

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW HAMPSHIRE**

NEW HAMPSHIRE YOUTH MOVEMENT,

Plaintiff,

v.

DAVID M. SCANLAN, in his official capacity
as New Hampshire Secretary of State,

Defendant.

Consolidated Cases
Case No. 1:24-cv-00291-SE-TSM

COALITION FOR OPEN DEMOCRACY, *et
al.,*

Plaintiffs,

v.

DAVID M. SCANLAN, in his official capacity
as New Hampshire Secretary of State, and
JOHN M. FORMELLA, in his official capacity
as New Hampshire Attorney General,

Defendants.

**DEFENDANTS' OBJECTION TO PLAINTIFFS' SUPPLEMENTAL
MOTION TO COMPEL DOCUMENTS REFLECTING ATTORNEY-CLIENT
COMMUNICATIONS & ATTORNEY WORK PRODUCT**

INTRODUCTION

Plaintiffs ground their Supplemental Motion to Compel on a misunderstanding of the governing law and misreading of Defendants' privilege log. The log at issue is not "boilerplate" or "scant," but an unusually detailed, document-specific record that individually identifies each redacted record, all participants and their roles, and each asserted privilege. Each description summarizes the applicable law and then expressly applies the facts to the law, e-mail by e-mail in every e-mail chain. Where entries would be unnecessarily duplicative, Defendants provide pinpoint citations to complete records in the log. The privilege log itself establishes the

applicability of the asserted privileges on its face and easily satisfies the requirements of Rule 26(b)(5) of the Federal Rules of Civil Procedure.

Moreover, Plaintiffs' argument that Defendants waived privilege on 13 e-mails misapprehends the relationship between the Department of State and its vendor. The attorney and client in this case have an indispensable need for the Statewide Voter Registration System's ("SVRS") architect to act as agent to implement House Bill 464 ("HB 464")—it is not a third party disclosure. This specialized consultant's contribution to gathering information necessary for the provision of legal advice is essential to fulfilling the State Department's statutory mandate. The complexities of the subject matter require specialized expertise to ensure the Secretary of State's attorney can provide informed legal advice. And Plaintiffs' argument that 27 records were not generated for the purpose of obtaining or providing legal services similarly falls flat. Each document is a draft or internal confidential discussion about application of the law in which the Elections Legal Counsel was directly engaged for the purpose of assuring HB 464's lawful implementation. Because Plaintiffs have shown neither a deficiency in the privilege log nor waiver of privilege, the Court should deny the Supplemental Motion to Compel.

STANDARD OF REVIEW

Parties may obtain discovery regarding any nonprivileged matter that is relevant to claims or defenses and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). A party asserting an exemption from disclosure based on privilege has the burden to establish the applicability of the claimed exemption. *See In re Grand Jury Subpoena*, 662 F.3d 65, 69 (1st Cir. 2011). The asserting party must provide "sufficient information to allow the court to rule intelligently on the privilege claim." *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991).

ARGUMENT

The Court should deny Plaintiffs' Supplemental Motion to Compel for at least three reasons. First, Defendants' privilege log provides document-specific detail sufficient to establish the validity of each asserted privilege on its face.¹ Second, privilege has not been waived. Communications involving the SVRS database architect were necessary for the provision of legal services and fit squarely within settled First Circuit precedent. Third, each challenged redaction reflects communications for the purpose of obtaining or providing legal advice regarding interpretations and implementation of HB 464.

I. Defendants' Privilege Log Provides Document-Specific Detail Sufficient to Establish Each Claim of Privilege on Its Face

A privilege log must describe withheld information in a manner that enables others to assess the merits of the claim without revealing privileged information. *Begley v. Windsor Surry Co.*, No. 17-cv-317-LM, 2020 U.S. Dist. LEXIS 157373, at *5 (D.N.H. July 6, 2020) (quoting Fed. R. Civ. P. 26(b)(5)). The description need only be sufficiently detailed to permit that assessment. *Emerson Elec. Co. v. Ouellette*, No. 96-364-B, 1998 U.S. Dist. LEXIS 23845, at *22 (D.N.H. May 12, 1998) (citing 8 Charles A. Wright *et al.*, Federal Practice and Procedure § 2016.1, at 234-35 (2d ed. 1994)). Defendants' privilege log not only meets this standard—it exceeds it.

The privilege log identifies the Bates number, subject, author, recipient, date sent, and privileges claimed. Most importantly, each description is highly detailed. Each identifies the type of document, and in the case of e-mail chains, it identifies the number of e-mails in the chain and describes each e-mail individually. Each entry establishes the legal standards to be applied to the record, and then applies the facts of the record to the legal standards. The log

¹ Defendants' HB 464 Itemized Privilege Log (Dec. 19, 2025) is attached as Exhibit A.

identifies individuals by their roles to evince the necessity of the person's participation in the solicitation or provision of legal advice and to confirm the confidential nature of the communication. The log even goes so far as to identify identical entries by Bates number to facilitate Plaintiffs' and the Court's review. Plaintiffs are wrong to characterize the log as "boilerplate" and "scant."

Moreover, privilege logs must be read together with the redacted documents themselves. *Bacchi v. Mass. Mut. Life Ins. Co.*, 110 F. Supp. 3d 270, 274 (D. Mass. 2015). Where information such as authors, recipients, or dates is available on the face of the document or in the accompanying metadata, Rule 26(b)(5) does not require that the same information be duplicated in the log. *Id.* ("That is sufficient to satisfy the requirements of Rule 26(b)(5), which mandates that a party provide information 'in a manner' that will allow for adequate analysis but does not otherwise require that all of the information be contained in the log itself.>"). Here, Defendants produced extensive metadata, including custodians, file paths, copies, blind copies, hashes, and file extensions, as well as unredacted e-mail headers identifying all recipients. The absence of redundant datapoints from the log reflects Defendants' deliberate effort to keep the log usable and informative. Privilege logs need not be "precise to the point of pedantry." *In re Grand Jury Proceedings*, 802 F.3d 57, 69 (1st Cir. 2015) (quotations and citations omitted) (cleaned up).

Plaintiffs identify 54 documents redacted entirely or nearly entirely, claiming that they have been "effectively withheld." ECF No. 114 at 6. More accurately, Plaintiffs are challenging 17 descriptions, not 54. For example, this is the description of SOS-3948749:

E-mail chain (14). Confidential communications not disclosed to third parties, seeking, providing, or facilitating the provision of legal services between client and attorney or their respective agents, or intended to be shared with counsel to facilitate the provision of legal services. Confidential predecisional communications or documentation necessary for the agency to implement policies and practices, the disclosure of which could undermine or jeopardize the integrity, efficiency, or

effectiveness of the agency's final decisions, execution of its statutory duties, cause public confusion, and discourage candid internal agency deliberations. | E-mail chain identical to first 14 e-mails logged at SOS-3949842.

Plaintiffs challenge this entry and 36 others like it, which Defendants provided to *reduce* the burden on Plaintiffs and to make the privilege log more useful.² These entries establish the basis for the privilege claim, and direct Plaintiffs to a pinpoint Bates reference for a complete description of the entire e-mail chain. So, the 17 nonduplicative entries at issue are: SOS-3948300, SOS-3948306, SOS-3948526, SOS-2948673, SOS-3948678, SOS-3948914, SOS-3948935, SOS-3948945, SOS-3948966, SOS-3949138, SOS-3949142, SOS-3949513, SOS-3949691, SOS-3949842, SOS-3950168, SOS-3950445, and SOS-3950851.

Plaintiffs assert that most of the “heavily (or entirely) redacted productions” have insufficient detail because “Defendants neither explain how these communications relate to legal advice, nor, in many instances, identify any attorney at all.” *See* ECF No. 114 at 6. A closer examination of the 17 documents at issue leaves a very different impression. Thirteen include Douglas.Bruno@sos.nh.gov (Elections Legal Counsel) for the Department of State (“ELC”), one includes Bud.Fitch@sos.nh.gov (then-General Counsel) for the Department of State (“GC”), and one includes Brendan.A.Odonnell@doj.nh.gov (then-Election Law Unit Chief) for the Department of Justice (“ELU”). So, 15 of the 17 documents include attorneys. The two remaining documents (SOS-3950168 and SOS-3950851) do not include sender/receiver information because they do not have metadata showing electronic transmittal. Both descriptions explain the documents’ legal services purpose, and SOS-3950851 includes e-mails, marginalia, and notes reflecting legal advice from the former GC. Defendants’ production and

² Two of the 37 entries, SOS-3949601 and SOS-3949604, reflect redacted content that is substantively identical to the e-mail chain logged at SOS-3949138. Because the communications are materially indistinguishable, a separate description would be duplicative. The description for SOS-3949138 therefore applies to all three entries.

privilege log descriptions more than adequately demonstrate that all 54 challenged entries are privileged from disclosure.

II. Defendants Have Not Waived the Attorney-Client Communications Privilege Because the Communications Were Necessary for the Provision of Legal Advice

Defendants have not waived any asserted privilege. Plaintiffs contend that privilege does not attach to 13 emails because they were communicated to purportedly third parties. *See* ECF No. 114 at 2-3. That is incorrect, but as an initial matter, Plaintiffs' document count is inaccurate for the same reasons explained in Section I above. Ten of the cited entries are incomplete e-mail chains that provide pinpoint references to complete chains, for ease of review. Properly understood, Plaintiffs' waiver argument concerns only three emails—SOS-3948381, SOS-3950435, and SOS-3950469—none of which supports a finding of waiver.

The confidential attorney-client communications privilege “protects communications made in confidence by a client and a client’s employees to an attorney, acting as an attorney, for the purpose of obtaining legal advice.” *Mississippi Pub. Employees’ Ret. Sys. v. Bos. Sci. Corp.*, 649 F.3d 5, 30 (1st Cir. 2011) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 394-95, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). “The attorney-client privilege is the most venerable of the safeguards afforded to confidential communications and is enshrined as such in the federal common law.” *In re Grand Jury Subpoena*, 662 F.3d at 70. If a client fails to maintain the confidentiality of his, her, or its communications with an attorney, the privilege will not attach. *See id.* at 70-71. Notably, the First Circuit disfavors finding implied waivers. *See United States v. SpineFrontier, Inc.*, No. 25-1251, 2025 U.S. App. LEXIS 30946, *10 (1st Cir. Nov. 26, 2025) (quoting *XYZ Corp. v. United States*, 348 F.3d 16, 23 (1st Cir. 2003)).

All three e-mail chains include WSD employees, but this does not constitute waiver of the attorney-client communications privilege. “[T]hird-party specialists, such as accountants,

hired to assist lawyers in complicated matters, cannot be compelled to testify about client confidences.” *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 24 (1st Cir. 2011). The First Circuit has explained that:

[t]he key, it seems to us, involves considering the source and nature of the information contained in the documents. If the communication contains only client confidences made in pursuit of legal advice -- or legal advice based on such client confidences -- that communication, if intended to remain confidential, should be covered by the privilege, regardless of whether it came from the client, his attorney, or an agent of either one.

Id. WSD is the State Department’s SVRS vendor and agent in implementing HB 464. It has specialized knowledge—arguably, more specialized knowledge than an accountant—regarding WSD’s proprietary relational database it designed and maintains on behalf of its client. HB 464 requires significant changes to the SVRS, and information regarding data that must be collected (and collected by whom), shared (and shared with whom), and accessible (and accessible to whom), are all essential to the provision of legal services surrounding the State Department’s statutory duties. WSD’s engagement in the HB 464 implementation process is vital to the legal advice shared between counsel and the Secretary of State.³

The question is not, as Plaintiffs argue, whether WSD was “hired to act as the attorney’s agent for the purpose of offering legal advice.” *Contra* ECF No. 114 at 4. The question is whether the consultant is necessary for effective consultation between lawyer and client. *Cavallaro v. United States*, 284 F.3d 236, 240 (1st Cir. 2002). In the context of HB 464 implementation and these redactions, WSD is not a third party—it is the architect of the SVRS and the client’s agent—it is indispensable to the provision of legal advice.

³ Some redactions also include nonresponsive technical information, such as database infrastructure details, that is inextricably intertwined with privileged material and could pose a cybersecurity risk if disclosed, as explained in the privilege log.

III. Each Redacted Record's Purpose Was to Obtain or Provide Legal Services

Implementing HB 464 requires statutory interpretation and fact-gathering to plan for and evaluate compliance with applicable laws. Notwithstanding, Plaintiffs contend that 22 non-email documents and five e-mails were not generated for legal purposes, so these documents should not be withheld based on the attorney-client communications privilege. *See* ECF No. 114 at 5. Plaintiffs again miscount, however. Seventeen of the 22 non-email documents are duplicates, and four of the five e-mails are incomplete e-mail chains. Each description includes a pinpoint citation to the most complete record in the privilege log.⁴ So, five non-email documents, and one e-mail are at issue here.⁵

In the First Circuit, whether the attorney-client communications privilege could apply to a record depends on whether the record is necessary to assist a client in obtaining fully informed legal advice. *See Begley*, 2020 U.S. Dist. LEXIS 157373, at *7 (citations omitted). The First Circuit does not set the bar as high as other courts that employ the “primary purpose” or “but-for” tests. *See Westernbank P.R. v. Kachkar*, No. 07-1606, 2009 U.S. Dist. LEXIS 146910, at *25 (D.P.R. May 6, 2009). But even at the higher standard of other jurisdictions, all six records at issue (and their duplicates and incomplete chains) easily satisfy this threshold.

The log describes SOS-3948529 as a draft analysis of election bills pending in the General Court shared with the ELC, SOS-3948786 as a draft PowerPoint presentation titled

⁴ Ten of the 17 non-email descriptions, SOS-3948818, SOS-3948848, SOS-3948850, SOS-3948880, SOS-3948897, SOS-3949280, SOS-3949454, SOS-3949484, SOS-3950097, and SOS-3950533, are substantively identical to entries logged at SOS-3948786 or SOS-3948816. Separate descriptions are unnecessary given the substantial overlap. The principal entries provide the operative descriptions for all near-duplicates.

⁵ Plaintiffs state that “[w]here Defendants assert attorney-client communications privilege over a document that appears to be attorney work-product, Plaintiffs assume in good faith Defendants intended to rely on the attorney work-product privilege.” ECF No. 114 at 2 n.2. The attorney-client communications privilege and the attorney work product doctrine are distinct, but not mutually exclusive—a document may qualify for both protections. *See In re Grand Jury*, 106 F.R.D. 255, 256 (D.N.H. 1985) (citing *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975)). SOS-3948381, for example, satisfies the legal standards for both the attorney-client communications privilege and attorney mental impression (opinion) work product.

“2025 Legislative Update” for which the Deputy Secretary sought legal advice from the ELC, SOS-3948816 as a draft communication that was part of an exchange of legal advice regarding absentee voter registration, SOS-3948950 as a draft form reflecting legal advice, and SOS-3949029 as notes exchanged with the ELC interpreting state law. The log describes e-mail SOS-3950348 as an e-mail chain that includes the ELC in which the ELC seeks information necessary to provide legal advice. The subject matter of implementing a new law evinces a request for legal services in its own right, but even were that not the case, the privilege log spells out the legal necessity of these records in detail, to the extent possible without revealing the privileged information itself.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court deny Plaintiffs’ Supplemental Motion to Compel.

Respectfully submitted,

DEFENDANTS DAVID M. SCANLAN, in his official capacity as New Hampshire Secretary of State and JOHN M. FORMELLA, in his official capacity as New Hampshire Attorney General

By their attorney,

JOHN M. FORMELLA
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Date: January 7, 2026

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all parties of record in the consolidated cases, *New Hampshire Youth Movement v. Scanlan* (1:24-cv-00291-SE-TSM) and *Coalition for Open Democracy, et al. v. Scanlan, et al.* (1:24-cv-00312-SE-TSM), through the Court's e-filing system.

/s/ Michael P. DeGrandis

Michael P. DeGrandis