

## Privilege Logs: How to Effectively and Efficiently List Single "E-mails" That Include Earlier E-mail Text

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During the past fifteen years, e-mail has transformed how we work, emerging from relative obscurity to become the way most of us communicate on the job. Unfortunately for attorneys and litigation support professionals, case law has not kept pace with this change. Rulings from Federal District Courts raise the issue of how to list a privileged e-mail on a privilege log when that e-mail is a reply or a forward of an earlier e-mail and the text of an earlier e-mail is included in the latest e-mail.

To aid our analysis let us call the e-mail that includes the text of an earlier e-mail the "embedding e-mail" and let's refer to the earlier e-mail as the "embedded e-mail." Can the privilege log have only one entry containing data pertaining to only the most recent sender and recipients of the embedding e-mail or does there need to be an entry for not only the embedding e-mail but also an entry for each of the earlier embedded e-mails? The answer may require that much more time and expense be spent preparing privilege logs. Only a few courts have addressed how to capture embedding e-mails on privilege logs, and the few that have spoken have been inconsistent, and have unfortunately chosen terminology that adds to the confusion.

With little guidance available, litigation professionals are left to make the best decisions they can when producing a privilege log that includes embedding e-mails. Following are our recommendations, based both on legal precedent and the technical limitations associated with handling e-mail during e-Discovery.

### **Capturing Embedding E-mails on a Privilege Log**

When it comes to identifying embedding e-mail on a privilege log, you have two options: single-entry or multiple-entry listing. In the single-entry approach, only one entry is made for an embedding e-mail on the privilege log, even if there are multiple privileged earlier embedded e-mails within the embedding e-mail. In the multiple-entry approach, a separate entry for each privileged earlier embedded e-mail is listed on the privilege log, as though each e-mail is a distinct document. Most courts refer to these embedding e-mails as a "strand," "chain," "thread," or "string." The use of these terms is unfortunate because many people understand a strand, chain, thread, or string to be all of the replies that can be linked to an originating e-mail, not just to the content of one of the replies.

*Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007) supports just one privilege log entry per embedding e-mail. In Muro, the court ruled that FRCP Rule 26(b)(5)(A) does not require itemizing each embedded e-mail on the privilege log, and that creating such a detailed list may actually breach the rules of professional conduct. Instead, the court stated, “Rule 26(b)(5)(A) requires only that a party provide sufficient information for an opposing party to evaluate the applicability of privilege, ‘without revealing information itself privileged.’”

On the other hand, in *Rhoads Industries, Inc. v. Building Materials Corp. of America, et al.* 2008 WL 5082993 (E.D.Pa. Nov. 26, 2008), the court used the Muro decision to support requiring multiple privilege log entries per embedded e-mail, stating, “Even though Judge Pallmeyer (in Muro) rejected the Magistrate's Order to log every message contained within an e-mail string sent to an attorney, her approach does require that each version of an e-mail string (i.e., a forward or reply of a previous e-mail message) must be considered as a separate, unique document. See Muro, 250 F.R.D. at 363. Based on this approach, each embedded message which is privileged must be separately logged in order to claim privilege in that particular document.” Based on a thorough analysis of the Muro decision, we believe the Rhoads court misinterpreted the decision, as it cited language that was quoted and rejected by the Muro court.

Another case that argues for multiple privilege log entries for embedded e-mails is *In re Universal Service Fund Telephone Billing Practices Litigation*, 232 F.R.D. 669 (D.Kan. 2005). Defendant argued that e-mail “chains” (i.e. what we have called embedding e-mails) should be treated as a single document on privilege logs, analogizing them to a transcription of a conversation. The Court rejected this argument stating that: (1) e-mail “strands” may span several days, unlike conversations; (2) recipients and CCs can vary throughout the “strand;” and (3) portions of the “strand” may contain non-privileged content. The court argued multiple log entries for embedded e-mails are necessary in order to ensure privilege is asserted only where necessary. Therefore, the court “strongly encourage[d]” parties to list each e-mail within a “strand” as separate entries to avoid privilege waiver. However, the court also acknowledged that “[i]n those instances where each and every separate e-mail within a strand is limited to a distinct and identifiable set of individuals, all of whom are clearly within the attorney-client relationship in which legal advice is being sought or given, listing the e-mail strand as one entry on the privilege log might be regarded as sufficient.” *Id.* at 674. Therefore, the single-entry approach can be utilized as long as we conduct a proper privilege review and ensure that only e-mails where privilege has not been waived are listed on the log.

Based on our reading of Muro and the acknowledgement made in *In re Universal Service Fund*, we believe there is significant legal support for using the single-entry approach for embedding e-mails. The most prudent course is to check each specific jurisdiction to see if courts have addressed the issue of e-mail “chains” on privilege logs. If they have not, as is the case in many jurisdictions, we recommend using the single-entry approach. Do note however, that while we use the single-entry approach for embedding e-mails, we flag these embedding e-mails within the collection in case we need to quickly transition to a multiple-entry approach.

There are also significant technical and cost benefits to the single-entry approach. The multiple-entry approach requires listing the header information for the embedding e-mail as well as for each of the earlier embedded e-mails. Most current technology options can only automatically capture one set of header information within an embedding e-mail. Therefore, the multiple-entry approach will require more manual effort to generate the privilege log.

### **Capturing Header Information**

When employing a single-entry approach as described above, we recommend capturing the header information from the embedding e-mail to ensure that only communications in which the privilege is maintained throughout the entire chain are listed as a single entry in the privilege log. If the most recent content in an embedding e-mail seems to release the privilege, we flag the embedding e-mail for an in-depth review to ensure an accurate determination of whether the privilege was, in fact, actually lost.

### **Redaction vs. Withholding**

While we are unaware of any court directly addressing the propriety of producing redacted e-mail versus withholding privileged e-mail in its entirety, we follow a general rule of producing redacted documents whenever possible to avoid over-withholding. When redacting, we also keep the header information of redacted e-mail completely intact so that opposing counsel can view all parties involved in the “chain.”

### **Summary**

While the courts have provided little guidance on how to handle embedding e-mails on a privilege log, our experience in e-Discovery and our analysis of case law lead us to believe that — at least for now — employing a single-entry approach that captures header information from the most recent privileged content in an e-mail is the most reliable way to produce a privilege log that is likely to satisfy the court. However, you should check your specific jurisdiction for any guidance on this issue before choosing any approach. Additionally, unless there is a significant reason to entirely withhold an embedding e-mail that includes privileged content, the most conservative approach is to redact only the privileged content and leave the header information completely intact. And even though we've successfully produced many privilege logs following these guidelines, we still proactively mark embedding e-mails that include multiple privileged earlier embedded e-mails in case a transition to the multiple-entry approach unexpectedly becomes necessary.

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