

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY TO FIRSTENERGY’S OPPOSITION TO OCC’S MOTION FOR THE
PUCO TO REVIEW CLAIMS OF PRIVILEGED DOCUMENTS WITH AN *IN*
CAMERA REVIEW**

AND

**REPLY TO FIRSTENERGY’S OPPOSITION TO OCC’S MOTION TO
REQUIRE FIRSTENERGY ENTITIES TO FILE A NOTICE IF THEY
ANYWHERE DISCLOSE RECORDS THAT THEY WILL NOT DISCLOSE TO
OCC BASED ON A CLAIM OF PRIVILEGE**

BY

OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The Office of the Ohio Consumers’ Counsel (“OCC”) is trying to get to the bottom of the impacts on the FirstEnergy Utilities’ consumers from what the U.S. Attorney called the largest bribery scheme in Ohio’s history. FirstEnergy Corp. is charged with a federal crime. Despite this problematic scenario for consumers, this case is lacking an independent audit. We’ve asked the Public Utilities Commission of Ohio (“PUCO”) to remedy this shortcoming.

In any event, OCC has sought relevant documents needed for a real investigation. FirstEnergy Utilities¹ have such documents that could be produced. But they refuse to

¹ Ohio Edison Company, Cleveland Electric Illuminating Company, and the Toledo Edison Company, referred to throughout as “FirstEnergy Utilities,” and sometimes as the “Companies”.

produce them. Instead, they provided a *privilege log* in support of their claim that a legal privilege protects them against disclosure.

But the privilege log supports no such thing, despite 234 individual and often redundant privilege claims. FirstEnergy Utilities provide no theory and no authority for three separate FirstEnergy corporations asserting the same privilege.

Therefore, the PUCO should make an *in camera* review of the documents referenced in the privilege log. It then should order the production of the non-privileged documents. PUCO Attorney Examiner Gregory Price addressed this process. The PUCO should also issue an order indicating that the Parties agreed that FirstEnergy Utilities will “keep[] the Commission informed of developments concerning any compelled disclosure of privileged material,” and then order that the OCC shall receive the same notification.²

A. To protect consumers and promote transparency, the PUCO should grant OCC’s Motion for an *in camera* review of FirstEnergy’s allegedly privileged documents.

FirstEnergy Utilities must produce responsive documents unless they can justify withholding them through a privilege log. Because the privilege log cannot carry this burden, the PUCO should order an *in camera* review and the production of non-privileged documents.

1. FirstEnergy Utilities, not OCC, carry the burden of asserting privilege.

It is the FirstEnergy Utilities’ burden to show privilege, not the OCC’s burden. It is “well-settled” that the burden of asserting privilege to exclude a document “rests upon the party seeking to exclude it.” *Smith v. Technology House, Ltd.*, 11th Dist. Portage No.

² FirstEnergy Memorandum Contra at 11 (Jan. 28, 2022).

2018-P-0080, 2019-Ohio-2670, ¶ 16 (citing *Waldmann v. Waldmann*, 48 Ohio St.2d 176, 178, 358 N.E.2d 521 (1976)). That is because, generally, “parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” *Id.*, ¶ 15; *see also Jacobs v. Equity Tr. Co.*, 9th Dist. Lorain No. 20CA011621, 2020-Ohio-6882, ¶ 11 (party asserting privilege “carries the burden of establishing the existence of the privilege”).

But contrary to well-settled law, the FirstEnergy Utilities are trying to shift the burden to the OCC. They argue, for example, that the OCC has not done “nearly enough” to bring this issue to the PUCO.³ That is wrong. The FirstEnergy Utilities conceded that these documents are relevant and responsive. This generally requires production under Ohio’s Rules of Civil Procedure, and the FirstEnergy Utilities can produce the documents at any time. But because the FirstEnergy Utilities continue to hold documents back, it is the FirstEnergy Utilities’ burden to show why.

2. The privilege log is the first step for FirstEnergy Utilities to meet their burden of proof, not the last step.

The PUCO should conduct an *in camera* review now that it has a privilege log. A trial court “shall determine by in camera inspection which portions of the file, if any, are so privileged.” *Cargile v. Barrow*, 182 Ohio App.3d 55, 2009-Ohio-371, 911 N.E.2d 911, ¶ 8 (1st Dist.) (citation omitted). This is generally a mandatory duty, and a trial court errs if it fails to conduct a review. *Marcum v. Miami Valley Hosp.*, 2015-Ohio-1582, 32 N.E.3d 974, ¶ 20 (2d Dist.) (collecting cases across Ohio that show a mandatory duty for an *in camera* review). This is where the privilege log comes in. It eases the burden for the

³ *Id.* at 6.

trial court’s review, so much so that some courts will find that a failure to timely produce a privilege log waives the exclusion. *See, Csonka-Cherney v. Arcelormittal Cleveland, Inc.*, 2014-Ohio-836, 9 N.E.3d 515, ¶ 24 (8th Dist.).

Despite an established practice of an *in camera* review using a privilege log, and the Attorney Examiner’s willingness to review these records, FirstEnergy Utilities says that the job is done.⁴ Not so. FirstEnergy Utilities has the burden of asserting privilege, and the first step in that burden is making a privilege log. The alternative, which is still available, is explicitly waiving privilege and producing the documents.

But without production, the next step is for the Attorney Examiner to conduct an *in camera* review of the records, which he has already agreed to do. And then production of the non-privileged documents should be ordered.

3. The FirstEnergy Utilities concede that blanket assertions of privilege fall short—yet the privilege log is exactly that.

The blanket assertions of privilege from the FirstEnergy Utilities cannot protect the supposedly privileged documents. A privilege log “must be detailed enough to prove that the communications in question were in fact confidential communications relating to legal advice.” *Cooey v. Strickland*, 269 F.R.D. 643, 649 (S.D. Ohio 2010). This requires an “evidentiary showing,” including that the communications “within the document relates to seeking or giving legal advice.” *Meyer v. Bank of Am., N.A.*, No. 2:18-cv-218, 2018 U.S. Dist. LEXIS 206686, at *9 (S.D. Ohio Dec. 7, 2018). That is why a “blanket assertion” assertion of privilege is improper. *State v. E.I. Du Pont de Nemours & Co.*, 4th Dist. Washington No. 20CA30, 2021-Ohio-2614, ¶ 24 (citation omitted).

⁴ *Id.*

The FirstEnergy Utilities concede that a “blanket and generic privilege claim” is inappropriate.⁵ Yet the provided privilege log is exactly that. The privilege log is almost nothing but blanket generalities:⁶

Excel spreadsheet reflecting legal advice and work product regarding vendor payment analysis.
Excel spreadsheet reflecting legal advice and work product regarding vendor payment analysis.
Excel spreadsheet reflecting legal advice and work product regarding vendor payment analysis.
Email reflecting legal advice and work product regarding vendor payments and show cause proceedings.
Email requesting legal advice and work product regarding vendor payments.
Excel spreadsheet reflecting legal advice and work product regarding vendor payment analysis.
Excel spreadsheet reflecting legal advice and work product regarding vendor payment analysis.
Excel spreadsheet reflecting legal advice and work product regarding vendor payment analysis.
Excel spreadsheet reflecting legal advice and work product regarding vendor payment analysis.
Excel spreadsheet reflecting legal advice and work product regarding vendor payment analysis.
Excel spreadsheet reflecting legal advice and work product regarding vendor payment analysis.

⁵ *Id.* at 7.

⁶ OCC Motion for In Camera Review, Attachment, ## 168-177 (Jan. 13, 2022).

The privilege log simply repeats a few phrases in independent cells:⁷

Excel spreadsheet reflecting legal advice and work product regarding vendor payment analysis.
Excel spreadsheet reflecting legal advice and work product regarding vendor payment analysis.
Excel spreadsheet reflecting legal advice and work product regarding vendor payment analysis.
Document reflecting legal advice and work product regarding political and charitable spending.
Email reflecting legal advice and work product regarding pole attachment rates.

Despite more than 234 independent assertions of privilege, the same reasons are copied and pasted across the log. The FirstEnergy Utilities do not escape the “blanket” label by saying the same thing in multiple places instead of saying it once (which would save the Parties and the PUCO time and money). The privilege log makes it impossible to determine that the communications in fact relate to legal advice.

Because it is FirstEnergy Utilities’ burden to establish privilege, and the privilege log is full of blanket assertions, the PUCO should conduct an *in camera* review and then order production.

4. Beyond blanket assertions of privilege, FirstEnergy’s privilege log contains other questionable notations that should be reviewed or the privilege should be waived.

The FirstEnergy Utilities carry the burden of asserting a privilege, not the OCC. And along with the failures above, they failed in three other specific ways.

First, no entity is specifically identified as holding the privilege. Generally, disclosure to a third-party “constitutes a waiver of attorney-client privilege.” *MA Equip.*

⁷ *Id.*, Attachment, ## 185-190.

Leasing I, LLC v. Tilton, 2012-Ohio-4668, 980 N.E.2d 1072, 1082 (10th Dist.). The rules are slightly different for corporate entities. “But courts should not assume, as a matter of law, that members of a corporate family have a sufficient common legal interest to constitute joint clients.” *Id.*, 1085. Indeed, “absent some compelling reason to disregard entity separateness,” in the typical case, courts should “treat the various members of the corporate group as the separate corporations they are and not as one client.” *Id.*, 1082 (citation omitted).

The FirstEnergy Utilities deny asserting privilege claims on behalf of a parent company, such as FirstEnergy Corp.⁸ Instead, they argue that the “Companies”—as in three separate companies—assert every privilege together.⁹ But there is no theory or authority provided to overcome third-party waiver or their separate corporate forms.¹⁰ This is not just a legal failing, but a practical one too. How do three companies assert the same privilege over two people—and no lawyers—with a “@firstenergycorp” email?¹¹ It is not the OCC’s burden to explain, and the “Companies” do not even try. The FirstEnergy Utilities’ burden has not been met, so a review should be conducted, and production ordered.

Second, non-lawyer communications that “reflect” legal advice are not protected. The Parties agree that non-attorney corporate employees “seeking” or “relaying” legal advice *may* fall under the attorney-client privilege.¹² But that standard is not met here.

⁸ FirstEnergy Memorandum Contra at 5 (Jan. 28, 2022).

⁹ *Id.*

¹⁰ *Id.*

¹¹ OCC Motion for In Camera Review, Attachment, # 192 (Jan. 13, 2022).

¹² FirstEnergy Memorandum Contra at 7 (Jan. 28, 2022).

For one, as discussed above, there is no evidence that the employees work for the same corporation, so this exception does not apply. Second, the privilege log does not generally mention “seeking” or “relaying” legal advice. Instead, it uses the much broader “reflecting” legal advice.¹³

Many things “reflect” legal advice but do not relay or seek it. For example, a non-discrimination policy reflects legal advice. But it does not “seek” or “relay” it, as required to be privileged. The FirstEnergy Utilities failed to meet their burden by showing that legal advice is being sought or relayed. So a review should be conducted and production ordered.

Finally, the attorney-client privilege does not apply to criminal or fraudulent acts. The Parties also agree that the attorney-client privilege does not apply to documents that, when created, documented an ongoing or future criminal act.¹⁴ But the FirstEnergy Utilities makes a temporal defense, claiming that the responsive documents were “created after this case was opened”¹⁵ That is not true, at least not according to the privilege log. The FirstEnergy Utilities’ privilege log provides that the responsive documents reach back well before the scandal, so this defense falls flat.¹⁶

¹³ OCC Motion for In Camera Review, Attachment, # 203 (Jan. 13, 2022) (“reflecting legal advice and work product regarding vendor payments”).

¹⁴ FirstEnergy Memorandum Contra at 9 (Jan. 28, 2022).

¹⁵ *Id.*

¹⁶ OCC Motion for In Camera Review, Attachment, # 201, 202 (Jan. 13, 2022).

- B. The PUCO should require FirstEnergy entities to publicly file at the PUCO a notice of disclosure(s) that pertain to withheld discovery documents. And the PUCO should require FirstEnergy to produce the disclosed documents to OCC and others. The attorney-client privilege and work product privileges are waived by disclosing the communications to third parties.**

The Parties agree that FirstEnergy Utilities should provide notice to the PUCO when the FirstEnergy Utilities are compelled by other jurisdictions to disclose material for which a claim of privilege was asserted in the other jurisdiction or in Ohio. (Memo. Opp., 11.) The PUCO should order that, when this occurs, the FirstEnergy Utilities must also provide the material to the parties in this case. As a secondary alternative, the PUCO should require the FirstEnergy Utilities to provide notice of such disclosure in the form of a filing in the docket of this case. This notice would allow any party to review the circumstances of the disclosure. And it would allow parties to ask the PUCO to review, in an *in camera* proceeding, whether the material should also be disclosed in this proceeding. Unfortunately, this secondary alternative would enable FirstEnergy to delay OCC and waste our time.

II. CONCLUSION

For these reasons, the PUCO should authorize an *in camera* review of the FirstEnergy privilege log. After the review, the PUCO should order the production of the non-privileged documents. And the PUCO should issue an order indicating that the FirstEnergy Utilities will keep the PUCO and the OCC informed of developments about any disclosure of privileged material.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was served on the persons stated below via electronic transmission, this 4th day of February 2022.

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Summary: Reply Reply to FirstEnergy's Opposition to OCC's Motion for the PUCO to Review Claims of Privileged Documents with an In Camera Review and Reply to FirstEnergy's Opposition to OCC's Motion to Require FirstEnergy Entities to File a Notice If They Anywhere Disclose Records That They Will Not Disclose to OCC Based on a Claim of Privilege by Office of the Ohio Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of Willis, Maureen R.