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 FOR ENTRY OF A PROTECTIVE ORDER

INTRODUCTION

The University of Texas (UT) asserts that it has no desire to misuse the discovery process in order to spy on Professor Richard Lowery or other dissident academics. Yet, when UT had the opportunity to demonstrate that it had no ulterior motives by establishing an "attorneys' eyes only" (AEO) protective order to address Lowery's fears, UT refused and insisted that members of its in-house legal department—who played a vital role in the campaign against Lowery and have reason to snoop on him in the future—must have access to Lowery's confidential private communications. Thus, UT only agreed to seek a lower-level protective order that permitted parties to designate materials as "confidential" but not as "attorneys' eyes only." UT is interested in shielding itself from bad publicity about its campaign to silence Lowery but not interested in defending Lowery and other dissidents from harassment and reprisals. And perhaps UT also hopes to conceal possible evidence of nepotism in admissions at UT, including favored treatment for Jay Hartzell's son.

Moreover, UT is unwilling to acknowledge that Lowery's communications with like-minded academics should receive special protection and insists on using an off-the-rack definition of confidential materials better suited to a commercial or trade secret case. The goal here is not to protect Lowery at all, but to protect UT.

A protective order without AEO designation will not address Lowery's privacy concerns. Moreover, until the pending discovery motions are resolved, any protective order is premature. Once the pending discovery motions are resolved, this Court should deny UT's motion for entry of a confidential-only protective order and enter instead the stronger AEO order that Lowery proposes, for this recognizes that Lowery's private communications with like-minded academics should be protected.

FACTS AND BACKGROUND

Because the facts of this case are well known to the Court, *see, e.g.*, Dkt. 60 at 4-7; Dkt. 68 at 5-7; Lowery will not recount them all here.

In the summer of 2022, UT leaders began to pressure and threaten Richard Lowery, to stop him from publicly criticizing the university and its top officers. Dkt. 1. UT's in-house counsel assisted in the campaign to silence Lowery from the beginning, participating in key meetings and communicating regularly about Lowery with the officials that censored his speech. *See* Dkt. 60 at 3, 6-7; Dkt. 63.

Currently, both parties have motions to compel pending before this court, seeking the production of documents that the other side maintains are private and irrelevant. *See* Dkt. 73 at 2-3; Dkt. 66; Dkt. 64 at 7-10. Moreover, UT emphasized before this Court that "no one is using the discovery process to spy on anyone" and that Defendants could "negotiate with Lowery which items should be sealed or even attorney's eyes only." Dkt. 62 at 8 (cleaned up). As a result, for over a week, counsel conferred over email and on the phone, attempting to prepare a protective order acceptable to both sides. Dkt. 73 at 1. Although parties eventually agreed on most elements of the proposed order, three main issues divided them. Kolde Dec. ¶ 4.

First, Plaintiff required an order with both an AEO level of designation and a lower "Confidential" level. Kolde Dec. ¶ 5. Plaintiff interprets the phrase "retained counsel" in the model definition of "Qualified Persons" to exclude all UT employees (including UT's in-house counsel) from accessing AEO materials. *See* Dkt. 73-1 at 3. But if UT disagreed with this construction of "retained counsel," then Plaintiff wished to clarify the model order to confirm that the definition excluded in-house counsel. Kolde Dec. ¶ 5. Defendants were willing to establish both Confidential and AEO levels of designation, but they insisted that UT's in-house attorneys are "retained counsel" and that they must be permitted to view AEO material. *Id.*, ¶ 9.

Second, Plaintiff sought to revise the designation criteria for "Confidential" materials to state that documents to which the public has access under the Texas Public Information Act, TEX. GOV'T CODE § 552.221, cannot be marked Confidential or AEO. Kolde Dec. ¶ 6. Lowery believes the model order implies this ("Information that is generally available to the public . . . shall not be designated as Confidential," *see* Dkt. 73-1 at 4) but wanted it declared expressly as a check against over-designation. Kolde Dec. ¶ 6. Defendants opposed "marry[ing] two different bodies of law (TX PIA law and federal discovery law)" and did not agree. *Id.*, ¶ 9.

Finally, Plaintiff sought to amend the designation criteria to state that "plaintiff's personal emails and text messages about non-UT business" could be marked Confidential; AEO materials would include "Plaintiff's private First Amendment speech and associational activities that all participants had a good-faith belief would remain private and the disclosure of which would give UT administrator's insight into Plaintiff's dissident activities or might subject him or his communication partners to scorn, ridicule, retaliation, or adverse employment action." *Id.*, Ex. A. As Lowery's counsel explained over email, Lowery fears that his communications with other dissident academics could be used for opposition research against him beyond the scope of this lawsuit or even to discipline him or his fellow dissidents. *Id.*, ¶¶ 5, 7. UT could not agree that that these documents constitute AEO material and did not "see a need for that [AEO] category." *Id.*, ¶ 9.

On January 11, 2024, after it became clear that the parties could not settle upon a proposed protective order, Defendants moved for this Court to enter a model order containing only Confidential level designation and using standard definitions of "confidential materials." *See* Dkt. 73; Dkt. 73-1.

On January 12, at Sheridan Titman's deposition, Lowery's counsel investigated allegations that Jay Hartzell engaged in nepotism by using state resources to

benefit his son in UT graduate admission, asking questions on this topic. Kolde Dec. ¶ 12; Lowery Dec. ¶¶ 4-11. Requests for production followed on January 15. Kolde Dec. ¶ 14; Ex. B. Shortly before the campaign to silence him began, Lowery had opined in an article that university administrators "disadvantage in the admissions process people with the same identity profile as their own children — though, of course, this disadvantage seldom reaches to their children themselves." *Id.* ¶ 13; Dkt. 8-7; *see also* Dkt. 1, ¶¶ 9-10, 12 (discussing this article as an example of Lowery's criticism of Hartzell and UT leaders). Lowery believes this comment may have contributed to Hartzell's irritation with him, and it also explains why Lowery has a low opinion of Hartzell's honesty and integrity. Lowery Dec. ¶¶ 12-19.

ARGUMENT

I. UT'S IN-HOUSE COUNSEL PLAYED A KEY ROLE IN CENSORING LOWERY, SO THEY SHOULD NOT BE PERMITTED TO VIEW HIS PRIVATE COMMUNICATIONS

Because UT's in-house legal team have been involved in the campaign to silence Lowery from the start, Lowery has shown good cause for a protective order defining his private communications with fellow dissidents "Attorneys' Eyes Only" and excluding UT's in-house counsel from the persons qualified to see these materials.

The purpose of protective orders is to keep a party or person "from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1); *see also* Dkt. 64 (moving for an order to protect Lowery's private communications with other dissidents). "Upon motion by any party demonstrating good cause, the court may enter a protective order in . . . any [] appropriate form." W.D. TEX. CIV. R. 26(c). Such orders shield "confidential, sensitive, or private information" from "public disclosure and from use for any purpose other than prosecuting this litigation." *Cloud49, LLC v. Rackspace Tech., Inc.*, No. 1:22-CV-229-LY, 2022 U.S. Dist. LEXIS 227473, at *1 (W.D. Tex. Oct. 25, 2022).

Lowery agrees with Defendants that—assuming further discovery of Lowery's private emails occurs—there is good cause for a protective order. *Cf.* Dkt. 73. Parties differ, however, about whether an AEO designation is needed, what falls under that designation, and who can view AEO material. The Western District's model designation criteria focus on the types of confidential materials commonly disclosed in commercial cases: for instance, "trade secrets, . . . operational data, business plans, and competitive analyses." Dkt. 73-1 at 4. This case, however, is not commercial, and instead concerns documents whose disclosure burdens Plaintiff's freedom of speech and association. *See* Dkt. 64 at 2, 8. As a result, Lowery proposed that the parties supplement the model language, so that the designation criteria closer reflect the confidential materials under dispute. Kolde Dec. ¶¶ 6-7.

Lowery seeks AEO designation for a narrow category of his private communications. According to Plaintiff, Lowery's documents should be marked AEO if (1) the people communicating with Lowery believed in good faith that the communication was confidential, and (2) these communications would enable UT officials to monitor Lowery's dissident activities or subject him and his supporters to scorn, ridicule, retaliation, or adverse employment action. Kolde Dec., Ex. A. Lowery fears that UT's legal department will misuse discovery to conduct opposition research against him and fellow dissidents such as those affiliated with the Global Liberty Institute. Dkt. 64-2, ¶¶ 20-28. Some of Lowery's correspondents risk discipline or even firing if their communications became known. *Id.*

In contrast, UT's counsel stated that they see no need for an AEO category to cover documents meeting the narrow description above. Kolde Dec. ¶ 9. Put another way—although Defendants assert that they do not intend to spy on Lowery and his supporters, *see* Dkt. 62 at 8—UT's counsel insists that UT administrators must be able to monitor Lowery's confidential communications with fellow dissidents and

subject them to ridicule and retaliation. Defendants vocalize no reason UT's in-house lawyers (rather than just its outside litigation counsel) need to review these materials except for purposes "other than prosecuting this litigation." *Cloud49*, 2022 U.S. Dist. LEXIS 227473, at *1.

Courts in the Fifth Circuit have repeatedly prohibited in-house counsel from seeing AEO material or restricted such material to a small subset of in-house lawyers who played no role in the events giving rise to the litigation and possessed no decision-making authority. *See, e.g.*, *Videoshare, LLC v. Google LLC*, No. 6:19-cv-00663-ADA, 2021 U.S. Dist. LEXIS 199538, at *6 (W.D. Tex. Oct. 8, 2021); *Polaris Powerled Techs., LLC v. Samsung Elecs. Am., Inc.*, No. 2:17-CV-00715-JRG, 2018 U.S. Dist. LEXIS 190654, at *3 (E.D. Tex. Oct. 29, 2018); *Indus. Print Techs., LLC v. O'Neil Data Sys.*, No. 3:15-cv-01100-M, 2016 U.S. Dist. LEXIS 205401, at *7, *13 (N.D. Tex. June 23, 2016); *GE v. Mitsubishi Heavy Indus., Ltd.*, No. 3:10-cv-276-F, 2010 U.S. Dist. LEXIS 162726, at *4, *20 (N.D. Tex. Feb. 10, 2011).

Defendants have testified that UT's legal team, such as General Counsel Amanda Cochran-McCall and Deputy Vice President for Legal Affairs Adam Biggs, were involved in discussions about Lowery and decisions about how to respond to his speech. *See, e.g.*, Dkt. 61-2; Dkt. 31-2 at 3-4. Although their exact role is obscure, due to UT's invocation of attorney-client privilege, UT leaders repeatedly sought their advice—legal or operational—during August 2022, when those same leaders pressured and threatened Lowery into self-censoring. *See* Dkt. 63.

UT's in-house lawyers, moreover, are not "retained counsel" in ordinary usage, so the Western District's model order does not permit them to view AEO materials. *See*, *e.g.*, *McR Oil Tools v. Spex Offshore*, No. 3:18-CV-731-X-BK, 2020 U.S. Dist. LEXIS 191138, at *4 (N.D. Tex. May 27, 2020) (stating that "retained counsel for the parties in this litigation" can view AEO materials, but "in-house counsel"

cannot); *Nearstar, Inc. v. Jason Waggoner*, No. 4:09-CV-00218, 2009 U.S. Dist. LEXIS 147700, at *12 (E.D. Tex. Dec. 10, 2009) (treating "retained counsel" as equivalent to "outside" counsel); *Microsoft Corp. v. Commonwealth Sci. & Indus. Research Organisation*, No. 6:06 CV 549, 2009 U.S. Dist. LEXIS 13675, at *19 n.1 (E.D. Tex. Feb. 23, 2009) (contrasting retained counsel with in-house counsel).

Granting UT's in-house counsel access to Lowery's confidential communications would undermine the purpose of the protective order and empower UT's unlawful campaign against Lowery's speech. This Court should issue a protective order clearly defining AEO material and preventing UT employees, including UT's in-house legal team, from reviewing those materials.

II. UT'S PROPOSED ORDER SUPPLIES NO PROTECTION FOR LOWERY'S ASSOCIATIONAL FREEDOM

Any protective order entered must acknowledge and protect Lowery's speech and associational rights sufficiently to guarantee that UT's discovery requests are narrowly tailored to important government interests. *See* Dkt. 64 at 2, 8. "Disclosure requirements can chill association even if there is no disclosure to the general public." *Ams. for Prosperity Found. v. Bonta* (*AFPF*), 141 S. Ct. 2373, 2388 (2021) (cleaned up). UT's disproportionate discovery requests function as a disclosure regime. UT seeks bulk collection of all Lowery's dissident activities. And without tailoring to safeguard Lowery's First Amendment freedoms, discovery will be more disproportional to the needs of the case. *See* The Sedona Principles, *Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 69 (2018). ("non-monetary costs [] such as the invasion of privacy rights" factor into the proportionality analysis).

Defendants "don't see a need for that [AEO] category" to protect Lowery's rights, *see* Kolde Dec. ¶ 9, and elsewhere they assert that Lowery must show an

"objectively reasonable probability" of "economic reprisal, loss of employment, threat of physical coercion, [or] other manifestations of public hostility" before First Amendment privilege applies, *see* Dkt. 62 at 7 (citation omitted). UT thus believes that the obsolete two-step test for First Amendment privilege, developed in the Ninth Circuit, is still good law. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1160-61 (9th Cir. 2010). 591 F.3d 1147 (9th Cir. 2010); *see also Whole Woman's Health v. Smith*, 896 F.3d 362, 369 (5th Cir. 2018) (discussing *Perry* while warning that that this "case[], of course, must yield to our circuit precedent").

This two-step test, however, did not survive the Supreme Court's 2021 *AFPF* decision. Instead, after *AFPF*, the government must narrowly tailor disclosure requirements that "*might* deter perfectly peaceful discussions of public matters of importance" because "the risk of a chilling effect on association or speech is enough." *Cornelio v. Connecticut*, 32 F.4th 160, 170 (2d Cir. 2022) (citing *AFPF*) (emphasis original); *see also, e.g.*, *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1247 (10th Cir. 2023) ("compliance with [disclosure] requirements necessarily burdens [the] First Amendment right to association" so the government must "justify why it could not use less intrusive tools"); *Sisters For Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 407 (6th Cir. 2022) ("if a statute is not narrowly tailored, it cannot be constitutionally applied to *anyone*") (emphasis original); *Ward v. Thompson*, No. 22-16473, 2022 U.S. App. LEXIS 30270, at *10 (9th Cir. Oct. 22, 2022) (Ikuta, J., dissenting) ("Because [*AFPF*] held that a court must presume that a disclosure requirement burdens First Amendment rights and start its analysis by determining whether the disclosure requirement is narrowly tailored, it supersedes *Perry*").

The Supreme Court's opinion in *AFPF* required that the government prove narrow tailoring initially, without any prior showing of "objective reasonableness." *AFPF*, 141 S. Ct. at 2380, 2389. A court's "assessment of the burdens imposed by

disclosure should *begin* with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring." *Id.* at 2385 (emphasis added). The court presumed that "[w]hen it comes to a person's beliefs and associations, broad and sweeping state inquiries into these protected areas discourage citizens from exercising rights protected by the Constitution." *Id.* at 2384 (citation omitted); "Exacting scrutiny is triggered by state action which *may* have the effect of curtailing the freedom to associate, and by the *possible* deterrent effect of disclosure." *Id.* at 2388 (internal quotation omitted) (emphasis original); *see also id.* at 2395 (Sotomayor, J., dissenting) (stressing that the Court's opinion "abandons the requirement that plaintiffs demonstrated that they are chilled, much less that they are reasonably chilled").

The central theme of Lowery's complaint, *see* Dkt. 1, is that UT acted to prevent others hearing what he had to say, and Lowery maintains his fears of harassment and reprisals are objectively reasonable, *see* Dkt. 64-2, ¶¶ 20-28. But, under binding precedent, Lowery's associational privilege applies and must be factored into the protective order and proportionality analysis, even if his fears were unreasonable. UT, a government agency, bears the initial burden of showing that its discovery requests are narrowly tailored to further an important state interest. UT has not attempted to meet this burden and refused to accept the AEO protective order that Lowery proposed as a safeguard for private First Amendment activities. And this Court has yet to determine that UT is entitled to the broad discovery it seeks.

III. MATERIAL AVAILABLE TO THE PUBLIC THROUGH THE TEXAS PUBLIC INFORMATION ACT ARE NOT CONFIDENTIAL

Evidence that is readily available to the public through the Texas Public Information Act (TPIA) cannot be designated as confidential. *See* Dkt. 73-1 at 4. UT is a government agency, with broad obligations under state law to provide

information and internal documents to those request it, for it is the policy of the state of Texas that "[t]he people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." TEX. GOV'T CODE § 552.001(a); *see also Richmond v. Coastal Bend Coll. Dist.*, No. C-07-458, 2009 U.S. Dist. LEXIS 56255, at *7 (S.D. Tex. July 2, 2009) (noting that the TPIA is "liberally construed in favor of the public's right of access."). The TPIA already contains many exceptions for materials that the state deems sensitive, such as personnel files. *See* TEX. GOV'T CODE §§ 552.1081ff. Material not subject to one of these exceptions, however, is public.

The Western District's model order expressly applies only to information not "generally available to the public." *See* Dkt. 73-1 at 4. Courts in the Fifth Circuit look to the TPIA in assessing what information about Texas state agencies is confidential. *See, e.g.*, *Bay Area Unitarian Universalist Church v. Ogg*, No. 4:20-cv-03081, 2022 U.S. Dist. LEXIS 131265, at *8 (S.D. Tex. July 25, 2022); *Roque v. Harvel*, No. 1:17-CV-932-LY-SH, 2019 U.S. Dist. LEXIS 179730, at *19 (W.D. Tex. Oct. 16, 2019); *Carter v. Anderson*, Civil Action No. 6:02-CV-0005-BI, 2004 U.S. Dist. LEXIS 35435, at *18 (N.D. Tex. Sep. 30, 2004). Defendants cannot flout Texas' own policy of government transparency by insisting materials that are public by state law should be marked as confidential. That is even more true if reports about nepotism by Jay Hartzell prove to be founded and are evidenced by UT documents that are available to the public under the TPIA. *See* Kolde Dec., Ex. B.

CONCLUSION

After this Court decides the pending discovery motions, if Lowery is ordered to produce some or all of the contested private communications, then it should enter the AEO order that Lowery proposes, rather than UT's less-protective order, which lacks an AEO designation.

Respectfully submitted,

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