

What Litigants Should Know About New Court Decisions on Categorical Privilege Logs

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COURTS HAVE ISSUED SEVERAL RECENT OPINIONS THAT PROVIDE GUIDANCE FOR HOW PARTIES SHOULD HANDLE THE DEVELOPMENT OF PRIVILEGE LOG ALTERNATIVES LIKE METADATA LOGS, CATEGORICAL LOGS, AND LOGS REFLECTING SAMPLES OF PRIVILEGED DOCUMENTS.

Parties are turning to [privilege log alternatives](#) like metadata logs, categorical logs, and logs reflecting samples of privileged documents to ameliorate the burdens of preparing document by document logs. As they do so, courts have in turn issued several recent opinions that provide guidance for how parties should handle the development of these logs, particularly categorical logs. That guidance includes the following four points: (1) Courts routinely approve categorical logs; (2) parties may consider reaching agreements with adversaries regarding log categories; (3) log categories should provide key details regarding withheld information; and (4) Federal Rule of Civil Procedure (“FRCP”) 26(b)(1) proportionality standards apply to privilege logs.

Courts Routinely Approve Categorical Privilege Logs.

Categorical privilege logs provide parties with a streamlined method for claiming the privilege over communications they have traditionally logged document by document. As the court in *Maxus Energy Corp. v. YPF, S.A.* recently observed, categorical logs are “an efficient and appropriate accommodation to allow for the production of meaningful privilege logs without undertaking the huge expense and significant delay arising from the production of a document-by-document log.”¹ Indeed, federal courts appear to routinely authorize the use of categorical logs, particularly in cases involving massive troves of documents.² The authorization to use categorical logs extends to parties as well as nonparties in civil litigation.³

Parties May Consider Reaching Agreements with Adversaries Regarding Log Categories

While not expressly required by FRCP 26(b)(5), courts anticipate that parties will try to reach an agreement with adversaries on the nature and meaning of the document categories that comprise a log.⁴ In some courts like [the Southern and Eastern Districts of New York](#),

¹ *Maxus Energy Corp. v. YPF, S.A.*, Nos. 16-11501, 18-50489, 2021 WL 3619900, at *3 (D. Del. Aug. 16, 2021).

² *In re Aenergy, S.A.*, 451 F. Supp. 3d 319, 325 (S.D.N.Y. 2020) (“There is little doubt that ‘[b]oth the Federal and Local Rules permit categorical privilege logs.’”); *Maxus Energy Corp.*, 2021 WL 3619900, at *3 (“categorical privilege logs . . . [are] a common practice in litigation involving the review of an extremely large number of documents.”).

³ *Lake v. Charlotte Cty. Bd. of Cty. Commissioners*, No. 2:20-CV-809-JLB-NPM, 2021 WL 2351178 (M.D. Fla. June 9, 2021) (allowing two nonparties to serve a categorical privilege log in connection with their responses to subpoenas).

⁴ *See Copenhagen v. Cavagna Grp. S.p.a Omeca Div.*, No. CV 19-71-BLG-SPW-TJC, 2021 WL 948813, at *2 (D. Mont. Mar. 12, 2021) (observing that the parties agreed that a defendant would be permitted to serve a categorical privilege log “where any withheld documents could be grouped under certain specified categories, rather than itemizing each document individually.”).

cooperation on privilege logging is more than a mere suggestion as local rules “encourage” parties to work together on the form and substance of the log.⁵

Beyond merely satisfying a directive, there are also practical reasons for doing so as fulsome cooperation may help eliminate disputes before they culminate into motion practice. Consider *Addi v. Corvias Mgmt.-Army, LLC*, where the court had to resolve a dispute between the parties over the meaning and scope of certain document categories the parties had exempted from defendants’ privilege logging obligations.⁶ After agreeing to the wording of the exemptions and then memorializing them in the ESI protocol, the parties still had not reached an accord on the precise meaning of those categories. Subsequent motion practice on the disputed meaning of those exemptions may have been avoided had the parties shared their respective understanding on the provisions during their ESI protocol negotiations.

Log Categories Should Provide Key Details Regarding Withheld Information

Courts have also recently emphasized that categorical logs should satisfy the express requirements of FRCP 26(b)(5). This means categorical logs must offer sufficient details regarding “the nature of the documents, communications, or tangible things not produced or disclosed” to enable adversaries to evaluate claims of privilege.⁷ Logs that provide detailed information regarding the categories at issue should withstand judicial scrutiny while courts may reject logs that are “vague” or otherwise fail to offer actionable details.⁸ *Rekor Systems, Inc. v. Loughlin* and *In re Aenergy* are particularly instructive on these points.

In *Rekor Systems*, the court found that plaintiff’s categorical log satisfied FRCP 26(b)(5)’s requirements because it disclosed “the persons who are on the communications, the date range of the communications, the document types, and the basis of privilege.”⁹ For example, one category reflected communications between plaintiff and its lawyers regarding a specific property lease. Other categories revealed documents relating to plaintiff’s sale of certain business entities and the activities of its attorneys regarding those transactions. In summary, the categorical log memorialized enough information to allow defendants to assess plaintiff’s privilege claims.

In contrast, *Aenergy* held that the respondent to a 28 U.S.C. §1782 petition failed to provide sufficient details to support its categorical log.¹⁰ For instance, the court was concerned that the respondent “generically” categorized the withheld information as “confidential internal documents between [respondent] employees and in-house counsel ‘seeking or conveying legal

⁵ See S.D.N.Y. and E.D.N.Y. Local Civil Rule 26.2(c) and Committee Note (effective October 15, 2021).

⁶ *Addi v. Corvias Mgmt.-Army, LLC*, No. 1:19-CV-03253-ELH, 2021 WL 4286466, at *6 (D. Md. Sept. 21, 2021).

⁷ Fed. R. Civ. P. 26(b)(5)(A)(ii);

⁸ *U.S. Bank Nat’l Ass’n v. Triaxx Asset Mgmt. LLC*, No. 18-CV-4044 (BCM), 2021 WL 1968325, at *4 (S.D.N.Y. Mar. 31, 2021) (holding that three categorical log descriptions out of 18 needed additional detail to satisfy FRCP 26(b)(5)(A)).

⁹ *Rekor Systems, Inc. v. Loughlin*, No. 19-CV-7767 (LJL), 2021 WL 5450366, at *1 (S.D.N.Y. Nov. 22, 2021).

¹⁰ *In re Aenergy*, S.A., 451 F. Supp. 3d 319, 326 (S.D.N.Y. 2020).

advice' about the 'on-sale contracts.'" The court ordered the respondent to provide "more granular" information to ensure the categories were not concealing nonprivileged documents.

The FRCP 26(b)(1) Proportionality Standards Apply to Privilege Logs

Courts considering categorical logs have also recently addressed whether FRCP 26(b)(1) proportionality standards apply to privilege logs. In particular, the court in *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC* held that "proportionality is an issue in evaluating privilege logs, just as it is with respect to other aspects of discovery."¹¹ In adopting this view, the court observed generally that categorical logs further proportionality objectives by reducing the burdens of preparing document by document logs. In addition, the court specifically invoked proportionality to curtail certain aspects of defendants' logging obligations, finding they would be "disproportionately burdensome." For example, the court would not order defendants to memorialize in their categorical log (as plaintiff requested) "the representational history of every law firm," given the complexities of that litigation.

Use Log Alternatives to Reduce Burdens

A final issue regarding privilege logs is that the [Federal Civil Rules Advisory Committee is presently considering](#) whether it should amend FRCP 26(b)(5) to ameliorate the burdens of preparing privilege logs. While it remains unclear whether the Advisory Committee will take any action on this front, counsel and clients can reduce their burdens in the meantime by turning to log alternatives like categorical, metadata, and sample logs.

¹¹ *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, No. 18-CV-4044 (BCM), 2021 WL 4973611 (S.D.N.Y. Oct. 25, 2021).