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April 9, 2009

VIA MESSENGER DELIVERY

Ms. Renee Jenkins
Chief, Docketing Division
Public Utilities Commission of Ohio
180 E. Broad Street, 13th Floor
Columbus, Ohio 43215

Re: In The Matter of: The Consolidated Duke Energy Ohio, Inc.
Rate Stabilization Plan Remand and Rider Adjustment Cases
Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2080-EL-ATA,
03-2081-EL-AAM, 05-724-EL-UNC, 05-725-EL-UNC,
06-1068-EL-UNC, 06-1069-EL-UNC & 06-1085-EL-UNC

Dear Ms. Jenkins:

Enclosed please find an original and fifteen copies the Memorandum Contra The Office of the Consumers' Counsel's Motion to Modify Protective Order.

Please accept the original and fourteen copies of this document for filing in the above identified matters. I would appreciate the return of a time stamped copy via the individual who delivers the same to you.

As always, please call me if you have any questions concerning this filing. Thank you.

Very truly yours,

Michael D. Dortch

Enclosures

cc: (w/ enc.): Rocco D'Ascenzo, Esq.
Elizabeth Watts, Esq.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Consolidated Duke Energy Ohio, Inc.,	)	**Case Nos.**	**03-93-EL-ATA**
Rate Stabilization Plan Remand and	)		**03-2079-EL-AAM**
Rider Adjustment Cases	)		**03-2081-EL-AAM**
	)		**03-2080-EL-ATA**
	)		**05-724-EL-UNC**
	)		**05-725-EL-UNC**
	)		**06-1068-EL-UNC**
	)		***06-1069-EL-UNC***
	)		**06-1085-EL-UNC**

MEMORANDUM CONTRA THE OFFICE OF THE CONSUMERS' COUNSEL'S MOTION TO MODIFY PROTECTIVE ORDER

I. INTRODUCTION

Duke Energy Ohio, Inc. (DE-Ohio), Cinergy Corp. (Cinergy), and Duke Energy Retail Sales, LLC (DERS) respectfully ask the Public Utilities Commission of Ohio (PUCO or Commission) to issue an entry that denies the Office of the Consumers' Counsel's (OCC's) March 13, 2009 Motion to Modify this Commission's Protective Orders (OCC's Motion.)

II. FACTS

On March 13, 2009, the OCC filed OCC's Motion with this Commission asserting the Commission should modify its October 1, 2008 protective order. OCC asserts that still more proprietary, confidential business information belonging to DERS, Cinergy and DEO and protected in this case by Orders of this Commission[1] be released to the public.

[1] The Ohio Supreme Court has now unequivocally found that the information protected by the Orders of this Commission – customer names, account numbers, the price and volumes of generation sold, and certain contract terms (the Protected Information) – is, indeed, confidential information that deserves the protection of this Commission, and which this Commission has the legal authority to protect. *Ohio Consumers Counsel v. PUCO,* 2009-Ohio-604, ¶¶23-32.

As the sole basis for its Motion, OCC reports that certain documents containing Protected Information were disclosed to the public on September 18, 2008, when those documents were filed in the public record as attachments to Plaintiff's Motion for a Preliminary Injunction in the case of *Williams v. Duke Energy International, Inc.*, Case No. 1:108-CV -00046 (U.S. Dist. Ct., S.D. Ohio).

Since receiving service of OCC's March 13, 2009 Motion, DE-Ohio, Cinergy, and DERS have confirmed that the OCC is unfortunately correct. Unredacted copies of certain "option agreements" – agreements that are among those that have been mischaracterized as "side agreements" by some parties to this proceeding – were indeed filed in the public docket of the *Williams* action ***by the opposing parties' legal counsel*** in that action. DE-Ohio represents to this Commission, upon information and belief, that the opposing counsel obtained possession of those documents because he was also counsel to the plaintiff in still another case, *Deeds v. Duke Energy*, Case No. A 0701671, Hamilton County Court of Common Pleas, and the documents were produced during court-supervised discovery in the *Deeds* action.

The discovery materials in *Deeds*, however, were produced subject to a stipulated protective order entered by the Hamilton County Court of Common Pleas on December 12, 2007. The Hamilton County Court entered an order dissolving that portion of its protective order that sealed documents filed within the record of the *Deeds* proceeding. As an unfortunate result of this unanticipated Order, some information that had been protected by Orders of both this Commission and by Orders of the Hamilton County Court of Common Pleas was revealed to and published within a Cincinnati newspaper before DE-Ohio had any opportunity to be heard upon the subject of the disclosure. The

Deeds case was subsequently resolved via an agreed settlement Thus, despite their persistent efforts, DE-Ohio, DERS, and Cinergy proved unable – in that instance – to effectively protect their proprietary information.

The release of information in the *Deeds* action, of course, formed the basis upon which OCC subsequently demanded this Commission modify prior protective agreements in this action. In its October 1, 2008 Second Entry on Rehearing in these cases, the Commission found that some (but not all) the information identified by OCC had been disclosed in a manner that meant it could no longer be protected. Even so, the Commission also recognized that the information disclosed in *Deeds* did not include all the information produced to the plaintiff in that case. Specifically, Protected Information included information within "option agreements" between DERS and its customers that remained undisclosed to the public.

Presumably because of confusion regarding what had been disclosed as a result of the Court's action in *Deeds,* DE-Ohio's counsel in that matter did not recognize at the time the option agreements were attached to the September 18, 2009 Motion that the option agreements had still not been disclosed to the public and thus contained Protected Information.

Upon learning through receipt of service of OCC's Motion that the option agreements had been filed in the *Williams* matter, however, DE-Ohio, Cinergy and DERS immediately reviewed the documents filed in support of the Plaintiff's Motion for Injunctive Relief. DE-Ohio then immediately contacted counsel to the *Williams* plaintiffs to advise him of the improper disclosure of trade secret information in the docket of the

Williams action, and to request[2] that he immediately approach the United States District Court for the Southern District of Ohio with a motion to protect confidential customer identification information in the record and to permit redacted versions of the documents to be filed instead.[3] Opposing counsel responded to the attorneys representing DE-Ohio in the *Williams* matter that he would comply with DE-Ohio's request.

III. LAW AND ARGUMENT

Ohio's Public Records Act (the Act) certainly does not mandate the general public disclosure of confidential information following an unauthorized disclosure of such information as OCC suggests, particularly when, as here, the general public has exhibited no actual awareness of the disclosed information. For example, Ohio's Eleventh District Court of Appeals expressly found that the exempt status of confidential information under the Act is not waived when the information is released to the public without authorization by the holder of the information. *State ex rel. Lundgren v. LaTourette* (Ohio Ct. App. 11th Dist. 1993), 85 Ohio App. 3d 809, 811–13.

Such is the case here. Opposing counsel in the *Deeds* case came to possess copies of the contracts only due to litigation against DE-Ohio. The documents were produced to him subject to a protective order. Opposing counsel was never authorized to disclose that information to the public, even after the Hamilton County Court of Common Pleas released a subset of Protected Information in a manner that resulted in newspaper reports

[2] The Local Rules of the Southern District of Ohio strongly suggest that the burden of protecting such information is placed upon the party seeking to submit confidential or private information to the Court. See for example, S.D. Ohio L.R. 26.2.

[3] Ironically, on March 31, 2009, the same day that OCC filed its most recent Motion, the United States District Court for the Southern District of Ohio issued a decision dismissing all claims raised in the *Williams* matter and thus denying injunctive relief to the plaintiffs in that action.

regarding that information. Nor was he free to file those documents in another proceeding without first protecting personal identification information of third parties.

Similarly, a second Ohio Court of Appeals recently signaled that public policy sometimes compels efforts to correct an improper disclosure of confidential information. In *State of Ohio v. Zione*, 2009–Ohio-1455, ¶¶2-3[4], the Twelfth District Court of Appeals Ordered both a confidential document (a pre-sentence investigation report) and a brief that specifically referenced the protected information found within that report sealed even though both had been filed in the public record and were available to scrutiny for the entire time between the date the appellant's brief was filed and the date the Court issued its decision.

Lundgren and Zione demonstrate that under Ohio law erroneous disclosures, including even the filing of protected materials within the public record of a court proceeding, do not result in a *per se* waiver of the right to protect the information. Instead, courts remain willing to protect confidential information to the best of their ability, even if the protection that can be offered that information is less than perfect. Any other result is inequitable, and imposes a penalty upon the owner of such information as the result of the acts of others who will frequently be hostile to the owner.

Ohio's Act and case law interpreting it is consistent with the federal Freedom of Information Act ("FOIA") and federal FOIA jurisprudence. Like the Courts in *Lundgren* and *Zione,* the federal courts often find that unauthorized or inadvertent disclosure to the public does not result in a waiver of the exemption for purposes of public records requests.

[4] Attached hereto as Exhibit C.

In *Public Citizen Health Research Group v. Food and Drug Administration* (D.D.C. 1996), 953 F. Supp. 400 for example, the FDA inadvertently released a table containing two drug companies' trade secrets to the plaintiff, which had requested disclosure of the information pursuant to FOIA. 953 F. Supp. at 401–02. The plaintiff then attached the table as an exhibit to two pleadings that it filed in a United States District Court. *Id.* at 402. Three months after the table containing trade secrets was filed in the public record, the interested drug companies intervened in order to move for the issuance of a protective order. *Id.*

Notwithstanding the table's disclosure in its public docket, the court held that the table maintained its exempt status under FOIA. *Id.* at 405–06. The court found it very important that the table was inadvertently, rather than intentionally, disclosed by the government entity, to which the information did not belong. *Id.* at 404; *see also Florida House of Representatives v. United States Dept. of Commerce* (11th Cir. 1992), 961 F.2d 941, 946 ("[i]f documents are exempt from disclosure under the FOIA, the fact that they were involuntarily disclosed by means other than the FOIA [e.g., court-ordered discovery; forced disclosure to the Congress] should not lead to a finding of waiver").

The court expressly rejected the argument that it had no power to seal documents simply because they had already been revealed to the public. *Public Citizen Health Research Group*, 953 F. Supp. at 405. In rejecting the argument, the court held that "the decision as to access [to judicial records] is one best left to the sound discretion of the trial court." *Id.* (quoting United *States v. Hubbard* (D.C. Cir. 1980), 650 F.2d 293, 316–17). Finally, the court ruled that even though the drug companies did not act immediately to request a protective order for their trade secrets, their inaction did not constitute a

waiver because there was no evidence that the confidential character of the table had been breached by another party or that the public had taken advantage of its improperly-gained access to the confidential information. *Id.* at 405–06.

In this case, confidential information belonging to DERS, DE-Ohio and Cinergy, including customer account numbers, was wrongfully disclosed. Steps are being taken to remedy that disclosure. This Commission should permit the United States District Court to exercise the "sound discretion" it possesses, rather than increase the injury to DERS, DE-Ohio, Cinergy and their customers by mandating the release of the information in this proceeding.

Courts evaluating state records acts analogous to Ohio's have reached the same conclusions as Ohio's courts have regarding the Act, and as federal courts have regarding FOIA. In *Gates Rubber Co. v. Bando Chemical Indus. Ltd.*, (10th Cir. 1993), 9 F.3d 823, 849, for example, the plaintiff inadvertently disclosed its own trade secrets at a permanent injunction hearing. *Id.* The United States Court of Appeals for the Tenth Circuit found that the disclosure of the trade secrets at the public hearing did not waive exempt status. *Id.* The court found that the trade secret holder's efforts to maintain confidentiality were adequate despite the fact that it failed to move to seal the disclosed trade secrets until appeal of the matter had been taken. *Id.* at 849. The court also rejected arguments that the delay in seeking to protect the secrets constituted waiver, finding that there was "no evidence that a competitor had access to or learned of the [trade secrets] during the period after the hearing and before the record was sealed." *Id.* The court therefore concluded ". . .absent a showing that the [trade secrets] were published outside the court records, . . . [the holder's] inadvertent and inconsequential disclosure of the

[trade secrets] at trial and delay in sealing the record, are inadequate to deprive the [trade secrets] of their status as trade secrets." *Id.*

Furthermore, in this age of nearly immediate, electronic, access to information, the safeguarding of information that the law recognizes deserves protection has become more difficult, complicated, and expensive than ever before. The Federal Rules of Evidence were amended as recently as December 1, 2008, by the addition of FRE 502[5] in recognition of the growing problem of inadvertent waivers of privileged and work product information, and in response to:

> . . . the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege and work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information.

See Notes to Rule 502[6]

> Rule 502(b) provides:
>
> When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal ***or State*** proceeding if:
>
> 1. the disclosure is inadvertent;
> 2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
> 3. the holder promptly took reasonable steps to rectify the error.

(Emphasis supplied.)

It is true that Rule 502 addresses only the disclosure of privileged and work product information. It does not speak directly to the similar problems that arise from the inadvertent disclosure of confidential, proprietary business information. Still, the issues raised by privileged and work product information that is protected by law and

[5] Attached hereto as Exhibit A.
[6] Attached hereto as Exhibit B.

proprietary, confidential business that is also protected by law are obviously similar, and the flexible, common-sense, approach adopted by Rule 502, which focuses upon the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure, and the overriding issue of fairness[7] is plainly available by analogy for application to the protection of other confidential information.

In this case, the factors applied to a Rule 502 analysis obviously favor the continued protection of the information improperly disclosed within the *Williams* docket:

- The Reasonableness of Precautions Taken:

This Commission is of course aware that each of DE-Ohio, DERS, and Cinergy have zealously sought throughout the duration of this proceeding to preserve the confidentiality of information that – but for compelled disclosure to others during litigation discovery – would be known only to each of the entities themselves and to the specific customers of each particular entity. Those efforts have included the pursuit of protective agreements and orders prior to production, protective orders following production, and the defense of what has become a protracted and expensive battle to preserve the confidentiality of information in this Commission's proceedings, in the Ohio Supreme Court, and now in still other venues. The efforts of DE-Ohio, DERS, and Cinergy have been more than merely reasonable.

- The Time Taken To Rectify The Error

For numerous reasons, DE-Ohio found it necessary and appropriate to employ different legal counsel in the actions before this Commission, in the *Deeds* action, and in the *Williams* action. Unfortunately, the use of different counsel in different proceedings appears to have contributed to a failure to recognize that what was released to the public

[7] Notes to FRE 502 subdivision (b).

in the *Deeds* matter was not inclusive of everything that had been produced in that matter, with the result that counsel in the *Williams* matter failed to recognize and apprise DE-Ohio, DERS, and Cinergy that unredacted versions of the option contracts had been filed in the public record in that forum. As a result, DE-Ohio, DERS, and Cinergy were unaware of the disclosure of this information in the federal court docket until OCC made the entities aware of this fact through its March 31, 2009 Motion.

Upon learning of the filing in the *Williams* case, however, and on behalf of itself, DERS, and Cinergy, DE-Ohio immediately requested that plaintiff's counsel address the issue with the federal court and request that the attachments be sealed. Plaintiff's counsel immediately acknowledged his responsibility to do so. DE-Ohio, DERS and Cinergy, should receive an opportunity to protect the information in the federal forum. If successful, the period in which the information will have been publicly available will also have been limited.

- The Scope of Discovery

The scope of discovery in the *Deeds* matter was broad, and the number of contracts produced was numerous. Even so, the third factor is not an issue on these facts because the instant disclosure was neither a result of the scope of discovery nor caused in any way by the inadvertence of any of the Duke Entities during discovery.

- The Extent Of The Disclosure

To date, the extent of the disclosure appears to have been quite limited. Although available in the public record of the *Williams* matter for some time, the protected information does not appear to have attracted public notice and/or comment, except, of course, by OCC. OCC, however, is required to protect the information by Orders of this

Commission. As a result, should the *Williams* court agree to seal a portion of its record in order to protect the information, it is possible that the extent of the disclosure will remain limited, and that no serious damage to the competitive positions of DERS or Cinergy, or injury to their customers, will have occurred.

- The Overriding Issue of Fairness

OCC's Motion is based upon a disclosure of proprietary and confidential business information by someone to whom the information does not belong. Such a disclosure should no more constitute a *per se* waiver of a business entity's right to protect that information than the inadvertent disclosure of a privileged attorney-client communication in which the entity bears even the small responsibility of inadvertence or error.

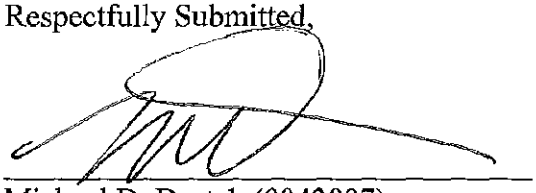
Furthermore, information that this Commission has already concluded is protectable trade secret information was erroneously filed in the public record of another forum. The Commission should therefore defer to the United States District Court and the "sound discretion" noted by the Court in *Public Citizen Health Research Group* to address the issue. OCC has demonstrated only a technical disclosure. It has not demonstrated that any third party has reviewed the information, or that the error of opposing counsel in *Williams* cannot and should not be corrected.

OCC's Motion should therefore be denied. DE-Ohio, DERS and Cinergy will apprise the Commission once the inadvertent disclosure of personal identification information has been addressed by the *Williams* Court, and the Commission will be free to modify its Protective Order at that time if it believes further modification is in Order.

III. CONCLUSION

DE-Ohio, Cinergy and DERS respectfully ask the Commission to issue an entry that denies the Office of the Consumers' Counsel's March 13, 2009 Motion to Modify this Commission's Protective Orders. DE-Ohio, DERS and Cinergy will apprise the Commission once the inadvertent disclosure of personal identification information has been addressed by the *Williams* Court, and the Commission will be free to modify its Protective Order at that time if it believes further modification is in Order.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically upon parties, their counsel, and others through use of the following email addresses this 9th day of April 2009.

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Federal Rule of Evidence 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver

When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

1. the waiver is intentional;
2. the disclosed and undisclosed communications or information concern the same subject matter; and
3. they ought in fairness to be considered together.

(b) Inadvertent disclosure.

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

1. the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding

When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

1. would not be a waiver under this rule if it had been made in a Federal proceeding; or
2. is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of court orders.

A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.

Exhibit A

(e) Controlling Effect of a Party Agreement

An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule

Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions

In this rule:

1. "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
2. "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."

Federal Rules of Evidence

NOTES TO RULE 502

Explanatory Note on Evidence Rule 502 Prepared by the Judicial Conference Advisory Committee on Evidence Rules (Revised 11/28/2007)

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product -- specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. See, e.g., Hopson v. City of Baltimore, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation") .

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the

Exhibit B

attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. See, e.g., Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); Ryers v. Burleson, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig., 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b). The rule rejects the result in In re Sealed Case, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a

waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. See generally Hopson v. City of Baltimore, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multifactor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a

disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. See 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). See also Tucker v. Ohtsu Tire & Rubber Co., 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. See generally Hopson v. City of Baltimore, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of

"claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. See Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). The rule provides a party with a predictable protection from a court order — predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

Under subdivision (d), a federal court may order that disclosure of privileged or protected information "in connection with" a federal proceeding does not result in waiver. But subdivision (d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal. If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then subdivision (d) is inapplicable. Subdivision (c) would govern the federal court's determination whether the state-court disclosure waived the privilege or protection in the federal proceeding.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(f) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorneyclient privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled selfincrimination. The definition of work product "materials" is intended to include both tangible and intangible information. See In re Cendant Corp. Sec. Litig., 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

[Cite as *State v. Zione*, 2009-Ohio-1455.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	CASE NO. CA2008-08-032
	:	OPINION
- vs -		3/30/2009
	:	
KAHLIF E. ZIONE,	:	
Defendant-Appellee.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI2008-5015

William E. Peelle, Clinton County Prosecuting Attorney, Brian A. Shidaker, 103 East Main Street, Wilmington, OH 45177, for plaintiff-appellant

Anthony S. VanNoy, 130 West Second Street, Suite 1600, Dayton, OH 45402, for defendant-appellee

POWELL, J.

{¶1} Plaintiff-appellant, the state of Ohio, appeals the criminal sentence imposed by the Clinton County Court of Common Pleas, arguing that the trial court committed error when it departed downward from the presumption of prison and imposed a community control sanction on defendant-appellee, Kahlif E. Zione.[1]

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.

Exhibit C

{¶2} Before we address the issues set forth in this appeal, we note that the state made specific references to appellee's presentence investigation ("PSI") report in its argument, and attached a copy of the PSI to its appellate brief. R.C. 2951.03(A)(2) and (D)(1) clearly state that a PSI report prepared for sentencing purposes shall be considered confidential information and is not a public record under R.C. 149.43. According to R.C. 2951.03(D)(2), immediately after imposition of the sentence, copies of the PSI shall be returned to the trial court, and the defendant, his counsel, or the prosecutor "shall not make any copies of the presentence investigation report or part of the * * * report that the court made available to them pursuant to this section."

{¶3} Based upon the fact that a confidential document was attached to the state's appellate brief, which is available to the public, we are compelled to place the state's appellate brief under seal to avoid further public disclosure of the information contained in the PSI.

{¶4} Returning to the merits of the instant appeal, the record in this case indicates that appellee pled guilty to the second-degree felony charge of burglary as part of a negotiated plea.

{¶5} The state asserts under its single assignment of error that the trial court erred in imposing a community control sanction when it failed to impose the presumptive prison term on the second-degree felony and departed downward to community control without making the requisite findings on the record. The state also argues the record on appeal does not support the downward departure to a community control sanction and the sentence should be reversed and remanded with instructions to resentence appellee to impose a prison term within the appropriate range.[2]

2. Appellee did not file a brief in this case.

{¶6} A trial court at sentencing is required to make judicial findings only for downward departures pursuant to R.C. 2929.13(D), or for judicial release. See *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶36.

{¶7} R.C. 2929.13(D)(1) provides: "Except as provided in division (E) or (F) of this section, for a felony of the first or second degree, * * * it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code."

{¶8} R.C. 2929.13(D)(2) states, that: "Notwithstanding the presumption established under division (D)(1) of this section for the offenses listed in that division * * *, the sentencing court may impose a community control sanction * * * instead of a prison term on an offender for a felony of the first or second degree * * * if it makes both of the following findings:

{¶9} "(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

{¶10} "(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense."

{¶11} The sentencing statute of R.C. 2953.08(G)(1), states: "If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13, * * * relative to the imposition or modification of the sentence, and if the sentencing court failed to

state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings." See, also, *Mathis* at ¶36.

{¶12} A review of the sentencing transcript in the instant case indicates that the trial court made none of the specific findings outlined above at the sentencing hearing to deviate downward from a presumption of prison.

{¶13} In the sentencing entry, the trial court indicated that it considered both the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12, but failed to make all of the findings outlined in R.C. 2929.13(D). Specifically, the trial court did not make findings pertaining to how this appellee posed a lesser likelihood of recidivism or his conduct was less serious than conduct normally constituting the offense. See R.C. 2929.13(D)(2)(a) and (b).

{¶14} The trial court did not make findings sufficient to substantiate a downward departure from a presumption of prison to enable this court to properly review the issues on appeal. The state's assignment of error is sustained only as it pertains to the lack of findings on the record for the downward departure from a presumption of prison.

{¶15} Appellee's sentence is reversed and this cause remanded to the trial court for resentencing in accordance with the law and consistent with this Opinion. The brief filed by the state of Ohio shall be sealed so as to prevent further public disclosure of the contents of the presentence investigation report attached to the brief.

{¶16} Judgment reversed and remanded.

WALSH, P.J., and BRESSLER, J., concur.