

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

JORDAN HARDMAN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 19-cv-02251-KHV-TJJ
)	
UNIFIED GOVERNMENT OF WYANDOTTE)	
COUNTY AND KANSAS CITY, KS, et al.,)	
)	
Defendants.)	

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF HER MOTION TO COMPEL DEFENDANT
UNIFIED GOVERNMENT TO PRODUCE DOCUMENTS**

In support of her Motion to Compel Defendant Unified Government (“UG”) to produce documents, Plaintiff Jordan Hardman provides the following:

OVERVIEW

In the summer of 2016, the Unified Government hired Plaintiff as a KCKPD Police Cadet. The police cadet program was an on-ramp for individuals interested in becoming police officers but too young to enter the Police Academy. (At the time she was hired, Plaintiff was a teenager.) Cadets rotated through the different KCKPD departments and worked on special projects as needed; they were not police officers, but the chain of command applied to them all the same.

One year earlier, KCKPD Police Officer Steven Rios, an officer with more than two decades’ experience, was working in the Dignitary Protection Unit (“DPU”) providing security to the Unified Government’s top officials. Then-Chief Terry Zeigler quietly transferred Rios out of the DPU in late April 2015 after a female UG employee complained

that Rios, while on duty, was openly discussing oral sex. Chief Zeigler transferred Rios to the Police Academy Training Facility, where he would have significant access to and influence over young recruits like Plaintiff. Despite the UG's policy requiring an investigation, Chief Zeigler did not investigate the complaint against Rios, and he did not formally discipline him.

Defendant Rios continually sexually harassed Plaintiff during her approximately two years' employment with the UG. The harassment culminated on March 9, 2018, with Rios' unwanted touching of Plaintiff's intimate area, an action about which Plaintiff complained and one that caused the District Attorney to criminally prosecute Rios, resulting in the termination of Rios' employment with the UG. Shortly thereafter, on June 13, 2018, Chief Zeigler fired Plaintiff. Plaintiff asserts Title VII gender discrimination (sexual harassment) and retaliation claims against the UG.

THE REQUEST AT ISSUE AND DEFENDANT UG'S RESPONSE

The specific request at issue is Request No. 24 from Plaintiff's First Request for Production, which, along with the UG's response, reads as follows:

24. If not already provided, all communications, including emails and text messages, concerning the factual allegations or claims at issue in this lawsuit among or between: Plaintiff and Unified Government employees; or Unified Government employees and any other person, including but not limited to the individuals identified on the parties' respective Rule 26 disclosures.

RESPONSE: Defendant objects to the extent this request asks for communications protected by the attorney client privilege or the work product doctrine. In addition to the documents already produced, potentially responsive e-mails are currently being reviewed and Defendant's response to this request will be supplemented as soon as that review is complete.

See **Exhibit B**, Defendant UG's Responses and Objections to Plaintiff's First RFP, p. 7.

Notably, Defendant UG asserted only privilege-based objections to this request. It did not object on the basis of burdensomeness or breadth or anything other than privilege.

TIMELINE AND LOCAL RULE 37.2 COMPLIANCE EFFORTS¹

On October 30, 2019, Plaintiff served her First Request for Production on Defendant UG.² The UG's responses were initially due November 29, 2019. The UG sought numerous extensions, first, to December 13, 2019, then, to December 20, then, to December 23 (later changed to January 3, 2020). Plaintiff agreed to all the requested extensions.³

On January 2, 2020, the day before the UG's responses were due, Plaintiff's counsel received an email from the UG's current counsel informing Plaintiff that the UG would be changing counsel and requesting two additional weeks, i.e., until January 17, 2020, to respond to Plaintiff's First RFP. The next day, Plaintiff agreed to the requested extension but cautioned that additional extension requests may not be well received.⁴ (At this point, Plaintiff had agreed to four extensions to the UG's deadline to respond.)

¹ Plaintiff's counsel's certification is attached as **Exhibit A** and is referred to in this brief as "Riemann Cert." In the certification, Plaintiff's counsel attests to the authenticity of all communications attached as exhibits to this motion. See Riemann Cert. ¶¶ 3-7.

² See ECF 36.

³ The emails evidencing Defendant UG's first three requests for additional time (and Plaintiff's agreeing to those requests) is attached as **Exhibit C**. In some of these requests, the UG's counsel references only extensions to the UG's deadline to submit interrogatory answers, however, the parties treated the requested extensions as applying to the UG's RFP response deadline as well.

⁴ The email showing Defendant UG's fourth request for additional time (and Plaintiff's agreement) is attached as **Exhibit D**.

On January 17, 2020, the UG produced written responses to Plaintiff's First RFP, along with a partial document production, which was supplemented the next day.⁵ Although the UG asserted privilege objections, no privilege log was produced.

On February 3, 2020, Plaintiff sent Defendant UG a golden rule letter, including a request that counsel speak by telephone about the discovery issues.⁶ On February 10, 2020, Plaintiff's counsel and the UG's counsel participated in a teleconference to discuss the issues raised in Plaintiff's February 3, 2020 golden rule letter. During the call and in follow up emails, the UG's counsel made clear that its production was not imminent and would not commit to a hard deadline for producing the documents responsive to Request No. 24.⁷

Prior to the parties' February 10 teleconference, the UG never disclosed that it was using search terms to narrow the materials reviewed for production, and, even during that call, the UG repeatedly failed to provide a comprehensive list of the custodians whose emails had been searched and what search terms were used.⁸

On February 12, 2020, Plaintiff's counsel requested a teleconference with the Court to discuss various discovery issues; the conference was held on February 14, 2020.⁹ Prior to

⁵ See ECF 56.

⁶ See **Exhibit E**, Plaintiff's counsel's golden rule letter to UG's counsel, dated February 3, 2020.

⁷ The parties' post-meet-and-confer-teleconference email strings, during which Plaintiff's counsel repeatedly, but to no avail, asked UG's counsel to commit to a hard deadline by when it would produce the documents that already were several weeks late, is attached as **Exhibits F, G, H, and I**.

⁸ See **Exhibit A**, Riemann Cert. ¶ 9.

⁹ See ECF 58 & 59.

the call, the parties agreed to certain deadlines, which were memorialized in a February 13, 2020 joint proposal,¹⁰ which was provided to the Court prior to the February 14 conference.

The joint proposal deadlines pertinent to this motion included:

- By February 19, 2020, Defendant UG will disclose the names of the custodians whose emails were captured and the exact search terms used to collect emails;
- By February 21, 2020, Defendant UG will provide an initial email production and privilege log, if applicable, to Plaintiff;
- By February 26, 2020, Plaintiff will provide the UG with any additional reasonable search terms and custodians; and
- By March 13, 2020, Defendant UG will complete its production of all responsive documents, including a final privilege log.

On February 18, 2020, the UG disclosed (for the first time) the exact search parameters it used when attempting to find emails responsive to Request No. 24.¹¹ As discussed in this memorandum's argument section, the parameters were far too limited.

Despite agreeing to do so and despite producing materials purportedly redacted for privilege, the UG did not produce a privilege log by February 21, 2020.

On February 26, 2020, Plaintiff's counsel wrote to the UG's counsel expressing concern with the inadequacies apparent from its production, including the UG's continued failure to comply with the standards for confidentiality designations, the UG's failure to provide a privilege log, and the UG's failure to adopt appropriate search terms, date ranges,

¹⁰ See **Exhibit J**, "Plaintiff and Defendants' Joint Discovery Dispute Summary and Request for Extension to Discovery Deadline," dated February 13, 2020.

¹¹ See **Exhibit K**, email from UG's counsel to Plaintiff's counsel, dated February 18, 2020.

and custodians so to capture all materials responsive to Request No. 24. As discussed in this memorandum's argument section, the letter included a request that specific additional searches be performed.¹²

On March 2, 2020, Defendant UG produced a privilege log listing only the documents it had produced in redacted form.¹³ The log does not comply with this Court's well-known requirements for privilege logs, nor does it identify any materials whatsoever that were withheld from the UG's production.

On March 3, 2020, Plaintiff's counsel wrote to Defendant UG again expressing concerns about deficiencies in the UG's document production, search terms, confidentiality designations, and general failure to comply with deadlines to which it had agreed. Plaintiff's counsel also raised issues concerning the UG's inadequate privilege log.¹⁴

On March 13, 2020, i.e., the date the UG previously agreed to finalize its production, the UG's counsel responded by email to Plaintiff's February 26, 2020 letter and the searches requested therein. In its email, the UG rejected several of the searches requested and wholesale ignored Plaintiff's request that it redo its confidentiality markings. It also indicated that additional documents were being reviewed for production and promised timely updates on those efforts.¹⁵

¹² See **Exhibit L**, letter from Plaintiff's counsel to UG's counsel, dated February 26, 2020.

¹³ See **Exhibit M**, UG's privilege log concerning redactions.

¹⁴ See **Exhibit N**, letter from Plaintiff's counsel to UG's counsel, dated March 3, 2020.

¹⁵ See **Exhibit O**, email from UG's counsel to Plaintiff's counsel, dated March 13, 2020.

Approximately two weeks later, on March 26, Plaintiff's counsel emailed the UG's counsel asking when it would complete its review and production. The next day, the UG's counsel emailed, stating that the UG was unable to provide an answer but assuring counsel that the UG "will keep you posted."¹⁶ Despite the UG's assurances, no updates have been provided and no emails have been produced in the more than 40 days since the UG's counsel's March 27 email.

On April 10, 2020, the Court extended deadlines in this matter, including Plaintiff's deadline for filing this motion to compel, which was extended to May 29, 2020.¹⁷

RELIEF REQUESTED

Plaintiff respectfully asks the Court to make the following orders:

1. That Defendant UG must perform additional and/or modified searches and produce documents relevant to the claims asserted in this case so to fully comply with **Plaintiff's Requests A, B, D and E**, as outlined below.
2. That, by failing to timely produce a privilege log, Defendant UG has waived its attorney-client privilege and the protections afforded to it under the work product doctrine as to all communications up to August 10, 2018, i.e., the date Plaintiff filed her Charge of Discrimination with the EEOC, and the UG must immediately produce those communications and documents to Plaintiff;¹⁸

¹⁶ See **Exhibit P**, email string between Plaintiff's counsel and UG's counsel, dated March 26-27, 2020.

¹⁷ See ECF 64, Second Amended Scheduling Order, pp. 1-2.

¹⁸ See ECF 1-1.

3. That Defendant UG redo its document production, removing markings that are not permitted by the protective order and complying with the protective order's requirement that the UG act in good faith when marking documents "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER."

ARGUMENT

Plaintiff's Request No. 24 sought all communications involving any UG employee that concerned the factual allegations or issues raised in this lawsuit. Importantly, the UG did not object to this request except to the extent it required the production of communications protected by the attorney-client privilege or the work product doctrine. The UG waived all other objections, including to breadth and burdensomeness. *See Hopkins v. Bd. of Cty. Commissioners of Wilson Cty., Kansas*, No. 15-CV-2072-CM-TJJ, 2018 WL 3536247, at *3 (D. Kan. July 23, 2018) ("Objections that a responding party fails to initially raise in the answer or response to the discovery request are deemed waived.") (citing *Cotracom Commodity Trading Co. v. Seabord Corp.*, 189 F.R.D. 655, 662 (D. Kan. 1999)).

I. DEFENDANT UNIFIED GOVERNMENT HAS FAILED TO PRODUCE (OR EVEN LOOK FOR) ALL RELEVANT DOCUMENTS AND, BY NOT OBJECTING TO PLAINTIFF'S REQUEST NO. 24, HAS WAIVED ALL NON-PRIVILEGED OBJECTIONS TO PLAINTIFF'S PROPOSED SEARCH PARAMETERS.

The UG received Plaintiff's RFP on October 30, 2019, and provided its response on January 17, 2020. During this 79-day period, the UG never contacted Plaintiff's counsel to indicate that search terms were being used to collect responsive documents or that such terms may need to be negotiated. Moreover, in its January 17 response to Plaintiff's Request No. 24, the UG did not assert any objection to the breadth of the request or to the fact that the request was not time limited. Indeed, the UG did not assert any non-privilege objections at all, and did not indicate in its answer that anything other than full compliance was

forthcoming. Instead, the UG simply stated that it was continuing to review emails and would supplement.¹⁹

The UG provided no updates and made no attempt to supplement for the next 17 days, prompting Plaintiff to send her February 3 golden rule letter. During the parties' February 10 golden rule teleconference, the UG disclosed (for the first time) that search parameters were being used but it did not disclose those parameters. On February 12, the UG informed Plaintiff as to "some" of the search terms that were used. (The search terms communicated to Plaintiff on February 12 did not even include Plaintiff's name.) Finally, on February 18, the UG disclosed the actual search terms used and custodians searched, which included only the following:

UG Search #1

Search terms: "Hardman" or "Jordan Hardman"

Custodians: All KCKPD email accounts

Date Range: July 28, 2016 to June 13, 2018

UG Search #2

Search terms: "academy," "blow," "complain," "harass," "inappropriate," "oral," "Rios," "sex," and "transfer"

Custodians: Terry Zeigler, Rodney Smith, and John Turner

Date Range: January 20, 2015 to June 30, 2015

UG Search #3

Search terms: "academy," "blow," "complain," "complaint," "harass," "inappropriate," "oral," "Rios," "sex," and "transfer"

¹⁹ See **Exhibit B**, UG's Responses to Plaintiff's First RFP, p. 7.

Custodians: Elizabeth Calderon, Shanda Mitchell, Rachael Botello, Diana Segui, Jennifer Myers, Jody Boeding, and Doug Bach

Date Range: January 20, 2015 to June 30, 2015

As explained in the following paragraphs, the search the UG conducted was deficient. On February 26, 2020, Plaintiff requested additional reasonable search terms from which relevant documents should be produced. To be clear, Plaintiff does not argue that every document captured by Plaintiff's proposed search terms should be produced, just that Plaintiff's proposed search parameters are the most appropriate starting point from which the UG's document review should have commenced. As explained throughout this memorandum, the UG, despite having Plaintiff's request for many months, never attempted to work with Plaintiff's counsel on search parameters prior to producing documents using the parameters it alone deemed appropriate.

Plaintiff asks the Court to order the UG to conduct the additional specific searches of emails and communications that Plaintiff requested on February 26 and produce all relevant documents uncovered by those searches. Plaintiff's requests were as follows:

A. Plaintiff's Request A

Search terms: "Hardman" or "Jordan Hardman" or "Jordan"

Custodians: the email accounts and computer files of (i) all KCKPD personnel; (ii) Henry Couchman; and (iii) Casey Meyer

Date Range: July 28, 2016 to January 31, 2019

Plaintiff's Request A is similar to the UG's Search No. 1, except, as explained below, it solves some of the obvious deficiencies in the UG's initial search, including the following:

1. “JORDAN” SHOULD BE INCLUDED AS A SEARCH TERM.

The UG’s initial search captured only the terms “Jordan Hardman” or “Hardman.” If an email referred to Plaintiff by her first name Jordan without also referencing her last name, it would not have been captured. Based on the UG’s production, it is obvious that, at times, KCKPD employees referred to Plaintiff as simply “Jordan.”²⁰

In its March 13 email, the UG rejected the proposal to include “Jordan” as a search term on the ground that it would require the UG to duplicate some work it already performed.

The UG’s position is unreasonable for at least two reasons. First, the UG waived all non-privilege objections when it failed to assert them in its January 17, 2020 response to Plaintiff’s Request No. 24. Second, the UG alone decided what the search parameters would be when it performed the first search. Plaintiff was never asked for input and never agreed to the UG’s search terms, which were only disclosed after the search had been completed. Plaintiff respectfully suggests that it would be unjust to allow the UG to avoid the time and expense of doing a proper search on the grounds that it already incurred time and expenses doing a deficient search, one that was not agreed to by Plaintiff.

²⁰ For example, the UG’s production includes an email in which a UG employee asks “Can anyone advise what time Jordan is using in her absence” (UG 6373) and another in which UG employees discuss “the investigative report that we had Jordan write” and “Jordan’s social media usage” (UG 6393). These emails are attached as **Exhibit Q**; they serve as examples that KCKPD referred to Plaintiff, at times, by her first name only, but they certainly are not the only such emails contained within the UG’s production. Because the UG marked these emails as CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER, Plaintiff will submit them for *in camera* review.

2. CORRESPONDENCE DATED AFTER PLAINTIFF'S TERMINATION DATE SHOULD BE INCLUDED.

The UG excluded from its search any emails after June 13, 2018, i.e., the date Plaintiff's employment was terminated, which was shortly after she complained about sexual harassment. According to the UG, "we don't believe e-mails beyond the date Ms. Hardman was terminated have any relevancy to this matter[.]"²¹ Literally, the UG's document collection efforts would not have captured communications between UG decisionmakers discussing Plaintiff's termination the day after she was fired.

Plaintiff respectfully suggests that it is commonsense that communications relevant to an employee's termination could occur after the employee's termination date. The UG chose to not even consider that possibility and, to date, refuses to even look at emails after June 13, 2018. Plaintiff's proposal that the search parameters include emails through January 31, 2019, which is approximately 7 months after Plaintiff's termination, is reasonable.

3. COMMUNICATIONS INVOLVING HENRY COUCHMAN AND CASEY MEYER SHOULD BE INCLUDED.

The UG erred when it failed to include Henry Couchman's and Casey Meyer's communications in its search parameters. Mr. Couchman and Ms. Meyer are UG attorneys working in-house. Initially, they were counsel of record for the UG in this case, but before that they were directly involved in the decision to terminate Plaintiff's employment.

It is well settled that "the mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege."

²¹ See **Exhibit O**, email from the UG's counsel to Plaintiff's counsel, dated March 13, 2020. Because the UG marked this email as CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER, Plaintiff will submit it for *in camera* review.

Motley v. Marathon Oil Co., 71 F.3d 1547, 1550-51 (10th Cir. 1995); *see also Lawson v. Spirit AeroSystems, Inc.*, No. 18-1100-EFM-ADM, 2020 WL 1643679, at *3 (D. Kan. Apr. 2, 2020) (“Not all communications involving attorneys are privileged . . . To be privileged, communications must be confidential and involve requesting or giving legal advice . . . Legal advice must predominate; attorney-client privilege does not attach if legal advice is incidental to business advice.”).

The documents produced by the UG show that Mr. Couchman and Ms. Meyer were intimately involved with the decision to terminate Plaintiff, acting as a de facto human resources department. For example, emails produced (but without attachments) seem to show that Ms. Meyer and Chief Zeigler actively collaborated on various drafts of the termination letter that was provided to Plaintiff. (The UG claims the termination letter contains the reasons for her termination.) Indeed, the morning of Plaintiff’s termination, Ms. Meyer sent an email, subject line: Termination Cadet Hardman, to Chief Zeigler directing that he: “Use this one.”²² It appears that Ms. Meyer was dictating to Chief Zeigler which draft of the termination letter to use and what reasons would be put forward for Plaintiff’s termination. (The UG has not produced these earlier drafts, including the drafts first provided by Chief Zeigler to Ms. Meyer, which, presumably, contain his reasons for terminating Plaintiff prior to Ms. Meyer’s curating those reasons.)

Another example is an email from J. Renee Ramirez, the UG’s Director of Human Resources, in which she tells Chief Zeigler that Mr. Couchman has asked that no action be

²² **See Exhibit R**, emails between Ms. Meyer and Chief Zeigler in the days leading up to and on the morning of Plaintiff’s employment’s termination, labeled UG 7449, 7466, and 7557. Because the UG marked these emails as CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER, Plaintiff will submit them for *in camera* review.

taken against Plaintiff until after Mr. Couchman has had an opportunity to discuss such actions with him.²³ Still other documents show that Chief Zeigler instructed KCKPD personnel to collect only negative items in Plaintiff's file for him to use in his meeting with Mr. Couchman.²⁴

The UG refuses to even review Mr. Couchman's and Ms. Meyer's communications, claiming without explanation that "any" communication they have about Plaintiff would be privileged.²⁵ This statement is obviously untrue, as demonstrated by the UG's already producing some such communications, and as a matter of law. *See Marten v. Yellow Freight System, Inc.*, No. 96-2013-GTV, 1998 WL 13244, at *4 (D. Kan. Jan. 6, 1998) (holding that "[a] 'blanket claim' as to the applicability of a privilege or the work product doctrine does not satisfy [the withholding party's burden of proof]) (citing *Kelling v. Bridgestone/Firestone, Inc.* 157 F.R.D. 496, 497 (D. Kan. 1994)). Even if it were true, Mr. Couchman's and Ms. Meyer's communications (at least up until Plaintiff filed her Charge of Discrimination) should have been catalogued on a privilege log. This, however, did not happen; the UG never produced a log identifying documents withheld on the basis of privilege.

Simply put, Mr. Couchman and Ms. Meyer were involved with the decision to terminate Plaintiff as well as the presentation of the reasons the UG has put forward for

²³ See Exhibit S, email from Ms. Ramirez to Chief Zeigler, labeled UG 7418. Because the UG marked this email as CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER, Plaintiff will submit it for *in camera* review.

²⁴ See Exhibit T, email from Robert Angell to Pamela Waldeck, labeled UG 6399-6400. Because the UG marked this email as CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER, Plaintiff will submit it for *in camera* review.

²⁵ See Exhibit O, email from the UG's counsel to Plaintiff's counsel, dated March 13, 2020.

Plaintiff's termination. As suggested from emails produced in this litigation,²⁶ Mr. Couchman seems to have wielded sufficient power to dictate whether Plaintiff's employment was terminated. At the very least, Mr. Couchman had the power (and exercised the power) to delay Plaintiff's termination, and Chief Zeigler perceived Mr. Couchman as having such power and authority that he tasked other KCKPD officials with gathering dirt on Plaintiff so that he could take it with him to his meeting with Mr. Couchman.

Mr. Couchman and Ms. Meyer are witnesses in this case, and Plaintiff expects they will be deposed and testify at trial. The UG's excluding them from the initial search parameters was inappropriate.

B. Plaintiff's Request B

Search terms: "academy," "blow," "complain," "harass," "inappropriate," "oral," "Rios," "sex," and "transfer"

Custodians: the email accounts of all KCKPD personnel

Date Range: January 20, 2015 to January 31, 2019

***Any reference to Rios acting inappropriately or creeping women out should be produced, even if it does not directly mention Plaintiff.

In Request B, Plaintiff adopts the search terms the UG used in UG Search No. 2 but expands the search to a more appropriate number of custodians and time frame. The search performed by the UG was limited to a five-month period in 2015. This 5-month period correlated only to Rios removal from the Dignitary Protection Unit, which occurred after a female UG employee complained about his discussing oral sex. The 5-month period unilaterally chosen by the UG does not overlap by even one day with Plaintiff's two-year stint

²⁶ See Exhibits S and T.

as a UG employee. The UG's limiting its search in this way was designed to exclude the discovery of relevant communications and is unjustifiable.

In her Amended Complaint, Plaintiff alleges that the UG knew or should have known that Rios had behaved inappropriately with women in the past or had received reports or complaints that he had.²⁷ Of course, it is undisputed that Rios behaved inappropriately in 2015 (oral sex comments leading to his quiet transfer away from the Dignitary Protection Unit) and 2018 (Rios was criminally charged and fired after sexually assaulting Plaintiff).

Plaintiff is entitled to discover whether Rios harassed or assaulted other individuals and to what extent UG officials knew about it. For its part, the UG adopted search parameters that would absolutely ensure that none of Rios' bad behavior, other than what was already known to Plaintiff, would be discovered.²⁸

The UG claims the search proposed by Plaintiff would return an enormous number of documents and, therefore, is too burdensome.²⁹ The UG, however, waived any such objection by failing to assert it when it submitted its response to Request No. 24. Accordingly, the UG should be ordered to comply with Plaintiff's Request B.

If the Court finds full compliance with Request B to be too onerous, then Plaintiff respectfully suggests that a reasonable compromise would be for the UG to review and

²⁷ See ECF 21, Plaintiff's First Amended Complaint, ¶77.

²⁸ Plaintiff anticipates the UG will argue that it has produced all "complaints" against Rios and that its producing those complaints cures any delinquency in its email search. The problem, however, is that the KCKPD has a documented history of not investigating sex-related complaints leveled against Rios, despite UG policy requiring such investigation. The KCKPD's failure to investigate the 2015 incident at the Dignitary Protection Unit is an example of this.

²⁹ See **Exhibit O**, email from the UG's counsel to Plaintiff's counsel, dated March 13, 2020.

potentially produce only the documents that contain the word “Rios” plus one additional search term.

C. Plaintiff’s Request C

Plaintiff’s Request C is not at issue in this motion.

D. Plaintiff’s Request D

Search terms: None Produce All Emails

Custodians: (i) John Turner; (ii) Rodney Smith; (iii) Steve Rios; (iv) Steven Kopp; (v) Chris Blake; (vi) Mark Holland; (vii) Terry Zeigler; (viii) Racheal Botello; (ix) Lindsay Behgam; (x) Tyrone Garner; (xi) Kevin Steele; (xii) Clinton Swan; (xiii) George Sims; (xiv) Angie Dreger; and (xv) Doug Bach.

Date Range: Friday, April 24, 2015 through Tuesday, April 28, 2015

***You may omit from your production any emails that obviously have nothing whatsoever to do with Steve Rios.

The UG agreed to perform this search and, as of February 26, 2020, represented that it was reviewing documents for production.³⁰ Plaintiff has not received any updates since February 26, 2020. Plaintiff asks the Court to order the UG to expeditiously complete its review of emails collected pursuant to Plaintiff’s Request D and produce any such emails within seven days of the Court’s order.

E. Plaintiff’s Request E

Request: For the time period January 20, 2015 to January 31, 2019, please produce all emails between Terry Zeigler and Steve Rios. Emails sent to more than three persons need not be produced.

Plaintiff is entitled to communications between Chief Zeigler and Rios because that relationship is highly relevant to Plaintiff’s claims. Chief Zeigler and Rios worked together

³⁰ See **Exhibit O**, email from the UG’s counsel to Plaintiff’s counsel, dated March 13, 2020.

for many years. Chief Zeigler quietly transferred Rios out of the Dignitary Protection Unit after he behaved inappropriately there and chose not to investigate further despite clear UG policies requiring him to do so. Chief Zeigler fired Plaintiff a few short weeks after Plaintiff's complaint resulted in charges being filed against Rios. Plaintiff should be allowed information to help her more fully understand the relationship between these two men.

The UG has not produced any documents responsive to Request E and has not updated Plaintiff as to its efforts, despite committing to do so more than 70 days ago.³¹

Plaintiff asks the Court to order full compliance with Plaintiff's Request E. In the alternative, Plaintiff asks the Court to order the UG to produce any emails between Mr. Zeigler and Rios that either: (1) refer to or concern Rios' behavior with women; or (2) refer to non-KCKPD business (thereby shedding light on the nature of the two men's personal relationship).

II. DEFENDANT UNIFIED GOVERNMENT HAS FAILED TO PROVIDE AN ADEQUATE PRIVILEGE LOG AND, THUS, HAS WAIVED ITS PRIVILEGES.

The Unified Government has made no meaningful effort to comply with this District's well-known and long-established privilege log requirements. Indeed, as of the date this memorandum is filed, the UG has not produced a privilege log describing documents withheld from its production. (After requests by Plaintiff's counsel, the UG produced a minimalist privilege log listing redacted documents.) Accordingly, the UG should be deemed to have waived the protections afforded by the attorney-client privilege and work-product doctrines for all materials up to August 10, 2018, which is the date Plaintiff filed her Charge of Discrimination with the EEOC, and should immediately produce all such materials.

³¹ See **Exhibit O**, email from UG counsel to Plaintiff's counsel, dated March 13, 2020.

Alternatively, the UG should be ordered to immediately produce a privilege log containing the nine categories of information generally required in this District for each document withheld, including all communications and documents involving Henry Couchman or Casey Meyer.

A. As to withheld documents, the UG waived its attorney client privilege and its protections under the work product doctrine by failing to produce a privilege log.

Defendant UG provided its responses to Plaintiff's First Request for Production on January 17, 2020. The responses, including the UG's response to Request No. 24, included objections based on the attorney-client privilege and the work-product doctrine. Accordingly, its privilege log was due on January 17. *See Hopkins v. Bd. of Cty. Commissioners of Wilson Cty., Kansas*, No. 15-CV-2072-CM-TJJ, 2018 WL 3536247, at *5 (D. Kan. July 23, 2018) ("Under Rule 26(b)(5)(A), a party must expressly make the claim of privilege or protection at the time it 'withholds' the discoverable information. Thus, the date a party is deemed to 'withhold' discoverable material is the date when the party's responses to the discovery requests are due.). To date, the UG has not produced any log indicating what documents it has withheld from its production pursuant to a privilege or work product claim. At this point, the UG's privilege log is more than 110 days late.

Plaintiff attempted to cooperate with the UG by informally, i.e., not Court-ordered, agreeing to extensions to certain of the UG's document production deadlines. These extensions were memorialized in the February 13 joint proposal referenced above and attached as **Exhibit J**. The joint proposal required the UG to produce an "initial" privilege log no later than February 21, 2020 and a "final" privilege log no later than March 13, 2020. The UG did not meet its February 21 deadline to produce an initial privilege log, despite having

agreed to the deadline only eight days earlier. Even if March 13 were the only relevant date, the UG's privilege log is more than 50 days late (and counting).

"It is well settled in this district that an inadequate privilege log may result in waiver of the privilege." *McNabb v. City of Overland Park*, No. 12-CV-2331 CM/TJJ, 2014 WL 1152958, at *6 (D. Kan. Mar. 21, 2014) (citation omitted). "[M]inor procedural violations, good faith attempts at compliance, and other such mitigating circumstances bear against finding waiver." *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 671 72 (D. Kan. 2005).

In this case, waiver is the appropriate remedy because the UG has not made a good faith attempt to comply with this district's well-known privilege log standards. This is not a minor violation; it is a complete abdication of a party's responsibilities in litigation. Accordingly, Plaintiff asks the Court to order the UG to produce all documents currently withheld on the basis of the attorney-client privilege or the work product doctrine.

B. As to redacted documents, the UG waived its attorney client privilege and its protections under the work product doctrine by failing to produce an adequate redactions log.

In addition to failing to produce a log showing withheld documents, the UG failed to produce an adequate log cataloguing redacted documents.³²

As this Court has held, "[t]he party withholding a document on the basis that it contains attorney-client privilege communications has the burden of establishing the privilege. The asserting party must make a clear showing that the objection applies by

³² The UG's log showing its redactions is attached as **Exhibit M**.

describing in detail the information sought to be protected and providing precise reasons for the objection.” *McNabb*, 2014 WL 1152958, at *6.

The UG’s redactions log contains 14 entries 11 of the 14 concern the same short message sent from Casey Meyer to R. Quinn, the other three entries concern a nonparty’s criminal history. (Plaintiff does not seek the unredacted production of the three criminal history emails.) All 11 Meyer-to-Quinn entries contain only the following information:

3	8/14/18 – Meyer e-mail – email correspondence Jordan Hardman – redacted (UG006944)	R. Quinn	Attorney-client privilege and work product
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The information provided is inadequate to allow Plaintiff to determine whether the redaction is appropriate. *See Hopkins*, 2018 WL 3536247, at *6 (“At the very least, a privilege log should contain sufficient information so that the opposing party and the court can evaluate the claimed privilege. If a party fails to carry its burden of establishing that any documents withheld are subject to privilege, the court may conclude that the privilege is waived.”). Moreover, the UG has made no attempt to comply with this Court’s general guidance that a privilege log should contain the nine categories of information identified in *Hopkins*, 2018 WL 3536247, at *6.

Plaintiff asks the Court to order the UG to produce the 11 Meyer-to-Quinn emails in unredacted form or, at minimum, immediately produce a sufficient privilege log concerning these redactions.

III. DEFENDANT UG HAS NOT ACTED IN GOOD FAITH WITH RESPECT TO ITS USE OF CONFIDENTIALITY MARKINGS AND SHOULD BE ORDERED TO REDO PORTIONS OF ITS PRODUCTION.

Plaintiff challenges: (1) whether the UG has acted in good faith when using the “CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER” label; and (2) whether the UG may

mark documents as “CONFIDENTIAL” if those documents cannot appropriately be marked “CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER.”

A. The UG has not acted in good faith in reviewing its email production.

The standard District of Kansas protective order was entered in this case on October 1, 2019.³³ The Protective Order permits a producing party to place the words “CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER” on “Confidential Information.” Importantly, the producing party must act in good faith when labeling documents as “CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER.”³⁴ The good faith requirement is explicit in the Protective Order governing this case but, even if it were not explicit, a good faith requirement is implicit in protective orders in the District of Kansas. *See Paradigm Alliance, Inc. v. Celeritas Techs., LLC*, 248 F.R.D. 598, 605 (D. Kan. 2008) (holding that “[i]mplicit in the protective order and its provision for designating documents as ‘confidential’ or ‘AEO’ is a requirement of good faith”). Moreover, as the *Paradigm Alliance* court held: “The duty of good faith in the protective order is a duty to review the documents in good faith *before* designating them.” *Id.*

The Protective Order describes the process the requesting party should go through in order to challenge the designation of a single document, but the Protective Order does not preclude the requesting party from challenging whether the producing party has acted in good faith, generally. *Id.* (“Nothing in the protective order precludes [the requesting party]

³³ See ECF 32.

³⁴ See ECF 32, ¶ 2.

from asserting a lack of good faith by [the producing party] in reviewing the documents and using the [confidentiality designation.]”).

In this case, Plaintiff asserts that the UG has not acted in good faith in reviewing its email production and using the “CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER” label. To date, the UG has produced more than 1,300 pages of emails (and additional email productions have been promised). So far, every single page produced has been marked “CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER,” even if the email itself contains no confidential information of any kind. Plaintiff’s counsel raised this issue with the UG’s counsel several times, but the UG has refused to redo its production.³⁵ Plaintiff respectfully suggests that the UG’s practice in this instance is contrary to the good faith requirement contained in the Protective Order and asks the Court to order the UG to redo its email production, specifically, UG 6373 through UG 7684, this time adding the “CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER” label only where appropriate.

B. The UG should not mark documents as “CONFIDENTIAL” when it knows the documents are not subject to the Protective Order.

The law firm currently representing the UG has employed an odd tactic of marking every document with some sort of confidentiality stamp. Some are marked “CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER,” others are simply marked “CONFIDENTIAL.” The “CONFIDENTIAL” label has been applied to numerous documents that clearly are not confidential, including, blank candidate questionnaires, blank applications for employment,

³⁵ Plaintiff’s counsel raised his concerns regarding the UG’s confidentiality-designation abuse with the UG’s counsel during the parties’ February 10, 2020 golden rule teleconference; in emails on February 12, 2020 (**Ex. I**) and February 13, 2020 (**Exs. G & H**); and, in letters dated February 26, 2020 (**Ex. L**) and March 3, 2020 (**Ex. N**). See also, **Ex. A**, Riemann Cert. ¶4.

UG organizational charts, KCKPD general orders, general UG policy documents, and human resources guides. These documents include, at least, UG 3376 UG 3442, UG 3659 UG 3670, UG 7786 UG 7788, and UG 7687 7689.

Plaintiff's counsel raised this issue with the UG's counsel, who responded as follows: "All documents that leave this office are marked confidential. Not all documents are marked 'confidential subject to protective order.' We are not asserting that the documents simply marked 'confidential' are done so pursuant to the protective order or that they are protected by the protective order."³⁶

Plaintiff respectfully suggests that it is inappropriate for the law firm currently representing the UG to place "CONFIDENTIAL" labels on documents documents that could ultimately be shown to the jury when the law firm knows (and readily acknowledges) that the label has no meaning. There is no justification for this practice and it could lead to confusion. Accordingly, Plaintiff asks the Court to order the UG to re-produce in clean form any documents to which it previously applied the meaningless "CONFIDENTIAL" label.

CONCLUSION

For the reasons stated above and in her motion, Plaintiff asks the Court to grant her Motion to Compel and order Defendant Unified Government to produce materials as outlined in this memorandum and for any other relief the Court deems appropriate.

³⁶ See **Exhibit H**, email string between the UG's counsel and Plaintiff's counsel, dated February 13, 2020.

Dated: May 12, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on May 12, 2020, I filed the foregoing with the Court's CM/ECF system, which will send notice to:

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