IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:24-MC-5-RJ

IN RE:	)	
	)	
SUBPOENA TO NATIONAL ACADEMY OF SCIENCES	)	O R D E R
	)	

This matter is before the court on motions of the National Academy of Sciences (the "Academy") to quash or modify a subpoena, [DE-1] or alternatively, for a protective order prohibiting discovery, [DE-2]. The Plaintiffs' Leadership Group (the "PLG")[1] responded in opposition, [DE-8-1], and contemporaneously moved to compel the Academy's compliance with the subpoena, [DE-8]. The Academy replied in support of its motion to quash or modify, [DE-10] and simultaneously opposed the PLG's motion to compel, [DE-11]. The PLG replied in support of its motion to compel. [DE-13]. For the reasons that follow, the Academy's motion to quash or modify the subpoena or alternatively for a protective order prohibiting discovery is denied, and the PLG's motion to compel is granted in part.

I. Background

This dispute concerns the ongoing Camp Lejeune Justice Act ("CLJA") litigation currently underway in this district.[2] *See* Pub. L. No. 117-168, § 804, 135 Stat. 1759, 1802–04. With the CLJA, Congress created a new federal cause of action permitting "appropriate relief for harm that was caused

[1] At the outset of the litigation underlying this dispute, the court appointed a plaintiffs' "leadership group to fairly, effectively, and efficiently represent the interests of all plaintiffs before this [c]ourt." 7:23-CV-897 [DE-10] at 1; [DE-260].

[2] There are more than eighteen hundred individual CLJA lawsuits pending in this district.

by exposure to the water at Camp Lejeune" for individuals who resided, worked, or were otherwise exposed for not less than 30 days during the period between August 1, 1953, and December 31, 1987. *See id.* § 804(b). To better manage this litigation, the court entered case management orders streamlining pretrial procedures in all CLJA cases. *See e.g.*, [DE-23].

Relevant here, the Academy, a non-party in the underlying litigation, is a "federally chartered [private] corporation," 36 U.S.C. § 150301, that "upon call from any U.S. Government Department . . . investigate[s], examine[s], experiment[s], and report[s] upon any subject of science or art[.]" *Id.* § 150303. "The Academy prepares reports of a scientific and technical nature, primarily for the federal government pursuant to contracts, grants, and cooperative agreements with sponsoring agencies." [DE-1-2] at ¶ 7. When it agrees to study a topic of interest, the Academy "convene[s] committees of experts" (the "study committee(s)") which "collaborate on a consensus report that addresses a specific scientific issue." [DE-1-1] at 5.[3] "[P]rominent experts and scientists in the relevant field" usually volunteer to serve on Academy study committees and deliberate in "confidential, closed sessions" after reviewing "the relevant scientific literature, data, and research[.]" *Id.* at 6; *see* [DE-1-2] at ¶ 9. "This [process] culminates in the preparation of draft reports, which are revised until the study committee members reach consensus and a final draft is prepared." [DE-1-2] at ¶ 9.

Subsequently, "the Academy carries out a detailed and rigorous internal review of that [final] draft report by independent experts who serve as reviewers." *Id.* at ¶ 10. Per Academy policy, steps are taken to ensure the confidentiality of deliberations: among other restrictions, the Academy's policy "prohibits disclosure of review comments outside the Academy . . . [and] requires removing the names (and other identifiers) of individual reviewers when their review comments are provided to the study committee." [DE-1-1] at 7. At the conclusion of the peer review process, "[t]he

[3] Throughout this order, the page number references the page number in the CM/ECF footer where, as here, it differs from the original document's pagination.

reviewers' comments are furnished to the study committee for consideration, further deliberations, and drafting and revision," and "the study committee responds to the reviewer's comments." [DE-1-2] at ¶ 14. The Academy issues a final study only after the co-chair of the Report Review Committee "determines that the . . . review has been satisfactorily completed and the report manuscript has been approved by the division director of the study committee's parent unit within the Academy." *Id*. And while final Academy studies are "normally made available to the public[,] . . . drafts, internal reviews of reports, correspondence of reviewers, and any material that reflects the study committee's deliberative process or the review process are not released to the public." *Id.* at ¶ 16.

In 2009, the Academy published a final study, titled *Contaminated Water Supplies at Camp Lejeune: Assessing Potential Health Effects* (hereinafter, the "Report"), addressing the health effects of contaminated water at Camp Lejeune. *Id.* at ¶ 21.[4] The Report is publicly available. *See Contaminated Water Supplies at Camp Lejeune: Assessing Potential Health Effects* (Nat'l Academies Press 2009), at 1, https://nap.nationalacademies.org/download/12618. However, "documents that reflect the committee appointment process as well as the deliberative processes of the study committee and reviewers, including drafts and review comments, remain confidential and have not been released by the Academy." [DE-1-2] at ¶ 21.

On December 12, 2023, the PLG subpoenaed the Academy pursuant to Fed. R. Civ. P. 45, seeking documents related to the Report. *See* [DE-1-1] at 8; *see* [DE-1-4]. In particular, the PLG's subpoena sought "basic information about the development of the Report." [DE-8-1] at 6; *see generally* [DE-8-2]. In response, the Academy produced almost 200,000 pages of material, but objected to the disclosure of its "confidential deliberations or privileged communications" pertinent

[4] The Academy prepared the Report in response to a request made by the United States Department of the Navy "to address the evidence on whether adverse health outcomes are associated with past contamination of the water supply at Camp Lejeune." [DE-1-1] at 9.

to the Report. [DE-1-1] at 5, 9; *see* [DE-1-5]. Despite the parties' good-faith efforts to resolve the issue,[5] on May 8, 2024, the Academy filed a motion in the United States District Court for the District of Columbia to quash or alter the PLG's subpoena pursuant to Fed. R. Civ. P. 45(d)(3)(A), or in the alternative, to issue a protective order under Fed. R. Civ. P. 26(c)(1). [DE-1, DE-2].[6] The Academy argues that certain documents are properly withheld on the basis of confidential deliberations and privileged communications, and further, responding to the subpoena would be unduly burdensome. [DE-1-1] at 5. In opposition, the PLG asserts that the Academy is required, at a minimum, to produce a privilege log under Fed. R. Civ. P. 45(e)(2), that the Academy erroneously asserts a privilege with no basis in the law, and assuming such a privilege exists, the PLG is still entitled to production of the relevant documents under the requisite balancing test. *See* [DE-8-1] at 6–7. The Academy resists production of a "document-by-document privilege log." [DE-1-1] at 9.

II. Standard of Review

Subpoenas issued to nonparties are governed by Rule 45 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 34(c) ("As provided in Rule 45, a nonparty may be compelled to produce a document and tangible things or to permit an inspection."). "In response to such a subpoena, a non-party may either file a motion to quash or modify the subpoena pursuant to Fed. R. Civ. P. 45(d)(3)(A), move for a protective order pursuant to Fed. R. Civ. P. 26(c), or oppose a motion to compel production of the subpoenaed documents pursuant to Fed. R. Civ. P. 45(d)(2)(B)." *Schaaf v. Smithkline Beecham Corp.*, 233 F.R.D. 451, 453 (E.D.N.C. 2005) (citing *United States v. Star*

[5] As part of the efforts to resolve the instant dispute, the Academy "identified the *categories* of internal deliberative documents it was withholding." [DE-1-1] at 9 (emphasis added).

[6] In an order dated July 10, 2024, the District Court for the District of Columbia ordered the motions transferred to the Eastern District of North Carolina. *See In Re: Subpoena to Nat'l Acad. of Sciences*, Misc. Action No. 24-59 (JDB), 2024 WL 3370249, -- F.R.D. – (D.D.C. 2024). The motions were transferred July 23, 2024. [DE-20].

Scientific, Inc., 205 F. Supp. 2d 482, 484 (D. Md. 2002)); *Eshelman v. Puma Biotechnology, Inc.*, No. 7:16-CV-18-D, 2017 WL 5919625, at *4 (E.D.N.C. Nov. 30, 2017).

Rule 45 adopts the standard codified in Rule 26 in determining what is discoverable. *Schaaf*, 233 F.R.D. at 453.

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). However, simply because "requested information is discoverable under Rule 26[(b)] does not mean that discovery must be had." *Nicholas v. Wyndham Int'l, Inc.*, 373 F.3d 537, 543 (4th Cir. 2004); *Artis v. Murphy-Brown LLC*, No. 7:14-CV-237-BR, 2018 WL 3352639, at *2 (E.D.N.C. July 9, 2018); *Jones v. Campbell Univ.*, No. 5:20-CV-29-BO, 2020 WL 4451173, at *2 (E.D.N.C. Aug. 3, 2020). Indeed, courts must quash or modify a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies" or "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A).[7] And Fed. R. Civ. P. 26(c)(1) permits courts to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" upon a finding of "good cause." In opposing a request for production, "[a] non-party . . . may seek from the court protection from discovery by the overlapping and interrelated provisions of Rules 26 and 45[.]" *Insulate Am. v. Masco Corp.*, 227 F.R.D. 427, 432 (W.D.N.C. 2005); *Schaaf*, 233 F.R.D. at 453; *Eshelman*, 2017 WL 5919625, at *4.

[7] Fed. R. Civ. P. 45(d)(3)(B) also *permits* courts to quash or modify a subpoena "[t]o protect a person subject to or affected by a subpoena . . . if it requires . . . disclosing a trade secret or other confidential research, development, or commercial information[.]"

However, Fed. R. Civ. P. 45(e)(2)(A) provides that "[a] person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." And similarly, under Fed. R. Civ. P. 26(b)(5)(A), "[w]hen a party withholds information otherwise discoverable by claiming that the information is privileged . . ., the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." The movant asserting a privilege bears the burden of establishing its applicability. *Solis v. Food Emps. Lab. Rels. Ass'n*, 644 F.3d 221, 232 (4th Cir. 2011); *Avent v. State Farm Fire and Casualty Co.*, No. 5:16-CV-278-BO, 2017 WL 384314, at *2 (E.D.N.C. Jan. 25, 2017); *Spilker v. Medtronic, Inc.*, No. 4:13-CV-76-H, 2014 WL 4750292, at *2 (E.D.N.C. Sept. 24, 2014).

III. Discussion

The court first turns to the precise contours of the Academy's asserted privilege or heightened confidentiality interest. In support,[8] the Academy relies on the District of Columbia Court of Appeals' decision in *Plough, Inc. v. Nat'l Acad. of Sciences*, 530 A.2d 1152 (D.C. 1987) and a line

[8] At times in its briefing, the Academy asserts a privilege in its internal deliberative materials. *See* [DE-1-1] at 5 (". . . objecting to the production of its confidential deliberations or *privileged* communications) (emphasis added); *see* [DE-10] at 8–9 ("[T]he Academy is arguing that its internal deliberations are *specially protected* under a string of cases specific to the Academy.") (emphasis added); *see* [DE-10-1] at 4 ("[W]e have now produced all responsive, *non-privileged* documents that do not reflect or concern confidential internal Academy deliberations.") (emphasis added). In other parts of its briefing, the Academy argues that while it is not entitled to any kind of formal privilege, the Academy's confidentiality interests are so great as to essentially nullify any applicable balancing test. *See, e.g.*, [DE-1-1] at 18 ("In all these cases, the tribunals recognized the Academy's compelling need to protect its internal deliberations and prohibited their disclosure."); *see also* [DE-10] at 11 ("But instead of acknowledging the unbroken line of cases protecting the Academy's internal deliberations, [the PLG] argues that the [c]ourt should balance the Academy's interest in confidentiality against [the PLG's] interest in acquiring the documents.").

of cases protecting the Academy from disclosing its internal deliberative materials. In response, the PLG argues that the relevant case law shows the Academy lacks any formal privilege in those materials. *See, e.g.*, *Anker v. G.D. Searle & Co.*, 126 F.R.D. 515 (M.D.N.C. 1989).

In *Plough*, the plaintiff brought an action against a pharmaceutical manufacturer of aspirin alleging that the aspirin caused him to develop Reye Syndrome, a serious condition leading to swelling in the brain. *Plough*, 530 A.2d at 1154. The defendant subpoenaed the Academy's internal documents related to the Academy's review of a pilot study, which found a strong association between the use of aspirin and Reye Syndrome, and sought a deposition of the Academy's custodian of records. *See id.* In response, the Academy produced most of the documents requested but moved for a protective order as to 1) documents "reflecting the [Academy] [c]ommittee's confidential deliberations in closed session concerning its review of the methodology of the [p]ilot [s]tudy[,] (2) preliminary drafts of the [c]ommittee's [r]eports, and (3) documents reflecting [the Academy's] confidential internal review of the [c]ommittee [r]eports." *Id.*

After summarizing the Academy's internal confidential processes and the parties' arguments, the D.C. Court of Appeals located support "in two lines of . . . cases" for affording the Academy a qualified privilege. *Id.* at 1157.[9] Thus, the court found that "[t]he concern expressed in these cases for unimpeded criticism and self-analysis supports confidentiality of the deliberations of the [Academy] review panels" and proceeded to analyze whether the *Plough* defendant rebutted "the [Academy's] showing of the potential harm of disclosure [by] . . . demonstrat[ing] that the materials which [he sought] to discover [were] relevant and necessary to the . . . action." *Id.* The D.C. Court

[9] The first line of cases pertained to the academic or researcher privilege – that, "in order to prevent a chilling of the uninhibited conduct of academic and scientific research, [courts] have recognized an interest in protecting from discovery the analyses, opinions and conclusions drawn by researchers from their data." *Plough*, 530 A.2d at 1157. The second line of cases "ha[s] extended a qualified privilege to protect the deliberations of internal institutional bodies like [the Academy's] review panels, whose function is to review and criticize the quality of the institution's work." *Id.* at 1158.

of Appeals concluded that the Academy's interest in protecting the documents was greater than their "relevan[ce] and necess[ity]" to the defendant. *Id.* at 1157.

Nevertheless, "evidentiary privileges contravene the fundamental principle that the public has a right to every man's evidence."[10] *Solarex Corp. v. Arco Solar, Inc.* 121 F.R.D. 163, 168 (E.D.N.Y. 1988); *see also Wright v. Jeep Corp.*, 547 F. Supp. 871, 875 (E.D. Mich. 1982) ("Privileges are the exception to the general duty of every citizen to provide evidence when necessary to further the system of justice."). And as the PLG asserts, other courts have resisted creating "some privilege for academicians, researchers or other experts from having to involuntarily provide a party to the lawsuit with their expertise." *Anker*, 126 F.R.D. at 519. Yet, the Academy argues that it is not relying on a muddled and general academic privilege, but rather on an Academy-specific privilege or heightened confidentiality interest grounded on "protect[ing] the deliberations of internal institutional bodies." *Plough*, 530 A.2d at 1158. And "[c]ourts have consistently and repeatedly ruled in favor of protecting the Academy against the chilling effects of unnecessary litigation." *McMillan v. Togus Reg'l Off., Dep't of Veterans Affairs*, 294 F.Supp.2d 305, 318 (E.D.N.Y. 2003).

But there is no Academy-specific qualified privilege recognized in this Circuit. Moreover, as the Academy appears to acknowledge, many of the cases it cites prevent disclosure of internal confidential materials *only* following an interest balancing analysis. *See Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1269 (7th Cir. 1982) ("It is well settled that disclosure of subpoenaed information may be restricted where compliance would force an unreasonable burden on the party from whom production is sought."); *see Richards of Rockford, Inc. v. Pac. Gas & Elec. Co.*, 71 F.R.D. 388, 390 (N.D. Cal. 1976) ("[T]he [c]ourt's aim is not to create a privilege, but rather to achieve a balance between certain competing interests."); *see also In re Fosamax Prods. Liab. Litig.*, 2009 WL 2395899

[10] Internal citations and quotation marks are omitted from all citations unless otherwise specified.

at *5 (S.D.N.Y. Aug. 4, 2009) (referencing Rule 26(c) without mentioning any formal privilege, concluding that "subpoenas of third party researchers at the Academy raise[] serious concerns[,]" and quashing the plaintiffs' subpoena after weighing the burden on the Academy researcher against the plaintiffs' need for discovery).

Whether a qualified privilege or heightened confidentiality interest for the Academy is recognized, each court considering similar disputes has engaged in balancing the parties' competing interests under the applicable discovery rules.[11] Therefore, the court need not decide whether the Academy is entitled to a formal privilege. "[T]here is not even a need to overcome these venerable principles cautioning judicial restraint in the creation or expansion of privileges . . . the Federal Rules of Civil Procedure provide a framework for balancing, in the pre-trial discovery context, a litigant's need for disclosure against a societal interest in confidentiality asserted by one opposing such disclosure." *Solarex*, 121 F.R.D. at 168–69; *and compare Plough*, 530 A.2d at 1158 ("To rebut [the Academy's] showing of the potential harm of disclosure, [the plaintiff] must demonstrate that the materials which it seeks to discover are relevant and necessary to the . . . action."), *with Anker*, 126 F.R.D. at 518 (determining motions to compel and for a protective order require courts to "weigh[] the need for discovery by the requesting party and the relevance of the discovery to the case against the harm, prejudice or burden to the other party"), *and Insulate America*, 227 F.R.D. at 432 ("Even if

[11] It is not clear how the recognition of a qualified privilege or some heightened confidentiality interest for the Academy results in a materially distinct analysis from the balancing tests mandated by Rules 26 and 45. Indeed, as stated above, the court reads *Plough* to afford the Academy a qualified privilege. But thereafter, the D.C. Court of Appeals still weighs the relevance of the sought materials and the defendant's articulated need for them against the Academy's asserted confidentiality interest. *See Plough*, 530 A.2d at 1160–61. Indeed, the D.C. Court of Appeals expressly rejects an "extraordinary necessity standard" and acknowledges that "[i]n a case in which a higher level of need [was] shown, disclosure under such [a protective order] might be appropriate." *Id.* at 1161. And the Academy does not articulate how the balancing test applied in *Plough* and other cited cases differs from a more standard burden inquiry under Rules 26 and 45. *See Anker*, 126 F.R.D at 518 (finding that courts "should also consider societal interests in full and complete litigation along with other important values which may deserve confidentiality or protection even though not given formal privilege status.").

the information sought is relevant, discovery is not allowed where no need is shown, or where compliance is unduly burdensome, or where the potential harm caused by production outweighs the benefit.").

In that regard, the Academy argues its heightened confidentiality interests outweigh the PLG and plaintiffs' private interests in the underlying litigation. In response, the PLG argues that its need for the Academy's deliberative materials outweighs any harm or prejudice to the Academy, and alternatively, that the Academy should be required to produce a privilege log in accordance with Fed. R. Civ. P. 45(e)(2)(A). The court is convinced of the latter.

Fed. R. Civ. P. 45(e)(2)(A) requires that "[a] person withholding subpoenaed information under a claim that it is privileged . . . must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." The parties do not contest that the Academy has expressly asserted a claim of privilege. Further, the Academy argues that it already provided the PLG with a functional equivalent to a privilege log when it detailed four categories of withheld documents.[12] *See* [DE-10] at 13 ("[T]hese categories gave [the PLG] all the information it needed to assess the Academy's claim."). The court disagrees that this four-category

[12] The Academy notified the PLG of the following four categories of documents it has withheld:

1. Drafts of the Academy's 2009 Camp Lejeune Report, documents and information reflecting the substance of such drafts, documents and information reflecting the preliminary conclusions and ideas of the Committee members, and documents and information concerning the authorship of portions of the Academy's 2009 Cap [sic] Lejeune Report.
2. Review comments on the Academy's 2009 Camp Lejeune Report.
3. Discussions concerning possible appointment of Committee members, conflict information concerning the Committee, and any related discussions.
4. Internal Committee communications; communications between or among Committee members; communications between or among Committee staff and consultants; documents submitted, written, or prepared by Committee members; and documents reflecting the view of members of the Committee or Committee deliberations.

[DE-10-1] at 5.

disclosure sufficiently "describe[s] the nature of the withheld documents . . . in a manner that . . . will enable the parties to assess the claim." Fed. R. Civ. P. 45(e)(2)(A)(ii). Even if the Academy eschews production of a privilege log, it still must "as to each document . . . set forth *specific* facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed." *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 502 (4th Cir. 2011) (emphasis added); *see also In re Grand Jury Subpoena*, 274 F.3d 563, 575 (1st Cir. 2001) ("The operative language is mandatory and, although the rule does not spell out the sufficiency requirement in detail, courts consistently have held that the rule requires a party resisting disclosure to produce a document index or privilege log.").

Here, the Academy recites four broad categories of *types* of materials withheld from the PLG but fails to "set forth specific facts that . . . would suffice to establish" its asserted privilege or allow the PLG the opportunity to assess the claim and its countervailing need. *Cf. Interbake Foods*, 637 F.3d at 502 (finding that a privilege log was scant on details but minimally sufficient where it "identified the nature of each document, the date of its transmission or creation, the author and recipients, the subject, and the privilege asserted."). Indeed, the Academy's categories lack many of the hallmarks of Rule 45(e)(2) privilege assertions recognized by courts in this Circuit. *See id.* at 503 (concluding that "[b]ecause Interbake has not presented a document-by-document privilege analysis of the reply e-mails or offered a specific reason why the e-mail string should be treated as a group, . . . the district court must assess the privilege claim with respect to each e-mail in the string to determine whether Interbake has carried its burden"); *see also Johnson v. Ford Motor Co.*, 309 F.R.D. 226, 233 (S.D. W.Va. 2015) ("The focus is on the specific descriptive portion of the log, and not on conclusory invocations of the privilege . . ., since the burden of the party withholding documents cannot be discharged by mere conclusory or ipse dixit assertions.").

The Academy's resistance to producing a privilege log appears to dovetail with its assertion of an Academy-specific privilege or heightened confidentiality interest. *See* [DE-10] at 13 ("The need for a [privilege] log here is minimal because the protection that the Academy is asserting . . . does not depend on the details of protected materials."). But even if the Academy retains a privilege or elevated confidentiality interest in its deliberative materials, it remains subject to the Federal Rules. And ordering the Academy to produce a privilege log or its equivalent accords with the standard approach taken by courts deciding the applicability of any privilege or balancing inquiry pursuant to Rules 45 and 26. *See In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65, 71 (1st Cir. 2011) ("Determining whether documents are privileged demands a highly fact-specific analysis – one that most often requires the party seeking to validate a claim of privilege to do so document by document."); *see also Wilkinson v. F.B.I.*, 111 F.R.D. 432, 442 (C.D. Cal. 1986) ("It is thus apparent that such a privilege . . . would be applied only after the scholar had satisfied the threshold showing applicable to the privilege."); *see Garcia v. E.J. Amusements of New Hampshire, Inc.*, 89 F.Supp.3d 211, 214–15 (D. Mass. 2015) ("At this threshold stage, the [c]ourt does not need to determine whether CDM qualifies for this academic privilege, or how to balance the competing interest with respect to the research materials sought by defendants . . . Rather, the order simply requires CDM to briefly describe the nature of each document . . . so that the parties and the court can assess the claims in privilege.").

The Academy maintains that "a document-by-document log" would not further assist the PLG above and beyond what the PLG already knows from the document categories provided by the Academy. *See* [DE-1-1] at 21. Further, the Academy argues that creating a privilege log "would run a substantial risk of disclosure of confidential committee deliberations by revealing details that the Academy does not disclose to protect the committee process." [DE-1-1] at 20. But the parties in the

underlying litigation, including the PLG, are subject to a robust protective order. *See* 7:23-CV-897 [DE-266]. And the very purpose of a privilege log is to ascertain whether the party asserting privilege is entitled to withhold documents on that basis. *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 254 n.2 (D. Md. 2008) ("[W]hen a party refuses to produce documents during discovery on the basis that they are privileged or protected, it has a duty to particularize that claim."). Here, the Academy cannot circularly refuse to provide a privilege log on the basis that doing so would disclose the allegedly protected information. *See Mainstreet Collection, Inc. v. Kirkland's Inc.*, 270 F.R.D. 238, 241 (E.D.N.C. 2010) ("The party resisting discovery ... must make a particularized showing of why discovery should be denied, and conclusory or generalized statements fail to satisfy this burden as a matter of law."). Of course, the court does not suggest that the Academy must produce a privilege log that contains "information itself privileged or protected." Fed. R. Civ. P. 45(e)(2)(A)(ii). But the court concludes that the four general categories provided to the PLG are insufficient under Fed. R. Civ. P. 45(e)(2)(A)(ii).

The Academy also fails to adequately show why the production of a privilege log would be unduly burdensome. The Academy argues that "logging such documents would require the Academy to hand-review all of its hard copy documents, noting all the information relevant to each document." [DE-1-1] at 20. Because many of these documents are older, the Academy asserts that the absence of e-discovery applications increases their burden. *See id.* But the PLG proffers evidence, uncontested by the Academy, that suggests the Academy overstates its burden to produce a privilege log. *See* [DE-8-3] at 2 (stating that the Academy informed the PLG that "there is approximately [one] box of files that has approximately [three] expandable file folders of privileged documents). While the court does not minimize the additional work and time constraints that may be imposed onto the

Academy, the Academy's representations do not show an "undue burden" would follow from producing a privilege log in compliance with Fed. R. Civ. P. 45(e)(2)(A)(ii).

In sum, the Academy has asserted a claim of qualified privilege or, alternatively, a heightened confidentiality interest but has not provided a sufficient privilege log to allow the PLG or the court to assess the claim. *See Moore v. Shapiro & Burson, LLP*, No. 3:14CV832 DJN, 2015 WL 6674709, at *1 (E.D. Va. Oct. 29, 2015) (denying motion to quash based on, among other deficiencies, the "fail[ure] to provide a privilege log or functional equivalent, thereby failing to comply with Rule 45(e)(2)(A) of the Federal Rules of Civil Procedure."). Finally, the PLG has represented that the withheld documents may go directly to its core strategy in the underlying litigation, which already involves more than eighteen hundred individual plaintiffs and may impact hundreds of thousands of CLJA administrative claimants. Given those stakes, the court will not entertain the Academy's blanket claim to an effective privilege until it meets the standard requirements of Rule 45(e)(2)(A).[13]

Therefore, the court orders the Academy to produce a privilege log in compliance with Fed. R. Civ. P. 45(e)(2)(A).

IV. Conclusion

For the foregoing reasons, the Academy's motion to quash or modify subpoena [DE-1], or in the alternative, to issue a protective order [DE-2] is denied. The PLG's motion to compel the production of a privilege log [DE-8] is granted. The Academy is ordered to produce a privilege log of withheld documents in compliance with Federal Rule of Civil Procedure 45(e)(2)(A) within 14 days of this order.

So ordered, the 6th day of August 2024.

Robert B. Jones, Jr.
United States Magistrate Judge

[13] The court reserves ruling on the Academy's request that the court order the PLG to "reimburse the costs of" creating the privilege log. [DE 1-1] at 21 n.8.