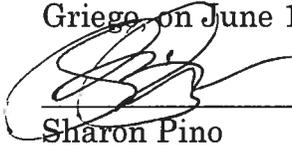
Request for Relief

The State respectfully requests that this Court deny the Motion to Quash or Modify.

HECTOR H. BALDERAS
NEW MEXICO ATTORNEY GENERAL

BY: 
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I certify that I emailed a copy of this response to Thomas M. Hnasko, thnasko@hinklelawfirm.com, and Michael B. Browde, browde@law.unm.edu, counsel for LCS, and Thomas M. Clark, tmclark@cjplawsf.com, counsel for Phil A. Griego on June 13, 2016.



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