

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the)	
Political and Charitable Spending by)	
Ohio Edison Company, The Cleveland)	Case No. 20-1502-EL-UNC
Electric Illuminating Company, and The)	
Toledo Edison Company.)	

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM CONTRA
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL MOTION FOR IN CAMERA
HEARING REGARDING THE SIXTH SET OF DISCOVERY**

Along with the Office of the Ohio Consumers’ Counsel’s (“OCC”) Motion to Compel Responses to the Sixth Set of Discovery (“Set 6”), OCC moved for an *in camera* review of certain privileged documents identified on the Companies’ privilege log. Like its motion to compel, OCC’s request for an *in camera* inspection of the Companies’ privileged records should be denied.

OCC claims that an *in camera* review is necessary to evaluate the validity of the Companies’ privilege claims. While *in camera* review may be appropriate at times,¹ that is not the case here, where the Companies have produced relevant documents and otherwise provided an itemized privilege log detailing why some records are protected from disclosure. Indeed, *in camera* hearings are needed when a party withholds broad categories of documents and asserts only a blanket privilege claim. For example, in *Peyko v. Frederick*, a defendant claimed privilege over the “claims file” of the defendant’s insurer.² The defendant there offered no particular reason

¹ See *Peyko v. Frederick*, 25 Ohio St. 3d 164, 166, 495 N.E.2d 918, 920 (1986); *In the Matter of the Complaint of Cameron Creek Apartments, Complainant*, No. 08-1091-GA-CSS, 2009 WL 2138514, at *1 (F.E.D.A.P.J.P. July 8, 2009).

² *Peyko*, 25 Ohio St. 3d at 166.

for why any specific document was privileged—instead resting on a “blanket” assertion that all claims file materials were privileged by default.³ Such generic privilege assertions fail to meet the standard set by the civil rules requiring that privilege claims “shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced.”⁴

Here, however, the Companies have produced a detailed privilege log with particularized reasons for why each document withheld is protected under the attorney client privilege or work product doctrines.⁵ The Companies’ privilege log—which covers 14 specific records—is a far cry from a “blanket” assertion of privilege. Each log entry contains a detailed explanation for the protection claimed. And while OCC states that in some instances there are communications between two non-attorneys, the privilege log makes clear that these are “[c]onfidential communications reflecting [a] request from in-house counsel for information needed to provide[] legal advice concerning analysis of the misallocation of vendor payments.”⁶ This level of detail is beyond what is required for the Companies to meet their burden with respect to the privilege log.⁷ And any further detail would run the risk of revealing the privileged information and waiving privilege.⁸

³ *Id.*

⁴ Ohio Rule of Civil Procedure 26(B)(8)(a).

⁵ *See* OCC Attachment 2.

⁶ *See, e.g.*, OCC Attachment 2, Row 6.

⁷ *Cargotec, Inc. v. Westchester Fire Ins. Co.*, 2003-Ohio-7257, ¶ 13, 155 Ohio App. 3d 653, 657, 802 N.E.2d 732, 735–36 (“In our view, privilege may be sufficiently established if the log states that communications were made between attorney and client for the purpose of procuring legal advice or representation. More detailed descriptions may risk revealing privileged information.”).

⁸ *Id.*

Beyond this, most productions—whether in Commission or civil proceedings—will necessarily involve *some* privileged material. And it would be an undue drain on the Commission’s and parties’ resources if just the submittal of a privilege log triggered the need for an *in camera* review of the documents outlined within.⁹ Instead, *in camera* review should be reserved for situations where there is a “well-founded basis for challenging” a party’s privilege claims, because to hold otherwise would render privilege logs a “mere formality.”¹⁰ OCC has “not demonstrated any reasons to justify” the “expenditure of judicial time” it would take to sift documents simply to “act as a check” on the Companies’ descriptions of privilege.¹¹

The Companies have produced a detailed privilege log that plainly shows that the identified records are protected from disclosure. OCC has offered no legitimate reason to challenge the log’s entries or to effectively set a standard under which every single claim of privilege will require manual review by an Attorney Examiner. Accordingly, OCC’s motion for an *in camera* hearing should be denied.

⁹ See, e.g., *Guy v. United Healthcare Corp.*, 154 F.R.D. 172, 176 (S.D. Ohio 1993) (declining to entertain an *in camera* review because “[s]uch a procedure would constitute . . . an expenditure of judicial resources that could be justified only by an implicit determination that the representations made by defense counsel are untrue” and finding that “determination [was] unwarranted”).

¹⁰ *Weir v. United Airlines, Inc.*, No. 19 CV 7000, 2021 WL 1517975, at *16-17 (N.D. Ill. Apr. 16, 2021) (rejecting request for *in camera* review and the notion that *in camera* review should be granted as a default).

¹¹ *Dowkin v. Honolulu Police Dep’t*, No. CV 10-00087, 2015 WL 13812182, at *4 (D. Haw. Mar. 31, 2015).

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Respectfully submitted,

/s/ Ryan A. Doringo

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On behalf of the Companies

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on July 14, 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Ryan A. Doringo

Attorney for the Companies

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Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel's Motion for In Camera Hearing on the Sixth Set of Discovery electronically filed by Ryan A Doringo on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company