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

HARRY POLLAK,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 22-CV-49-ABJ
)	
SUSAN WILSON, et a.)	
)	
Defendants.)	

Defendants’ Motion to Compel Discovery Responses

Defendants Susan Wilson et al. (referred to herein collectively as “SCSD2”), by and through their undersigned attorney, and pursuant to Fed.R.Civ.P. 37(a), hereby move the court for an order compelling Plaintiff to provide full and complete responses to the discovery requests described below. In support of this motion, SCSD2 shows the court as follows:

Rule 37(a) Certification

The undersigned certifies that legal counsel for Defendants has in good faith conferred with legal counsel for Plaintiff in an effort to obtain the requested discovery without court action.

Nature of Case

1. Plaintiff Harry Pollak (referred to herein as “Pollak”) brought suit against the board members of SCSD2 in their official and individual capacities claiming that the Board violated his First Amendment right to free speech when it did not allow him to discuss personnel issues during the public comment portion of a board meeting held on February 7, 2022. Pollak filed a motion

for a preliminary injunction requesting that the court find SCSD2 Board Policy BEDH to be unconstitutional and order the restriction against discussing personnel and the restriction against use of abusive language removed from Policy BEDH. (ECF No. 8). The court determined that there was not a likelihood that Pollak would succeed on the merits of his claims and denied the motion for an injunction. (ECF No. 17).

2. Pollak appealed the denial of his motion for a preliminary injunction to the Tenth Circuit Court of Appeals. The Tenth Circuit affirmed, holding that SCSD2 Policy BEDH was viewpoint neutral and reasonable and thus, constitutional on its face. *Pollak v. Wilson*, 2022 WL 17958787 (10th Cir. 2022). The Tenth Circuit also held that Pollak had waived his “as-applied” argument and “pretext” argument and went on to state that even if the pretext argument had not been waived, such an argument would likely fail based on the undisputed facts in the record. *Pollak v. Wilson*, WL 17958787 at *9-11.

3. The case was remanded back to this court after the Tenth Circuit’s decision. Pollak filed an amended complaint again asserting “as-applied” and “pretext” claims. (ECF No. 43). The parties are now in the discovery phase of this litigation. Discovery is required to be completed by September 1, 2023 pursuant to the court’s Scheduling Order. (ECF No. 42).

Discovery Requests

4. On March 16, 2023, SCSD2 served Pollak with *Defendants’ First Interrogatories to Plaintiff*, a copy of which is attached as **Appendix A**, and *Defendants’ First Request for Production to Plaintiff*, a copy of which is attached as **Appendix B**. Pollak responded to these discovery requests on April 17, 2023. See **Appendix C** and **Appendix D**. However, Pollak did not fully respond to the discovery requests. He objected to the interrogatories and requests set forth below claiming that the information requested is protected by the First Amendment

associational privilege because it involves communications with persons associated with the Free our Faces Facebook page. Pollak's counsel also indicated that Pollak will refuse to provide the requested information during his deposition.

5. This motion to compel seeks full and complete responses to the discovery requests set forth below including production of the documents identified as bates # 0110-0156 in Pollak's privilege log. SCSD2's specific discovery requests and Pollak's responses are as follows:

INTERROGATORY NO. 4: Describe your role and/or participation in any way with respect to any parent groups or community groups that discussed any [of] the issues and/or subject matter addressed in your amended complaint including, but not limited to, the "Free our Faces" group in Sheridan, Wyoming.

ANSWER: Plaintiff objects to Interrogatory No. 4 under FRCP 26(b) because it seeks information protected by the First Amendment associational privilege. Plaintiff objects to Interrogatory No. 4 because the phrase "the issues and/or subject matter addressed in your amended complaint" is vague, ambiguous, overbroad, and seeks discovery not proportional to the needs of this case. Plaintiff further objects to Interrogatory No. 4 as not seeking information relevant to any party's claims or defenses. Plaintiff further objects in Interrogatory No. 4 because the phrases "parent groups" and "community groups" are vague, ambiguous, overbroad, and seek discovery not proportional to the needs of this case.

REQUEST FOR PRODUCTION NO. 3: Produce a complete copy of all documents evidencing communications between Plaintiff and any other person other than Plaintiff's attorneys concerning the events of the SCSD2 board meeting held on November 1, 2021.

RESPONSE: Plaintiff objects to Request No. 3 because the phrase "concerning the events of the events of the of the SCSD2 board meeting held on November 1, 2021" is vague and ambiguous. Plaintiff objects to Request No. 3 under FRCP 26(b) to the extent it seeks documents protected by attorney-client privilege, the work-product doctrine, the marital privilege, and the First Amendment associational privilege. Subject to and without waiving these objections, Plaintiff states he possesses responsive documents but is withholding them for the following reasons:

Plaintiff is withholding a document in response to this request under the marital privilege, which will be further identified in a forthcoming privilege log.

Plaintiff is additionally withholding documents in response to this request under the First Amendment associational privilege, which will be further identified in a forthcoming privilege log.

REQUEST FOR PRODUCTION NO. 4: Produce a complete copy of all documents evidencing communications between Plaintiff and any other person other than Plaintiff's attorneys concerning Plaintiff's comments during the SCSD2 board meeting held on January 10, 2022.

RESPONSE: Plaintiff objects to Request No. 4 as vague and ambiguous. Plaintiff objects to Request No. 4 under FRCP 26(b) to the extent it seeks documents protected by attorney-client privilege, the work-product doctrine, the marital privilege, and the First Amendment associational privilege. Subject to and without waiving these objections, please see the attached documents.

Plaintiff is additionally withholding documents in response to this request under the First Amendment associational privilege, which will be further identified in a forthcoming privilege log.

REQUEST FOR PRODUCTION NO. 5: Produce a complete copy of all documents evidencing communications between Plaintiff and any other person other than Plaintiff's attorneys concerning the SCSD2 board meeting held on February 7, 2022.

RESPONSE: Plaintiff objects to Request No. 5 as vague and ambiguous. Plaintiff objects to Request No. 5 under FRCP 26(b) to the extent it seeks documents protected by attorney-client privilege, the work-product doctrine, the marital privilege, and the First Amendment associational privilege. Subject to and without waiving these objections, please see the attached documents.

REQUEST FOR PRODUCTION NO. 7: Produce a copy of all electronically-stored information, including but not limited to writings, e-mails, correspondence, postings, wall posts, private messages, photographs, sound recordings, images, and other data or data compilations, stored on or under your Facebook Account Profile beginning January 1, 2021. Attached are instructions for downloading all data from Plaintiff's Facebook Account onto the DVD which is being provided with this request, or you are free to produce the data upon some other portable storage device so long as it is in a usable/viewable format.

RESPONSE: Plaintiff objects to Request No. 7 under FRCP 26(b) to the extent it seeks information or documents protected by attorney-client privilege, the work-product doctrine, the marital privilege, and the First Amendment associational privilege. Plaintiff further objects to Request No. 7 as vague, ambiguous, overly broad, unduly burdensome, irrelevant, not likely to lead to evidence relevant to any party's claim or defense, and not proportional to the needs of this case. Plaintiff is not producing documents in response to this Request based on his objections.

REQUEST FOR PRODUCTION NO. 8: Produce a copy of all electronically-stored information, including but not limited to writings, e-mails, correspondence, postings, wall posts, private messages, photographs, sound recordings, images, and other data or data compilations, that you have posted on the

“Free our Faces” Facebook Account. Attached are instructions for downloading all data from Plaintiff’s Facebook Account onto the DVD which is being provided with this request, or you are free to produce the data upon some other portable storage device so long as it is in a usable/viewable format.

RESPONSE: Plaintiff objects to Request No. 8 under FRCP 26(b) to the extent it seeks information or documents protected by attorney-client privilege, the work-product doctrine, and the First Amendment associational privilege. Plaintiff further objects to Request No. 8 as vague, ambiguous, overly broad, unduly burdensome, irrelevant, not likely to lead to evidence relevant to any party’s claim or defense, and not proportional to the needs of this case. Plaintiff is not producing documents in response to this Request based on his objections.

6. On April 27, 2023, Pollak provided SCSD2 with *Plaintiff’s First Privilege Log*, a copy of which is attached as **Appendix E**. In this privilege log, Pollak identified certain documents (bates # 0110-0156) for which he is asserting the First Amendment associational privilege. From the information provided in the privilege log it appears that these documents are directly responsive to the discovery requests. These documents appear to consist primarily of Pollak’s personal e-mails, text messages, and Facebook posts concerning the school district and/or its board meetings.

7. On April 28, 2023, SCSD2’s legal counsel sent correspondence to Pollak’s legal counsel in an attempt to obtain the requested information. See **Appendix F**. In this correspondence, SCSD2 agreed to narrow the scope of the discovery requests to information and documents that pertain to Sheridan County School District No. 2 and/or its board meetings during the 2021/2022 school year. Pollak’s counsel responded on May 2, 2023 and reiterated his refusal to fully respond to the discovery requests on the basis of the asserted associational privilege. See **Appendix G**. Legal counsel for SCSD2 also contacted Pollak’s legal counsel via telephone conference on May 3, 2023 in an attempt to discuss and resolve the issue.

8. On May 10, 2023, counsel for the parties held a discovery conference with the court pursuant to Local Rule 37.1(b). During this conference, the focus of Pollak’s objections centered

on his assertion of the associational privilege. During the scheduling conference, SCSD2 offered to stipulate to a reasonable protective order. SCSD2 also offered to accept the requested documents (Pollak bates # 0110-0156) with the names of third parties redacted, provided SCSD2 retained the right to address the matter further if any such persons are later identified as a material witness in this case. Despite these efforts, Pollak has continued to refuse to provide the requested information.

Legal Argument

9. The Supreme Court has recognized that in the context of discovery, the First Amendment creates a qualified privilege from disclosure of certain associational information. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *NAACP v. State of Ala.*, 357 U.S. 449, 462–63, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). However, this privilege is not absolute.

10. In evaluating claims of associational privilege in the discovery context, the Court applies a burden-shifting analysis. *Wyoming v. USDA*, 239 F.Supp.2d 1219, 1236 (D.Wyo. 2002), *appeal dismissed as moot*, 414 F.3d 1207 (2005). First, the party asserting the privilege must make a prima facie showing that the privilege applies. To make this showing, the party must demonstrate an objectively reasonable probability that compelled disclosure will chill associational rights, i.e. that disclosure will deter membership due to fears of threats, harassment or reprisal from either government officials or private parties which may affect members' physical well-being, political activities or economic interests. *See NAACP*, 357 U.S. at 462–63, 78 S.Ct. 1163.

11. If the party makes a prima facie showing, the burden shifts to the party issuing the discovery to demonstrate a compelling need for the requested information. *Id.* In the Tenth Circuit, to determine whether the requesting party has a compelling need, the Court considers the following

factors: (1) the relevance of the information sought; (2) the requesting party's need for the information; (3) whether the information is available from other sources; (4) the nature of the information sought; and (5) whether the person from whom discovery is sought has placed the information in issue. *See Grandbouche v. Clancy*, 825 F.2d 1463, 1466–67 (10th Cir. 1987) (citing *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977)). After examining these factors, the Court determines “whether the privilege must be overcome by the need for the requested information.” *Grandbouche*, 825 F.2d at 1466.

Pollak cannot not make a *prima facie* showing that the associational privilege applies to his personal e-mails, text messages, and Facebook posts.

12. Pollak appears to be claiming that the associational privilege applies to his personal e-mails, text messages, and Facebook posts because these communications were with persons who joined the “Free our Faces” Facebook page. Free our Faces is essentially a group of individuals who started a Facebook page during Covid to protest mask requirements. It does not appear that the group has ever been formally organized or that the association extends beyond those persons who have asked to join the Facebook page. Pollak cannot carry his burden of showing that disclosure of the requested information will “chill” associational rights that Free our Faces may have, if any, or subject persons that joined the Free our Faces Facebook page to “threats, harassment or reprisal.”

13. Counsel for SCSD2 has not been able to find any case in which the associational privilege has been applied to Facebook pages or other social media posts in the manner advocated by Pollak. Rather, it appears that courts have primarily applied the privilege in situations where a recognized organization is legitimately attempting to protect its membership and volunteer lists, contributor lists, and past political activities of organizations. *See Wyoming v. U.S.D.A.*, 239 F.Supp.2d 1219, 1237 (D.Wyo. 2002) (collecting cases). SCSD2 is not seeking any of this type

of information from the Free our Faces group. If the associational privilege can be applied to a litigant's personal e-mails, texts or social media posts in the manner asserted by Pollak, then it is hard to envision where this privilege starts and stops. It would frustrate the purposes of discovery if every Facebook page or other similar social media post were deemed to be an association and entitled to assert the privilege to avoid disclosing relevant information.

Even if Pollak is able to make a *prima facie* showing that the associational privilege applies to his personal e-mails, text messages, and Facebook posts, application of the *Silkwood* balancing test weighs in favor of disclosure.

14. If it is determined that Pollak has made a *prima facie* showing of entitlement to the associational privilege, the court then considers the relevance of the information sought, SCSD2's need for the information, whether the information is available from other sources, the nature of the information sought, and whether Pollak has placed the information in issue (referred to as the *Silkwood* balancing test). *See Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977). Pollak focuses primarily on the first factor and argues that the information sought by SCSD2 does not meet the heightened relevancy requirement. *See Wyoming v. U.S.D.A.*, 239 F.Supp.2d at 1237 (stating that when the associational privilege is applicable, the relevance is more exacting than required by Rule 26(b)(1), and that the information being sought must go to the "heart of the matter" at issue).

15. In this case, Pollak has asserted that he has a constitutional right to discuss personnel during the public comment period of school district board meetings. In his amended complaint, Pollak makes a number of allegations concerning his intent and purpose in coming to speak at the board meetings. (*See e.g.*, Amended Complaint, ECF No. 43, ¶¶ 23, 25, 40). SCSD2 seeks specific information concerning the November 1, 2022, January 10, 2023 and February 7, 2023 board meetings, which all occurred during the general period of time in which the events at

issue in the case occurred. SCSD2 has also modified its requests to only seek information and documents pertaining to the school district and/or its board meetings during the 2021/2022 school year. This information is directly relevant to the allegations being made by Pollak.

16. It is important to note that Pollak's reasons for attending and speaking at the board meetings are relevant because of the allegations Pollak has made in his amended complaint. SCSD2 does not contend that Pollak's intent and purposes in attending the board meetings will present issues of fact that must be decided by the court or jury. Rather, SCSD2 has taken the position that the Tenth Circuit has already addressed the substance of the claims alleged in Pollak's amended complaint and that this case should ultimately be decided on a motion for summary judgment that SCSD2 intends to file. However, the parties are currently in the discovery phase of this litigation, which ends September 1, 2023, and this is the only opportunity SCSD2 will have to conduct discovery and prepare to defend against Pollak's allegations should the case go to trial.

17. The other factors of the *Silkwood* balancing test also weigh heavily in favor of disclosure. The information sought is not readily available from other sources. While it may be possible for SCSD2 to subpoena the administrators of the Facebook pages or other senders/recipients of Pollak's personal e-mails, such discovery would involve the same issues concerning the associational privilege. Further, the nature of the information sought (e-mails, texts and social media posts) is not the type of information generally protected by the associational privilege. Finally, Pollak has certainly placed the information being sought in discovery in issue. Pollak should not be allowed to make allegations concerning his actions at school board meetings and then refuse to produce information that is directly relevant to the claims he is making.

18. Submitted herewith is a proposed order compelling the requested discovery.

Wherefore, SCSD2 respectfully requests that the court enter an order compelling Pollak to provide full and complete responses to the discovery requests described above and grant SCSD2 the expenses and attorney fees it has incurred in this motion pursuant to Fed.R.Civ.P. 37(a)(5).

Dated this 18th day of May, 2023.

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Certificate of Service

I, Kendal R. Hoopes, hereby certify that on May 18, 2023, I served a true and correct copy of the above and foregoing through the Case Management/Electronic Case Filing (CM/ECF) system for the United States Federal Court for the District of Wyoming.

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