UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,

Plaintiff,

v.

LILLIAN MILLS, *et al.* ,

Defendants.

Case No. 1:23-cv-00129-DAE

PLAINTIFF'S MOTION TO COMPEL RE UT'S PRIVILEGE LOG

RULE CV-7(G) STATEMENT

Plaintiff conferred with counsel for Defendants on December 14, 2023, who indicated that this motion to compel would be opposed.

INTRODUCTION

UT, and its lawyers, have repeatedly attempted to conceal President Jay Hartzell's involvement in the effort to silence Plaintiff Richard Lowery. When Lowery previously asked this Court to allow him to depose Hartzell, Lowery asserted that UT was hiding something. UT's representatives feigned indignation. But now we know that they are in fact hiding something.

One of Lowery's theories of his case is that Hartzell asked underlings to silence Lowery because the president was offended that Lowery had publicly criticized Hartzell, including opining that Hartzell's job is to be good at lying to Republicans. Defendants successfully resisted Lowery's request to take an early deposition of Hartzell. On April 17, 2023, Defendants Mills and Burris also testified, under oath, in written deposition answers, that they had exchanged *no text messages* with Hartzell about Lowery during the summer of 2022.

But on December 8, 2023, Defendants finally produced their privilege log, revealing for the first time that *Hartzell actually had texted* Defendants Mills and Burris about Lowery on August 5, 2022, a mere week before Mills and Burris began pressuring Carlos Carvalho to help them bring Lowery to heel. This is a potentially critical communication—the content of which UT is now trying to conceal. Defendant's privilege log also omits required information about the subject matter of other documents withheld as privileged.

Likewise, in response to Lowery's interrogatories seeking to ascertain whether President Hartzell had oral conversations about Lowery in the summer of 2022, UT made a blanket assertion of attorney-client privilege and refused to provide details

about those conversations that would enable assessment of that assertion, including dates, media, participants, and general subject-matter of the communications. And Mills and Burris have now changed their deposition answer to the text message question, adding the assertion of privilege.

Lowery now moves to compel production of Hartzell's August 5th text message and other communications listed on Defendants' log, or in the alternative, for in camera review of those documents. Lowery also requests that Defendants submit revised interrogatory answers providing customary details about any oral conversations Jay Hartzell had about Lowery in the summer of 2022, including allegedly privileged conversations.

FACTS

The facts of this case are by now known to this Court, but to summarize, UT Professor Richard Lowery has for some time publicly criticized the ideological direction of the university and its president, Jay Hartzell. ECF No. 1. Lowery asserts that beginning in August 2022, the defendant UT officials engaged in illegal efforts to pressure Lowery to stop criticizing UT and President Hartzell, causing him to self-censor. *Id.* On February 8, 2023, Lowery sued in defense of his First Amendment rights. *Id.*

In accordance with his theory of Hartzell's involvement, Lowery moved for early discovery, including for a short deposition of Hartzell. ECF No. 16, 24-1. Defendants resisted early discovery, but on April 5, 2023, Magistrate Judge Howell ordered named parties—and only named parties—on both sides to respond to depositions of up to ten written questions (DWQ). ECF Nos. 29, 39.

On April 17, 2023, Defendants submitted their DWQ answers, which included the following answers:

> **DEPOSITION QUESTION NO. 9.** During the time period from June 30, 2022 through November 1, 2022, did you ever exchange text messages with Jay Hartzell concerning Richard Lowery?
>
> **ANSWER**: No.

ECF Nos. 31-2 at 8, 31-3 at 4.

Lowery next moved to compel supplemental expedited discovery (ECF No. 31), and UT cross-moved for a stay of the Rule 26(f) conference requirement (ECF. No. 30). One of the bases for Lowery's second motion was that Mills's and Burris's DWQ answers asserted a blanket privilege on communications with the UT legal counsel's office about Lowery, without providing a privilege log or the equivalent. *Id.* at 7-9.

On August 9, 2023, this Court granted UT's stay request and denied Lowery's motion to compel, without prejudice. ECF No. 44. After this Court ruled on the parties' substantive cross motions (ECF No. 51), regular discovery commenced.

Lowery promulgated interrogatories and requests for production that sought information about Hartzell's communications and his (and other UT administrators') consultations concerning Lowery's speech. Kolde Dec. ¶¶ 2-3, Exs. A at 5 & B at 8 (Interrogatories Nos. 2 and 7).

On October 30, 2023, Defendants responded with objections. Kolde Dec. ¶¶ 4-6, Exs. C and D. In response to the interrogatory about Hartzell's consultations on how to respond to Lowery's speech (Int. No. 2), Defendants asserted a blanket privilege, answering "Subject to the objections and without disclosing any privileged

information/discussions, Defendants respond as follows: President Jay Hartzell: None. Nancy Brazzil: None." Kolde Dec., Ex. C. Defendants again did not list any privileged conversations.

In responses to the interrogatory about Jay Hartzell's conversation about Richard Lowery's speech (Int. No. 7), Defendants asserted a blanket privilege objection, answering "Subject to these objections and without disclosing any privileged information, Defendants respond as follows…" and then listed two non-privileged communications, one with Sheridan Titman and the other with a prominent UT donor and former regent. Kolde Dec., Ex. D. Defendants again did not list any privileged conversations.

On December 8, 2023, Defendants produced their privilege log, listing eight withheld documents. Kolde Dec. ¶¶ 7-8, Ex. E at 3-4. The log, for the first time, disclosed the existence of a text communication initiated by Jay Hartzell on August 5, 2022 and sent to defendant Mills, defendant Burris, Hartzell's deputy Nancy Brazzil, and VP for Legal Affairs Amanda Cochran-McCall. *Id.* at 4:

7.	PRIV-UT-LOWERY-000012	PRIV-UT-LOWERY-000013	8/5/22	• Jay Hartzell	• Lillian Mills • Amanda Cochran-McCall • Nancy Brazzil • Ethan Burris		Text	Correspondence with counsel regarding media coverage of new institute.	Attorney Client

Defendants' log also listed an August 12, 2022 email and attachment from a university-communications administrator, Mike Rosen, to Hartzell and Mills, that was copied to seven other people. *Id.* at 4-5. Both documents were described as "talking points for syllabus inquiries." *Id.* On August 11, 2022, Lowery had been quoted in a College Fix article about UT's new syllabus requirements entitled

"Business school professors advised to warn students about possible curriculum-induced trauma," which generated inquiries from donors. ECF No. 31-2 at 5. UT's log also lists six November 8, 2021, documents described as "Email with counsel containing legal advice related to confidential communications." Ex. E at 3-4.

On the same date Defendants disclosed their log, Mills and Burris also amended their earlier DWQ answers concerning texting with Jay Hartzell about Lowery, changing their prior, unequivocal "no" to instead assert a blanket objection: "Defendant is instructed not to answer on the basis of attorney-client privilege. Subject to and without waiving that instruction, no." Kolde Dec. ¶¶ 11-12, Exs. F, G.

The parties counsel conferred by phone on December 14, 2023, but were unable to resolve their disagreement about UT's limited production. Kolde Dec. ¶ 13. Depositions of Titman, Burris, and Mills are currently set for January 12, 17, and 29, respectively. *Id.*

ARGUMENT

I. HARTZELL'S TEXT ABOUT LOWERY AND MIKE ROSEN'S PUBLIC RELATIONS TALKING POINTS ARE NON-PRIVILEGED BUSINESS COMMUNICATIONS

UT cannot hide relevant business and public-relations communications from discovery just because a lawyer was part of the communication. Parties asserting the privilege must "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." FED. R. CIV. P. 26(b)(5)(A). Attorney-client privilege "is interpreted narrowly so as to apply only where necessary to achieve its purpose,"

and any "ambiguities as to whether the elements of a privilege claim have been met are construed against the proponent." *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017) (cleaned up).

Accordingly, privilege logs must describe each communication with "sufficient information to permit courts and other parties to test the merits of the privilege claim" by setting forth "specific facts that, if credited, would suffice to establish *each element* of the privilege or immunity that is claimed." *Id.* at 697 (cleaned up) (emphasis added). That is, the log entry for each withheld document must state specific non-conclusory facts showing that it was a confidential communication to a lawyer for the primary purpose of legal advice. *See Taylor Lohmeyer Law Firm P.L.L.C. v. United States*, 957 F.3d 505, 510 (5th Cir. 2020).

"[B]ecause in-house counsel has an increased level of participation in the day-to-day operations of the corporation," communications with in-house counsel are privileged only when "made for the purpose of giving or obtaining legal advice or services, not business or technical advice or management decisions." *Stoffels v. SBC Communs., Inc.*, 263 F.R.D. 406, 411 (W.D. Tex. 2009) (citations omitted). "The critical inquiry is, therefore, whether any particular communication facilitated the rendition of predominantly legal advice or services to the client." *Id.* (citations omitted). "When a corporation simultaneously sends communications to both lawyers and non-lawyers," as in Lowery's case, the corporation "usually cannot claim that the primary purpose of the communication was for legal advice or

assistance because the communication served both business and legal purposes." *Slocum v. Int'l Paper Co.*, 549 F. Supp. 3d 519, 524 (E.D. La. 2021) (cleaned up).

Courts must "differentiate between in-house counsel's legal and business work." *Muller v. Bonefish Grill*, No. 20-1059, 2021 U.S. Dist. LEXIS 249158, at *7 (E.D. La. Apr. 13, 2021). If "in-house counsel merely participated in a decision regarding public relations" by being copied on or replying to an email, "the documents do not satisfy the requirements for attorney-client privilege." *Slocum*, 549 F. Supp. 3d at 525; *see also BDO*, 876 F.3d at 696 ("where there is a mixed discussion of business and legal advice," the proponent must establish that "the manifest purpose" was legal). Similarly, outside the litigation context, public relations advice is not ordinarily privileged. *See Ictech-Bendeck v. Waste Connections Bayou, Inc.,* No. 18-7889, 2023 U.S. Dist. LEXIS 92390, at *44-45 (E.D. La. May 26, 2023); *In re Riddell Concussion Reduction Litig.*, No. 13-7585 (JBS/JS), 2016 U.S. Dist. LEXIS 168457, at *19, *24-26 (D.N.J. Dec. 5, 2016) (standard PR, messaging is not legal advice).

The Hartzell text and Rosen talking points bear the indicia of business communications. None of them originated with a lawyer, and they present as texts or emails concerning fundraising and public relations sent to a group that included one attorney. Ex. E at 4-5.

UT's log describes Hartzell's text as "regarding media coverage of new institute." Its log description does not suggest that the primary purpose of President Hartzell's text was securing legal advice. Indeed, both the description and context reveal that the text's primary purpose was counteracting the public relations fiasco brought by

Lowery's media criticisms of Civitas: the new UT institute that Lowery repeatedly opined was used to hijack the Liberty Institute project. ECF No. 8-1, ¶¶ 21-28. If some portion of the text specifically sought or conveyed legal advice, it can be redacted, but Hartzell's text should not presumptively be withheld in its entirety.

Defendant Mills's DWQ answers also describe her efforts to respond to donor inquiries about UT's syllabus requirements, a controversy triggered by Lowery's public speech *See* ECF No. 31-2 at 3-7. Rosen's email and attachment are described as "talking points for syllabus inquiries" and appear to consist of widely circulated public relations advice seeking to help UT employees respond to donors angered by the article quoting Lowery. Kolde Dec. ¶ 10, Ex. F ("Any additional specific talking points for donors outside of what we already have from last week? . . . If not, we'll recommend use of what's in place already."). If the talking points reflect any specifically identifiable legal advice, it can be redacted, but the talking points should not be withheld. *See Ictech-Bendeck*, 2023 U.S. Dist. LEXIS 92390, at *44-51 (delineating, after in camera review, which documents must be produced in full and which with redactions).

This Court should require Defendants to turn over these communications in full or—in the alternative—examine them in camera to determine if they are mixed legal and business communications where some discrete portion must be redacted prior to their delivery to Plaintiff. *Cf. In re Riddell,* 2016 U.S. Dist. LEXIS 168457, at *1-2, *10-12 (conducting in camera review to resolve status of allegedly privileged communications mixing business and legal advice).

II. THE REMAINING COMMUNICATIONS ON DEFENDANTS' LOG REQUIRE ADDITIONAL DETAIL TO ENABLE LOWERY TO ASSESS THE CLAIM OF PRIVILEGE

UT privilege log's description of the six November 8, 2021, emails (documents 1-6) as "email[s] with counsel containing legal advice related to confidential communications," Ex. E at 3-4, is wholly conclusory. *See BDO*, 876 F.3d at 696-97 ("Calling the lawyer's advice 'legal' does not help in reaching a conclusion; it is the conclusion.") (cleaned up).

Defendants' privilege log did not disclose email subject lines or subject matter which is customarily sourced from metadata and was included on Plaintiff's logs. Kolde Declaration, ¶ 9. From the information on UT's log, Plaintiff knows almost nothing about these six emails, other than that in-counsel was a sender or a recipient. This Court should compel UT to supplement its log with facts sufficient to meet its burden.

III. UT'S ANSWERS TO TWO INTERROGATORIES LACKS SUFFICIENT INFORMATION TO ESTABLISH A CLAIM OF PRIVILEGE FOR ORAL COMMUNICATIONS

This Court should also order UT to supplement its answers to two interrogatories (Nos. 2 and 7), so Lowery can assess if the withheld conversations were privileged or work product and if an undue burden overcomes work product protection. *See* FED. R. CIV. P. 26(b)(3)(A)(ii).

Interrogatories must be answered "fully in writing under oath," and "[t]he grounds for objecting to an interrogatory must be stated with specificity." FED. R. CIV. P. 33(b)(3)-(4). Parties must provide non-conclusory information demonstrating that privilege or work product applies. *See, e.g.*, *Civic Ctr. Site Dev., LLC v. Certain Underwriters at Lloyd's London*, 2023 U.S. Dist. LEXIS 163005, at *17-18 (E.D. La.

Sept. 14, 2023); *Harrington v. State*, No. 5:20-cv-4081-HLT-KGG, 2021 U.S. Dist. LEXIS 226513, at *20, *26 (D. Kan. Nov. 24, 2021); *Cole v. Collier*, No. 4:14-CV-1698, 2020 U.S. Dist. LEXIS 94320, at *11-12 (S.D. Tex. May 28, 2020). "Even if defendant is correct that the *substance* of the communications is privileged in some cases, he has no right to decline to *identify* the privileged communications," as UT has. *Blumenthal v. Drudge*, 186 F.R.D. 236, 242-43 (D.D.C. 1999).

This Court, therefore, should command UT to either supplement its answers to Interrogatories No. 2 and 7 with the requested information or update its privilege log to include entries on withheld conversations, so that Lowery can determine if any responsive conversations even occurred, let alone if they are privileged.

CONCLUSION

The Court should compel UT to provide Lowery with Hartzell's newly disclosed text to Mills and Burris and with Rosen's syllabus talking points and should also require UT to supplement both the other entries on its privilege log and its answers to Interrogatories No. 2 and 7, so that Lowery and this Court can assess those claims of privilege and work product doctrine. In the alternative, the Court should conduct an in camera review of the withheld documents and order appropriate redactions, if they contain actual legal advice or requests for legal advice.

Respectfully submitted,

Dated: December 14, 2023

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