

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In Re: Air Crash at Toronto
Pearson International Airport
on February 17, 2025

MDL No. 25-3155 (JWB/JFD)

**PRETRIAL ORDER NO. 5:
Privilege Log and Clawback Protocol**

Pursuant to Pretrial Order No. 1, the parties have conferred on a protocol on asserting privilege and work product protection, including the use of categorical privilege assertions, clawback provisions under Federal Rule of Evidence 502(d), and a uniform privilege log format.

Following review of the proposal, **IT IS HEREBY ORDERED** as follows:

I. ASSERTION OF PRIVILEGE

“A claim for protection against disclosure based on privilege or protection of trial preparation materials must be made ‘expressly’ and describe the nature of the allegedly protected information sufficiently to enable opposing parties to assess the merits of the claim.” Manual for Complex Litigation § 11.431, Privilege Claims and Protective Orders, at 75 (4th ed. 2025).

Accordingly, the parties have agreed to the following procedure to assert privilege or work product protections, consistent with Fed. R. Civ. P. 26(b)(5):

- A. **Good Faith Review.** Each party shall conduct a good faith review to identify potentially privileged or protected material and implement screening procedures designed to limit inadvertent production.

B. **Privilege Log Format.** To claim protection against disclosure based on privilege or protection of trial preparation materials, a party must produce a privilege log, which shall identify for each document or category of documents claimed to be privileged or protected:

- i. A unique document identifier;
- ii. The date of the document (using sent date for emails and, where reasonably available, the date created and date last modified for documents);
- iii. The author of the document;
- iv. All recipients of the document (for emails, separately listing the To, Cc, and Bcc recipients);
- v. The Subject line of an email or file name to the extent that it would not disclose privileged information; and
- vi. The claimed basis for withholding the document (e.g., attorney-client privilege, attorney work product, common interest, joint defense, consulting expert, self-critical analysis, or other applicable protection) and a brief description sufficient to assess the claim without revealing privileged information.

C. **Categorical Privilege Logs.** Where appropriate to reduce burden and where documents share substantially the same authors, recipients, date ranges, and subject matter, a producing party may use categorical descriptions in lieu of document-by-document entries, provided the

categories are described with sufficient detail to allow assessment of the privilege claim. Upon reasonable request, the producing party will supplement a categorical log with document-level entries for a reasonable sample or for specific documents identified by unique document identifier or Bates range.

- D. **Specificity Required for Protection.** Neither party may claim privilege or work product protection without identifying the specific information listed above. Additional information and description shall only be provided if the privilege log entry is insufficient for evaluating privilege claims.
- E. **Privilege Log Redaction.** The parties may in good faith redact any portion of the file name, subject line, or any other information that reveals the privileged information, while preserving enough contextual information to evaluate the claim, subject to the requirements in Section I.B.
- F. **Privilege Log Schedule.** Privilege logs shall be served within 14 days of the producing party's discovery production or on a date mutually agreed to by the parties.
- G. **Production of Withheld Documents.** If a receiving party disputes the producing party's withholding of certain documents based on privilege and/or work product, and the parties agree to, or the Court orders production of such documents, the parties shall meet and confer in good faith regarding the extension of relevant discovery deadlines. If the parties do not agree to an extension, each party reserves its rights to raise the issue

with the Court by letter or motion as permitted by the Local Rules, and as set forth in Section I.I.

H. **Documents Not Required to be Logged.** The following documents presumptively need not be included on a privilege log:

- i. Communications exclusively between a party and its counsel regarding and occurring after the Incident.
- ii. Work product created by counsel or by an agent of outside counsel other than a party, testifying expert, or third-party vendor, regarding and created after the Incident.
- iii. Redacted emails need not be logged so long as the objective document data set forth in Section I.B. is not redacted (unless the privilege or protection is contained in these fields), and the reason for the redaction, including the nature of the privilege asserted, is noted on the face of the document. For redacted documents where the subject matter is not decipherable because of the redactions, a description of the contents that is sufficient to understand the subject matter of the document may be requested. Non-email documents do not need to be logged if the reason for the redaction is noted on the face of the document in the redacted area.

I. **Challenges to Privilege Claims.** Before seeking Court intervention, the Parties shall meet and confer in good faith. The challenging party shall identify, by identifying information, Bates number, or category, the entries

at issue and the basis for challenge. The producing party shall, within 14 days, provide supplemental information or amended log entries as reasonably necessary. If disputes remain, the parties may submit the issue for in camera review or motion practice, as directed by the Court.

II. CONFIDENTIAL INFORMATION / CLAWBACK PROVISION UNDER RULE 502(d)

- A. **Reservation of Rights.** The parties retain all rights under Federal Rule of Evidence 502(d) to the extent documents are inadvertently produced that contain privilege or work product protections. Production of Clawback Material shall not constitute a waiver of any privilege or protection in this or any other proceeding under Rule 502(d). The burden of establishing the privileged or protected nature of the Clawback Material remains with the producing party. The receiving party may challenge the designation but may not assert waiver based on the production.
- B. **Clawback Procedures.** Any receiving party who receives notice in writing or on the record at a hearing or deposition (“Clawback Notice”) that a producing party has determined it produced information containing privilege or work product information shall adhere to the following procedure to ensure all copies of such information (“Clawback Material”) are appropriately returned, sequestered, or destroyed from the Receiving Party’s document review and/or production database (“Database”), with the potential exception of a single copy for purposes of the Receiving Party

challenging the designation.

Upon receipt of a Clawback Notice, the receiving party shall:

- i. Promptly cease review, dissemination, and use of the Clawback Material, and immediately sequester the Clawback Material consistent with Fed. R. Civ. P. 26(b)(5)(B). If the Clawback Material has been used in a deposition, filing, or expert report, the receiving party shall promptly notify the producing party and cooperate in securing appropriate protections, including sealing, redaction, or substitution where feasible;
- ii. Locate a copy of the Clawback Material and determine whether the receiving party intends to challenge the designation;
 - a. If the receiving party intends to challenge the designation, it may retain a copy of that particular Clawback Material and maintain it in a manner that reasonably restricts access to the material those who are or will be working on that challenge. The receiving party must provide notice to the producing party of its intent to challenge the designation and its maintenance of a copy pursuant to this provision.
 - b. Other than in the preceding paragraph, all other copies of the Clawback Material shall be returned and/or destroyed according to the remaining portions of this procedure.
- iii. Locate each copy of the Clawback Material in the Database and

- return or destroy the record from the Database;
- iv. If there is a native file link to the Clawback Material, return or destroy the native file from the network path;
 - v. If the Database has an image load file, locate the document image(s) of the Clawback Material loaded into the viewing software, return or destroy the image file(s) corresponding to the recalled documents, and remove the line(s) corresponding to the document image(s) from the image load file;
 - vi. Apply the same process to any additional copies of the document or database, where possible;
 - vii. Locate and return or destroy all other copies of the Clawback Material, whether in electronic or hardcopy form. If copies of the document are contained on write-protected media such as CDs or DVDs, these media shall be returned or destroyed and rendered unusable, with the exception of production media received from the producing party, which shall be treated as described in this Section;
 - viii. If the Clawback Material was produced in a write-protected format, the producing party shall, at its election, either (a) provide a replacement copy of the relevant production from which the Clawback Material has been removed, in which case the receiving party shall destroy and render unusable the original production media; or (b) allow the receiving party to retain the original

production media, in which case the Receiving Party shall take steps to ensure that the Clawback Material will not be used; and

- ix. The receiving party must confirm by letter to the producing party that the procedure for the Clawback Information set forth in this Section has been completed within 14 days of the Clawback Notice, absent good cause.

C. **Depositions and Hearings.** If Clawback Material is identified during a deposition or hearing, the producing party may state on the record that the material is subject to clawback. The transcript and any exhibits containing the Clawback Material shall be treated as sequestered and shall not be used or further disclosed pending resolution, except as necessary to address the clawback challenge. The parties shall cooperate to substitute non-privileged excerpts where feasible.

III. PRIVILEGE LOG TEMPLATE

A. The parties shall serve privilege logs in substantially the following format:

Log ID	Bates	Date Sent, Created, and Last Modified	Author	Recipients	Subject	Claimed Basis for Withholding	Notes
1			[Full name and email address]	[Full name and email address for each recipient]			

Date: November 4, 2025

s/ Jerry W. Blackwell
 JERRY W. BLACKWELL
 United States District Judge