

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

ROBERT STEINBUCH,)	
)	
Movant,)	
)	
v.)	Case No. 4:06-mc-0028-SWW
)	
JESSICA CUTLER,)	
)	
Non-movant)	
)	

**DEFENDANT’S RESPONSE TO
PLAINTIFF’S ASSERTIONS OF PRIVILEGE**

Comes Now Defendant and, pursuant to the Court’s Order of October 3, 2006, objects to the Plaintiff’s designation of the following emails as containing or constituting privileged materials:

9/27/06
From: Joshua Silverstein
To: UALR Law School Faculty
Contents: Message forwarded from J.T. Sullivan regarding law school publication of monthly "Footnotes."
Privilege asserted: outside scope of subpoena as it contains faculty/academic sensitive/confidential information

8/30/06
From: George Fisher
To: R. E. Steinbuch
Contents: Congratulations and advice regarding publication of Steinbuch article.
Privilege asserted: outside scope of subpoena as it contains individual sensitive/confidential information

8/29/06
From: AJC Editorial Office
To: R. E. Steinbuch
Contents: Submission of Steinbuch s article to the American Journal of Cardiology. Contains user name and password for Steinbuch to check on progress of paper.
Privilege asserted: outside scope of subpoena as it contains individual sensitive/confidential information

8/29/06

From: AJC Editorial Office

To: RE. Steinbuch

Contents: Contains username and confidential password needed to access editorial system at American Journal of Cardiology.

Privilege asserted: outside scope of subpoena as it contains individual sensitive/confidential information

*UA Position: Contents are same as above. Can be redacted.

8/24/06

From: Joshua Silverstein

To: R.E. Steinbuch

Contents: Additions and changes to main minutes of faculty meeting. Two attachments. One attachment is duplicate of above executive meeting minutes, containing discussion about readmission status of former law student. Privilege asserted: outside scope of subpoena as it contains faculty sensitive/confidential information

*uA position: Attachment containing readmission discussion should be omitted. No privilege concerning remainder of contents.

8/24/06

From: Heather McKinney

To: RE. Steinbuch

Contents: Question from former student and currently practicing attorney regarding advice on filing a complaint. Question is framed generally, with no identifying information regarding the lawsuit at issue.

Privilege asserted: attorney/client

8/24/06

From: Joshua Silverstein

To: R.E. Steinbuch

Contents: Attached faculty meeting attendance sheet, faculty meeting minutes of 3/9/06 and faculty meeting minutes of 10/13/05.

Privilege asserted: outside scope of subpoena as it contains faculty sensitive/confidential information

8/22/06

From: Marcie Long, paralegal to Nicholas Patton, re. pleadings

To: RE. Steinbuch

Contents: General note from paralegal notifying Steinbuch that package will be sent via FEDEX. Pleadings not attached.

Privilege asserted: attorney/client

8/21/06

From: Ira Wiener

To: RE. Steinbuch

Contents: Answer from managing attorney of law firm in New York to Steinbuch. General question regarding a stay of discovery.

Privilege asserted: attorney/client

8/18/06

From: Foundation Press

To: RE. Steinbuch

Contents: 2006 update to Teacher s Manual for Evidence published by Foundation Press.

Privilege asserted: outside scope of subpoena as it contains individual/academic sensitive/confidential information

8/17/06

From: Jamie Evans

To: RE. Steinbuch

Contents: Research information attached regarding civil products liability in France, Canada and Japan.

Privilege asserted: outside scope of subpoena as it contains academic sensitive/confidential information

8/15/06

From: Tony Joseph

To: R.E. Steinbuch

CC: Lee Crayton, Ezra Amsterdam, Dov Frankel

Contents: Research and database information from AMC Chest Pain Registry.

Privilege asserted: outside scope of subpoena as it contains individual/academic sensitive/confidential information

8/5/06

From: George Fisher

To: RE. Steinbuch

Contents: Concerns supplement for Evidence textbook. Attachment contains answers to Chapter 8.

Privilege asserted: outside scope of subpoena as it contains academic sensitive/confidential information

8/4/06.

From: mxflannery

To RE. Steinbuch

Contents: Discussion of and attachment for application for faculty promotion

Privilege asserted: outside scope of subpoena as it contains faculty/academic sensitive/confidential information

8/1/06

From: Barbara Peterson

To: RE. Steinbuch

Contents: attachment of Teacher s Manual to accompany Law and Economics textbook.

Privilege asserted: outside scope of subpoena as it contains academic sensitive/confidential information

8/1/06

From: Bob Lipetz

To: Christopher P. Cannon, M.D., Cynthia G. Wailer, Ezra Amsterdam, ifesmir, peacow, Dennis, J. Lee Garvey, M.D., James McCord, M.D., Louisgraph, tothrn, Michael Ross, Ray Bahr, aghababr, rjesse, RE. Steinbuch, Robert Stomel, dadkhahsc, ssieck, wayne

CC: Kay Holmes

Contents: Analysis of accredited versus non-accredited chest pain center performance. Document attached. Information is denoted as confidential and recipients of e-mail are asked not to share information until said information is made public.

Privilege asserted: outside scope of subpoena as it contains individual/academic sensitive/confidential information

7/29/06

From: RE. Steinbuch

To: Glennis

CC: R.E. Steinbuch

Contents: Attached receipt for Bar dues and reference to dues for membership to Society of Chest Pain Centers.

Privilege asserted: outside scope of subpoena as it contains individual/academic/financial sensitive/confidential information

7/26/06

From: Tony Joseph

To: Connie Wolfe, Lee Crayton, Rob Steinbuch, Ezra Amsterdam, Dov Frankel

Contents: Data spreadsheet regarding "Influence of Time of Day on PPCI Draft"

Privilege asserted: outside scope of subpoena as it contains individual/academic sensitive/confidential information

7/26/06

From: Ellen Horton

To: R.E. Steinbuch

Contents: Acknowledgment of receipt of payment for membership in Society of Chest Pain Centers. Contains membership number and password for access to members only internet privileges.

Privilege asserted: outside scope of subpoena as it contains individual/academic sensitive/confidential information

7/24/06

From: George Fisher

To: RE. Steinbuch

Contents: Attachments include case supplement for law school textbook and attachment for answers to Chapter 8.

Privilege asserted: outside scope of subpoena as it contains individual academic sensitive/confidential information

7/22/06

From: Joshua Silverstein

To: RE. Steinbuch

Contents: Discussion of paper submitted by law school student.

Privilege asserted: outside scope of subpoena as it contains academic/student sensitive/confidential information

*UA position: Student's name should be redacted under FERPA.

7/13/06

From: J.T. Sullivan

To: RE. Steinbuch

Contents: Discussion by law school colleague regarding Steinbuch's ideas about Arkansas law journal publications and submission of articles by faculty members.

Privilege asserted: outside scope of subpoena as it contains faculty/academic sensitive/confidential information

7/3/06

From: VoteGreenberg

To: RE. Steinbuch

Contents: Request for Steinbuch's assistance as informal advisor to new State Representative.

Privilege asserted: outside scope of subpoena as it contains individual sensitive/confidential information

7/2/06

From: RE. Steinbuch

To: xjonathan@mac.com

CC: R.E. Steinbuch

Contents: General summary of Arkansas law regarding suits against the State for employment actions.

Privilege asserted: attorney/client

6/27/06

From: Accounts Payable

To: RE. Steinbuch

Contents: Direct deposit information.

Privilege asserted: outside scope of subpoena as it contains individual/financial sensitive/confidential information

*UA position: Account number and deposit amount should be redacted or e-mail omitted.

6/13/06

From: Melissa Surfass

To: R. F. Steinbuch

Contents: Information from law school librarian regarding access to law school database and index sources. No password included.

Privilege asserted: outside scope of subpoena as it contains individual/academic sensitive/confidential information

5/30/06

From: Frances Fendler

To: RE. Steinbuch

Contents: E-mail from law school colleague regarding Business Associations course and proposal change.

Privilege asserted: outside scope of subpoena as it contains faculty/academic sensitive/confidential information

5/18/06

From: Bob Lipetz

To: Members of Board of Trustees of Society of Chest Pain Centers (see addresses listed in 8/1/06 above) -

Contents: attachment contains file to print new letterhead of Society of Chest Pain Center

Privilege asserted: outside scope of subpoena as it contains individual/academic sensitive/confidential information

5/2/06

From: toifaac@ualr.edu

To: RE. Steinbuch

Contents: Request for advice regarding personal lawsuit (no specific or identifying information)

Privilege asserted: outside scope of subpoena as it contains individual sensitive/confidential information and attorney/client

4/3/06 From: Southwest Airlines

To: RE. Steinbuch

Contents: Receipt and Itinerary for flight departing 3/29/06. Contains passenger account number for Southwest Airlines.

Privilege asserted: outside scope of subpoena as it contains individual sensitive/confidential information

3/29/06

From: Nathan M. Krystal

To: RE. Steinbuch

Contents: Questions and answers to and from Steinbuch and law professor at University of South Carolina regarding application of evidentiary rules to various situations.

Privilege asserted: outside scope of subpoena as it contains individual/academic sensitive/confidential information

3/25/06 From: Bruce Anderson

To: RE. Steinbuch

Contents: Information from UALR regarding check for reimbursement issued on 3/24/06 and general information regarding direct deposit accounts.

Privilege asserted: outside scope of subpoena as it contains individual/financial sensitive/confidential information

3/3/06

From: RE. Steinbuch

To: RE. Steinbuch

Contents: Attachment containing U.S. Senate testimony.

Privilege asserted: outside scope of subpoena as it contains individual/academic sensitive/confidential information

2/16/06

From: UALR List LAWFAC-L, Melissa Surfass

To: Law School Faculty

Contents: Message from law school librarian regarding consideration of

Purchase of online version of US Law Week. Contains a username and password. Privilege asserted: outside scope of subpoena as it contains individual/academic sensitive/confidential information

*UA position: Username and password can be redacted.

12/15/05 From: Ralph@CCV

To: RE. Steinbuch, robertaitan@hotmail.com

Contents: Invoice from Cross Country Van Lines

Privilege asserted: outside scope of subpoena as it contains individual/financial sensitive/confidential information

12/8/05

From: RE. Steinbuch

To: RE. Steinbuch

Contents: Attachments containing law school exam, exam questions and answers

Privilege asserted: outside scope of subpoena as it contains faculty/academic sensitive/confidential information -

11/17/05

From: R.E. Steinbuch

To: A. Mike Beard

Contents: Question to Steinbuch regarding Beard s capital gains tax and Steinbuch s answer.

Privilege asserted: outside scope of subpoena as it contains individual/financial sensitive/confidential information

11/10/05

From: Jamie Evans

To: RE. Steinbuch

Contents: Lengthy discussion from student regarding performance in class and request for makeup.

Privilege asserted: outside scope of subpoena as it contains individual/academic sensitive/confidential information

*UA position: Protected by FERPA. Student s name can be redacted.

11/9/05

From: Jack Nagel

To: RE. Steinbuch

Contents: Request for information from Steinbuch regarding a Professor Frey.

Nagel responds with Frey s home address.

Privilege asserted: outside scope of subpoena as it contains individual sensitive/confidential information

11/2/05

From: Sarah Howard Jenkins

To: Ken Gallant

CC: R.E. Steinbuch

Contents: Attachment containing memorandum from Jenkins to Promotion and Tenure Committee recommending retention of R.E. Steinbuch.

Privilege asserted: outside scope of subpoena as it contains individual/academic/faculty sensitive/confidential information

11/1/05

From: Paula Casey

To: RE. Steinbuch

Contents: Attachment containing review of Steinbuch s performance in class by Casey.

Privilege asserted: outside scope of subpoena as it contains individual/academic/faculty sensitive/confidential information

10/14/05

From: Joshua Silverstein

To: RE. Steinbuch

Contents: Links to various investment funds.

Privilege asserted: outside scope of subpoena as it contains individual sensitive/confidential information

8/16/05

From: A. Mike Beard

To: RE. Steinbuch -

Contents: Contains a case sensitive code for CALI registration.

Privilege asserted: outside scope of subpoena as it contains individual/academic sensitive/confidential information

UA position: Information can be redacted.

Defendant has not objected to the assertion of privilege by the University of Arkansas and Defendant concurs with the University of Arkansas' position regarding the emails to which it has asserted that privileged information may be redacted. Defendant opposes Plaintiff's assertion of privilege in all other respects.

A. Steinbuch's Assertion of Privilege On The Basis That Emails Contain "Faculty/Academic Sensitive/Confidential Information" Is Without Merit

Evidentiary privileges in the federal court system are established under Rule 501 of the Federal Rules of Evidence. As the Eighth Circuit has held:

Federal common law recognizes a privilege only in rare situations. See, e.g. . . . University of Pa. v. EEOC, 493 U.S. 182, 189, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990) (**rejecting academic peer review privilege**) . . . (emphasis added).

In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 918 (8th Cir. 1997). This clear and binding statement of authority is such that Plaintiff's objection on this basis is without substantial justification and, therefore, should entitle Defendant to an award of attorneys' fees for having had to respond to the assertion of privilege.

B. Steinbuch's Assertion of Privilege On The Basis That Emails Contain "Individual Sensitive/Confidential Information" Is Without Merit

As noted above, recognition of new privileges by the federal courts is rare. A privilege for "individual sensitive/confidential information" is so inherently vague that it would strike at the heart of the right to obtain evidence in discovery. While Defendant does not desire production of passwords for internet websites, she is entitled to a redacted version of the documents in question, as the University of Arkansas has indicated.

Steinbuch has failed to assert any recognized (or recognizable) privilege with respect to these emails. He has failed to show how his communications with the parties to these emails are in any way subject to any claim of privilege. They should be produced.

C. Steinbuch's Assertion of Privilege On The Basis That Emails Contain "Individual/Financial Sensitive/Confidential Information"

"Financial Sensitive/Confidential Information" is not a recognized privilege. Even were Steinbuch an accountant, no privilege for such information would apply. Couch v. United States, 409 U.S. 322, 335 (1973) ("no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases.") As a result, Steinbuch simply cannot claim a "financial" privilege in a case in which he seeks money damages for lost income,

emotional distress, and harm to his reputation. These email should be produced notwithstanding his claim of financial privacy.

D. Steinbuch's Assertion of Privilege On The Basis That Emails Are Protected By The Attorney-Client Privilege Is Without Merit

There are five emails which fall within the scope of this assertion of privilege:

8/24/06

From: Heather McKinney

To: RE. Steinbuch

Contents: Question from former student and currently practicing attorney regarding advice on filing a complaint. Question is framed generally, with no identifying information regarding the lawsuit at issue.

Privilege asserted: attorney/client

8/22/06

From: Marcie Long, paralegal to Nicholas Patton, re. pleadings

To: RE. Steinbuch

Contents: General note from paralegal notifying Steinbuch that package will be sent via FEDEX. Pleadings not attached.

Privilege asserted: attorney/client

8/21/06

From: Ira Wiener

To: RE. Steinbuch

Contents: Answer from managing attorney of law firm in New York to Steinbuch. General question regarding a stay of discovery.

Privilege asserted: attorney/client

7/2/06

From: RE. Steinbuch

To: xjonathan@mac.com

CC: R.E. Steinbuch

Contents: General summary of Arkansas law regarding suits against the State for employment actions.

Privilege asserted: attorney/client

5/2/06

From: toifaac@ualr.edu

To: RE. Steinbuch

Contents: Request for advice regarding personal lawsuit (no specific or identifying information)

Privilege asserted: outside scope of subpoena as it contains individual sensitive/confidential information and attorney/client

The University of Arkansas has claimed no privilege with regard to these emails and Plaintiff has failed to support any such claim in his own right.

It is black letter law that a party which claims the existence of a privilege bears the burden of establishing both the existence and parameters of any such privilege. Department of Economic Dev. v. Arthur Andersen & Co., 139 F.R.D. 295, 300 (S.D.N.Y.1991) (citations omitted). Because the existence of the privilege and the applicability of any exception to the privilege is a question of fact for the judge, this burden requires an evidentiary submission establishing the existence of the privilege. In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 454 (6th Cir.1983), cert. denied, 467 U.S. 1246, 104 S.Ct. 3524, 82 L.Ed.2d 831 (1984). The burden is on the party claiming the privilege to establish those facts that constitute the essential elements of the privileged relationship. Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 470 (S.D.N.Y. 1993) (quoting Von Bulow v. Von Bulow, 811 F.2d 136, 144 (2d Cir. 1987)). "This burden can be met only by an evidentiary showing based on competent evidence and not be discharged by mere conclusory or ipse dixit assertions." Id.

To determine if a particular communication is confidential and protected by the attorney-client privilege, defendant must prove the communication was "(1) intended to remain confidential and (2) under the circumstances was reasonably expected and understood to be confidential." Bogle v. McClure, 332 F.3d 1347, 1358 (11th Cir. 2003). In this case, emails to and

from Steinbuch are not privileged and cannot be considered privileged because of the very prominent notice displayed upon log-in to the University's computers. See Exhibit 1.

"A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Ark. R. Evid. 502(a)(5). In this case, Steinbuch was notified that every communication which he had using his University of Arkansas computer was **not** confidential and that his use of the computer system gave the University the exclusive right to determine what would or would not be maintained as confidential. If he had had questions about this issue, he was even given the telephone number to call to gain further information.

These emails, using his work email address and the email server at the University of Arkansas, are the property of the University of Arkansas, a unit of the Board of Regents of the State of Arkansas, and are **not** that of Plaintiff. Ark. Code Ann. §§ 25-19-103(1), 25-19-105(a) (Repl. 1992); Biby v. Bd. of Regents, 419 F.3d 845 (8th Cir. 2005); United States v. Thorn, 375 F.3d 679, 2004 U.S. App. LEXIS 14295 (8th Cir. Mo. 2004), vacated on other grounds by, remanded by, motion granted by, Thorn v. United States, 543 U.S. 1112, 125 S. Ct. 1065 (2005), reinstated by United States v. Thorn, 413 F.3d 820 (8th Cir. 2005). He has shown no expectation of privacy in these emails and, given the public nature of these records under Arkansas' Freedom of Information Act, can show none. As held in United States v. Bailey, 272 F. Supp. 2d 822, 835-836 (D.Neb. 2003):

An employee cannot claim a justified expectation of privacy in computer files where the employer owns the computer; the employee uses that computer to obtain access to the internet and e-mail through the employer's network; the employee was

explicitly cautioned that information flowing through or stored on computers within the network cannot be considered confidential, and where computer users were notified that network administrators and others were free to view data downloaded from the internet. United States v. Angevine, 281 F.3d 1130 (10th Cir. 2002) (professor had no Fourth Amendment right to suppress evidence of child pornography located on the erased files on his office computer which was part of university network). See also, United States v. Simons, 206 F.3d 392 (4th Cir. 2000) (CIA division's official Internet usage policy eliminated any reasonable expectation of privacy that employee might otherwise have in copied files); Muick v. Glenayre Electronics, 280 F.3d 741 (7th Cir. 2002) (employee had no reasonable expectation of privacy in laptop files where employer announced it could inspect laptops it furnished to employees and employer owned laptops); Garrity v. John Hancock Mut. Life Ins. Co., 2002 U.S. Dist. LEXIS 8343, 18 I.E.R. Cas. (BNA) 981, 2002 WL 974676 (D. Mass. 2002) (employees had no reasonable expectation of privacy where they admitted knowing employer had ability to look at e-mail on company's intranet system, and knew they had to be careful about sending e-mails; Wasson v. Sonoma County Junior Coll., 4 F. Supp. 2d 893, 905-06 (N.D. Cal. 1997) (employer's computer policy giving it "the right to access all information stored on [the employer's] computers" defeats employee's reasonable expectation of privacy in files stored on employer's computers); United States v. Monroe, 52 M.J. 326 (C.A.A.F. 2000) (sergeant had no reasonable expectation of privacy in his government e-mail account because e-mail use was reserved for official business and network banner informed each user upon logging on to the network that use was subject to monitoring).

Given the presumption under Arkansas law that records created by public employees using public property are public records, Plaintiff can show no privacy or other personal right in preventing the disclosure of these records. In light of the specific notice that his use of this computer would not afford him any expectation of privacy, he cannot even have claimed to believe he had any such right.

Because he has no personal right or privilege in preventing disclosure of the email communications sought by Defendant's subpoena, he is without standing to object to their production. Laxalt v. McClatchy, 809 F.2d 885, 891 (D.C. Cir. 1987):

A litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). This rule clearly applies to discovery proceedings. See e.g., Diamantis v. Milton Bradley Co., 772 F.2d 3, 4-5

(1st Cir. 1985). Thus, where, as here, a subpoena duces tecum is directed to a nonparty, "unless a party to the action can make a claim to some personal right or privilege with respect to the subject matter of such subpoena directed to a nonparty witness, the party to the action has no right to relief under these rules, [26(a), 30(b), 45(b) and 45(d)]." Taylor v. Litton Medical Prods., Inc., 19 Fed.R.Serv. 2d (Callaghan) 1190, 1192 (D. Mass. 1975) (bracketed material in original).

Id., at 891. Thus, Plaintiff does not have standing to object to the production of these emails and any privilege he claims to have had in these emails has been waived by their public disclosure.

Respectfully submitted this 18th day of October, 2006.

/s/ Matthew C. Billips
Matthew C. Billips
Georgia Bar No. 057110
MILLER & BILLIPS, LLC
730 Peachtree Street, Suite 750
Atlanta, GA 30308
ph: (404) 969-4101
fax: (404) 969-4141
mbillips@mbalawfirm.com

**COUNSEL FOR DEFENDANT
JESSICA CUTLER**

WILLIAMS & ANDERSON PLC
111 Center Street
Twenty-Second Floor
Little Rock, Arkansas 72201
(501) 372-0800
(501) 372-6453 (facsimile)
E-mail: bdeere@williamsanderson.com
By: /s/ Beth Deere
Beth M. Deere, Ark. Bar #86050

LOCAL COUNSEL

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

ROBERT STEINBUCH,)	
)	
Movant,)	
)	
v.)	Case No. 4:06-mc-0028-SWW
)	
JESSICA CUTLER,)	
)	
Non-movant)	
)	

CERTIFICATE OF SERVICE

This is to certify that I have on this day served copies of the attached **“DEFENDANT’S RESPONSE TO PLAINTIFF’S ASSERTIONS OF PRIVILEGE”** on defense counsel identified below by electronically filing a copy of same with the Clerk of Court by using the CM/ECF System which will automatically send e-mail notification of such filing to the following attorneys of record:

Jonathan Rosen, Esq.
1645 Lamington Road
Bedminster, New Jersey 07921

Jonathan Rosen, Esq.
1200 Gulf Blvd., 1506
Clearwater, Florida 33767

This 18th day of October, 2006.

/s Matthew C. Billips
Matthew C. Billips
Georgia Bar No. 057110

MILLER & BILLIPS, P.C.
730 Peachtree Street, Suite 750
Atlanta, Georgia 30308
(404) 969-4101
(404) 969-4141 (fax)
[mbillips@mbalawfirm.com](mailto:mwillips@mbalawfirm.com)