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

RICHARD LOWERY *Plaintiff,* v. LILLIAN MILLS, in her official capacity as Dean of the McCombs School of Business at the University of Texas at Austin; ETHAN BURRIS, in his official capacity as Senior Associate Dean for Academic Affairs of the McCombs School of Business at the University of Texas-Austin; and CLEMENS SIALM, in his official capacity as Finance Department Chair for the McCombs School of Business at the University of Texas-Austin *Defendants.*	§	CIVIL ACTION NO. 1:23-cv-00129-LY

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO COMPEL RE DEFENDANTS' PRIVILEGE LOG

Defendants Lillian Mills, Ethan Burris and Clemens Sialm (collectively, "Defendants") respond to Plaintiff Richard Lowery's ("Plaintiff") Motion to Compel re Defendants' Privilege Log (Dkt. 60).

Introduction

This dispute involves privileged communications between Defendants and UT's General Counsel. As UT's General Counsel explains in her attached declaration, and Defendants' Amended Privilege Log confirms, each communication contained her legal advice. In one case, the document is a set of talking points she drafted for the purpose of providing legal advice about UT policies on syllabi. In the other case, the text chain included the General Counsel; the participants discussed her

legal advice related to Professor Lowery and the First Amendment, and they sought additional advice regarding then-recent developments in media coverage induced by Lowery. Lowery is simply wrong to claim that such communications are not privileged based on his perception that they appear to be business or public relations advice.

Lowery then raises two smaller issues. First, Lowery's complaint about Defendants' privilege log is reducible to a fight over whether subject lines are required for a privilege log. Lowery's lawyer attests that, in *his* experience, they are. But the text of Rule 26(b) says nothing about subject lines, and Lowery cites no precedent supporting his position. Second, Lowery complains that interrogatory responses do not reveal who asked for legal advice. But the Fifth Circuit has recognized that disclosing who asked for legal advice may in effect disclose confidential and privileged information, so that such information is often protected. Still, to the extent that information is revealed by the privilege log, Defendants will amend their interrogatory responses to reflect that information.

Lowery's motion to compel on all these items is also premature. Had Lowery waited more than an hour after the meet-and-confer with Defendants' counsel before filing that motion, Defendants' counsel could have consulted with their clients and potentially resolved some of these issues. Nonetheless, Defendants have taken extra steps in an effort to resolve these discovery issues.

Background

Lowery sued Defendants because of non-existent retaliation and self-inflicted chilling of his speech (i.e. making his X account private). *See* Dkt. 51 at 6-7 (describing claims); *id.* at 24, 26 (dismissing retaliation claim for failure to state a claim because insufficient allegations to support retaliation). After he sued, Lowery also moved for a preliminary injunction.[1] *See generally* Dkt. 8.

[1] As part of this accelerated preliminary injunction process, the Court ordered depositions on written questions one of which was whether Defendants ever texted Jay Hartzell about Richard Lowery. After an initial search, the Defendants found none. It was not until after using a method that searched archived texts that do not show up with a simple search that Defendants found the text

Ultimately, the Court denied a preliminary injunction and dismissed Lowery's retaliation claim. *See* Dkt. 51 at 26, 28. The parties moved on to discovery.

After each side served discovery and responded with objections, the parties met and conferred on December 14. Defendants' counsel and Lowery's counsel disagreed regarding several discovery issues. Despite the disagreement, Defendants' counsel wanted to reassess after discussing the issues with their clients, and asked for a week to do so.

Instead, of giving Defendants' counsel an opportunity to discuss (and potentially resolve) these issues, Lowery filed his motion to compel about an hour after the meet-and-confer ended. Nonetheless, Defendants have served an amended privilege log with more detail about the contents of the communications, including for the emails from November 8, 2021. And they are willing to amend their interrogatory responses to cover the same information provided in the privilege log.

Argument

I. Defendants' privilege log was sufficient, but they have mooted the issue by providing more detail.

Lowery demands Defendants include "email subject lines" in their privilege log. The only support for requiring email subject lines is the declaration of Lowery's counsel, which in turn merely cites his "experience that those logs typically include the subject line." Dkt. 60-1 (Kolde Decl.) ¶ 9. But nothing in Rule 26(b)(5)(A)(ii) requires email subject lines if the privilege log "describe[s] the nature of the documents" so that other parties may "assess the claim."

To assess a claim for attorney-client privilege, need only know if the communication is (1) confidential; (2) to a lawyer or her subordinate; and (3) for the primary purpose of securing a legal opinion. *E.E.O.C. v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017).

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message at issue. After a search that incorporates archived data, one of the Defendants' archives contained the text now highlighted on the privilege log. This effectively answers the DWQ, but Defendants are happy to amend the DWQ with the information in the privilege log.

Here the November 8, 2021 emails are (1) private emails; (2) to counsel, either Jim Davis and later Amanda Cochran-McCall; that (3) sought "legal advice related to confidential communications." *See* Dkt. 60-6 (Original Privilege Log) at 3–4. Revealing much more would risk destroying the privilege by revealing the content, but Defendants have fleshed out the description in their Amended Privilege Log to resolve the matter. As revised, the log now explains that the advice was about the scope of and exceptions to public information laws: a quintessentially legal topic. *See* Ex. A (Amended Privilege Log). This additional information provides further confirmation that the communications were legal advice. Lowery's request to require Defendants to supplement the privilege log should be denied.

II. Legal advice from a university's legal counsel or a client within the university asking for advice is protected by the attorney client privilege.

Lowery recites the uncontroversial principle that merely copying a lawyer does not make a communication privileged. *See* Dkt. 60 at 6–7. But that principle does not apply when the communication is "generated for the purpose of obtaining or providing legal assistance." *BDO USA*, 876 F.3d at 696 (quote omitted). Indeed, "the paradigm examples of privileged statements are private client-to-lawyer communications, [but] '[t]he privilege also protects communications from the lawyer to his client, at least if they would tend to disclose the client's confidential communications.'" *League of United Latin Am. Citizens v. Abbott*, 342 F.R.D. 227, 232 (W.D. Tex. 2022) (quoting *Hodges, Grant & Kaufmann v. IRS*, 768 F.2d 719, 721 (5th Cir. 1985)).

There are three documents at issue. The first is a series of texts; the second and third are an email and its respective attachment.

Here, the text thread in the privilege log involved President Hartzell, Dean Mills, Senior Associate Dean Burris, and UT's General Counsel Amanda Cochran-McCall discussing Cochran-McCall's prior legal advice related to Professor Lowery and the First Amendment's requirements, and Dean Mills sought additional legal advice regarding then-recent developments in media coverage induced by Lowery. *See* Ex. A (Amended Privilege Log); Ex. B (McCall Decl.) ¶ 6. This presents

enough information for Lowery to assess the elements of the privilege, and any further information would reveal the content of the General Counsel's advice and the request for additional advice. All three elements of the attorney-client privilege are met for the texts.

The "talking points" email is privileged for similar reasons. The first two elements of the privilege are clearly met; the email and the attachment were exchanged within a small group of officials whom the General Counsel was advising, and the General Counsel is a lawyer. *See* Ex. B (McCall Decl.) ¶¶ 4, 7. Lowery disputes only whether the General Counsel was acting a lawyer or a public relations advisor. *See* Dkt. 60 at 6–7. Despite the description as talking points, they contain the advice of counsel Amanda Cochran-McCall about syllabus content. Ex. B (McCall Decl.) ¶ 7. The content of university syllabi is a sensitive topic on which legal advice is often requested. *See, e.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 506–07 (6th Cir. 2021) (Thapar, J.) (analyzing a professor's free-speech claim about syllabus content).

Statements and positions that university officials make about these policies could affect how courts analyze these policies. *See generally, e.g.*, *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020). Moreover, this lawsuit shows the legal import of carefully crafted statements, as Lowery's own lawsuit seizes on manipulating Defendants' words. *See, e.g.*, Dkt. 1 at 16. "[I]t is no surprise that [UT officials] would seek advice from [their] attorney on how" to navigate this area. *Exxon Mobil Corp.*, 751 F.3d 379, 382 (5th Cir. 2014). The context "strongly suggests that [UT officials] w[ere] approach[ing] [their] in-house counsel for just the sort of lawyerly thing one would expect of an in-house lawyer" at a university. *See id.*

Revealing any of these documents will disclose communications from clients to their counsel either directly, or by the answer revealing the precise nature of the question. This is exactly what the attorney-client privilege prevents. *See, e.g., Abbott*, 342 F.R.D. at 232. The Court should deny Lowery's demand that Defendants turn over these items on the privilege log.

In camera review is also unnecessary here. *In camera* review is only necessary when "th[e] evidence may be presented only by revealing the very information sought to be protected by the privilege[.]" *Slaven v. Great Am. Ins. Co.*, 83 F. Supp. 3d 789, 801 (N.D. Ill. 2015). "In fact, resort to an in camera review is appropriate only after the burdened party has submitted detailed affidavits and other evidence to the extent possible." *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 474 (N.D. Tex. 2004). Here the Privilege Logs and Declaration of General Counsel Cochran-McCall are enough to determine the privilege. If the Court disagrees, however, then Defendants will produce the items to the Court for its review. In any event, the Court should conduct an *in camera* review before ordering any disclosure. *See In re BankAmerica Corp. Secs. Litig.*, 270 F.3d 639, 644 (8th Cir. 2001) ("[D]istrict courts should be highly reluctant to order disclosure without conducting an in camera review of allegedly privileged materials.").

III. Fifth Circuit precedent protects the identity of who seeks advice when that disclosure would allow the other side to obtain information given to the attorney as part of the confidential communication.

Lowery demands to know every time Defendants have talked with President Hartzell about Richard Lowery. *See, e.g.*, Dkt. 60 at 9–10, 60-5 at 3. That broad inquiry could invade the attorney-client privilege because it could reveal a confidential purpose for which an attorney, co-defendant, and client might meet and discuss.

Indeed, the Fifth Circuit has recognized "[i]f the disclosure of the client's identity will also reveal the confidential purpose for which he consulted an attorney, we protect both the confidential communication and the client's identity as privileged." *In re Grand Jury Subpoena for Att'y Representing Crim. Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991). By expressing with whom and when Defendants spoke and when it coincided with President Hartzell, Defendants could be revealing the purpose of communications, effectively disclosing their content. "In such circumstances, [courts] protect the anonymous client's identity not because it may incriminate the client but because disclosure

would allow the [other part] to obtain information given to the attorney as part of a confidential communication." *Reyes-Requena*, 926 F.2d at 1432. As the Fifth Circuit's discussion reveals elsewhere shows, this is not a criminal-specific rule. *Id.* at 1431. ("For example, a client may wish to consult an attorney concerning adopting a child but not wish the matter to be made public. Such an individual normally will reveal the nature of his problem as well as his identity, and reasonably expects both to remain confidential.").

Here, Defendants recognize the practical reality of the privilege log. For that reason, they are willing to amend their interrogatory answers to supplement with the information contained in the privilege log to include the conversation on August 5, 2022.

Respectfully submitted,

JACKSON WALKER LLP

By: */s/Matt Dow*

Charles L. Babcock
Texas State Bar No. 01479500
cbabcock@jw.com
Joel R. Glover
Texas State Bar No. 24087593
jglover@jw.com
Javier Gonzalez
Texas State Bar No. 24119697
jgonzalez@jw.com
1401 McKinney Street, Suite 1900
Houston, Texas 77010
(713) 752-4200 – Phone
(713) 752-4221 – Fax

Matt Dow
Texas State Bar No. 06066500
mdow@jw.com
Adam W. Aston
Texas State Bar No. 24045423
aaston@jw.com
100 Congress Ave., Suite 1100
Austin, TX 78701
(512) 236-2056 – Phone
(512) 691-4456 – Fax

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2023, I caused a copy of the foregoing pleading to be served upon counsel of record for all parties via the Court's ECF system.

/s/Matt Dow
Matt Dow