

1. An order from the U.S. District Court for the District of Kansas finding that certain descriptions in a government agency’s categorical privilege log lacked sufficient detail and information to permit the Defendant and the court to assess the privileges claimed and requiring the agency to individually log the documents in those categories.

In *Consumer Financial Protection Bureau v. Carnes*, No. 23-cv-2151-DDC-TJJ Slip Copy, 2024 WL 1195565 (D. Kan. Mar. 20, 2024), U.S. Magistrate Judge Teresa J. James addressed the standards governing categorical privilege logs.

The Consumer Financial Protection Bureau (CFPB) brought this action seeking to avoid allegedly fraudulent transfers it claimed were undertaken to shield assets in connection with an investigation and subsequent administrative proceeding conducted by the CFPB. *Id.* at *1. Among several discovery disputes, one Defendant claimed that a categorical privilege log served by the CFPB was insufficient and moved to compel the CFPB to produce a more thorough privilege log.

Magistrate Judge James first described Defendant’s requests to the CFPB and the CFPB’s categorical privilege log. She noted that the majority of the categorical descriptions related to Defendant’s requests for documents (1) pertaining to the CFPB’s investigation of Defendants, (2) communications regarding the alleged fraudulent transfers, and (3) communications provided to, exchanged with, or received from any other federal, state, or local agency or regulator concerning any allegation in the CFPB’s complaint. *Id.* at *6.

After responding to the requests for production, the CFPB served a categorical privilege log with five columns: (1) Description; (2) Approx. Date Range; (3) Authors, Senders, Addresses, and Recipients; (4) Applicable Privileges or Protections; and (5) Responsive [Request for Production]. Magistrate Judge James explained that the CFPB’s categorical descriptions contained “lengthy date ranges and identify the authors/senders column with the general description ‘[a]ttorneys and supporting staff at the Bureau.’” Further, the “description” column provided categorical descriptions for “thousands” or “hundreds” of internal notes, memoranda, drafts, analyses, and interoffice communications withheld.

In her motion regarding the CFPB’s categorical privilege log, Defendant argued that the log did “not comport with basic requirements or provide sufficient information to assess the validity of the asserted privileges,” and she was unable to meaningfully challenge any claimed privilege over the withheld documents. *Id.* at

*5. In particular, Defendant argued that the documents on the log would be relevant to her claimed defense based on the statute of limitations.

In response, the CFPB argued that it had provided a sufficient privilege log by categorically objecting to the wholesale production of its internal attorney-client communications. The CFPB submitted a declaration from one of its senior litigation counsel describing the manner in which the CFPB grouped and described the responsive documents by categories, including that each category indicated the volume of responsive communications to demonstrate the unreasonableness of providing a line-by-line privilege log, when the only withheld communications were the CFPB's internal communications and work product.

Turning to the merits of Defendant's motion, Magistrate Judge James explained that Federal Rule of Civil Procedure 26(b)(5) requires a party withholding information as privileged to "describe the nature of the documents, communications, or tangible things not produced or disclosed — and to do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." *Id.* at *7 (quoting Rule 26(b)(5)(A)(ii)). She noted that the advisory committee notes accompanying the 1993 amendments to Rule 26 recognized that "[d]etails concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories."

Magistrate Judge James next discussed prior case law, stating that "some cases from this District have permitted categorical privilege logs." She explained that the prior cases had "allowed categorical privilege logs and recognized [that] whether to allow them is a case specific inquiry." But she noted that the parties in those cases had only asserted attorney-client privilege and/or work product doctrine, whereas the CFPB was asserting "multiple privileges including the deliberative process and law enforcement privileges." She also noted that the CFPB's log did not reflect the same "magnitude" of documents that were at issue in those prior cases.

Magistrate Judge James ultimately concluded that the CFPB's categorical privilege log lacked sufficient detail and information to permit Defendant and the court to assess many of the privileges claimed. *Id.* at *8. She found, in particular, that the grouping of withheld documents into broad categories on the CFPB's privilege log made it "impossible to ascertain who sent or received the specific document withheld, the nature of the document (e.g., email, draft letter), the date it was sent,

or which particular privilege(s) and/or protection(s) are being asserted for the specific document withheld.”

With respect to certain categories listed on the log, Magistrate Judge James found that it was “impossible to ascertain from the broad categories and limited information provided” whether the CFPB was withholding as privileged documents relevant to Defendant’s statute of limitations defense. She noted that if the CFPB were withholding documents related to the alleged transfers within the date range relevant to the statute of limitations defense, those documents “would be relevant ... and must be individually logged in detail.” And, while she was “sympathetic to [the CFPB’s] desire to avoid individually logging a large number of documents, the Court must balance those concerns against [the CFPB’s] obligation to provide a sufficient privilege log that allows [Defendant] to assess [the CFPB’s] privilege claims.”

But Magistrate Judge James found that certain of the categories of documents detailed on the CFPB’s log were clearly not relevant to Defendant’s claimed statute of limitation defense because they covered a time period irrelevant to that defense. Accordingly, she ruled that these categorical descriptions were “sufficient” and that the CFPB would not “be put to the unnecessary and burdensome task of providing any additional privilege log information regarding those categories.”