UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 25, 2008

CBCA 395, 455

LFH, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Richard J. Conway, Scott Arnold, and Michael J. Slattery of Dickstein Shapiro LLP, Washington, DC, counsel for Appellant.

Robert M. Notigan and Leigh Erin S. Izzo, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

DANIELS, Board Judge (Chairman).

ORDER

As the parties slog their way through discovery, they continue to disagree as to various matters, principally those involving claims of privilege by the respondent, the General Services Administration (GSA). The disagreements affect nearly two hundred documents. In the interest of economy, rather than reviewing each and every one of those documents, the Board in this order provides guidelines which we expect the parties to apply.

The principal questions raised by the parties are as follows:

1. Are documents which GSA has shared with personnel of the Social Security Administration (SSA) subject to the attorney-client privilege or the attorney work product privilege?

2. Has GSA waived claims of privilege as to certain documents by circulating those documents to certain GSA personnel?

3. Has GSA waived claims of privilege as to certain documents by altering and supplementing those claims as to those documents in the course of addressing discovery disputes?

4. Should the Board (a) require the appellant, LFH, LLC (LFH), to affirm that it has produced the single relevant, non-privileged document from a particular electronic mail account, or (b) require LFH to produce all relevant, non-privileged documents from that account?

We address each of these questions in turn.

1. The attorney-client privilege is a common law concept that protects a confidential communication between a client and an attorney or an attorney's agent, if the purpose of the communication is to obtain legal services or advice. *LFH, LLC v. General Services Administration*, CBCA 395, et al. (Nov. 28, 2007), slip op. at 2 (*LFH*) (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)). The purpose of this privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. The attorney work product privilege is enunciated in Federal Rule of Civil Procedure 26(b)(3), which provides that documents and tangible things prepared in anticipation of litigation or for trial by or for a party or its representative (including its lawyer) are ordinarily not discoverable. *See also Hickman v. Taylor*, 329 U.S. 495 (1947). "The purpose of this privilege is to 'encourage[] attorneys to write down their thoughts and opinions with the knowledge that their opponents will not rob them of the fruits of their labor.'" *TAS Group, Inc. v. Department of Justice*, CBCA 52, 07-2 BCA ¶ 33,641, at 166,604 (quoting *In re EchoStar Communications Corp.*, 448 F.3d 1294, 1301 (Fed. Cir.), *cert. denied sub nom. TiVo Inc. v. EchoStar Communications Corp.*, 127 S. Ct. 846 (2006)).

Both privileges can be properly asserted only if the attorney involved is the attorney for the client (or party) in question. This principle is implicit in the attorney-client privilege and is clearly stated in the Rule which establishes the attorney work product privilege. *See, e.g.*, *In re Subpoena Served on the California Public Utilities Commission*, 892 F.2d 778, 781 (9th Cir. 1989); *Ramsey v. NYP Holdings, Inc.*, No. 00 Civ. 3478, 2002 WL 1402055, at *6

(S.D.N.Y. June 27, 2002) (quoting 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure: Civil* § 2024, at 354-56 (2d ed. 1994)). The question to be resolved is whether counsel for GSA, which leased from LFH the building which is at issue in these cases, is the attorney for SSA, which physically occupied the building under an agreement with GSA.

LFH asserts, based on an electronic mail message it obtained through discovery, that we can quickly conclude that no attorney-client or attorney work product privilege is applicable in these cases. The message, sent on April 25, 2002, from a senior GSA regional official to GSA, SSA, and contractor personnel, reads, "Everyone -- all this email is discoverable -- and don't think Mr. Haney's not smart enough to know that -- or at least his lawyers." Appellant's Reply Brief, Exhibit A at G0175615. According to LFH, "That e-mail constitutes the direction of a client to its attorney that no inter-agency privilege exists, and also constitutes a binding admission by GSA that such communications did not constitute work product." Appellant's Reply Brief at 4. We see the message differently: it is merely a layman's understanding of applicable law -- and even if it were otherwise, because a contractor was involved in the exchange of correspondence, the conclusion expressed could be no more than a restatement of the law explained in our November 28, 2007, order: disclosure of a document by a government agency to a contractor waives the attorney-client privilege. *See LFH*, slip op. at 5 (quoting *AT&T Communications Inc. v. General Services Administration*, GSBCA 14732, 99-2 BCA ¶ 30,580, at 157,014-15, *aff'd sub nom. AT&T Communications, Inc. v. Perry*, 296 F.3d 1307 (Fed. Cir. 2002)). We must delve deeper into this matter in order to make a ruling.

GSA maintains, "Simply put, SSA is GSA's client in this matter." Appellant's Motion to Compel Production of Documents, Exhibit 3 at 3. In support of the proposition that such a relationship is possible, GSA cites two cases in which courts found that attorneys employed by one government agency were representing another agency -- *Cities Service Helex, Inc. v. United States*, 216 Cl. Ct. 470 (1978), and *Hollar v. Internal Revenue Service*, No. 95-1882, 1997 WL 732542 (D.D.C. Aug. 7, 1997). As LFH points out, these decisions are inapposite because the attorneys there were employed by the Department of Justice (DOJ), and except as otherwise authorized by law, DOJ lawyers represent the entire United States Government, including all agencies thereof, in litigation before United States courts. 28 U.S.C. § 516 (2000); *see also* 5 U.S.C. § 3106 (agencies may not hire attorneys for the conduct of such litigation; they must refer matters to the DOJ). Boards of contract appeals are not courts, however. *Sterling Federal Systems, Inc. v. Goldin*, 16 F.3d 1177, 1182, 1184, 1185-86 (Fed. Cir. 1994); *SMS Data Products Group, Inc. v. Austin*, 940 F.2d 1514, 1517 (Fed. Cir. 1991);

ViON Corp. v. United States, 906 F.2d 1564, 1566-67 (Fed. Cir. 1990).[1] Proceedings before these boards are not "litigation" for the purpose of 28 U.S.C. § 516, and DOJ lawyers do not represent agencies (other than their own agency) before such boards. *PLB Grain Storage Corp. v. Glickman*, No. 95-1169, 1997 WL 242179, at *3 (Fed. Cir. May 12, 1997) (unpublished, but persuasive as confirming longstanding practice). Therefore, GSA attorneys do not have the same relationship to other agencies that DOJ attorneys have.

As to the question whether an attorney employed by an agency other than DOJ may be considered to represent another agency, we find decisions cited by LFH to be pertinent and persuasive. *United States v. American Telephone & Telegraph Co.*, 86 F.R.D. 603 (D.D.C. 1980), and *Gray v. Rhode Island Department of Children, Youth & Families*, 937 F. Supp. 153 (D.R.I. 1996), both conclude that the department or agency that employs an attorney is the attorney's client. 937 F. Supp. at 159; 86 F.R.D. at 616. The *Gray* decision contains this useful analysis:

> The District of Columbia Bar Special Committee on Government Lawyers and The Model Rules of Professional Conduct, the New York State Bar Association, and the State Bar of Montana Ethics Committee have all examined the issue of client identification with regard to governmental lawyers. All agree that the appropriate rule should be that a lawyer representing a governmental agency only represents that agency and not the government as a whole. . . . Treating the whole government as the client creates great difficulty in delineating the lines of ethical standards. . . . As the D.C. Bar Report noted "[t]he identification of one's client as the entire government would raise serious questions regarding client control and confidentiality." Thus, restricting the definition of the client to the lawyer's agency, proves to be the most appropriate answer for purposes of applying the Model Rules.

937 F. Supp. at 158-59 (citation omitted).

One of our predecessor boards, the General Services Administration Board of Contract Appeals, handled a case consistent with the rule established in *American Telephone* and *Gray*. In *Heritage Reporting Corp. v. General Services Administration*, GSBCA 10396,

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[1] The boards are, however, "courtlike" -- they "function as quasi judicial bodies" and have "quasi-judicial nature and powers." S. Rep. No. 95-1118 at 24, 25, 26, *reprinted in* 1978 U.S.C.C.A.N. at 5258, 5259, 5260; *see also Boeing Petroleum Services, Inc. v. Watkins*, 935 F.2d 1260 (Fed. Cir. 1991).

the board held that end-user agencies for which a contractor provided a service under a GSA contract were not parties to a case between the contractor and GSA. The board "recognize[d] that counsel for GSA does not represent the Department of Justice." 92-1 BCA ¶ 24,677, at 123,122 (1991). Consequently, statements by GSA counsel could not bind those agencies. 95-1 BCA ¶ 27,555, at 137,322 (1992). The other agencies were permitted to appear in the case, as represented by their own lawyers, for specific, limited purposes. 94-2 BCA ¶ 26,686; 92-1 BCA ¶ 24,677; 91-2 BCA ¶ 23,845. We expressly hold here that this practice was correct, and that an attorney who is employed by a government agency does not represent another agency when he or she appears before the Board.

American Telephone and *Gray* do recognize that there is an exception to this rule: when an attorney employed by one agency provides legal advice or assistance to another agency on a basis that is confidential among the clients and relates to a matter in which the two agencies have a substantial identity of legal interest, communications may be privileged. 937 F. Supp. at 159; 86 F.R.D. at 617. This exception is an expression of the common interest doctrine, pursuant to which "parties with shared interest in actual or potential litigation against a common adversary may share privileged information without waiving their right to assert the privilege." *Katz v. AT&T Corp.*, 191 F.R.D. 433, 437 (E.D. Pa. 2000) (quotation and citation omitted). "The nature of the interest, however, must be identical, not similar, and be legal, not solely commercial." *Id.* Furthermore, "[a] party which relies on the . . . common interest doctrine must establish that the parties had agreed to pursue a joint defense strategy. A written agreement is the most effective method of establishing the existence of a common interest agreement, although an oral agreement whose existence, terms and scope are proved by the party asserting it, may provide a basis for the requisite showing." *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007) (citing *Minebea Co. v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005) (quotation omitted).

GSA has not met its burden of demonstrating that the common interest doctrine should be invoked here. As LFH maintains, numerous documents which have been obtained through discovery show that although GSA and SSA agree that LFH should bear the costs which are at issue in our cases, the two agencies have disagreed strenuously as to which of them is at fault for various problems and should bear the costs if LFH prevails against GSA. Appellant's Motion to Compel at 12-13, Exhibits 5-9. Additionally, GSA has provided no evidence that the two agencies have agreed to pursue a joint defense strategy. We have neither a written agreement nor an affidavit or declaration as to an oral agreement to this effect.

We consequently conclude that any communications which GSA may have shared with any SSA personnel are not subject to either the attorney-client privilege or the attorney work product privilege.

2. Even within GSA, the circulation of some or all of the documents in question may have waived any claim of privilege. "[T]he test of whether the circulation of an otherwise privileged communication to others within an agency waives the [attorney-client] privilege 'is whether the agency is able to demonstrate that the documents, and therefore the confidential information contained therein, were circulated no further than among those members who are *authorized to speak or act for the organization in relation to the subject matter of the communication*." *Alexander v. Federal Bureau of Investigation*, 186 F.R.D. 154, 162 (D.D.C. 1999) (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (emphasis added in *Alexander*)). Another formulation of this test is that communications are privileged only if they remain within the small, "magic circle" of "closely related persons who are appropriate, even if not vital, to a consultation." *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 684 (1st Cir. 1997). "The burden is on the agency to demonstrate that confidentiality was expected in the handling of these communications, and that it was reasonably careful to keep this confidential information protected from general disclosure." *Coastal States*, 617 F.2d at 863.

In attempting to meet its burden, GSA has done two things. First, it has provided us with long lists of GSA employees who are said to have been involved, in one way or another, in dealing with the lease in question. Respondent's Response to Appellant's Motion to Compel, Exhibits A-C. Second, it has argued, "In a purely pragmatic sense, it is questionable why one would be included on a communication if [that individual was] not related to the issue at hand in any way at all." *Id.* at 7. This information and contention are far from sufficient to prove that each of the recipients of all the communications at issue was authorized to speak or act for GSA in relation to a subject of a communication, or was part of the magic circle of closely related persons who were appropriate, even if not vital, to a consultation. To this point in the proceedings, GSA has not shown why any of the communications at issue should be privileged.

We provide the following additional guidance with regard to the two privileges. The attorney-client privilege does not protect every document that is transmitted between a lawyer and a client. It protects confidential communications from clients to their lawyers made for the purpose of securing legal advice or services. It protects communications from lawyers to their clients only if the communications rest on confidential information obtained from the client. *Citizens for Responsibility & Ethics in Washington v. Office of Administration*, 249 F.R.D. 1, 4 (D.D.C. 2008) (citing *Tax Analysts v. Internal Revenue Service*, 117 F.3d 607, 618 (D.C. Cir. 1997)).

As to claims of attorney work product privilege, even if GSA is ultimately able to show that it met the test for confidentiality as to the individuals with whom a communication was shared, it must also set forth objective facts to show that the document in question was

prepared in anticipation of litigation or for trial, and that it was prepared by or for GSA or by or for a representative of GSA. *TAS Group*, 07-2 BCA at 166,604; *Caremark, Inc. v. Affiliated Computer Services, Inc.*, 195 F.R.D. 610, 613-14 (N.D. Ill. 2000). "[T]he work product privilege does not apply to documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation. . . . [O]nly disclosures that are inconsistent with keeping the information from an adversary constitute a waiver of the work product privilege." *United States v. Textron Inc.*, 507 F. Supp. 2d 138, 150, 152 (D.R.I. 2007) (quotation and citations omitted); *see also Caremark*, 195 F.R.D. at 615-16.

3. During the course of discovery, GSA produced a privilege log which LFH considered inadequate. LFH asked GSA to explain more fully why it believed that various documents were privileged. In fleshing out its explanations, the agency changed some of its claims of privilege from attorney-client to attorney work product and vice versa. LFH believes that this action merits a ruling that GSA has waived its claim of privilege as to the documents which are involved.

As support for its position, LFH calls to our attention the statement in *General Electric Co. v. Johnson*, No. 00-2855, 2007 WL 433095, at *3 (D. D.C. Feb. 5, 2007), that "[f]ailure to assert [a] privilege within a reasonable time, without a showing of good cause, constitutes a waiver of the privilege." LFH also notes the statement in *In re Honeywell International, Inc. Securities Litigation*, 230 F.R.D. 293, 299 (S.D.N.Y. 2003) that "[p]arties should not be permitted to re-engineer privilege logs to align their privilege assertions with their legal arguments."

In response, GSA maintains that *First Savings Bank, F.S.B. v. First Bank System, Inc.*, 902 F. Supp. 1356, 1361 (D. Kan. 1995), *rev'd on other grounds*, 101 F.3d 645 (10th Cir. 1996), is instructive. That decision contains these sentences: "As the federal rules, case law and commentators suggest, waiver of a privilege is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith. . . . [T]he sanction of waiver is best suited for the more serious discovery violations. . . . The courts have been more circumspect in finding a waiver of a privilege objection."

We believe that GSA's changes to its claims of privilege do not merit the sanction of waiver of privilege. Even in *General Electric*, where the court did impose such a sanction, the basis of the ruling was a finding that the moving party had been prejudiced by the other party's action. 2007 WL 433095, at *6. Here, GSA acted promptly, after LFH requested revisions to the agency's privilege log, to make those revisions. In doing so, it realized, and informed LFH, that some of the initial claims had not been justified. LFH benefited from

GSA's revisions and has not demonstrated that it was prejudiced by those revisions. We deny the request for sanctions.

4. In responding to LFH's motion to compel the production of documents for which privilege was claimed, GSA filed a cross-motion asking the Board to require LFH to affirm that it has produced the single relevant, non-privileged document from the electronic mail account FLHANEYCO@AOL.COM, or to require LFH to produce all relevant, non-privileged documents from that account. LFH replied, "The fact that LFH has produced a single e-mail from a particular e-mail account is no indication that LFH has failed to meet its obligations under the Board's rules . . . . In accordance with the Board's rules, LFH will continue to produce any responsive, non-privileged documents should any be created, and has, in fact already done so." Appellant's Reply Brief at 32.

LFH has effectively made the affirmation that GSA requests the Board to require the appellant to make. We have no reason to doubt LFH's statements. Accordingly, we have no basis for imposing additional requirements on the appellant. *In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil*, 244 F.R.D. 434, 438 (N.D. Ill. 2007); *Cohn v. Taco Bell Corp.*, No. 92 C 5852, 1995 WL 519968 at *4 (N.D. Ill. Aug. 30, 1995).

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STEPHEN M. DANIELS
Board Judge