

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 5674 / April 6, 2018

Administrative Proceeding
File No. 3-17950

In the Matter of
David Pruitt, CPA

**Order Directing Respondent to
File Privilege Log**

Respondent David Pruitt has moved to quash or modify subpoenas served on him and a third party. Pruitt claims the subpoenas seek evidence protected by the work-product and attorney-client privileges.

Pruitt relies on precedent applying Federal Rule of Civil Procedure 26(b) and the Freedom of Information Act (FOIA) exemption for work-product.¹ It is appropriate to consider this precedent.² But it is also appropriate to consider that under Rules 26(b)(5)(A) and 45(e)(2)(A), a party resisting a subpoena based on a claim of privilege must “describe the nature of the [evidence] not produced . . . in a manner that . . . will enable other parties to assess the claim.”³ In practice, this means that a party must submit a privilege log when claiming that documents are privileged.⁴

¹ See Mem. at 5–6 (relying, among other decisions, on *Miller v. U.S. Dep’t of Justice*, 562 F. Supp. 2d 82, 115 (D.D.C. 2008) (FOIA) and *Clemmons v. Acad. for Educ. Dev.*, 300 F.R.D. 6, 7–8 (D.D.C. 2013) (Rule 26(b)).

² See *Clarke T. Blizzard*, Investment Advisers Act of 1940 Release No. 2030, 2002 WL 662783, at *3–4 & nn.17, 19 (Apr. 23, 2002).

³ Fed. R. Civ. P. 26(b)(5)(A)(ii), 45(e)(2)(A)(ii).

⁴ *Caudle v. District of Columbia*, 263 F.R.D. 29, 35 (D.D.C. 2009) (“A privilege log has become an almost universal method of asserting privilege under the Federal Rules.”); see Subpoena, Attach. A ¶ B.9 (instructing subpoena recipient to provide privilege log describing anything called for by

(continued...)

The Commission's Rules of Practice, however, do not contain an analogue to Rules 26(b)(5)(A)(ii) and 45(e)(2)(A)(ii). Even so, it is difficult to adjudicate claims of privilege in a vacuum, without a privilege log or a declaration that provides enough detail to evaluate the claim.

Given the foregoing, Pruitt shall forthwith file a privilege log or declaration that describes the evidence in question with sufficient detail to assess his claims of privilege.⁵ The Division may file an opposition within three days after Pruitt complies with this order.

James E. Grimes
Administrative Law Judge

the request but not produced); *see also In re Grand Jury Subpoena*, 274 F.3d 563, 576 (1st Cir. 2001) (“A party that fails to submit a privilege log is deemed to waive the underlying privilege claim.”); *Dorf & Stanton Commc’ns, Inc. v. Molson Breweries*, 100 F.3d 919, 923 (Fed. Cir. 1996) (holding that failing “to provide a complete privilege log demonstrating sufficient grounds for taking the privilege” waives the privilege); *cf. Clemmons*, 300 F.R.D. at 9 (discussing the adequacy of a privilege log).

⁵ *Cf. Texas Brine Co. & Occidental Chem. Corp.*, 879 F.3d 1224, 1229 (10th Cir. 2018) (“While the district court could have ruled otherwise, the court gratuitously allowed Texas Brine a second chance to produce a privilege log regarding the withheld documents.”).