VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 100-5-17 Lecv

**Sutton et al vs. The Vermont Regional Center et al**

# ENTRY REGARDING MOTION

Title: Plaintiffs' Motion to Compel (Motion: 54)
Filer: Russell D. Barr
Filed Date: January 17, 2023

The motion is GRANTED.

Plaintiffs move to compel Defendants to respond to discovery requests to which Defendants have asserted various privileges. Plaintiffs' motion is framed broadly: "to produce all requested documents and correspondence;" (Motion to Compel, #54, page 16); "to produce all responsive documents that are outstanding." (Reply to Memo in Opposition, page 17.) The specific discovery requests referenced in Plaintiffs' motion fall into two categories: responses to deposition questions by three deponents, and responses to requests for production of documents. Memos from both parties address the applicability of the various asserted privileges to the deposition questions and document requests.

Depositions of John Kessler, Brent Raymond, and Lawrence Miller

John Kessler was general counsel to the Agency of Commerce and Community Development ("ACCD"). In addition, he was the principal administrator of the Vermont Regional Center ("VRC").[1] At his deposition on June 16, 2021, he was asked what he understood certain documents pertaining to the responsibilities of the VRC meant in 2007. (Exhibit H to Motion, p. 2.) Defendants' counsel objected to the question "as calling for attorney-client privilege. I think you were asking for general counsel's mental impressions." (*Id.* pp. 2-3).

Defendants' reliance on "mental impressions" is inapplicable when referring to the attorney-client privilege, as this label relates to an aspect of attorney work product concerning pending or anticipated litigation, *Pcolar v. Casella Waste Sys., Inc.*, 2012 VT 58, ¶ 17, 192 Vt.

[1] The parties refer to VRC and ACCD interchangeably.

343, and there was no lawsuit in 2007. Defendants' counsel acknowledges in their brief that such a privilege is inapplicable in this context. (Opposition at 4.)

As to attorney-client privilege, Mr. Kessler had two roles at the VRC/ACCD: principal administrator and general counsel. The law related to the applicability of the attorney-client privilege requires a distinction to be made between communications for business purposes and the giving of legal advice. This is important in cases where in-house counsel communicates with staff or an executive administrator also happens to be a lawyer or in-house counsel. See *Brown v. Barnes and Noble, Inc.*, 474 F. Supp. 3d 637, 648 (S.D.N.Y. 2019) (communications between in-house counsel and company's employees must be scrutinized to determine whether purpose of communication was to convey business advice and information, which is not protected by attorney-client privilege, or to provide legal advice, which is). "The privilege is narrowly construed because it renders relevant information undiscoverable." *Id.* (citation omitted).

Information Mr. Kessler would have provided to VRC staff regarding the role and responsibilities of the Center falls within his responsibilities as principal administrator or communications concerning business operations of the Center. The question he was asked pertains to his role as administrator and his understanding of the responsibilities of the VRC as a regional center. There has been no showing that the question called for him to reveal legal advice given to an employee of ACCD concerning a discreet legal issue.

There might have been times when Mr. Kessler was called upon to give legal advice concerning a particular legal matter, but in this case, it appears that Defendants' counsel sought to shield him from any questions at all concerning VRC administration by claiming attorney-client privilege. The attorney-client privilege does not have such broad applicability. It can be evoked only in the narrow circumstances to which it applies. As the entity claiming the privilege, the VRC/ACCD has the burden of demonstrating that it is entitled to assert the attorney-client privilege. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977); *Shih v. Petal Card, Inc.*, 565 F. Supp. 3d 557, 566 (S.D.N.Y. 2021). "'Because the privilege shields from disclosure pertinent information and therefore constitutes an obstacle to the truth-finding process, it must be narrowly construed.'" *Shih*, 565 F. Supp. 3d at 566 (quoting *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624, 36 N.Y.S.3d 838, 842, 57 N.E.3d 30 (2016)). Defendants have not shown that the attorney-client privilege applies to questions put to Mr. Kessler during his deposition about the operations of the VRC during his tenure as principal administrator.

Defendant Brent Raymond was executive director of the VRC from 2012 to July of 2015. During his deposition on June 7, 2021, he was asked who provided him with certain information. (Exhibit F to Motion, pp. 2–3.) He was directed by Defendants' counsel not to respond to questions about information he received from John Kessler. (*Id.*, p. 3). For the same reasons described above, the attorney-client privilege cannot be invoked as a basis for a blanket refusal to answer any and all questions about the VRC just because some of the information came from Mr. Kessler.

Lawrence Miller, an employee of the VRC, was deposed on June 14, 2021, and he was instructed by Defendants' counsel not to respond to questions about information he received from John Kessler regarding any duty to investors. The basis for the objection was stated as "attorney-client privileged communication." (Exhibit G to Motion, p. 5.) Again, for the reasons described above, the court concludes that Defendants have not supported the applicability of the attorney-client privilege to any question posed to Mr. Miller included in Exhibit G. Mr. Miller is required to answer questions about VRC matters, even if his information came from Mr. Kessler, as Defendants' counsel has not shown that the information was provided in the context of solicitation of legal advice on a specific matter.

The court concludes that the attorney-client privilege asserted by Defendants' counsel in the above three depositions was not applicable. Plaintiffs' counsel is permitted to reconvene their depositions by the deadline set forth below to obtain responses to Plaintiffs' questions related to the administration of the VRC.

Responses to Requests to Produce Documents

Plaintiffs have apparently made various requests for the production of documents. They attached to their motion five exhibits described as privilege logs in which Defendants declined to produce most documents requested by relying on various privileges. Defendants did not request a protective order from the court pursuant to V.R.C.P. 26(c).

There is some disagreement about the extent to which the attorneys have engaged in the meet-and-confer requirement of Rule 26(h) on the issues, but the differences seem to relate to the format of privilege logs, whereas it appears that the attorneys have conferred on the issue of applicability of privileges. Therefore, the court accepts that they have complied with the requirement to meet and confer and the court will consider the motion as to the document requests and claimed privileges.

As stated above, the party asserting a privilege has the burden of showing the basis for the applicability of the privilege to the document requested. See *Shih*, 565 F. Supp. 3d at 566; *S.E.C. v. Beacon Hill Asset Mgmt. LLC*, 231 F.R.D. 134, 139 (S.D.N.Y. 2004). Plaintiffs do not identify in their motion the specific documents they have requested, but they argue that Defendants have responded to their document requests by claiming privileges that are inapplicable and that Defendants have not met their burden to show they are entitled to assert the privileges at issue.

Each privilege log apparently relates to a separate request for documents, as follows:

*Exhibit A – Privilege log dated 7/16/21 related to Plaintiffs' Third Request to Produce*

This is a 26-page document relating to items from 2014-2016[2] in which each document is identified by Bates stamp, type, date, sender, recipient, and subject matter. For some documents

[2] Many items on the log are listed as "undated."

there is a notation that the document was withheld entirely or produced with redactions. Privileges are identified for each document by label only, without explanation, and include one or more of the following: "attorney client," "work product," "common interest," and/or a sentence indicating "waiver was unintentional."

*Exhibit B – Privilege log dated 11/22/21 re: Response to Subpoena to Michael Pieciak*

This log is 8 pages long and is a spreadsheet listing 56 documents from 2015-2016. The column entitled "Email Subject/File Name" contains a very brief label for the document. The final column is "Privilege" and identifies asserted privileges for each document by label only, including: "Attorney-client," "Work Product," "DFR Investigatory Privilege, 8 V.S.A. §§ 22-23," and/or "Common Interest Doctrine." Other than the identification of the name of the privilege asserted, no additional information is provided.

*Exhibit C – Privilege log dated 5/25/22 in Response to Second Request, Request 6*

This log is 70 pages and is a spreadsheet with over 1,695 documents from 2008-2016. The "Privilege" column is limited to the labels "Attorney-Client" for many items and "Attorney-Client; Work Product" for others. The log is extremely sparse and does not even provide a field for describing any of the documents that Defendants assert are privileged.

*Exhibit D – Privilege log dated 9/7/22 in Response to Third Request to Produce*

This is a 16-page spreadsheet with over 371 items from 2013-2016.[3] The "Privilege" column states, variously, "Attorney-Client," "DFR Investigatory Privilege, 8 V.S.A. §§ 22-23," "Common Interest Doctrine," and/or "Work Product." Like Exhibit C, this log contains no field for describing any of the documents that Defendants assert are privileged.

*Exhibit E – Privilege log dated 12/13/22 re documents for "30b5-6 [sic] Deposition" to DFR*

This is a 4-page spreadsheet with over 46 items from, where they include a date, 2015 or early 2016. Three documents are noted as produced. The "Privilege" column for the others lists, variously, "DFR Investigatory Privilege, 8 V.S.A. §§ 22-23," "Common Interest Doctrine," "Attorney-Client," and "Work Product." The log includes no description of the documents withheld.

Sufficiency of Support for Asserted Privileges regarding Document Production

*Work Product*

As noted above with respect to the depositions, the "work product" privilege applies to the work of an attorney related to pending or anticipated litigation. There was no litigation in this case until 2017. All of the documents are identified as dating from 2016 or earlier. Thus, the work product privilege is inapplicable without further explanation.

[3] Some items are not dated at all.

*Attorney-Client Privilege*

Again, as noted above with respect to depositions, the attorney-client privilege applies to circumstances in which a client specifically solicits legal advice from an attorney (including in-house counsel) and not to communications with in-house counsel or an executive administrative (who may be a lawyer) concerning business and administrative affairs of the organization. The burden to support the privilege requires specificity:

> The party withholding a document on the basis of attorney-client privilege or the work product doctrine bears the burden of establishing facts to demonstrate applicability of the protective rule. *In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223, 224–25 (2d Cir. 1984). Federal Rule of Civil Procedure 26(b)(5) and Local Civil Rule 26.2 require the party withholding a document to prepare a privilege log, which BN has done. "The standard for testing the adequacy of the privilege log is whether, as to each document, it sets forth specific facts that, if credited, would suffice to establish each element of the privilege that is claimed." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 274 F.R.D. 106, 112 (S.D.N.Y. 2011) (internal quotation marks and citation omitted); *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 109 (S.D.N.Y. 2008) (a party must justify its assertion of privilege by providing sufficient information for its adversary to assess any potential objections).

*Brown v. Barnes & Noble, Inc.*, 474 F. Supp. 3d 637, 648 (S.D.N.Y. 2019), aff'd, , 2020 WL 5037573 (S.D.N.Y. Aug. 26, 2020).

The privilege logs prepared by Defendants do not meet the standard of setting forth "specific facts that, if credited, would suffice to establish each element of the privilege that is claimed." Defendants have not met their burden to show the applicability of this privilege to each item listed. There is simply no information to justify the use of this privilege in the wholesale manner it is asserted. It is noted that the discovery requests have been outstanding for a considerable length of time, and the first meet-and-confer was held on September 30, 2021. Defendants have had ample opportunity to comply with the requirements of their burden.

*Common Interest*

As Plaintiffs describe in their memo, this is not a separate privilege; it is a doctrine that operates as an application of an otherwise recognized privilege to circumstances when different parties represented by different attorneys share information that is otherwise privileged pursuant to one of the recognized privileges. See *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 71 (S.D.N.Y. 2009) (common interest doctrine is exception to general rule that voluntary disclosure of otherwise confidential or privileged material to third party waives

applicable privilege). Defendants have neither identified any other party with whom they may share a "common interest" with respect to a particular privilege, nor have they demonstrated the applicability of a particular privilege to any document. Moreover, Defendants have not established that Vermont courts have recognized or adopted the common interest doctrine.

*DFR Investigatory Privilege, 8 V.S.A. §§ 22-23*

The Department of Financial Regulation ("DFR") does have a statutory privilege to maintain confidentiality with respect to the investigations that it is authorized to undertake. See 8 V.S.A. §§ 22–23. However, the claims in this case do not call for confidential information derived from a DFR investigation. Rather, they relate to the conduct of the DFR in its role as administrator, along with ACCD, of the VRC. Moreover, as Plaintiffs' counsel notes, the statutory privilege applies to investigations of securities regulated by the DFR, which did not include entities like the Jay Peak projects until July 1, 2016, when 10 V.S.A. § 20(e) went into effect. The documents involved in this motion were prepared prior to this date and, thus, are not statutorily protected.

*Claims of nonwaiver and/or that any waiver was inadvertent*

The parties agree that Defendants shared information with the U.S. Attorney's Office in a federal proceeding that is not part of this case and in which neither Plaintiffs nor Defendants were parties. Plaintiffs contend that all documents voluntarily disclosed are now part of the public record and that Defendants have waived any privilege(s) they might otherwise have been able to assert in this case. (Motion at 11.) Defendants assert that they were responding to a subpoena in the federal proceeding, that some documents may have been produced inadvertently, and that any waiver in the federal proceeding was unintentional and does not constitute a waiver of any privilege applicable to this case. (See Opposition at 7; Exh. A to Motion.) The attorneys seem to have a common understanding about the events surrounding Defendants' disclosure and about which documents were shared with the U.S. Attorney's Office (Motion at 11-15, Opposition at 7-12, Reply 11-13), but neither the details of the disclosure nor the identification of the documents have been sufficiently provided to the court. The court, therefore, has no basis for addressing this argument. However, because the court concludes that Defendants have not met their burden to support their claims of privilege as to any of the documents requested in the five requests identified above, Plaintiffs' motion is granted as to all such documents.

Accordingly, Plaintiffs' motion to compel is granted as to all five document requests related to Exhibits A-E above.

**Order**

**Defendants are hereby compelled, pursuant to V.R.C.P. 37(a), to provide answers to the deposition questions and to provide the requested documents no later than March 23, 2023. Failure to do so could result in sanctions set forth in V.R.C.P. 37(h)(2), including such sanctions as: matters may be established in accordance with Plaintiffs' claims, denial of the opportunity for Defendants to support or oppose pertinent claims or defenses, or denial of the opportunity for Defendants to introduce designated matters into evidence.**

Electronically signed February 23, 2023 pursuant to V.R.E.F. 9 (d).

Mary Miles Teachout

Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned