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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Tohono O'odham Nation,
10 Plaintiff,
11 v.
12 Douglas A Ducey, et al.,
13 Defendants.

No. CV-15-01135-PHX-DGC

ORDER

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16 Daniel Bergin, Director of the Arizona Department of Gaming, moves to compel
17 the Tohono O'odham Nation to produce certain notes, minutes, and agendas from closed
18 sessions of the Tohono O'odham Council ("TON Council") – which is the legislative
19 body of the Nation's government – and the San Lucy District Council ("SLD Council") –
20 which is the legislative body for one of the Nation's political subdivisions. Doc. 153. In
21 addition, Director Bergin seeks to compel the Nation's witnesses to testify about certain
22 issues that may have been discussed at these closed sessions. *Id.* The motion has been
23 fully briefed (Docs. 156, 158) and neither party has requested oral argument. For the
24 reasons that follow, the Court will grant the motion in part and deny it in part.

25 **I. Background.**

26 In August 2003, Vi-ikam Doag Industries, Inc. ("VDI"), an economic
27 development corporation chartered by the Nation, purchased a plot of unincorporated
28 land within the outer boundaries of Glendale, Arizona (the "Glendale Property"). VDI

1 subsequently transferred the land to the Nation, which had the land taken into trust by the
2 Department of the Interior in 2010. The Nation announced plans to conduct casino-style
3 gaming on the property, an announcement that resulted in a protracted legal battle with
4 the State of Arizona and other entities.

5 The Nation has successfully argued before this Court and the Ninth Circuit that the
6 2003 gaming compact it entered with the State (the “Compact”) does not prohibit gaming
7 on the Glendale Property. *See Arizona v. Tohono O’odham Nation*, 944 F. Supp. 2d 748
8 (D. Ariz. 2013), *aff’d*, 818 F.3d 549 (9th Cir. 2016). The Director, who must issue
9 certifications with respect to certain aspects of gaming in Arizona, has refused to certify
10 casino-style gaming on the Nation’s property, claiming that the Nation procured the
11 Compact by fraud. The Nation brought this action to bar the Director from refusing
12 certifications, and the Director asserted counterclaims alleging that the Nation publicly
13 represented that the Compact would prohibit new casinos in the Phoenix metropolitan
14 area, while secretly planning to acquire property in the western part of that area for the
15 purpose of opening just such a casino.

16 The Director seeks to compel discovery of certain documents related to closed
17 sessions of the TON Council and the SLD Council that occurred around the time the
18 Compact was finalized. The documents are:

- 19 (1) Typed minutes, authored by the SLD Council Secretary on June 18, 2002,
20 regarding “Closed Session on West Valley Property”;
- 21 (2) Handwritten notes, authored by a member of the Nation’s Commerce
22 Committee on August 29, 2002, regarding “TON legislative council session
23 addressing the San Lucy District Land Proposal”;
- 24 (3) Typed agenda and handwritten notes, authored by the SLD Council
25 Secretary on December 29, 2002, regarding “Closed Council Session on the
26 West Valley Project”;
- 27 (4) Typed minutes, authored by the SLD Council Secretary on February 27,
28 2003, regarding “Closed Council Session VDI Report”;
- (5) Handwritten notes, authored by an unknown individual on February 27,
2003, regarding SLD “Closed Council Session on Phoenix Property”;

- 1 (6) Typed agenda, minutes, and handwritten notes, authored by the SLD
2 Council Secretary on March 4, 2003, regarding “Closed Council Session –
3 Report from VDI to Council”;
- 4 (7) Handwritten notes, authored by an unknown individual on March 13, 2003,
5 regarding “Report from VDI to [SLD] Closed Council Session”;
- 6 (8) Handwritten notes, authored by an unknown individual on July 13, 2003,
7 regarding “Special [SLD] Council Meeting re Chairwoman Saunders’
8 Response to District’s Position”.

8 Doc. 153 at 4-5.¹

9 In addition, the Director seeks an order barring the Nation’s witnesses from
10 invoking the legislative privilege to avoid answering certain questions that may implicate
11 discussions held in a closed legislative session. *Id.* at 2. Specifically, the Director seeks
12 to ask the Nation’s witnesses about:

- 13 • The location(s) where the Nation intended to build a fourth casino before
14 Proposition 202;
- 15 • The identities of those involved in the decision to purchase the Glendale
16 property;
- 17 • The dates on which witnesses first learned of the plan to purchase the
18 Glendale property;
- 19 • The Nation’s intentions for the Glendale property before and after it was
20 purchased;
- 21 • The dates on which witnesses first learned of the plan to conduct Class III
22 gaming on the Glendale property; and
- 23 • The reason the Nation kept its search for and purchase of land secret from
24 the State.

25 *Id.*

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28 ¹ The entries on this list are referred to by number throughout the order. For example, the first entry is referred to as Entry 1.

1 **II. Legal Standard.**

2 “On a motion to compel, the party seeking to compel discovery has the initial
3 burden of establishing that its request satisfies the relevancy requirements of Rule 26(b).”
4 *Miller v. York Risk Servs. Grp.*, No. 2:13-CV-1419-JWS, 2015 WL 3490031, at *2 (D.
5 Ariz. June 3, 2015). “The party asserting an evidentiary privilege has the burden to
6 demonstrate that the privilege applies to the information in question.” *Tornay v. United*
7 *States*, 840 F.2d 1424, 1426 (9th Cir. 1988); *see also Blankenship v. Hearst Corp.*, 519
8 F.2d 418, 429 (9th Cir. 1975). Whether material is privileged is generally determined as
9 a matter of federal common law, with exceptions not applicable here. Fed. R. Evid. 501.

10 **III. Analysis.**

11 **A. Relevance.**

12 The Director’s counterclaims and affirmative defenses allege that the Nation
13 engaged in fraud during negotiation of the Compact by representing that it had no plans
14 to engage in casino-style gaming in the Phoenix area even as it was secretly making plans
15 to purchase property on which to conduct such gaming. Doc. 96 at 15-16, 32-35. The
16 documents and testimony the Director seeks to discover would shed light on the Nation’s
17 plans at the time of the Compact negotiations. The documents were created during, or
18 shortly after, the negotiations, and appear to relate to the project that culminated in VDI’s
19 purchase of the Glendale Property – Entries 1, 2, 3, and 5 refer to the West Valley
20 Property, the San Lucy District Land Proposal, the West Valley Project, and the Phoenix
21 Property respectively, while Entries 4, 6, and 7 refer specifically to VDI.² The testimony
22 the Director seeks would provide insight into why the Nation purchased the Glendale
23 Property and when it developed plans to conduct casino-style gaming there. The
24 documents and testimony the Director seeks are relevant to his claims and defenses.

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26 ² Entry 8 is an exception. It refers to the “Special Council Meeting re
27 Chairwoman Saunders’ Response to District’s Position.” The Director argues that this
28 entry “appears to refer to the San Lucy District’s position on the Phoenix land acquisition
and whether to build a casino on that land.” Doc. 153 at 13. The entry description is
unclear. As a result, the Court will require the Nation to provide a copy of this document
or documents for *in camera* review.

1 **B. Legislative Privilege.**

2 The Nation bears the burden of showing that the requested evidence is privileged.
3 *See Tornay*, 840 F.2d at 1426. The Nation asserts that the evidence is protected by the
4 legislative privilege because it relates to closed sessions of the TON Council and the SLD
5 Council. Doc. 156.

6 **1. Does the Legislative Privilege Apply to Legislators Representing**
7 **Indian Tribes or Tribal Subdivisions?**

8 The Speech and Debate Clause of the United States Constitution provides that “for
9 any Speech or Debate in either House[, members of Congress] shall not be questioned in
10 any other Place.” U.S. Const., art. I, § 6, cl. 1. The Clause establishes a privilege that
11 protects members of Congress from being compelled to testify or produce evidence
12 regarding their legislative activities. *See Gravel v. United States*, 408 U.S. 606, 616
13 (1972); *United States v. Rayburn House Office Bldg., Room 2113, Washington, D.C.*
14 20515, 497 F.3d 654, 660 (D.C. Cir. 2007). From this privilege, courts have derived the
15 doctrine of federal legislative immunity, which shields members of Congress from civil
16 or criminal liability for their legislative acts. *Eastland v. U.S. Servicemen’s Fund*, 421
17 U.S. 491, 507 (1975). Courts have recognized analogous protections for state legislators
18 under federal common law. *See Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)
19 (recognizing state legislative immunity); *EEOC v. Wash. Suburban Sanitary Comm’n*,
20 631 F.3d 174, 181 (4th Cir. 2011) (recognizing state legislative privilege against
21 “compulsory evidentiary process”). Thus, state legislators, like members of Congress,
22 enjoy protection from criminal, civil, or evidentiary process that interferes with their
23 “legitimate legislative activity.” *See, e.g., Tenney*, 341 U.S. at 376.

24 Although there does not appear to be any case law addressing the question, the
25 Court concludes that the legislative privilege also applies to tribal legislative bodies. As
26 explained, the legislative privilege is a corollary to legislative immunity, and courts have
27 recognized that tribal legislators are protected by such immunity. *See Runs After v.*
28 *United States*, 766 F.2d 347, 354 (8th Cir. 1985) (“individual members of the Tribal

1 Council . . . enjoy absolute legislative immunity . . . for official actions taken when acting
2 in a legislative capacity”); *Grand Canyon Skywalk Dev., LLC v. Hualapai Indian Tribe of*
3 *Ariz.*, 966 F. Supp. 2d 876, 885-86 (D. Ariz. 2013) (“to the extent the complaint names
4 Tribal Council members for their role in passing the takings ordinance and resolution,
5 they have legislative immunity”). Moreover, the policy concerns animating the
6 legislative privilege – including the need to protect the integrity of the legislative process,
7 to safeguard legislators’ independence, and to exercise comity with respect to nonfederal
8 sovereigns (*Eastland*, 421 U.S. at 502) – apply with equal force whether the legislator
9 represents a state or a tribe. *Cf. Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024,
10 2041 (2014) (Sotomayor, J., concurring) (respect for tribal sovereignty requires according
11 tribes the same immunities as states).

12 The Court further concludes that at least some form of the legislative privilege
13 applies to legislators representing tribal subdivisions. Because tribal subdivisions are not
14 sovereign entities, the rationale for extending the legislative privilege to them is weaker
15 than the rationale for extending it to tribal legislators. But local governments are not
16 sovereign either, and courts nonetheless have held that “[l]ocal legislators are entitled to a
17 legislative privilege.” *Joseph’s House & Shelter, Inc. v. City of Troy, N.Y.*, 641 F. Supp.
18 2d 154, 158 (N.D.N.Y. 2009); *see Orange v. Cty. of Suffolk*, 855 F. Supp. 620, 623
19 (E.D.N.Y. 1994) (county legislator was entitled to legislative privilege); *cf. Bogan v.*
20 *Scott-Harris*, 523 U.S. 44, 49 (1998) (local legislators are entitled to absolute immunity).
21 Allowing tribal subdivision legislators to invoke the legislative privilege also serves
22 comity interests by preventing federal courts from inquiring unnecessarily into the
23 legislative activities of governmental units within tribes. And it protects the integrity of
24 the legislative process and safeguards legislative independence. Because application of
25 the legislative privilege to tribal subdivisions serves the same purposes as application of
26 the privilege to local non-tribal governments, the Court concludes that the SLD Council
27 may invoke the privilege in this case.

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2. Are the Documents Protected by Legislative Privilege?

The legislative privilege protects a legislator’s communications that “bear on potential legislation” – communications undertaken “in connection with or in aid of legislative acts.” *Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2016 WL 2587991, at *5 (D. Ariz. May 5, 2016) (citations and internal formatting omitted). But a communication is not protected by the legislative privilege simply because a legislator made or received it. The privilege applies only if the communication pertains to legislation, as opposed to executive or administrative action. *Cf. Gravel*, 408 U.S. at 625 (“Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies . . . but such conduct, though generally done, is not protected legislative activity.”); *Kaahumanu v. Cty. of Maui*, 315 F.3d 1215, 1224 (9th Cir. 2003) (for purposes of legislative immunity, “not all governmental acts by a local legislature are necessarily legislative in nature”). To determine whether an action is legislative, the Court considers four factors: “(1) whether the act involves ad hoc decisionmaking, or the formulation of policy; (2) whether the act applies to a few individuals, or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation.” *Kaahumanu*, 315 F.3d at 1220 (citations and internal quotation marks omitted).

In addressing these factors, the Court notes that seven of the eight documents at issue arise from proceedings of the SLD Council (Entries 1 and 3-8). Despite this fact, virtually all of the Nation’s arguments focus on the TON Council – its purposes, constitutional responsibilities, and legislation. To determine whether the legislative privilege applies to the SLD Council documents, however, the Court must focus on the SLD Council and its proceedings, not those of the TON Council. The Court therefore will address the relevant factors with respect to the two councils separately.

1 Considering these factors, the Court concludes that the Nation has not shown that
2 the relevant actions of the SLD Council were legislative in nature. As a result, the
3 legislative privilege does not protect the documents described in Entries 1 or 3-8 above.

4 **b. TON Council.**

5 Only Entry 2 relates to the TON Council. It consists of handwritten notes,
6 authored by a member of the Nation’s Commerce Committee on August 29, 2002,
7 regarding “TON legislative council session addressing the San Lucy District Land
8 Proposal.” Doc. 153 at 4. The Nation argues that this legislative session was related to
9 Resolution 375, enacted by the TON Council in 2003 to secure financing for “gaming
10 expansion opportunities,” and Resolution 49, enacted by the Council in 2009 to request
11 that the Department of the Interior take the Glendale Property into trust. *See* Resolution
12 No. 03-375 (Aug. 18, 2003), <http://tolc-nsn.org/docs/Actions03/03375.pdf>; Resolution
13 No. 09-049 (Jan. 27, 2009), <http://tolc-nsn.org/docs/Actions09/09049.pdf>.

14 For the reasons discussed above, the first two *Kaahumanu* factors suggest that
15 Entry 2 is not protected by the legislative privilege because it relates to a project that was
16 more ad hoc than general and focused on a single entity and property. The other two
17 *Kaahumanu* factors, however, may favor application of the legislative privilege. The
18 2003 and 2009 resolutions were formally legislative in character and bear hallmarks of
19 traditional legislation, and it may be that Entry 2 bears on these resolutions. The Court
20 concludes that it must review these notes *in camera* to determine whether they are in fact
21 entitled to protection under the legislative privilege.

22 If the Court determines that Entry 2 is protected by the legislative privilege, it will
23 not be discoverable if the privilege is absolute, but may be discoverable if the privilege is
24 qualified. The Court concludes that the legislative privilege, as applied to the TON
25 Council, is qualified. The Nation cites several cases for the proposition that legislative
26 immunity of non-federal legislators is absolute except in cases that seek to vindicate
27 federal law. Doc. 156 at 9-10. In fact, the Nation’s cases hold only that an interest in
28 vindicating federal law is sufficient to render the legislative privilege qualified, without

1 passing on whether such an interest is necessary for that purpose. *See United States v.*
2 *Gillock*, 445 U.S. 360, 373 (1980) (“although principles of comity command careful
3 consideration, our cases disclose that where important federal interests are at stake . . .
4 comity yields”); *In re Hubbard*, 803 F.3d 1298, 1313 (11th Cir. 2015) (“Because AEA
5 has not presented a cognizable First Amendment claim, there is no important federal
6 interest at stake in this case to justify intruding upon the lawmakers’ legislative
7 privileges.”) (citations and quotation marks omitted; alterations incorporated).

8 *Bethune-Hill v. Virginia State Board of Elections*, 114 F. Supp. 3d 323 (E.D. Va.
9 2015), the Nation’s principal case, is not to the contrary. The court explained that
10 whether the legislative privilege is absolute or qualified depends on “the nature of the
11 claim and the defendant.” *Id.* at 335. The court explained that legislators enjoy absolute
12 immunity in civil cases, and that absolute legislative privilege is applied in these cases to
13 effectuate the immunity. *Id.* at 334. But where the legislator is not named as a defendant
14 (and thus faces no threat of personal liability), “there is little to no threat to the ‘public
15 good’ of legislative independence” and “[t]he only interest advanced by the legislative
16 privilege . . . is the legislator’s interest in being free from the distraction of compulsory
17 process.” *Id.* at 335. Legislative immunity is appropriately qualified in these cases, at
18 least where a party seeks evidence that is relevant to the “adjudication of public rights
19 guaranteed by federal statutory law and the Constitution.” *Id.* at 337. The court had no
20 occasion to consider whether other interests might also render the privilege qualified.

21 Other cases suggest that the legislative privilege is qualified in cases seeking to
22 vindicate the public interest, whether or not that interest is one specifically protected by
23 federal law. *See In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987) (“*Gillock* instructs
24 us that any such privilege must be qualified, not absolute, and must therefore depend on a
25 balancing of the legitimate interests on both sides.”); *Comm. for a Fair & Balanced Map*
26 *v. Illinois State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct.
27 12, 2011) (“Under the federal common law, legislative privilege is qualified, not
28 absolute, and may be overcome by a showing of need.”); *Marylanders for Fair*

1 *Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 304 (D. Md. 1992) (Murnaghan &
2 Motz, JJ., concurring) (legislative privilege does not “prohibit judicial inquiry into
3 legislative motive where the challenged legislative action is alleged to have violated an
4 overriding, free-standing public policy”); *Kay v. City of Rancho Palos Verdes*, No. CV
5 02-03922 MMM RZ, 2003 WL 25294710, at *14 (C.D. Cal. Oct. 10, 2003) (“cases
6 applying a qualified privilege represent the better, and controlling, legal rule”).

7 The Court finds these cases persuasive. The legislative privilege as applied to
8 states and tribes is a common law creation founded upon the need to protect the integrity
9 of the legislative process, safeguard legislators’ independence, and exercise comity with
10 respect to nonfederal sovereigns. *Eastland*, 421 U.S. at 502. It is not a Constitutional
11 imperative like federal legislative immunity, and courts generally have found that it
12 should surrender when opposed by significant countervailing interests. Thus, if the Court
13 concludes that Entry 2 is subject to the legislative privilege, it will also consider whether
14 the Entry 2 documents should be produced under the qualified-privilege factors set forth
15 in *Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2016 WL 2587991, at *5 (D. Ariz.
16 May 5, 2016) (the relevance of the evidence sought to be protected, the availability of
17 other evidence, the seriousness of the litigation and the issues involved, the role of
18 government in the litigation, and the purposes of the privilege).

19 **3. Is the Contested Testimony Protected by Legislative Privilege?**

20 The Director argues that the Nation’s witnesses should not be allowed to invoke
21 the legislative privilege to avoid answering certain questions about the West Valley
22 Project. By and large, the Director intends to ask simple factual questions: when plans
23 were made to purchase the Glendale property, who was involved in the plans, why the
24 Nation sought to keep its purchase secret, and when plans were made to conduct casino-
25 style gaming on the Glendale property. The fact that the Director’s proposed questions
26 focus primarily on factual matters does not resolve the issue. *See Kay*, 2003 WL
27 25294710, at *11 (“Requiring testimony about communications that reflect objective
28 facts related to legislation subjects legislators to the same burden and inconvenience as

1 requiring them to testify about subjective motivations.”).

2 Because the Director has shown no legislative privilege attached to closed sessions
3 of the SLD Council, the Court concludes that the legislative privilege cannot be invoked
4 with respect to those sessions. The issue is not as clear with respect to the TON Council.
5 As noted above, the Nation has identified resolutions passed by the TON Council in 2003
6 and 2009 related to the West Valley Project. Because some of the TON Council’s work
7 related to the project appears to have been legislative in nature, the Court cannot
8 conclude that the privilege does not apply to entire categories of questions. Nor can it
9 conclude as a general matter that the qualified privilege is overcome. These issues must
10 be addressed on a question-by-question basis, something the parties do not attempt to do
11 in their briefing.

12 Thus, with respect to deposition questioning, the Court concludes that the Nation
13 has failed to show any legislative privilege applicable to closed sessions of the SLD
14 Council, and concludes that the Nation’s lawyers cannot invoke the privilege on
15 questions related to SLD Council sessions. The Court declines to enter such a ruling with
16 respect to sessions of the TON Council.

17 **C. Deliberative Process and Attorney-Client Privileges.**

18 In his motion to dismiss, the Director argues that the deliberative process privilege
19 does not apply because the Nation has failed to establish that any of the communications
20 at issue were pre-decisional and deliberative. Doc. 153 at 6-7, 9. The Nation, which has
21 the burden of establishing privileges in this case, does not respond. The Nation focuses
22 all of its attention on the legislative privilege. The Nation thus fails to carry its burden of
23 showing that the deliberative process privilege applies, and the Court will not permit
24 withholding of the documents on the basis of this privilege.³

25
26 ³ The Nation makes two passing references to the deliberative process privilege in
27 its response to Defendant’s motion. The first mentions the privilege in addressing the
28 factors to be considered when deciding whether the legislative privilege, if qualified, has
been overcome. Doc. 156 at 11 n.2. The second mentions the privilege only in
discussing the requirements for the legislative privilege. *Id.* at 16 & n.4. Nowhere does
the Nation show that the documents and testimony at issue are protected by the
deliberative process privilege.

1 The San Lucy District’s privilege log also asserts the attorney-client privilege with
2 respect to one document (Doc. 153-2 at 2), but the Nation makes no attempt to establish
3 this privilege in response to the motion to compel. The Nation instead asserts that the
4 resolution of that issue will be moot if the Court finds that an absolute legislative
5 privilege applies. Doc. 153 at 19. This response is not sufficient. The Director seeks to
6 compel production of this document, has shown its relevancy, and the Nation bears the
7 burden of showing that the attorney-client privilege applies. The Nation has not done so.
8 The Court therefore will not permit the withholding of any of the documents at issue on
9 the basis of the attorney-client privilege.⁴

10 **D. Ancillary Issues.**

11 The parties discuss two ancillary issues in their briefs. The first is whether the
12 Nation can compel the San Lucy District to produce documents in its possession. The
13 parties agree that this issue is moot in light of the District’s decision to cooperate in
14 document production. *See id.* (this is “a nonissue”); *see* Doc. 158 at 9 (in light of
15 District’s decision to cooperate, there is “no dispute”). The second issue concerns Entry
16 8. The Nation notes that the San Lucy District withheld this document as nonresponsive
17 to the Court’s December 16, 2011 order in one of the prior cases. The Nation concedes
18 that this order is not binding here, but argues that the Court should apply the same limit
19 on discovery that it previously applied. The Court will consider this issue when it
20 examines Entry 8 *in camera*. *See supra* n.2.

21 **IT IS ORDERED:**

- 22 1. The motion to compel (Doc. 153) is **granted** with respect to Entries 1 and
23 3-7, and deposition objections based on a legislative privilege for the SLD
24 Council. The Nation shall produce the documents in Entries 1 and 3-7 to
25 the Director within five days of this order.

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28 ⁴ The Nation also asserts in passing that many other communications at issue are
also protected by the attorney-client privilege, but makes no effort to show why.
Doc. 156 at 16 n.4.

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2. Within three days of this order, the Nation shall produce to the Court, for *in camera* inspection, the documents described in Entries 2 and 8. Doc. 153 at 4.

Dated this 21st day of June, 2016.



David G. Campbell
United States District Judge