

In²itiTive
Technologies

ezPriv

Automated Privilege Log Utility

WHITE PAPER

Introduction

ezPriv was designed and developed to automate the process of creating privilege logs for use during the review process in electronic discovery document productions. Automating the generation of privilege logs from the litigation support database will save countless hours lost to building privilege logs and will mitigate the substantial risks of waiving privilege that have occurred due to the following:

- the 2006 Federal Rules Amendments (Rule 26(b)(5)) requiring that all information contained on privilege logs must be particularized
- Federal Rule of Evidence 502 which addresses the steps required to protect privilege in the event of inadvertent disclosure of privileged information
- recent case law ordering that all email strings must be logged individually to preserve privilege¹

ezPriv will accept as input text files or a delimited text file containing the OCR or Extracted Text of tagged privileged documents and emails in the database and will generate a line by line privilege log. ezPriv will also individually list all the recipients to the privileged communication together with their family attachment(s), if any, and the bates number ranges associated with those records.

ezPriv is revolutionary. It is the first utility of its kind to aid the review team by automating the privilege log process in a manner consistent with the Rules of Procedure that the Courts are now requiring, *i.e.*, separately logging all the senders and recipients to emails claimed as a privileged communication together with their family attachments. Building privilege logs is an arduous task for the paralegal or litigation support department given the short amount of time allotted for privilege review and the enormous quantities of emails often involved with electronic discovery productions today.

Given the current downsizing within law firms, corporations and governmental agencies combined with the often short discovery phase presented during a document review, the lack of available staff resources to build privilege logs presents unique challenges to the document review team. Having the right tools on hand is essential. ezPriv will allow review teams to generate an Excel privilege log from a dataset with the push of a button. You will be able to sample and sort through the logged dataset in a legally defensible manner, ensuring the accuracy of the log. This is a best practice that the Courts are looking for today should an unfortunate event occur that a privileged record slips through inadvertently and you try to claw back the document per Rule 502.

¹ See *Muro v. Target Corporation*, 2007 U.S. Dist. LEXIS 81776, 2007 WL 3254463 (N.D. Ill. Nov. 2, 2007); see also *Rhoads Industries, Inc. v. Building Materials Corp. of America, et al.*, Memorandum Re: Clarification of Memorandum and Order dated November 14, 2008 re: Privilege logs of Emails (No. 07-4756, E. Dist. Pa., Nov. 26, 2008).

With ezPriv outside law firms, corporate law departments and government agencies, either working alone or with litigation support service providers, can easily export privileged documents from litigation databases and generate a line-by-line privilege log with family attachments to an Excel file format in a matter of minutes. This Excel file format provides nimbleness and flexibility to speed up the search process compared to searching and sorting through the heavy database that houses the entire data collection. Excel offers additional features such as auto filtering and Pivot tables that are useful as discovery tools.

ezPriv will aid the attorney, paralegal and litigation support staff with automated efficiency rather than the manual labor required to generate privilege logs. In a recent test, ezPriv allowed the user to construct a multi-level privilege log from 2,200 individual emails resulting in over 4,400 lines in the in less than 2 minutes from a directory of text files.

Case Law

Sanctions were awarded in almost one-fourth of the opinions issued in 2008 involving electronic discovery.² Privilege and waiver issues are at the forefront of this debate.

Judge Paul W. Grimm went so far as to state that all electronically stored information not searchable should be OCR'd to allow the attorneys to be able to search the data for privilege and relevancy or risk waiving privileges in the event of an inadvertent disclosure. *See Victor Stanley, Inc. v. Creative Pipe, Inc.*³ The privilege waiver occurred here because a scant 165 PDF files were not OCR'd, and therefore, these files escaped the review team's purview during a key word search for privileged material. Interestingly, the parties in *Victor Stanley* had a detailed case management plan in place before the review began, including an agreement on using 70 keyword search terms designed to locate responsive ESI. Nevertheless, Judge Grimm ruled that the inadvertent disclosure that occurred waived the attorney-client privilege and work-product protection because the Defendant failed to take reasonable precautions by performing a faulty privilege review of the text-searchable files and by failing to OCR the 165 documents that were given to the Plaintiff as part of Defendants' ESI production.⁴

Victor Stanley demonstrates that properly utilizing litigation support software and procedures has become mandatory in litigations today. Obtaining an agreement on the procedures deployed will go a long way in demonstrating to the Court that the review was conducted in a legally defensible manner and will mitigate risks in the event of an inadvertent disclosure of privileged information during the production.

² [Kroll Ontrack®](#), YEAR IN REVIEW: COURTS UNSYMPATHETIC TO ELECTRONIC DISCOVERY IGNORANCE OR MISCONDUCT, Dec. 2, 2008.

³ 250 F.R.D. 251 (D. Md. 2008).

⁴ The Court found some of the asserted privileges were unsubstantiated, and these documents would have been ordered to be produced notwithstanding the inadvertent disclosure.

To further mitigate risks against inadvertent disclosures, Judge Grimm instructed counsel in *Hopson v. Mayor of Baltimore*⁵ that if the parties were to involve the Court early in approving their agreed case management plan, it would improve the likelihood of avoiding privilege waivers with regard to the production of inadvertently produced privileged electronic data. Judge Grimm specifically ordered the parties to discuss the Rule 26(b)(2) factors in connection with the procedures Defendants reasonably should take to perform a review for privilege and work product claims.

There have been many other “e-discovery gone bad” opinions delivered since the federal rules amendments. These decisions have greatly impacted every conceivable area where electronically stored information is being touched, including how the ESI is being collected, the review process, and the manner in which ESI is being produced. These decisions are changing the landscape of how litigation management and procedures are used to conduct electronic reviews. The parties must adopt legally defensible collection and search protocols, and now the privilege log must conform to these ESI requirements as well.

Email Strings & Chains

Case law is emerging requiring all recipients for which privilege is sought and who appear in email chains to be identified individually on privilege logs together with their attachments. *See Muro v. Target Corporation*.⁶ Here, the Court ruled that Rule 26(b)(5)(A) is satisfied if the attorney-client communication transmitting an otherwise non-privileged communication is adequately described.

Judge Baylson, however, has set the precedent with regard to how email strings and email chains are to be prepared on privilege logs. *See Rhoads Industries, Inc. v. Building Materials Corp. of America, et al.*⁷ Judge Baylson clarified the Court’s previous ruling regarding how privileged material appears in email chains or email strings. In this case, the Defendants asked for a supplemented privilege log to be produced that would disclose all of the recipients involved in each email chain, not just those in the most recent message in the chain. The Court granted the Motion and ruled that the Plaintiff had an obligation to separately log all of the prior messages in the email string and further ruled that any email messages not logged waived privilege and must be produced to Defendants.

⁵ 232 F.R.D. 228 (D. Md. 2005).

⁶ 2007 U.S. Dist. LEXIS 81776, 2007 WL 3254463 (N.D. Ill. Nov. 2, 2007).

⁷ Memorandum Re: Clarification of Memorandum and Order dated November 14, 2008 re: Privilege logs of Emails (No. 07-4756, E. Dist. Pa., Nov. 26, 2008).

Rule 502 & Privilege Waiver

The *Rhoads* case was the first case addressing the applicability of Rule 502 with regard to privilege waivers due to inadvertent disclosures. Judge Baylson actively worked on development of Federal Rule of Evidence 502 by serving as a Liaison for the Advisory Committee on Civil Rules and he also served as member of the Advisory Committee on Rules of Evidence of the Judicial Conference.

The *Rhoads* case is instructive. Do not assume that Rule 502 will come to your rescue for your inadvertent production of privileged data. In case you think privilege log disputes and waivers due to inadvertent disclosures are thing of the past after the implementation of Rule 502, think again. Just recently a federal court in the Eastern District of New York ruled that parties waived privilege for inadvertently producing privileged documents. *See Brookdale Univ. Hosp. & Med. Ctr., Inc. v. Health Ins. Plan of Greater N.Y., et al.*⁸ In this situation, the waiver occurred exactly because some of the email header information from GroupWise emails was not captured by the review software. Therefore, the Court ruled, the party waived its privilege concerning the privileged email communications that were inadvertently produced to opposing counsel.

The Solution

The practice of manually creating privilege logs from electronic discovery collections is no longer acceptable. ezPriv automates the privilege log creation process, allowing for a fast and legally defensible process to aid attorneys and legal staff in capturing and logging privileged ESI. Litigation Support Databases are just not up to this task. Not after Judge Baylson ruled in his *Rhoads*' decision that all of the underlying emails in the email chain must be logged separately.

Considering the timing requirements, attachments, redactions and the like, review teams today must consider the burdensome task required in capturing and detailing all the email strings on a log as described in the *Rhoads*' opinion.

ezPriv

ezPriv is a standalone software application used to automate the process of creating privilege logs. Recent court decisions as discussed above have changed the way privilege logs must now be constructed, primarily when dealing with multi-conversation emails.

⁸ 2009 WL 393644 (E.D.N.Y. Feb. 13, 2009).

ezPriv efficiently sorts through vast quantities of electronically stored information to construct privilege logs, saving attorneys, paralegals, and other professionals hours of manual labor. The product also serves as an additional Risk Management tool by automating the majority of the work required.

ezPriv provides:

- Enhanced efficiency and productivity
- Reduced cost passed on to the client
- A simple, user-friendly interface
- The ability to Import information from a coded data file, a coded data file with OCR/Extracted Text, or point to a directory of OCR/Extracted Text email files
- The ability to enter specific privilege criteria and comment per record if desired
- Preview of the constructed privilege log prior to output
- Output formats of vertical or horizontal, text file or spreadsheet format
- Double Click to review the record being documented without leaving the program

Litigation Support review platforms as well as software used for processing ESI only extract for field based review the top level of the email. This assumes the software is extracting text from an email file type the software recognizes. If the email was saved as a text file or a PDF file prior to the data collection then there would be no field based information pertaining to the email header other than in a full OCR/Extracted text file or field holding the contents of the complete document. Inadvertent disclosures have been occurring, resulting in some privilege waivers.⁹

What are the Numbers?

U.S. v. Philip Morris Litigation

- **1,726 Requests for Production propounded by tobacco companies on 30 federal agencies**
- **U.S. had burden of searching through 32 million Clinton-era email records**
- **200,000 hits were based on keyword terms used**
- **100,000 relevant emails were identified**
- **20,000 emails were placed on privilege logs**
- **80,000 relevant emails were produced.**

Source: National Archives and Records Administration

⁹ *Brookdale Univ. Hosp. & Med. Ctr., Inc. v. Health Ins. Plan of Greater N.Y., et al.*, 2009 WL 393644 (E.D.N.Y. Feb. 13, 2009)

Electronic communication has revolutionized business in the last 20 years, yet it has also created a backlog of possibly relevant litigation information. The numbers of documents attorneys and legal teams are required to search during the discovery period are simply staggering, into the millions of printable pages of material, all of which may prove relevant in court. Judge Lee Rosenthal from the Southern District of Texas encapsulated this change in the information age with the observation that there are no longer plaintiffs and defendants. There are data requesters and data producers. She's right. In this age of instantaneous information, legal teams cannot devote the vast amounts of time necessary for manually logging information into a litigation database, spreadsheet or Word document. It's impractical and inefficient. ezPriv takes that once arduous task and reduces months of work into minutes of searchable, and legally defensible privilege logs for today's legal team.

Conclusion

ezPriv is a "must have" piece of software.

A 7-day fully functional trial version of ezPriv is available for download on the corporate website.

<http://www.in2itivetechologies.com>.