IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Charles Walen, an individual, et al., Plaintiffs, vs. Doug Burgum, in his official capacity as Governor of the State of North Dakota, et al., Defendants, and Mandan, Hidatsa, & Arikara Nation, et al., Defendant-Intervenors.	Case No. 1:22-cv-31 **ORDER REGARDING DISCOVERY DISPUTE**

Plaintiffs challenge the 2021 redistricting of North Dakota's legislative districts. The parties dispute plaintiffs' obligation to produce certain documents, the sufficiency of plaintiffs' search for responsive documents, and application of the attorney-client privilege. Pursuant to Civil Local Rule 37.1, the court held an informal conference to discuss the dispute on December 20, 2022, but the dispute was not resolved during that conference. The parties had submitted position papers prior to the conference and were allowed to submit additional position papers subsequent to the conference in lieu of formal briefing. All position papers have been incorporated into the docket. (Doc. 69-4; Doc. 75; Doc. 76).

Background

On November 10, 2021, the North Dakota Legislative Assembly passed House Bill No. 1504, which altered the state's legislative districts. H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021). Governor Doug Burgum signed the bill into law the following day. Id.

Before the redistricting legislation, voters in each of North Dakota's 47 legislative districts elected one state senator and two representatives at-large. The redistricting legislation retained that procedure for 45 of the 47 districts. (Doc. 12-1).

Districts 4 and 9 are now different from the other 45 districts. Those two districts were subdivided into single-representative districts, denominated House Districts 4A, 4B, 9A, and 9B. Id. Voters in each of these subdivided districts elect one senator and one representative, instead of one senator and two representatives at-large. House District 4A traces the boundaries of the Fort Berthold Reservation of the Mandan, Hidatsa, and Arikara (MHA) Nation. House District 9A contains most of the Turtle Mountain Indian Reservation, with the remainder in House District 9B.

Plaintiffs—private citizens who reside in the subdistricts—allege a violation of the Equal Protection Clause, asserting race was the predominate factor behind the redistricting legislation and the redistricting resulted in illegal gerrymandering. (Doc. 1, p. 9). The MHA Nation intervened as a defendant.

On September 29, 2022, MHA Nation served a request for production of documents on plaintiffs, which included, among other things, a request for "All Documents and Communications regarding the drawing of subdistricts for Legislative Districts 4 and 9." (Doc. 75-1, p. 6). On November 21, 2022, plaintiffs responded to MHA Nation's requests for production of documents. As to MHA Nation's request for communications "regarding the drawing of subdistricts," plaintiffs stated there were "no documents or communications in their possession responsive . . . . Upon information and belief, any and all documents or communications responsive to this Request are in the possession of the State of North Dakota." (Doc. 75-3, 2).

Plaintiffs Paul Henderson and Charles Walen were deposed on December 7, 2022. Henderson took notes throughout his deposition. (Doc. 75-5; Doc. 75-6). Walen, who was deposed after Henderson, brought notes he had taken while observing Henderson's deposition. (Doc. 75-6, p. 5).

At the beginning of Walen's deposition, he testified he searched his e-mails and text messages for the words "redistricting" and "lawsuit" in order "[t]o see if I had anything in those areas that pertained to this case." Id. Walen's search produced a text message exchange between himself and a third party pertaining to the lawsuit.[1] After Henderson and Walen's deposition, Henderson submitted an affidavit that stated he "conducted a search of all my electronic communications" and was "unable to identify documents or materials responsive to [MHA Nation's] request." (Doc. 76-5). Plaintiffs indicate a similar affidavit from Walen is forthcoming.

MHA Nation requests that (1) the text message exchange about which Walen testified be produced, (2) plaintiffs be directed to conduct a more thorough search for documents, (3) Walen and Henderson's deposition notes be produced, and (4) plaintiffs produce attorney-client communications because plaintiffs have failed to invoke the privilege in accordance with Federal Rule of Civil Produce 26(b)(5)(A).

Law and Discussion

The court has discretion to resolve discovery disputes. See Corkrean v. Drake Univ., No. 421CV00336, 2022 WL 18632, at *2 (S.D. Iowa Jan. 3, 2022). Rule 26(b)(1) permits discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." "The scope of permissible

[1] Walen testified the only other responsive documents he found "are between my attorney and myself." (Doc. 75-6, p. 6).

discovery is broader than the scope of admissibility." Kampfe v. Petsmart, Inc., 304 F.R.D. 554, 557 (N.D. Iowa 2015). "Discovery requests are typically deemed relevant if there is any possibility that the information sought is relevant to any issue in the case." Id.

1. Production of Text Message and Sufficiency of Plaintiffs' Document Search

MHA Nation requests Walen's text message exchange be produced and plaintiffs be directed to undertake a more comprehensive search for responsive documents. (Doc. 69-4, p. 2). Plaintiffs argue the text message exchange is not responsive to any of MHA Nation's discovery requests, not relevant to any party's claims or defenses, and not proportional to the needs of the case. (Doc. 76, p. 3).

Plaintiffs appear to interpret MHA Nation's requests for documents and communications "regarding" the drawing of subdistricts as information that would have been "considered by the Legislative Assembly or the Redistricting Committee during the 2021 redistricting process."[2] Id. at 2. This interpretation is too narrow. In its discovery requests, MHA Nation defined "regarding" as "having any connection, relation, or reference to." And "Communication(s)" was defined as "any exchange or transfer of information between two or more persons or entities, including, but not limited to . . . text messages." (Doc. 75-1, p. 2). Plaintiffs are to interpret MHA Nation's discovery request in light of the definitions provided. See Star Direct Telecom, Inc. v. Glob. Crossing Bandwidth, Inc., 272 F.R.D. 350, 359 (W.D.N.Y. 2011). Walen's text message

[2] Plaintiffs assert they had no involvement or input in the legislative process that resulted in the redistricting. (Doc. 76, p. 2).

conversation with the third party is responsive to MHA Nation's fourth request for production of documents.[3]

Plaintiffs contend, even if responsive, Walen's text message exchange is not relevant to any claim or defense. (Doc. 76, p. 3). In its answer, MHA pled certain affirmative defenses that focus on plaintiffs' actions.[4] (Doc. 33, p. 12) (pleading the affirmative defenses of "unclean hands" and plaintiffs' lack of standing). In general, "[d]iscovery . . . is not a one-way proposition." Hickman v. Taylor, 329 U.S. 495, 507 (1947). In South Carolina State Conference of NAACP v. Alexander, for example, a three-judge panel directed plaintiffs in a redistricting case, all private parties, to produce a document concerning their internal "bullet points." No. 3:21CV03302, 2022 WL 2375798, at *8 (D.S.C. Apr. 27, 2022). In light of the broad standard for relevancy at the discovery stage, the court finds Walen's text message exchange relevant to a claim or defense at issue in the case. Accordingly, plaintiffs are directed to produce the text message exchange Walen described during his deposition.

After the Walen and Henderson depositions, Henderson submitted an affidavit that stated he "conducted a search of all my electronic communications" and was "unable to identify documents or materials responsive to [MHA Nation's] request." (Doc. 76-5). Plaintiffs indicate a similar affidavit from Walen is forthcoming. Even so, plaintiffs' narrow interpretation of MHA Nation's document requests warrants a more

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[3] Walen's text message exchange may be responsive to MHA Nation's other document requests as well. (See Doc. 75-1, p. 6).

[4] The court takes no position on the substance of MHA Nation's affirmative defenses. See, e.g., Nat. Res. Def. Council v. Curtis, 189 F.R.D. 4, 8 (D.D.C. 1999) ("[P]ermitting discovery and leaving the question of the sufficiency of plaintiffs' case as a matter of law to a point after discovery closes is the way in which the federal courts handle such matters.")

thorough search. Plaintiffs are directed to search their communications on all electronic devices they used during the relevant time period, as well as any paper documents they sent or received during the relevant time period, for documents responsive to MHA Nation's discovery requests, in light of the definitions provided.

2. Deposition Notes

MHA Nation requests that deposition notes taken by both Henderson and Walen be produced in accordance with Federal Rule of Evidence 612. Rule 612, which applies at depositions, provides that when a writing is used to refresh a witness's memory, the adverse party "is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony." "Rule 612 is an evidentiary and not a discovery rule." Antero Res. Corp. v. Tejas Tubular Prod., Inc., 516 F. Supp. 3d 752, 753 (S.D. Ohio 2021). That said, Rule 612 "permits a court to require the production of a writing used to refresh a witness's memory if justice so requires." Id. at 753.

Walen arrived at his deposition with notes taken during his observation of Henderson's deposition. Walen testified he brought the notes "so that [if] any questions might be similar, I'll have the answer." (Doc. 75-6, p. 5). Walen further testified the notes only contained "names and dates." Id. Walen's notes fall within the scope of Rule 612. "[D]ocuments used by a witness during his or her testimony must generally be produced." Barham v. Royal Caribbean Cruises, Ltd., No. 20-22627-CIV, 2022 WL 4465407, at *8 (S.D. Fla. Sept. 26, 2022). Walen's notes are neither work product nor protected by the attorney-privilege. Accordingly, plaintiffs are directed to produce all notes Walen took during Henderson's deposition and brought to his own deposition.

Henderson took notes, unlike Walen, during his deposition. Henderson could not have refreshed his memory using those notes, and therefore Henderson's notes are outside the scope of Rule 612. MHA Nation claims no other legal basis requiring that Henderson's notes be produced. Accordingly, plaintiffs need not produce Henderson's deposition notes.

3. Attorney-Client Privilege

MHA Nation argues plaintiffs waived their attorney-client protection because their written responses were untimely and, once produced, "no privilege was invoked and no privilege log was produced." (Doc. 69-4, p. 3). Plaintiffs point out that the parties stipulated that "communications involving trial counsel that post-date the filing of the Complaint in this action need not be placed on a privilege log." (Doc. 44, p. 2). Plaintiffs also contend because Rule 26(b)(1) permits discovery of only "nonprivileged" matters, attorney-client communications are outside the scope of permitted discovery. (Doc. 76, p. 6).

"Waiver is generally appropriate if the court finds 'unjustified delay, inexcusable conduct, or bad faith are present.'" Johnson v. Ford Motor Co., 309 F.R.D. 226, 235 (S.D.W. Va. 2015) (citing Westfield Ins. Co. v. Carpenter Reclamation, Inc., 301 F.R.D. 235, 247-48 (S.D.W. Va. 2014)). "[C]ourts will typically examine the circumstances behind the failure to respond timely to determine whether it was inadvertent, defiant, or part of a larger calculated strategy of noncompliance." Muslow v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll., No. CV 19-11793, 2021 WL 4243321, at *5 (E.D. La. Apr. 23, 2021). "[F]inding a waiver in such situations is a sanction, not an automatic consequence of every failure to comply with Rule 34(b)'s time limit for responding to a

discovery request with sufficient detail." Charles Alan Wright et al., 8 Federal Practice and Procedure § 2016.1 (3rd ed. Apr. 2022 Update).

MHA Nation served its request for production of documents on September 29, 2022. (Doc. 75-1, p. 7). Rule 34(b)(2)(A) states "[t]he party to whom the request is directed must respond in writing within 30 days after being served." Thus, plaintiffs' deadline to respond to MHA Nation's document request was October 29, 2022. Plaintiffs, however, did not respond until November 21, 2022—twenty-three days after the time to respond had passed. (Doc. 69-4, p. 1).

Plaintiffs' twenty-three day delay in responding to MHA Nation's discovery request does not appear to be part of a calculated strategy of noncompliance. See, e.g., Caudle v. D.C., 263 F.R.D. 29, 36 (D.D.C. 2009) (determining waiver of privilege inappropriate when party responded twenty-one days late to requests for production of document and thirty-seven days late to interrogatories). Thus, waiver on this basis is not warranted.

The issue of plaintiffs' failure to produce a privilege log is a closer call. Rule 26(b)(5)(A) requires a party withholding documents on the basis of privilege to "expressly make the claim" and "describe the nature of the documents" that are withheld. To comply with Rule 26(b)(5)(A), parties often agree to serve privilege logs. See Bartholomew v. Avalon Cap. Grp., Inc., 278 F.R.D. 441, 447 (D. Minn. 2011) ("The privilege log is a convention of modern legal practice designed to conform with the requirements" of Rule 26(b)(5)(A)). "Failure to assert the privilege within a reasonable time, without a showing of good cause, constitutes a waiver of the privilege." Banks v. Off. of Senate Sergeant-at-Arms, 241 F.R.D. 376, 386 (D.D.C. 2007).

As MHA Nation notes, plaintiffs' interpretation of Rule 26 would effectively nullify Rule 26(b)(5)(A). (Doc. 75, p. 3). Even though Rule 26(b)(1) permits discovery of only "nonprivileged" matters, privileged documents responsive to MHA Nation's discovery requests may be withheld only after a proper invocation of the relevant privilege. Invocations of privilege over a document must be in accordance with Rule 26(b)(5)(A); plaintiffs must "expressly make the claim" of privilege and "describe the nature of the documents" they withhold.

The court recognizes the parties stipulated that communications with counsel occurring after the filing of the complaint need not be included on a privilege log. (Doc. 44, p. 2). Plaintiffs are directed to produce a privilege log describing any pre-complaint attorney-client communications that are responsive to MHA Nation's discovery requests. Documents withheld on the basis of other privileges must also be included on the privilege log. See Muslow, 2021 WL 4243321, at *5 (directing plaintiffs to produce privilege log instead of finding waiver of privilege). Further, plaintiffs may not withhold documents as not relevant based on a narrow interpretation of MHA Nation's discovery requests and should look to the definitions provided by MHA Nation.

Conclusion

Within **fourteen days** of today's date, plaintiffs must (1) produce the text message exchange Walen described during his deposition; (2) conduct a more thorough search of their electronic communications and paper documents to identify documents responsive to MHA Nation's discovery requests; (3) produce Walen's deposition notes; and (4) produce a privilege log describing responsive documents claimed to be privileged, including any responsive pre-complaint attorney-client communications but

excluding any communications between plaintiffs and their counsel dated after the complaint was filed.

IT IS SO ORDERED.

Dated this 19th day of January, 2023.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge