UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DO NO HARM	CASE NO. 24-CV-016
V.	JUDGE EDWARDS
JOHN BEL EDWARDS	MAGISTRATE JUDGE HORNSBY

OBJECTION TO MEMORANDUM ORDER COMPELLING PRODUCTION

NOW INTO COURT, through undersigned counsel, comes Jeff Landry, in his official capacity as Governor of Louisiana, who asks this Honorable Court to reconsider the magistrate judge's *Memorandum Order* in Doc. 24 and files these objections, as authorized by Federal Rules of Civil Procedure 72(b)(2) and 28 U.S.C.A. § 636. The Governor requests review of this decision, as this order is "clearly erroneous or contrary to law."

I. FACTS AND BACKGROUND

The plaintiff filed its motion to compel discovery on August 9, 2024, generally seeking to compel Defendant, Governor Jeff Landry, to fully respond to Interrogatories 7-10 and 12-13 and to produce documents in response to Requests for Production of Documents 5-8, 10, and 12. Doc. 20. Governor Jeff Landry responded opposing the motion to compel on August 26, 2024, explaining that the information sought in the interrogatories was requested from the Board of Medical Examiners, and that the records sought had been sent to the Louisiana State Archives, pursuant to state law. On October 31, 2024, the magistrate judge of this Court granted in part and denied in part Plaintiff's Motion to Compel, finding, "it would be much easier for the Governor to obtain the information and documents than it would be for Plaintiff" and ordering the Governor to provide the responses and documents by November 21, 2024.

Doc. 24. In fact, nothing in the record suggest that it would be easier for the Governor to obtain the documents, as the current Governor is not the custodian of the documents. Louisiana Revised Statute 44:5(D) expressly provides that a governor shall transfer all records of the office to the custody of the archives division of the secretary of state. There the records remain under the authority and custody of a separate state wide elected official.

The Governor with respect files these objections to the magistrate judge's order in Doc. 24 granting the Plaintiff's motion in part.

II. STANDARD OF REVIEW

Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. Fed. R. Civ. P. 72(b)(2). For dispositive matters, the district judge reviews a magistrate judge's report and recommendation de novo. Fed. R. Civ. P. 72(b)(3). However, for non-dispositive, pretrial motions, such as discovery motions, the district court applies a "clearly erroneous" standard. See Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A); *Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir.1995); See also, *Heck v. Buhler*, CV 07-00021-BAJ-SCR, 2015 WL 7432367, at *2 (M.D. La. Nov. 23, 2015). Under this standard, a magistrate judge's factual findings will be deemed "clearly erroneous" when the reviewing court, upon consideration of the entire record, is left with the definite and firm conviction that a mistake has been committed. See *Castillo v. Frank*, 70 F.3d at 385.

III. OBJECTIONS

The Governor respectfully objects to the magistrate's decision and requests further review by this Honorable Court on four grounds. First, the Court disregarded La. R.S. 44:5(D) and (E), which makes it clear that the current Governor does not have custody or control over the requested

documents from a former administration. Louisiana Revised Statutes 44:5 mandates that, upon the conclusion of the Governor's term, all records from the Office of the Governor be transferred to the custody of the Archives Division of the Secretary of State, where they are to remain withheld for a period of eight years before becoming public record. Second, the Court failed to recognize the Secretary of State's exclusive control over archived gubernatorial records under the Louisiana Constitution. Third, the Court failed to consider that the documents in which it compelled the Governor to produce may be protected by various privileges and thus exempt from disclosure. Fourth, the Court's erroneous conclusion that the Governor has practical access to the requested documents, and its subsequent partial grant of the Plaintiff's Motion to Compel, imposes an undue burden on the Governor in violation of Fed. R. Civ. P. 26 and 34(a)(1).

A. The Court's order disregards La. R.S. 44:5 by failing to recognize the Archives as custodian of the records

Louisiana law unambiguously designates the Archives Division of the Secretary of State as the custodian of prior gubernatorial records. Louisiana Revised Statutes 44:5 provides, in pertinent part:

> D. The governor and his internal staff shall preserve all records to which this Section is applicable and at the conclusion of his term of office, the governor shall transfer all such records to the custody of the archives division of the secretary of state. Any exemption granted by this Section for such records shall continue in accordance with Subsection E of this Section. For purposes of this Section, "internal staff" of the governor includes the governor's chief of staff, deputy chief of staff, executive counsel, and director of policy, but shall not include any employee of any other agency, department, or office.
>
> E. Any exemption granted by this Section shall lapse eight years after the creation of the record to which the exemption is applicable. After the lapse of eight years, the records of the office of the governor, as maintained by the state archivist and deposited with the state archives program pursuant to R.S. 44:417, shall be public record.

Under La. R.S. 44:5, upon the conclusion of a Governor's term, all records are transferred to the custody of the Archives Division, where they are withheld for eight years. Consequently, Governor Landry neither possesses nor controls the requested documents. Even if the Governor could access the records, the Governor could only access some of the records sought by Plaintiffs. Louisiana Revised Statutes 44:5 grants several disclosure exemptions to the Louisiana Governor, which would legally shield these records from disclosure. These statutory exemptions would only be lifted eight years after the documents were created. This means the records available to the public and the current Governor, would have to be created at least eight years before the current date. Despite these statutory designations and protections, the Court incorrectly found that Governor Landry has the legal right or practical ability to access these records, contrary to La. R.S. 44:5.

B. The Court failed to recognize the Secretary of State's exclusive control over archived gubernatorial records

The Court erred in not properly identifying who has control over the requested documents. Under the Louisiana Constitution, custodianship of records held by the State Archives belongs exclusively to the Secretary of State, not the Governor. Under La. R.S. 44:5, gubernatorial records at the end of a Governor's term are transferred to the Archives Division, which operates under the Secretary of State's Office. The Governor is the chief executive officer of the state. La. Const. Art. IV, sec. 5. The Secretary of State is the chief election officer of the state. La. Const. Art. IV, sec. 7. Further, the Secretary of State shall, "administer and preserve the official archives of the state." *Id*. Thus, the archives fall squarely within the Secretary of State's constitutional purview, not the Governor's.

However, the Plaintiff argues that control includes when a party "has the legal right to obtain the documents on demand or has the practical ability to obtain the documents from a

nonparty to the action." *Autery v. SmithKline Beecham Corp.*, No. 6:05-cv-982, 2010 WL 1489968, at *2 (W.D. La. Apr. 13. 2010), *quoting Chesapeake Operating, Inc. v. Stratco Operating Co.*, No. 3:07-cv-00354, 2009 WL 426101, at *4 (M.D. La. Feb. 20, 2009). Courts have ruled that a party's "practical ability to obtain documents" is an unworkable standard, as parties have broad ability to obtain documents.[1] Both Governor Landry and the Plaintiff can access public,

[1] See, e.g., the Third Circuit's holding in *Brewer v. Quaker State Oil Ref. Co.,* 72 F.3d 326, 334 (3d Cir. 1995). See also the Fifth Circuit's holding in *Wiwa v. Royal Dutch Petroleum Co*., 392 F.3d 812, 821 (5th Cir. 2004) (finding plaintiff's subpoena requesting all documents to which the defendant had "access" overly broad, and limiting the scope of documents requested pursuant to Fed. R. Civ. P. 34(a) to those over which the defendant had "control"). See also the Sixth Circuit's holdings in *In re Bankers Trust Co*., 61 F.3d 465, 469 (6th Cir. 1995) (explaining that a party has possession, custody, or control only when the party has the legal right to obtain the documents upon demand); accord Flagg v. City of Detroit, 252 F.R.D. 346, 353 (E.D. Mich. 2008) ("documents are deemed to be within the 'control' of a party if it 'has the legal right to obtain the documents on demand'"); and *Pasley v. Caruso*, No. 10-cv-11805, 2013 WL 2149136, at *5 (E.D. Mich. May 16, 2013) (concluding that the Sixth Circuit had not adopted the "expansive notion of control" constituting the Practical Ability Test). "). See also the Seventh Circuit's holdings in *Chaveriat v. Williams Pipe Line Co.,* 11 F.3d 1420, 1427 (7th Cir. 1993) (affirming party's failure to pro-duce documents not in its possession and to which it had no legal right); *United States v. Approximately $7,400 in U.S. Currency*, 274 F.R.D. 646, 647 (E.D. Wis. 2011) (holding that a party is obligated to produce records when it has a legal right to obtain those records even if it does not have actual pos-session); and *DeGeer v. Gillis*, 755 F. Supp. 2d 909, 924 (N.D. Ill. 2010) (same, in Rule 45 context). See also the Eighth Circuit's holdings in *Beyer v. Medico Ins. Grp., No*. CIV. 08-5058, 2009 WL 736759, at *5 (D.S.D. Mar. 17, 2009) ("The rule that has developed is that if a party 'has the legal right to obtain the document,' then the document is within that party's 'control' and, thus, subject to production under Rule 34."); *United States v. Three Bank Accounts Described as: Bank Account # 9142908 at First Bank & Trust, Brookings, S. Dakota*, No. CIV. 05-4145-KES, 2008 WL 915199, at *7 (D.S.D. Apr. 2, 2008) ("To the extent the government's subpoena asks for documents from Mr. Dockstader which he does not have in his possession or custody, and as to which he has no legal right to obtain the document, Mr. Dockstader's objection is sustained."); and *New All. & Grain Co. v. Anderson Commodities, Inc.*, No. 8:12CV197, 2013 WL 1869832, at *8 (D. Neb. May 2, 2013) (concluding that defendants had gone "above and be-yond their obligation under the Federal Rules of Civil Procedure" by requesting and obtaining documents that they did not have the "right or authority" to demand). See also the Ninth Circuit's holding in *7-UP Bottling Co. v. Archer Daniels Midland Co.* (*In re Citric Acid Litig.*), 191 F.3d 1090 (9th Cir. 1999), cert. denied sub nom. *Gangi Bros. Packing Co. v. Cargill, Inc.*, 529 U.S. 1037 (2000). See also the Tenth Circuit's holdings in *Am. Maplan Corp. v. Heilmayr*, 203 F.R.D. 499, 502 (D. Kan. 2001) (rejecting the Practical Ability Test and explaining that "[a]s it is undisputed that defend-ant does not have actual possession of the VET documents, he can be required to produce only those documents that he has 'legal right' to obtain on demand"); accord *Noaimi v. Zaid*, 283 F.R.D. 639, 641 (D. Kan. 2012) (same); and *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Nemaha Brown Watershed Joint District No. 7*, 294 F.R.D. 610 (D. Kan. 2013) (holding that plaintiff had not met its burden of proving defendant had necessary control because it "ha[d] not shown that the District has the legal right to obtain the documents requested on demand from former District Board members, staff, or employees"). See also the Eleventh Circuit's holding in *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) ("Under Fed. R. Civ. P. 34, control is the test with regard to the production of documents. Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand.").

non-privileged documents through standard procedures. The Plaintiff paints with too broad a bush, and urges an improper standard under Louisiana and federal discovery rules.

Control more appropriately rests with parties who have the legal right to obtain the documents *on demand*. Typically, a showing of control requires there be "a relationship, either because of some affiliation, employment, or statute, such that a party is able *to command* release of certain documents by the non-party...entity in actual possession." *Southern Filter Media, LLC,* 2014 WL 42878788, at *5 (M.D. La. Aug. 29, 2014) (*quoting Estate of Monroe v. Bottle Rock Power Corp.*, No. 03-2682, 2004 WL 737463, at *10 (E.D. La. April 2, 2004) [emphasis added]. In order for the Plaintiff to prevail in its showing of control, it would need to establish that the Governor's relationship to the Secretary of State is such that he could demand the Secretary of State to provide records, a relationship Louisiana law clearly does not support.

Governor Landry is subject to the Louisiana Public Records Law, as well as the statutes and regulations applicable to public entities for records management purposes. All past governors were subject to these statutes. All future governors will be subject to these statutes. Because a governor's records are generally regarded as more valuable than other executive branch entities, a governor, upon the end of his term of office, must transfer his records "to the custody of the archives division of the secretary of state." La. R.S. 44:5(D). This transfer is also noted in the statutes pertaining to the state archivist. "The records and associated historical materials of any governor of the state of Louisiana...shall be transferred to the custody the state archivist and deposited with the state archives program within the division when the governor...leaves office." See La. R.S. 44:417(A). This transfer falls within the state archivist's authority to collect and accept records. La. R.S. 44:406. After accepting the records, the state archivist must prepare

inventories, indexes, catalogs, and other aids to facilitate the access and use of these records. *Id*. Upon transfer to the state archives, the Secretary of State has statutory control: "The secretary shall have custody and control of the Louisiana State Archives and its contents. . . ." La. R.S. 44:408(A).

The Court's order, suggesting that it would be "easier" for the Governor to access these records than for the Plaintiffs, is incorrect. As Plaintiff agrees, the records of Governor Edwards' administration are in the state archivist's possession and are public records equally accessible to both parties. Governor Landry's ability to access prior administrations' records is equal to Plaintiff's ability to access the records. The Plaintiff need not rely on the Governor when it can obtain the records on request Governor Landry is unable to command the release of the records into his possession. He does not have the legal right to obtain these records "on demand." The Governor does not hold supervisory power over the Secretary of State, nor does the Secretary of State have authority over the Governor. These are distinct constitutional offices, each accountable directly to the people of Louisiana. This should suffice in showing that Governor Landry lacks sufficient control over the records. Thus, magistrate's mistaken conclusion that Governor Landry has practical access disregards the strict constitutional and statutory boundaries separating the offices of the Governor and the Secretary of State. This error undermines the foundation of the court's reasoning and strongly supports a finding of clear error.

C. The Court failed to consider that the documents in which it compelled the Governor to produce may be protected by various privileges

In addition to the numerous statutory exceptions that may apply to the records sought and the relevant constitutional provisions, it is quite possible that the documents have other privileges attached to them. Namely, documents protected by lawyer-client privilege pursuant to Louisiana Code of Evidence article 506 may be found. Additional privileges may include deliberative process or executive privilege. Such documents cannot and should not be accessed without permission

obtained from the clients involved. Governor Landry took office on January 8, 2024 and cannot speak to what privileges may or may not be applied to the records of his predecessor. The Middle District of Louisiana has found that a magistrate judge's order regarding attorney-client privilege may be subject to reversal. The Middle District noted that, "given the highly valued nature of attorney-client privilege and work product doctrine, and the vast quantity of documents at issue here, the Court finds that the automatic finding of a waiver was unduly harsh." *RPM Pizza, LLC v. Argonaut Great Cent. Ins. Co.*, CV 10-00684-BAJ-SCR, 2014 WL 12660120, at *5 (M.D. La. Jan. 14, 2014). Similarly, many documents sought by Plaintiffs here may be protected by attorney-client privilege. Furthermore, the volume of these documents could be substantial; however, this information is unknown to the current Governor, as the records in question do not belong to Governor Jeff Landry. Governor Landry's ability to search the records is no greater than the plaintiff's ability to search the records. Governor Landry's access to the records is no greater than the plaintiff's access to the records.

D. The Court's Erroneous Assumption of the Governor's Access Imposes an Undue Burden in Violation of Fed. R. Civ. P. 26 and 34

The Court's mistaken conclusion that Governor Landry has practical access to archived records improperly imposes an undue burden, contrary to the protections of Fed. R. Civ. P. 26 and 34. Under Fed. R. Civ. P. 34(a)(1), a party's obligation to produce documents extends only to materials within their possession, custody, or control. In this case, La. R.S. 44:5 makes clear that gubernatorial records, at the conclusion of a Governor's term, are transferred to the custody of the State Archives and remain there, exempt from public access, for eight years. Therefore, it is indisputable that the documents at issue are not in Governor Landry's possession or custody.

Federal Rule of Civil Procedure 26 protects against discovery requests that are unduly burdensome or disproportionate to the needs of the case, especially where a party lacks control

over the requested materials. By requiring Governor Landry to produce records held by the State Archives, records he neither created, retained, nor controls, the Court imposes an unreasonable and unsupported obligation. This erroneous assumption about the Governor's access imposes precisely the kind of undue burden that Fed. R. Civ. P. 26 is designed to prevent.

"A district court must limit otherwise permissible discovery if it determines that 'the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.'" *Crosby v. Louisiana Health Serv. & Indem. Co*., 647 F.3d 258, 264 (5th Cir.2011). The current Governor has affirmed that he does not intend to appoint members to the State Board of Medical Examiners based on race. Doc. 22-1. Consequently, this case is effectively moot, rendering any discovery here unnecessary. Imposing this burden would require the Governor to sift through years of records from a previous administration, many of which are likely protected by privilege. As noted in *Crosby v. Louisiana Health Serv. & Indem. Co.*, 647 F.3d 258, 264 (5th Cir. 2011), "Rule 26(b) 'has never been a license to engage in an unwieldy, burdensome, and speculative fishing expedition.'"

The Plaintiffs' request exemplifies such an impermissible "fishing expedition," seeking broad categories of records spanning several years of a prior Governor's administration, burdened with legal and practical challenges that this Court should not permit. The *Crosby* court also noted that, "all discovery, including discovery in ERISA matters, 'is limited by Rule 26(b)(2), which protects against, *inter alia,* overly burdensome discovery requests.'" *Crosby*, 647 F.3d at 264. Further, a "district court may, for good cause, issue a protective order to "protect a party or person

from annoyance, embarrassment, oppression, or undue burden or expense." *In re LeBlanc,* 559 Fed. Appx. 389, 392 (5th Cir.2014).

Compelling a current Governor to review the records of a previous governor, which he did not create, use, or retain, is unduly burdensome and violates the protections of Fed. R. Civ. P. 26.

IV. CONCLUSION

The magistrate clearly erred as a matter of fact and law in deciding that the Governor had the legal right and practical ability to obtain the documents from the archives. When viewed in totality, the magistrate's misapplication of La. R.S. 44:5, disregard for the separation of constitutional duties, and imposition of an undue burden establish a clear error in the decision that warrants correction. Therefore, the Governor respectfully objects to the magistrate's decision and requests further review by this Honorable Court. Governor Jeff Landry respectfully asks that this Court reverse the decision of the magistrate judge in Doc. 24 and deny in whole Plaintiff's Motion to Compel, Doc. 20.

Date: November 14, 2024

Respectfully submitted,

LIZ MURRILL

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Objection to Memorandum Order Compelling Production* was electronically filed with the Clerk of Court via the Court's CM/ECF system, which sends notification of such filing to all counsel of record by electronic means.

s/ Carey T. Jones
Carey T. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

DO NO HARM	CASE NO. 24-CV-016
V.	JUDGE EDWARDS
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ORDER

UPON RECONSIDERATION of the Memorandum Order (Doc. 240) entered on October 31, 2024:

The Memorandum Order is hereby modified to reject the Plaintiff's request for documents and information and to relieve Governor Jeff Landry of the obligation to obtain information and documents requested by the Plaintiff in discovery. In all other respects, the Memorandum Order is affirmed.

THUS DONE AND SIGNED at _____, Louisiana, this _____ day of _____, 2024.

_____
HONORABLE JERRY EDWARDS, JR.
DISTRICT JUDGE, WESTERN DISTRICT