

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Review of Ohio Edison)
Company, The Cleveland Electric Company,)
and The Toledo Edison Company's) Case No. 17-0974-EL-UNC
Compliance with R.C. 4928.17)
)**

**MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR A
PROTECTIVE ORDER REGARDING THE OFFICE OF THE OHIO CONSUMERS'
COUNSEL'S REQUEST FOR PUBLIC RECORDS**

In an improper end run around the Commission's discovery rules, the Office of the Ohio Consumers' Counsel ("OCC") has made a public records request to the Commission for certain materials confidentially provided to the Commission's appointed auditor by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") in this proceeding. The Companies respectfully move for a protective order finding that, with respect to the documents at issue, the public records request is improper, thus precluding their disclosure to OCC.¹

The Commission should grant a protective order because the documents sought by OCC are not "public records" within the meaning of Ohio law. In short, the records provided by the Companies during the audit process are barred from public release by Ohio statute, specifically R.C. 4901.16. And since R.C. 149.43 expressly excludes "[r]ecords the release of which is

¹ Consistent with prior practice, the Commission notified the Companies of OCC's public records request and provided the Companies with an opportunity to move for a protective order under Ohio Adm. Code 4901-1-24 in this docket. *See, e.g., In re Amendment of Ohio Adm. Code Chapters 4901-1, 4901-3, and 4901-9*, Case No. 95-985-AU-ORD, Entry (Mar. 21, 1996) at 10. While the Commission has notified the Companies of which specific audit responses OCC seeks, the Companies have not been provided with OCC's request itself. The Companies have therefore enumerated the requests at issue in the attached Memorandum in Support, rather than attaching a copy of the requests to this Motion.

prohibited by state or federal law” from the statutory definition of “public record,”² the documents OCC seeks are not subject to disclosure. For these reasons and those explained in the attached Memorandum in Support, the Commission should grant this Motion and bar the disclosure of the Companies’ audit responses.

Respectfully submitted,

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*On behalf of Ohio Edison Company,
The Cleveland Electric Illuminating Company,
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² R.C. 149.43(A)(1)(v).

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**MEMORANDUM IN SUPPORT OF MOTION OF OHIO EDISON COMPANY, THE
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COMPANY FOR A PROTECTIVE ORDER REGARDING THE OFFICE OF THE
OHIO CONSUMERS' COUNSEL'S REQUEST FOR PUBLIC RECORDS**

I. INTRODUCTION

OCC again seeks to insert itself improperly into the audit process undertaken by the Commission and Staff to review the Companies' compliance with Ohio's corporate separation rules. This time, OCC has filed a public records request for information confidentially provided by the Companies to the Commission's appointed auditor, Sage Management Consultants, LLC ("Sage"). This request follows an unsuccessful attempt by OCC to obtain every shred of information given to Sage initiated by OCC's filing of a premature set of discovery requests followed by a motion to compel, both of which were filed weeks before Sage had even submitted its audit report. After the issuance of that report, the Companies in good faith provided OCC with nearly all they gave to the Sage. Yet, OCC continued to press its motion, leading the Companies to file a supplemental memorandum contra. Only after the Companies incurred the expense of drafting and filing that memorandum did OCC withdraw its motion, effectively conceding the irrelevance of the information that the Companies hadn't produced. The dispute

should have ended there, but OCC now seeks to use a public records request as a means to subvert and circumvent the Commission's discovery rules.

As demonstrated below, R.C. 4901.16 prohibits the release of the documents OCC seeks. That statute exists for good reason. In order for the Commission to carry out its audit duties with efficiency, utilities must be able to provide their business information freely with an expectation of confidentiality and without fear of that information becoming a matter of public record. R.C. 4901.16 provides the protection that is critical to that exchange. Indeed, the Commission ordered the Companies to provide Sage with all the information it requested without objection, but only after expressly stating that Sage's work would be done subject to R.C. 4901.16's protection. In reliance on that protection, the Companies, as ordered, cooperated completely with Sage's requests.

OCC's request threatens to undermine the confidentiality and candor of the audit process here – and in future Commission investigations. If R.C. 4901.16 does not apply to preclude public disclosure of the Companies' sensitive business information here, there is scant protection for the Companies and future, similarly-situated utilities in the Commission's investigations. Accordingly, requests made in future Commission investigations will be assumed to be subject to the rules of discovery, permitting utilities subject to such requests to make objections and decline to provide certain materials, notwithstanding any order to the contrary. The Commission should grant the Motion for Protective Order, preserve the expectation of confidentiality that is crucial to the audit process, and reject OCC's invitation effectively to nullify the statutory protection afforded by the plain terms of R.C. 4901.16.

II. RELEVANT FACTS

A. Background

On April 12, 2017, the Commission opened this docket to audit the Companies' compliance with the Commission's corporate separation rules. A month later, the Commission issued an Entry ordering that Staff issue a request for proposal to select an auditor to assist the Commission with the review of the Companies' compliance.³ On July 5, 2017, the Commission ordered that Sage perform the audit.⁴ Initially, the audit period was to conclude on February 28, 2018 with the final report due on March 14, 2018.⁵ The Commission later extended the audit period with the final audit report due on May 14, 2018.⁶

During the audit period, the Companies responded to approximately 250 data requests from Sage. Those requests were numerous and broad, covering virtually every aspect of the Companies' operations and finances.⁷ Sage filed the Final Report of the Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio (the "Audit Report") on May 14, 2018.

B. OCC's Discovery Requests and Motion to Compel

On February 13, 2018, several months before Sage issued the Audit Report, OCC served the Companies with requests for production.⁸ Fashioning itself as the uber-auditor for any examination undertaken by or on behalf of the Commission or Staff, OCC demanded discovery of everything the Companies had provided to Sage. OCC contended that it needed the

³ Entry at ¶5 (May 17, 2017).

⁴ Entry at ¶1 (July 5, 2017).

⁵ Entry at Request for Proposal, p. 3 (May 17, 2017)

⁶ Entry at ¶8 (March 22, 2018).

⁷ See Audit Report at Appendix A (listing Sage's document requests).

⁸ OCC's Motion to Compel at Attachment 1.

information immediately to make sure Sage was asking the right questions.⁹ The Companies timely submitted responses and properly objected to the requests.

OCC moved to compel the Companies' responses to its requests on March 29, 2018. The Companies responded on April 13. As the Companies explained, because the Audit Report had not yet been issued, OCC's discovery requests were, at best, premature and numerous requests were irrelevant and overbroad in any event.¹⁰ The Companies also stated that they would supplement their discovery responses after the Audit Report was issued.¹¹ OCC filed a reply in support of its motion on April 20. The Commission did not rule on OCC's motion before Sage issued the Audit Report.

After Sage issued the Audit Report, the Companies and OCC engaged in several discussions to narrow the number of requests in dispute, and the Companies made supplemental document productions. As of the end of September, the Companies had produced, subject to and without waiving their objections, responses to 236 of Sage's 250 data requests.¹² On October 1, the Companies filed a Supplemental Memorandum Contra OCC's Motion to Compel.¹³ There, the Companies explained that their responses to the 14 audit requests that had not been produced to OCC were of no relevance to the parties' examination of the Audit Report or to the Companies' compliance with Ohio's corporate separation rules.¹⁴ Rather than attempting to show the relevance of the 14 responses, OCC withdrew its motion to compel on October 9.¹⁵

⁹ Companies' Memorandum Contra the Motion to Compel of the Office of the Ohio Consumers' Counsel, at 11 (April 13, 2018) ("Memo Contra").

¹⁰ See generally Memo Contra.

¹¹ *Id.* at 11.

¹² Many of these responses were provided subject to a protective agreement.

¹³ *Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Supplemental Memorandum Contra the Motion to Compel of the Office of the Ohio Consumers' Counsel* (Oct. 1, 2018).

¹⁴ *Id.*

¹⁵ *Notice of Withdrawal of Motion to Compel by the Office of the Ohio Consumers' Counsel* (Oct. 9, 2018).

C. OCC's Public Records Request

After the Companies had filed their Supplemental Memorandum Contra, the Commission informed the Companies that OCC had submitted a public records request for the Companies' responses to certain of Sage's audit requests. And following the withdrawal of OCC's motion to compel, the Companies were further informed that OCC had limited its request to the 14 irrelevant audit responses the Companies had briefed. The Commission then gave the Companies leave until October 26 to file a motion for protective order.

OCC seeks the public disclosure of the Companies' responses to the following requests submitted by Sage:

- Request 49 – Most recent [cost allocation manual] audit report for Maryland.
- Request 53 – Schedule of long-term debt for all three Ohio companies as of December 31, 2016 and June 30, 2017.
- Request 104 – Latest reliability audit.
- Request 128 – Actual results compared to budget for Shared Services departments for the past five years (2012–2016) and YTD 2017.
- Request 129 – Description of the budget process for the Shared Services departments.
- Request 151 – Most recent Earnings Driver Report for the three Ohio companies.
- Request 152 – Most recent [Operations and Maintenance] Analysis for the three Ohio companies.
- Request 153 – Most recent Earnings Report for the same period as the two previous documents.
- 154 – Power Point presentation of actual vs budget and forecast for the same period as above.
- 164 – Sample Daily Cash Position report for September 27, 2017.
- 165 – Sample SAP “Net Cash Position by Entity” report for September 27, 2017.

- 166 – Quarterly Cash Position/Transaction reports sent to PUCO for 2016 and YTD 2017.
- 196 – List of property insurance claims greater than \$10 million for the past five years (2012 – 2016) and YTD, 2017.
- 197 – Schedule of insurance premiums for the past five years (2012 – 2016) and YTD, 2017.

The Companies designated their responses to each of these requests as confidential under R.C. 4901.16, as permitted by Commission order.¹⁶

III. LAW AND ARGUMENT

Under R.C. 4905.07, the facts and information in the Commission’s possession are deemed public except as provided in R.C. 149.43 and as consistent with the purposes of Title 49 of the Revised Code. For its part, R.C. 149.43 expressly excludes “[r]ecords the release of which is prohibited by state or federal law” from the statutory definition of “public record.”¹⁷ Here, a state statute—R.C. 4901.16—bars the release of the Companies’ responses to Sage’s audit requests, and those responses are therefore not “public records” under R.C. 149.43.

R.C. 4901.16 prohibits the Commission and its agents from disclosing any information obtained from a public utility during the course of an audit except in a report or during testimony in a Commission proceeding. In its July 5, 2017 Entry appointing Sage as auditor, the Commission specifically ruled that Sage’s work would be subject to R.C. 4901.16. The Commission stated:

[Sage] is subject to the Commission’s statutory duty under Section 4901.16, Revised Code, which provides:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the

¹⁶ Entry at ¶ 10 (July 5, 2017).

¹⁷ R.C. 149.43(A)(1)(v).

transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent.¹⁸

The Ohio Supreme Court has construed R.C. 4901.16 as a statute that “prevents employees or agents of the PUCO who examine the accounts, records, or memoranda kept by public utilities . . . from divulging information regarding ‘the transaction, property, or business’ of the public utility other than in reports to the PUCO or testimony in court or commission proceedings.”¹⁹ In short, R.C. 4901.16 “imposes a duty of confidentiality on PUCO employees and agents.”²⁰

In turn, the Commission has applied R.C. 4901.16 to preclude the public disclosure of an audit report provided to Staff during a Commission investigation. In *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS (“CG&E Case”), 2004 Ohio PUC LEXIS 271, *10-11 (July 28, 2004), a party submitted a public records request for a report drafted by an auditor hired by CG&E, which the company later provided to Staff during the investigation. The Commission noted that—even though the audit report did not constitute a trade secret—publicly disclosing the report and refusing to follow R.C. 4901.16’s mandate could “have the impact of discouraging utilities from sharing information with the Staff for fear that it will be considered to be a public record that must be disclosed upon request (contrary to the likely purpose of [R.C. 4901.16]).”²¹ The Commission then held that disclosure of the report was barred by R.C. 4901.16.²²

¹⁸ Entry at ¶ 9 (July 5, 2017).

¹⁹ *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util Comm.*, 113 Ohio St. 3d 180, 191-192 (2007).

²⁰ *Id.*

²¹ *Id.* at *9-10.

²² *Id.* at *10-11.

This matter presents a simpler question than the one presented in the *CG&E Case*. Here, OCC's request seeks public disclosure of the Companies' information provided to Sage during an audit process that the Commission ordered was subject to R.C. 4901.16's protections.²³ The Commission expressly permitted the Companies to "conspicuously mark such documents or information 'confidential' if the Companies believe it should be deemed as such" while also warning that "[i]n no event, however, shall the Companies refuse or delay in providing such documents or information."²⁴ The Commission's intent is clear. The Companies were to cooperate completely with Sage's requests, regardless of the information or documents Sage sought, and in exchange for opening the entirety of their records for inspection, the Companies were assured that the information they provided would not be publicly disclosed, except as provided in the Audit Report. Encouraging this free exchange of information between utilities and the Commission during the audit process is precisely the point of R.C. 4901.16.²⁵

Sage has since publicly disclosed the findings of its investigation in the Audit Report, and the parties to this proceeding, including OCC, will have a full and fair opportunity to review the report and the underlying information relevant to it through the channels provided by the Commission's discovery rules. OCC's public records request is merely an attempt to circumvent that process.

²³ Entry at ¶¶ 9-10 (July 5, 2017).

²⁴ *Id.*

²⁵ In a case involving a public records request for a draft audit report related to AEP Ohio's business, the Commission again recognized that R.C. 4901.16 operates as an exception to R.C. 149.43. *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC, *et al.*, Entry (Feb. 3, 2016), 2016 Ohio PUC LEXIS 126, at *11-12. The Commission did, however, determine that the draft audit report itself and communications related to it were not protected by R.C. 4901.16 under the specific circumstances of the case, noting its decision "should not be construed as precedent in any other case." *Id.* The present case involves a different issue in any event; here, it is not the work product of the auditor in the form of a draft audit report at issue, but the Companies' sensitive information confidentially provided to the auditor under R.C. 4901.16's express protection.

But beyond just a misguided litigation tactic, OCC's request also risks undermining the integrity of the Commission's audit process by threatening the Companies with the public release of sensitive data they provided to Sage in confidence. Ten of the 14 responses at issue relate to the Companies' confidential financial data, including internal budgeted and forecasted figures and related processes; two requests concern similarly sensitive information regarding insurance claims, deductibles, and premiums; and two relate to other audits outside of the Commission's purview. The Companies designated all of these responses confidential under R.C. 4901.16, in reliance on the Commission's previous order and the expectation of confidentiality created by it.²⁶

There are far-reaching policy implications at play here. If in carrying out its audit duties the Commission will order utilities to provide any information requested by the auditor without objection, those utilities must be ensured of some protection for the information they produce. Under its plain terms, R.C. 4901.16 provides that protection. To hold that R.C. 4901.16 does not bar the public release of the information OCC seeks would effectively render that statute a dead letter. Indeed, if R.C. 4901.16 does not apply here, it is difficult to envision a scenario in which it would. And if that is the case, utilities in this State will always need to assume that all of the information they provide to the Commission and its agents will become public upon the mere submission of a records request. Such an outcome is contrary to the unambiguous language of R.C. 4901.16 and contrary to sound policy. What's more, if R.C. 4901.16 does not apply here,

²⁶ In communications with the Commission and the Companies about its public records request, OCC has indicated that it believes the Companies' confidentiality concerns have already been resolved by OCC entering into a protective agreement with the Companies. But that protective agreement is not relevant to this Motion. Under R.C. 149.43, records the release of which is prohibited by state law do not constitute "public records"—period. There is no exception to provide such materials subject to a protective agreement. If OCC wanted discovery of the confidential materials it now seeks through a public records request, its proper recourse was to file a motion to compel as a party in the main case and demonstrate the relevance of the information sought. OCC specifically declined to do so by withdrawing its motion to compel after the Companies had produced all but the 14 items that are at issue here.

then future Commission investigations will see utilities needing to treat Commission and Staff requests the same as discovery from other parties; the utilities will be required to assert objections and resist production as may be appropriate under the discovery rules. The Commission should not reach a holding that nullifies a statute and threatens the efficacy of the audit process.

IV. CONCLUSION

For all these reasons, the Commission should grant the Companies' Motion for Protective Order.

Respectfully submitted,

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*On behalf of Ohio Edison Company,
The Cleveland Electric Illuminating Company,
and The Toledo Edison Company*

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 October 26, 2018. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties of record.

/s/ David A. Kutik

*Attorney for Ohio Edison Company, The
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The Toledo Edison Company*

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Summary: Motion Companies' Motion for a Protective Order regarding the Office of the Ohio Consumers' Counsel's Request for Public Records and attached Memorandum in Support electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company