

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Libertarian Party of New Hampshire, *

*

Plaintiff *

vs. *

*

Civil Case No. 1:14-cv-00322 - PB

**William Gardner, Secretary of State of
the State of New Hampshire** *

*

In his official capacity, *

*

Defendant *

DEFENDANT’S EXPEDITED MOTION FOR A PROTECTIVE ORDER

Defendant, William Gardner, Secretary of State of the State of New Hampshire, by and through counsel, the New Hampshire Department of Justice (“DOJ”), hereby moves pursuant to F. R. Civ. P. 26(c) for a protective order preventing Plaintiff from taking his deposition. In support of this motion, Defendant states the following.

1. On March 20, 2015, Plaintiff Libertarian Party of New Hampshire gave notice to Defendant’s counsel that Plaintiff intended to take the deposition of William M. Gardner, Secretary of State, on **March 30, 2015 at 1:00 p.m.** See Exhibit A. Plaintiff also gave notice that it intended to take the deposition of David M. Scanlan, Deputy Secretary of State, on April 1, 2015 at 1:00 p.m. See Exhibit B.

2. Defendant does not object to Plaintiff taking the deposition of Deputy Secretary of State David Scanlan. Defendant does, however, object to Plaintiff taking the deposition of Secretary of State William Gardner, and moves for a protective order on the grounds that the Secretary is a high ranking government official and Plaintiff has not demonstrated a need to depose him.

3. This court is empowered by Fed. R. Civ. P. 26(c) to grant a protective order from discovery for “good cause shown.” *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007). Here, for the reasons discussed below, good cause exists to issue a protective order preventing Plaintiff from deposing Secretary of State William Gardner.

4. “The need for limited access to high government officials through the discovery process is well established.” *Id.* Relying on *United States v. Morgan*, 313 U.S. 409, 422 (1941), courts have concluded that “top executive department officials should not, absent extraordinary circumstances, be called to testify or deposed regarding their reasons for taking official action.” *Id.* (citing *Simplex Time Recorder Co. v. Sec’y of Labor*, 247 U.S. App. D.C. 85, 766 F.2d 575, 586 (D.C. Cir. 1985); *In re United States (Holder)*, 197 F.3d 310, 313 (8th Cir. 1999); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995); *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993)). “This rule is based on the notion that ‘[h]igh ranking government officials have greater duties and time constraints than other witnesses’ and that, without appropriate limitations, such officials will spend an inordinate amount of time tending to pending litigation.” *Id.* (quoting *Kessler*, 985 F.2d at 512). This rule, however, is not absolute. *Id.* A high ranking official may still be deposed if (1) he has first-hand knowledge related to the claim being litigated, and (2) the necessary information may not be obtained from other sources. *Id.*

5. As the Secretary of State of the State of New Hampshire, William Gardner “is a high ranking government official and therefore is not subject to being deposed absent a demonstrated need.” *Id.* The burden is on Plaintiff to establish sufficient need to warrant discovery directly from the Secretary of State. *See id.*

6. The claim being litigated in this case is the constitutionality of a statute, namely RSA 655:40-a. Plaintiff has not identified any necessary information that Secretary Gardner has

which cannot be obtained from other sources. The only reasons Plaintiff has given for needing to depose Secretary Gardner are (1) that he is the putative signatory of Defendant's response to Plaintiff's Interrogatories; (2) that the State disclosed Secretary Gardner as a possible fact and/or expert witness; and (3) that Secretary Gardner has been deposed in other cases. *See* Exhibit C (email chain between Plaintiff's counsel and Defendant's counsel regarding Plaintiff's request to depose Secretary Gardner).

7. First, while Plaintiff specifically directed its interrogatories to Secretary Gardner as the defendant in this action, Deputy Secretary of State David Scanlan assisted in answering every interrogatory. Defendant has confirmed the deposition of Deputy Secretary Scanlan, who can testify as to any of the issues raised in the interrogatories. *See* Exhibit C. Plaintiff has not identified a single piece of information that it believes Secretary Gardner has which cannot be obtained through Deputy Secretary Scanlan. *Id.* Plaintiff's assertion that "the Secretary of State's Office was the moving force behind the law," is insufficient to meet Plaintiff's burden of demonstrating that Secretary Gardner himself has first-hand knowledge related to the claim being litigated, and that any such necessary information may not be obtained from other sources. *See Bogan*, 489 F.3d at 423. This is a challenge to the constitutionality of a statute, and the legislative history speaks for itself.

8. Second, Plaintiff asserts that it must be allowed to depose Secretary Gardner because he was disclosed as a possible fact or expert witness in an email sent by Defendant's counsel on March 16, 2015. *See* Exhibit D. Defendant's counsel sent this email on the date of Defendant's expert disclosure deadline out of an abundance of caution in the event that this matter went to trial, that either Secretary Gardner or Deputy Secretary Scanlan was called to testify, and that Plaintiff challenged either of their testimonies as encompassing expert opinions.

Subsequent to the March 16, 2015 email, however, Defendant's counsel made clear that Secretary Gardner will not be used as either a fact or expert witness in this case. *See* Exhibit C. Defendant understands that by limiting Plaintiff's ability to depose Secretary Gardner, Defendant also limits his own ability to testify in this matter.

9. Finally, the fact that Secretary Gardner has been deposed in other cases does not entitle Plaintiff to depose him in this matter. That is precisely the reason courts limit access to high government officials through the discovery process. *See Bogan*, 489 F.3d at 423 (citations and quotations omitted) ("High ranking government officials have greater duties and time constraints than other witnesses and that, without appropriate limitations, such officials will spend an inordinate amount of time tending to pending litigation."). The fact that Secretary Gardner has been deposed in other matters does not mean he must submit to a deposition in this instance.

10. In summary, Plaintiff has not identified any information that Secretary Gardner has that Plaintiff cannot obtain through Deputy Secretary Scanlon, and Defendant has made it clear that Secretary Gardner will not be used as either a fact witness or expert witness in this matter.

11. Counsel for Defendant has in good faith conferred with counsel for Plaintiff in an effort to resolve this dispute without court action, but has been unsuccessful. F. R. Civ. P. 26(c).

12. Plaintiff does not assent to the relief requested herein. LR 7.1(c).

13. No memorandum of law is required as the relevant authority is cited herein. LR 7.1(a)(2).

WHEREFORE, Defendant respectfully requests that this Honorable Court:

- A. Issue a protective order preventing Plaintiff from deposing Secretary of State

William Gardner;

- B. Schedule this matter for an expedited hearing if appropriate; and

- C. Grant such other and further relief as justice may require.

Respectfully submitted,

WILLIAM M. GARDNER, SECRETARY OF
STATE OF THE STATE OF NEW HAMPSHIRE,
IN HIS OFFICIAL CAPACITY

By his attorneys,

JOSEPH A. FOSTER
ATTORNEY GENERAL

March 25, 2015

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Certificate of Service

I hereby certify that a copy of the foregoing document was filed this day electronically and served electronically by operation of the Court's electronic filing system.

March 25, 2015

/s/ Laura E. B. Lombardi
Laura E. B. Lombardi (# 12821)