

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY W. ROBINSON,

Plaintiff,

v.

COUNTY OF SAN JOAQUIN,

Defendant.

No. 2:12-cv-2783 MCE GGH PS

ORDER

Presently before the court is plaintiff’s renewed motion to compel discovery, filed April 11, 2014. (ECF No. 67). After reviewing the papers in support of and in opposition to the motion, the court now issues the following order.

BACKGROUND

The only outstanding discovery matter to be decided in this case is Document Request No. 1, “All emails in which Plaintiff’s name appears in the subject line or in the body of the e-mail from November 14, 2007 to July 1, 2011.”¹² This motion originally came to the court’s attention

¹ The document request further states:

The emails during this period may contain information relevant in these proceedings and are necessitated by disclosure by Defendant of an e-mail from Allet Williams (Defendant Witness) to Maria Castellanos (Defendant Witness) dated February 1, 2008, in which Plaintiff is mention in subject line and the body of the e-mail, and Ms. Williams states she has been in contact with Labor Relations

1 with plaintiff's initial motion to compel, filed January 28, 2014 (ECF No. 35). An order deciding
2 that motion was issued on February 24, 2014, (ECF No. 43), with directions to defendant to
3 provide a privilege log and a declaration supporting its burden objection. That information was
4 filed on March 6, 2014. (ECF No. 44.) Unsatisfied with that response, plaintiff filed his renewed
5 motion which is now before the court. On June 27, 2014, defendant was directed to file an
6 opposition, and plaintiff was permitted to file a reply, (ECF No. 86), which they did on July 11,
7 2014 (ECF No. 93), and July 17, 2014 (ECF No. 98), respectively.

8 DISCUSSION

9 The discovery thus far on this facially, seemingly, not extremely difficult to comply with,
10 discovery request has been a discovery shell game resulting in a futile attempt to discover the
11 "pea," but always coming up empty handed, and apparently so for different reasons. If the
12 purpose of responding to this request has been to wear the court out, that purpose has been
13 realized, and the undersigned has grown weary. The undersigned will characterize the discovery
14 efforts so far, highlight the inconsistencies/incompleteness in response, as well as the complete
15 cacophony of the San Joaquin County e-mail systems and information retrieval, and will then
16 issue one final and *specific* order, which will be complied with lest serious sanctions issue.

17 In the previous order addressing Document Request Number 1, the undersigned stated:

18 The County contends that it did conduct a search for emails
19 containing plaintiff's name which were sent to or from plaintiff's
20 direct supervisors, John Solis, Maria Castellanos and Allet
21 Williams, and that it has produced such non-privileged emails;
22 however, emails between Gil Gutierrez, Deputy County Counsel
23 and all County employees, as well as the Board of Supervisors are
24 protected by the attorney client privilege, are work product, and/or
25 may implicate the privacy rights of clients and consumers. The
26 County states that it did provide plaintiff with emails from County

23 and to "Please keep in mind that there is history with Anthony,
24 what we do and how we do will be scrutinized, however we will
25 deal with the problem." Ms. Williams further adds "I have been
26 cautioned to make certain what occurs is not retaliation or fallout
27 from previous situations." Finally, Ms. Williams concludes with "I
28 am receiving guidance from Human Resources and Labor
Relations."
(ECF No. 93-2 at 1.)

² The remainder of plaintiff's renewed motion to compel pertains to matters previously decided.

1 Employees to Gutierrez during the time period covering plaintiff's
2 EEOC complaint investigation.

3 The County further argues that this request is overbroad and
4 burdensome, and a search for every email with plaintiff's name
5 turns up emails completely unrelated to this litigation.

6 The County did not provide a privilege log with its
7 objections. Privilege logs are due at the time a discovery response
8 is made. See Fed. R. Civ. P. 26(b)(5) (requiring privilege log for
9 withheld documents), and Fed. R. Civ. P. 34(b) (objections are due
10 within 30 days). While not many litigants will be overly incensed
11 about a privilege log not delivered until actual document
12 production, at the very latest, privilege logs should be delivered, or
13 at least promised forthwith during the meet and confer process of a
14 discovery dispute. Eureka v. Hartford Ins., 136 F.R.D. 179, 184
15 (E.D. Cal. 1991). Under federal law, improper assertions of
16 privilege in the privilege log, or an untimely privilege log, may (but
17 not necessarily) result in waiver. Burlington Northern & Santa Fe
18 etc. v. U.S.D.C. Montana (Kapsner), 408 F.3d 1142 (9th Cir. 2005).
19 The court has discretion in this regard. United States v.
20 Construction Products Research, Inc., 73 F.3d 464, 473 (2nd Cir.
21 1996). Privilege logs should contain the following information:
22 general nature of the document, the identity and position of its
23 author, the date of authorship, identity and position of recipients,
24 location of the document, and reason document was withheld.
25 W.W. Schwarzer, A.W. Tashima & J. Wagstaffe, Federal Civil
26 Procedure Before Trial § 11:1919.

27 At the hearing, the County was directed to produce a
28 privilege log within ten court days of the hearing.

The County also failed to produce a declaration regarding
burden, arguing only that plaintiff's request was so broad that many
of the responsive documents would be irrelevant, and that its IT
Department stated that it would be difficult to find all responsive
emails.

General or boilerplate objections such as "overly
burdensome" are improper, especially when a party fails to submit
any evidentiary declarations supporting such objections. A. Farber
and Partners, Inc. v. Garber, 234 F.R.D. 186, 188 (C.D. Cal. 2006).
The County bears the burden, as the objecting party, to show
reasons for its objections, and for failing to produce the requested
discovery. Bible v. Rio Properties, Inc., 246 F.R.D. 614, 618 (C.D.
Cal. 2007). The objecting party must demonstrate "specifically
how, despite the broad and liberal construction afforded the federal
discovery rules, each interrogatory is not relevant or how each
question is overly broad, burdensome or oppressive [] by
submitting affidavits or offering evidence revealing the nature of
the burden." Roesberg v. Johns-Manville Corp., 85 F.R.D. 292,
296-97 (D.C. P. 1980) (internal citations omitted).

As the County has failed to provide a declaration supporting
its objection based on burden, it shall file and serve a declaration by

1 a member of its IT Department which outlines the burden involved
2 in responding to this document request.

3 (Order, filed February 24, 2014, ECF No. 43 at 3-4.)

4 *Thus, at this juncture, the County unilaterally narrowed plaintiff's requests to three*
5 *individuals, and apparently produced emails from these persons for all requested years, and*
6 *made non-specific attorney-client objections.*

7 In its response to the court's order regarding Document Request Number 1, and despite
8 having previously invoked the attorney-client privilege, defendant stated that no privileged
9 documents had been identified at that time. (ECF No. 44-1 at 1.)

10 In regard to burden, defendant submitted a declaration by a Department Information
11 Systems Analyst III for San Joaquin County, assigned to the Employment and Economic
12 Development Department ("EEDD") (plaintiff's department), which states in part:

13 3. The County email system is a system of individual email
14 boxes. The County does not have the capacity to perform a system-
15 wide search of all emails. Rather, to search for a particular email or
16 category of emails, one must access an individual employee email
box and perform a search in that particular email box. The nature
of the email system makes it a time consuming task to search for a
particular category of emails across multiple email boxes.

17 4. Retention of emails is also based on individual email
18 boxes. Employee email boxes are routinely backed up and those
19 backups are retained for one year. The Information Systems
20 Division does not control whether individual emails are deleted or
retained and each individual employee may delete or retain an
email for various lengths of time.

21 6. [sic] The County has conducted a search of all EEDD
22 current employee email boxes. The County has a limited ability to
23 search former employee's email boxes. In 2012, the County
24 transitioned to a new email system and in that transition, the ability
to access old emails as an administrator was eliminated. At this
point in time, I do not have the ability to log into or search any
additional former employee email boxes.

25 (Warren Decl., ECF 44-3 at 1-2.)

26 *This declaration raises more questions than it answers (especially when compared to the*
27 *Becker declaration below). In this individual email box situation where the overall systems*
28 *administrator apparently has little control (highly unusual), emails are backed up, but deletions*

1 of emails are at the seemingly unfettered discretion of each employee. A search was undertaken
2 of all current EEDD employees (for unspecified years), but a systems change made it impossible
3 to search for emails prior to 2012—(was this for current as well as former employees, or just
4 former employees?) Backups are retained for only one year, which apparently means that a
5 search for emails older than one year is entirely dependent upon whether an individual employee
6 determined: to clean his or her email box as soon as possible; to clean the box at some unknown
7 years time after the email was written/received; or to never delete any emails. No emails for
8 former employees for the years 2007-2011, regardless of relevance, would be available.
9 Destruction of potential evidence therefore was, and would continue to be, uncontrollable.

10 Next, the Systems Administrator for the entire County weighed in, or at least that part of
11 the County whose departments do not run an entirely independent systems administration like
12 EEDD. Declaration of Jerry Becker, ECF 93-6. Mr. Becker also describes the various email
13 systems in use for the County departments which are quite different from one another both in
14 terms of software company and age of each program. Thus, according to Mr. Becker, it would be
15 an unfair burden on anyone to try to find emails as plaintiff has requested from 2007- 2011. Mr.
16 Becker, unlike Ms. Warren, does believe a system wide search can be made for emails by the
17 systems administrator, but with the caveat that the network search might not find emails that are
18 kept “locally” on an individual’s computer, but not on the network (however that happens).
19 Backups of emails are made, but they are only retained for one year, apparently regardless of
20 whether an email box is for a current or former employee. He thought that Ms. Warren did have
21 access to an old server with the “potential” for the existence of older emails, but deferred to Ms.
22 Warren for that analysis.

23 So again, it appears that the existence of emails over one year old varies with each
24 employee depending on the whims of each employee. The discussion about burden (on a County
25 wide basis) becomes more understandable when it is realized that a systems based email search,
26 if possible at all, would be incomplete even within a one year time frame, and not possible for
27 emails older than one year (the emails in question). Thus, every employee’s “C” drive would
28 have to be searched in order to have any confidence that a “complete” search was performed for

1 *any emails that happened to be still around. Of course, a “complete” search of potentially very*
2 *incomplete records is a contradiction in terms. Whether potential evidence was destroyed would*
3 *apparently be based on a completely arbitrary, individual decision unconstrained by any*
4 *formalized procedures for preservation of evidence.*

5 CONCLUSION

6 Thus, the undersigned orders as follows:

- 7 1. Plaintiff’s motion to compel (ECF No. 67), is granted insofar as it resolves the
8 matters herein;
- 9 2. The County shall specify those emails produced from what persons and from
10 which County departments who/which have supplied emails pertinent to Request 1 thus
11 far, in terms of each year, 2007- present, which were available for a search; the
12 specification shall include a statement concerning the unavailability of potentially relevant
13 emails for the years for which the individual determined to delete “old” emails;
- 14 3. For the departments EEDD, Human Resources and Labor Relations (includes any
15 other personnel department however denominated), County Counsel, and that department
16 responsible for processing discrimination claims if different from Human Resources, etc.,
17 the County shall specify what, if any document preservation policies for potential/actual
18 litigation were in effect for the years 2007 and each year subsequent, and whether they
19 were complied with in this case;
- 20 4. For the departments listed in paragraph 2, and with the exception of those
21 employees identified in compliance with paragraph 1, the County shall perform a
22 computer by computer search for all current employees in order that *any* emails relating to
23 plaintiff’s discrimination claims or job performance for the years 2007 to present may be
24 produced; this search may be accomplished by an instruction to each department
25 employee to search *all* emails existing on his/her computer for the years 2007 to present;
26 the employee shall report to the person making the results/production required by this
27 paragraph known to the court what that employee’s email retention/deletion policy was
28 for the years 2007-present; the reporting person shall prepare a listing for each employee;

1 as indicated above, a report of documents produced and identification of individual
2 document retention/deletion policies shall be filed with the court;³ and

3 5. The court understands from the declarations submitted that no emails remain for
4 former employees for the years 2007-2011; if this is correct, a knowledgeable person(s)
5 shall affirm the court's understanding; if this is not correct, the same search/report
6 required in paragraph 3 shall be made for former employees of the specified departments
7 for these years. This search may be delegated to a person(s) knowledgeable in
8 information retrieval.

9 Specifications and report of searches as ordered above shall be made in the form of a
10 declaration by a knowledgeable person(s). The filing of the declarations(s) shall be made within
11 30 days of the filed date of this order; no extensions will be authorized.

12 IT IS SO ORDERED.

13 Dated: July 31, 2014

14 /s/ Gregory G. Hollows

15 UNITED STATES MAGISTRATE JUDGE

16

17

18

19

20 GGH:076/Robinson2783.mtc#1

21

22

23

24

25

26 _____
27 ³ The undersigned understands that substantial work will be required for compliance with this
28 order. However, the undersigned is not responsible for the County's email systems which
apparently have been designed for individual control and with *no* concern for litigation
responsibilities.