

IN THE SUPREME COURT OF OHIO

CHARLES E. WILSON, et al,

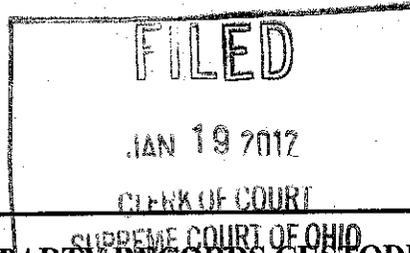
Relators,

v.

OHIO GOVERNOR JOHN R. KASICH,
et al.,

Respondents

Case No. 2012-0019



**RESPONSE ON BEHALF OF NON-PARTY RECORDS CUSTODIAN
TO RELATORS' MOTION FOR ORDER
FOR COMPLIANCE WITH PRIVILEGE LOG REQUIREMENTS**

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**RESPONSE ON BEHALF OF NON-PARTY RECORDS CUSTODIAN
TO RELATORS' MOTION FOR ORDER
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Relators ask for a more detailed privilege log in response to a third-party subpoena they served on Michael Lenzo, majority counsel for the Ohio House of Representatives. *See* Exhibit A, subpoena. Neither Mr. Lenzo nor the Ohio House is a party to this lawsuit. Mr. Lenzo may have been served with the subpoena in his capacity as the public records officer for the Ohio Apportionment Board. According to Relators' certificate of service, the motion was not served on Mr. Lenzo, but was served on the attorneys who have appeared in this case in their capacity as counsel for the Respondents. The motion seeks relief only with respect to third-party subpoenas, and not Respondents. The motion is thus procedurally improper and should be denied.

Moreover, as Relators' concede, Civ. R. 45(D)(4) requires only that a third-party claim privilege "expressly" and support such claim with a "description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Civ. R. 45(D)(4). As is apparent from Relators' Exhibits 2 and 3, the privilege logs furnished by Mr. Lenzo in response to the subpoena provide the date and size of the document, the author, the recipient, and the privilege claimed.

Relators now ask for identification of the lawyer, the client, legal authority for assertion of the privilege, the degree to which the document was shared with third parties or the public, and a substantive description of the content of the communication. None of this information is required by Rule 45(D)(4).

With respect to identification of the lawyer and client, the privilege logs identify the author and recipient(s) of each document. This information is sufficient to permit the Relators to determine whether the communication was to or from an attorney.

With respect to legal authority, nothing in Civ. R. 45(D)(4) requires a party invoking the privilege to set forth, in a privilege log, specific legal authority for invoking a privilege. The rule requires a claim of privilege to be “made expressly.” The logs on their face satisfy this requirement. Counsel is advised that in preparing the logs, no evidence was found that any of the documents identified on the privilege logs were shared with third parties or the public.

Regarding the “description” Relators seek, Relators were informed that most of the communications were electronic mail. It thus appears that Relators, through their motion, seek a description of the *substance* of each communication, rather than the form. This type of description is not required by the civil rules. “[P]rivilege may be sufficiently established if the log states that the communications were made between attorney and client for the purpose of procuring legal advice or representation. More detailed descriptions may risk revealing privileged information.” *Cargotec, Inc. v. Westchester Fire Ins. Co.*, 155 Ohio App. 3d 653, 2003-Ohio-7257, ¶ 13 (6th Dist., Lucas County). Rule 45(F) provides specifically that Civ. R. 45 shall not be construed “to authorize a party to obtain information protected by any privilege.” The rule thus cannot be construed to require a substantive description of the communication.

Notwithstanding the foregoing objections, and in the interest of cooperation, counsel with the Attorney General's office is in the process of reviewing the documents identified on the privilege logs prepared and produced in response to the subpoena. This process cannot be completed by 4:00 p.m. today, but the undersigned anticipates that it will be completed by noon on Monday, January 23, 2012. Counsel then will promptly attempt to confer with counsel for Relators and seek to provide additional detail to the extent consistent with the statutory attorney-client testimonial privilege set forth in R.C. 2317.02, as extended, where appropriate, to the legislative caucus as provided in R.C. 101.301, the broader attorney-client privilege recognized under Ohio common law, R.C. 102.06, with respect to confidential communications with the Joint Legislative Ethics Committee, and R.C. 101.30, regarding legislative confidentiality.

For the foregoing reasons, we respectfully request that this Court deny Relators' motion for an order for "compliance with privilege log requirements."

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Response On Behalf Of Non-Party Records Custodian To Relators' Motion For Order For Compliance With Privilege Log Requirements* was served on this 19th day of January 2012, by electronic mail and U.S. mail, postage prepaid, to:

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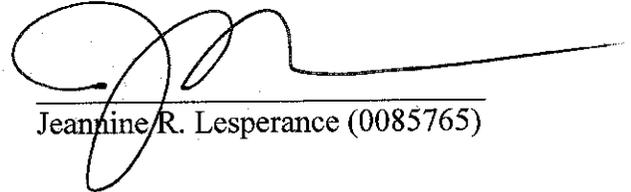
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