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 BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL AND CROSS-MOTION FOR A PROTECTIVE ORDER

RULE CV-7(G) STATEMENT

Plaintiff conferred in good faith with counsel for Defendants on December 14, 2023 in an effort to resolve their disputes, but were unable to come to an agreement.

INTRODUCTION

The University of Texas (UT) seeks to compel the production of Richard Lowery's *private* communications with like-minded academics that have nothing to with the claims or defenses in this lawsuit. Although this case is about Lowery's *public* speech, UT wants to see *all* his conversations with various dissident academics, including his nearly daily Signal messages with Carlos Carvalho on matters unrelated to this case. In support of its motion, UT cites the wrong legal standard, presumes relevance, and fails to engage in any proportionality analysis.

Citing a mangled version of Lowery's privilege log, UT also attacks the log's sufficiency. But Lowery's communications with counsel are presumptively privileged. And the timing and context of the communications, reflected on the actual, detailed, and objective log, only confirm that presumption.

This Court should deny UT's motion to compel, sustain Lowery's objections, and instead find good cause to grant Lowery's cross-motion for a protective order to preclude unduly burdensome, annoying, and harassing discovery related to irrelevant private communications and further logging of presumptively privileged communications.

FACTS

On February 8, 2022, Richard Lowery filed this lawsuit alleging that UT administrators censored his public speech criticizing UT's ideological direction, including its President, Jay Hartzell. ECF No. 1. Of the initial claims brought by Lowery, it is Count One (Chilling of Free Speech by State Actors) that remains in the case at this time. *Id.* at 20; ECF No. 51.

Lowery's legal claim pertains only to "public speech," not his private activity. *See, e.g.,* ECF No. 1 at 2, 8 (¶ 25), 19 (¶ 67). "Lowery reasonably fears that if he continues to offer *public* commentary that is critical of the UT Administration and

its policies, Defendants will not renew his appointment to the Salem Center…" *Id.* at 17 (emphasis added). "Lowery's *public* criticism of the UT Administration, its DEI policies, its hijacking of the Liberty Institute; as well as his criticism of the Sustainability Institute, its minor, and its ESG panel, all constitute protected speech on matters of public concern." *Id.* at 20 (emphasis added; allegation relating specifically to Count One). "Lowery has an intention to engage in future *public* criticism of the UT Administration, its DEI policies, its handling of the Liberty Institute, and its misuse of public funds for ideological purposes…" *Id.* at 21 (emphasis added). No pleaded claim or defense relates to Lowery's private activities. *Id.;* ECF No. 56.

Discovery in this case is on-going. On September 25, 2023, Defendants sent Lowery thirty-nine requests for production (RFPs), to which he timely responded on October 25. ECF No. 62-4 at 11. Plaintiff objected to some RFPs as irrelevant, disproportionate, and unduly burdensome on his First Amendment right to associate. *Id.* at 4-6, 9-10. Nonetheless, Plaintiff produced 4,726 pages in response—including hundreds of emails, text messages, and ephemeral communications—and his entire Twitter archive. Kolde Dec. ¶¶ 6-8; Ex. A; Lowery Dec. ¶¶ 2-4.

In Lowery's production, approximately 189 pages consisted of emails and other messages relating to his public speech at two academic conferences, and 14 pages consisted of messages with Richard Hanania relating to Lowery's podcast appearance and the Liberty-Institute controversy. Kolde Dec. ¶ 8; Lowery Dec. ¶ 4.

Lowery objected to collecting and producing other communications related to academic-conference planning and with persons affiliated with the Global Liberty Institute (GLI) because they did not relate to a claim or defense, were disproportionate to the needs of this case, and burden his right to associate with other dissenters. ECF No. 62-4 at 6 (RFP No. 13), 9-10 (RFP No. 29). He also

objected to providing communications with Richard Hanania that do not relate to UT or claims or defenses in this lawsuit, for the same reasons. ECF No. 62-4 at 5.

On December 8, Lowery also provided UT with three detailed privilege logs, containing 469 entries between them. Kolde Dec., ¶¶ 16-27; Ex. F; *see also* ECF No. 62-5; https://bit.ly/4aDgM0C (native copy of logs). The logs were generated based on searches and reports conducted by the undersigned counsel using Microsoft's Purview Advanced eDiscovery tool. Kolde Dec. ¶¶ 17-24. The logs were so detailed that they were produced as Excel spreadsheets and included all senders, recipients, subject lines, send dates, word count, file size, file name, and de-duplication information. Kolde Dec. ¶¶ 17-21; Exs. B, F; https://bit.ly/4aDgM0C. All of the logged information pertained to emails, Zoom meetings, and attachments exchanged with Lowery and his counsel from the date of first contact until the filing of this lawsuit. *Id*. The cover email transmitting the logs listed the identities of legal counsel, including those who had not formally appeared in the case. Ex. B.

Excel spreadsheets often do not render well when printed to PDF—as defense counsel unhelpfully did with ECF No. 62-5—presenting a jumbled, disorganized view of the logs. Kolde Dec. ¶¶ 22-25. Lowery's privilege logs must be viewed in their original Excel format in order to obtain an accurate, organized view of the information. *Id.*; *see also* Ex. F; https://bit.ly/4aDgM0C.

In contrast, UT unilaterally implemented rolling productions, often with poor communication. Kolde Dec. ¶¶ 13-14. Defendants belatedly completed their productions in response to Lowery's first two sets of RFPs on December 8—although their response was originally due on October 30. *Id*. Of the approximately 5,300 pages produced by UT so far, significant portions are duplicates and obviously non-responsive documents, such as newsletters, or routine operational emails. *Id.;* Ex. E.

Counsel conferred about their discovery disputes on December 14. ECF No. 60 at 5; Kolde Dec. ¶¶ 31-34. UT's concerns focused on four RFPs (nos. 6, 7, 13, and 29). ECF No. 62 at 3-4. Together these RFPs—as UT now construes them—would force Lowery to produce 2,600-4,000 private emails that do not relate to his legal claims. Lowery Dec., ¶¶ 6-11; Kolde Dec. ¶¶ 10-12, Exs. C, D (samples of non-responsive documents). UT also claimed that Lowery's metadata-based privilege logs were insufficient, but its counsel would not identify any specific problem entries. Kolde Dec. ¶ 32. UT filed its motion to compel on Friday night, December 22—just before the holiday weekend. ECF No. 62 at 10.

ARGUMENT

I. UT CITES AN INCORRECT AND OBSOLETE LEGAL STANDARD FOR THE SCOPE OF DISCOVERY

For reasons unknown to Lowery, UT's moving papers rely on a long-defunct version of Rule 26, referring to "relevant to the subject matter" and "reasonably calculated to lead to the discovery of admissible evidence"—text that was removed from the rule years ago. *Compare* ECF No. 62 at 6 *with* Fed. R. Civ. P. 26(b)(1). UT's brief materially misquotes Rule 26, does not analyze the actual legal standard, and therefore its motion fails at the outset.

Rule 26(b)(1)'s *current* text provides a narrower scope of discovery, vitiating UT's legal argument based on the obsolete standard.[1] *See Baker v. Walters*, 652 F. Supp. 3d 768, 777-78 (N.D. Tex. 2023) (stressing that the pre-2015 "reasonably calculated" standard is "obsolete" because it incorrectly expanded the scope of discovery); *Stag v. Smith*, No. 18-3425, 2019 U.S. Dist. LEXIS 172737, at *9-10 (E.D. La. Oct. 4,

[1] UT also repeated quotes from a 1991 case interpreting the meaning of "relevant to the subject matter." ECF No. 62 at 1, 6 (quoting *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991)). Because this case expounded the meaning of wording no longer in the rule, it is inapposite.

2019) ("Gone for good was the broad-ranging old standard that the [defendants] assert" for the modern rule "demands focus on the parties' claims and defenses").

Moreover, "Rule 26(b) has never been a license to engage in an unwieldy, burdensome, and speculative fishing expedition." *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258, 264 (5th Cir. 2011) (cleaned up). Indeed, Rule 26 restricts discovery to matters relevant to the claims and defenses "already identified in the pleadings," rather than merely relevant to "the subject matter" of the suit. *Samsung Elecs. Am., Inc. v. Chung*, 321 F.R.D. 250, 280 (N.D. Tex. 2017) (quoting Fed. R. Civ. P. 26, 2000 & 2015 cmts.).

A party must "plead a defense before he can seek discovery on it." *Id.* at 280-81. On a motion to compel, "[t]he moving party bears the burden to show that the materials and information sought are relevant to the action or will lead to the discovery of admissible evidence." *Acosta v. Williamson Cnty.*, No. 1:21-cv-00615-DII, 2023 U.S. Dist. LEXIS 97985, at *3-4 (W.D. Tex. June 6, 2023); *see also Medina v. Schnatter,* No. 1-22-CV-498-LY, 2022 U.S. Dist. LEXIS 106547, at *3 (W.D. Tex. June 15, 2022) (citing *Allen v. Priority Energy Servs., L.L.C.*, No. MO16CV00047DAEDC, 2017 U.S. Dist. LEXIS 229525, 2017 WL 7789280, at *1 (W.D. Tex. Jan. 30, 2017)). UT's motion does not meet this standard. Nor does it articulate in plain language why UT needs the additional documents it now seeks.

II. Communications unrelated to Lowery's public speech are irrelevant to any claim or defense

UT demands that Lowery produce between 2,600-4,000 personal emails consisting of his private communications with at least ten other academics that are unrelated to UT, let alone to any claims in this case. Lowery Dec. ¶¶ 5-10. They even want every Signal message or email between him and his colleague Carlos Carvalho since Aug. 24, 2022, no matter the topic. *Id.* ¶¶ 9-10.

UT is not entitled to force Lowery and his counsel to spend dozens of hours locating, collecting, and producing (and later supplementing) broad swaths of his private digital life. Not for mere curiosity, not for harassment, not for any reason. There is only one claim in this case—that Defendants' misconduct chilled Lowery's First Amendment rights to publicly criticize the university and its officials and to speak openly about academic affairs and other matters of public concern. ECF No. 1, ¶¶ 73-84. UT challenges this Court's subject matter jurisdiction and the relief sought, but it only pleaded one merits defense: that Lowery fails to state a chilled-speech claim. ECF No. 56, at 27. There is no claim or defense relating to Lowery's private communications with other academics about non-UT issues, such as who to invite to academic conferences and privately expressed political opinions. Sample emails illustrate this point. Kolde Dec. ¶¶ 11-12; Lowery Dec. ¶¶ 13-15; Exs. C, D.

Lowery has never argued that UT's misconduct chilled him from emailing or messaging with colleagues in *private*. Lowery's claim is about *public* speech. Indeed, the Hanania emails are not even responsive: they are neither "related to [Lowery's] 'speech'" nor "related to [his] position at the Salem Center." ECF No. 62-4 at 4-5.

And to the extent that UT wishes to assert that Lowery spoke at the Hillsdale and Stanford conferences, those matters are not contested, and what he said has already been transcribed and is a matter of public record. ECF Nos. 62-2, 63-3.

III. UT SEEKS DISCOVERY THAT IS DISPROPORTIONATE TO THE NEEDS OF THE CASE

"The parties and the court have a collective responsibility to consider the proportionality of all discovery." *Carr v. State Farm Mut. Auto. Ins.*, 312 F.R.D. 459, 467 (N.D. Tex. 2015) (quoting FED. R. CIV. P. 26, 2015 cmt.). But UT's brief never considers—or even mentions—proportionality.

Proportionality is determined by "considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." FED. R. CIV. P. 26(b)(1); *see also* The Sedona Conference, *Commentary on Proportionality in Electronic Discovery,* 18 Sedona Conf. J. 141, 154 (2017) ("Proper application of those proportionality factors focuses on the actual claims and defenses in the case, and how and to what degree requested discovery bears on those claims and defenses"). Additionally, courts "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1).

Disproportionate discovery "can be a tool for harassment." *Sartin v. Exxon Mobil Corp.*, No. 22-603-JWD-RLB, 2023 U.S. Dist. LEXIS 129892, at *27 (M.D. La. July 27, 2023). Accordingly, district courts must "guard against abusive discovery" and "must limit otherwise permissible discovery if it determines that the burden or expense of the proposed discovery outweighs its likely benefit." *Crosby*, 647 F.3d at 264 (cleaned up).

Even assuming, arguendo, some relevance here, UT has made no showing that it is worth Lowery's time and his counsel's time spending dozens of additional hours collecting and producing those communications. Lowery Dec. ¶¶ 11-12 (up to 34 hours); Kolde Dec. ¶¶ 6, 36-38 (up to 40 hours). Moreover, he would later need to update and supplement his future communications with those same individuals under Rule 26(e), burdening his future dialogue with those people. Lowery Dec. ¶¶ 11, 19-24. It would be the equivalent of Richard Lowery asking for every communication about any topic ever sent between Jay Hartzell, Lillian Mills, Nancy Brazzil, and Richard Flores, since Aug. 24, 2022, or every communication sent by

those people about "diversity, equity, or inclusion" to anyone since January 1, 2021—something Lowery has not done, but by UT's logic of presumed relevance, would be within his rights to do.

Lowery is a private individual, bringing a civil rights claim against one of the most powerful institutions in Texas. He is represented by a small non-profit that doesn't have a cadre of associates, paralegals, or support staff. Kolde Dec. ¶¶ 3-4. UT is represented by a large, well-resourced law firm. *See* https://www.jw.com/ ("Jackson Walker is a national, full-service law firm and the largest firm in Texas").

In addition, UT's insistence on obtaining broad access to Lowery's private emails burden his right to associate, as well as the rights of third parties who are not even represented in this litigation. Lowery Dec. ¶¶ 20-28. *See, e.g.*, *Nairne v. Ardoin*, No. 22-178-SDD-SDJ, 2023 U.S. Dist. LEXIS 159116, at *5-6 (M.D. La. Sep. 8, 2023) (refusing to compel on privilege); *Young Conservatives Found. v. Univ. of N. Tex.*, No. 4:20-CV-973-SDJ, 2022 U.S. Dist. LEXIS 132093, at *6, *11 (E.D. Tex. Jan. 11, 2022) (granting protective order on privilege); *Beinin v. Ctr. for the Study of Popular Culture*, No. C 06-02298 JW, 2007 U.S. Dist. LEXIS 47546, at *6, *10 (N.D. Cal. June 20, 2007) (protecting the identities of professor's online correspondents who privately supported his lawsuit). While those rights are not absolute, the burden on them should factor into the proportionality analysis and weighs against disclosure. And although UT never provided a proposed protective order (Kolde Dec. ¶ 34), if this Court overrules any of Lowery's discovery objections, his private emails should be protected from re-disclosure by way of an appropriate protective order.

IV. LOWERY'S PRIVILEGE LOGS ARE DETAILED AND FULLY COMPLIANT

Lowery's 469-entry privilege logs supply far more detail than UT's log—containing just nine entries—and satisfy Rule 26. Moreover, the context shows that Lowery and his counsel engaged in typical pre-lawsuit communications for which

UT has provided no basis to assert that non-privileged communications took place—why would they? IFS is Lowery's *litigation* counsel, not in-house counsel. Kolde Dec. ¶¶ 28-30.

"[T]he level of detail required on a claim of privilege is likely a matter that can only be determined on a case-by-case basis." *Zelaya v. H&F Transp., Inc.*, No. SA-16-CA-450-PM, 2016 U.S. Dist. LEXIS 196119, at *9 (W.D. Tex. Oct. 28, 2016) (cleaned up); *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 697 (5th Cir. 2017) (quoting FED. R. CIV. P. 26, 1993 cmt.). Courts in the Fifth Circuit impose a high burden on proponents if an allegedly privileged communication is with *in-house* counsel. *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 797, 799 (E.D. La. 2007). But there is "an unstated operating presumption that communications with outside counsel constitute legal advice"—as in Lowery's case. *Exxon Mobil Corp. v. Hill*, No. 13-236, 2013 U.S. Dist. LEXIS 91378, at *17 (E.D. La. June 28, 2013); *see also Vioxx*, 501 F. Supp. 2d at 797 n.12.

Plaintiff provided UT with "objective privilege logs": a recognized system for logging ESI, recommended by experts. *See* The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 162-63 (2016); *see also, e.g., Arconic Inc. v. Novelis Inc.*, No. 17-1434, 2018 U.S. Dist. LEXIS 176777, at *3 (W.D. Pa. Aug. 27, 2018) (using an objective log protocol); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-489 (PLF/JMF/AK), 2009 U.S. Dist. LEXIS 99187, at *42 (D.D.C. Oct. 23, 2009) (approving the use of objective logs because the judge "all too often [has] found the traditional privilege log useless"). In this system, the producing party records objective metadata from all privileged ESI and then permits the other party to designate documents that it would like described in greater detail. Sedona Conference, *supra* at 163. As Lowery's counsel stated at the December 14 conference, Plaintiff can supplement the information about any email

whose status is unclear—a normal step with objective privilege logs. Kolde Dec. ¶¶ 16-23. Defense counsel has not requested any such information. *Id.* ¶¶ 29, 32.

But supplementation is unnecessary, because Lowery's logs, as a whole, already show that these communications were primarily made for the purposes of legal advice and litigation preparation. The logs reveal not only the date, sender, and recipients of all communications but also subject line, size, word count, format, custodian, and other metadata. Kolde Dec. ¶¶ 18-22; Ex. F (manually filed); https://bit.ly/4aDgM0C. Courts often hold that far less information than this satisfies the privilege. *See, e.g.*, *Bellamy v. Wal-Mart Stores, Tex., LLC*, Civil Action No. SA-18-CV-60-XR, 2019 U.S. Dist. LEXIS 140720, at *4 (W.D. Tex. Aug. 19, 2019); *Zelaya*, 2016 U.S. Dist. LEXIS 196119, at *9.

Moreover, it is clear from Lowery's logs that all withheld communications were from Lowery to one or more of his outside litigation counsel or vice versa and that all were sent between August 23, 2022 (the day Lowery began self-censoring) and February 7, 2023 (the day before he sued). Ex. F; https://bit.ly/4aDgM0C. The document titles repeatedly discuss topics such as declarations, local counsel, service of process, and the drafts of the complaint. *Id*. These emails are obviously legal advice in preparation for filing this lawsuit, and UT has no credible basis to contest that conclusion.

CONCLUSION

This Court should declare that Lowery's privilege log complies with Rules 26 and deny UT's motion to compel the production of Lowery's private communications. Instead, the Court should issue a protective order, preventing the disclosure of these communications as oppressive and unduly burdensome.

Respectfully submitted,

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