UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO COMPEL DENIED: December 8, 2022

CBCA 6558

RITA R. WADEL REVOCABLE LIVING TRUST AND 229 JEBAVY ROAD, LLC dba LUDINGTON INDUSTRIES BUILDING,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

John V. Byl, Gaëtan Gerville-Réache, and Adam D. Bruski of Warner Norcross + Judd LLP, Grand Rapids, MI, counsel for Appellant.

James Scott, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

BEARDSLEY, Board Judge (Chair).

ORDER

The General Services Administration (GSA) filed a motion to compel the production of certain documents withheld as privileged by Rita R. Wadel Revocable Living Trust and 229 Jebavy Road, LLC dba Ludington Industries Building (the Trust). We find that neither the fact that the Trust's counsel sent privileged communications to a trustee's work email address nor the fact that a trustee sent privileged communications to a Trust beneficiary defeats the attorney-client privilege or the work product doctrine. The motion to compel is, therefore, denied.

Background

I. Communications from Trust Counsel to Trustee's work email address

Mary Pat Dunleavy is a trustee of the Trust and a Senior Vice President and Agency Division Manager at Fidelity National Financial (FNF). For several years, the Trust's counsel sent emails containing information relating to legal representation of the Trust to Ms. Dunleavy's FNF email address. The Trust maintains that these emails are protected both by the attorney-client privilege and the work product doctrine.

Ms. Dunleavy asserts that she had a reasonable belief that the emails were confidential:

> There has never been a breach of [Ms. Dunleavy's] email privacy by any entity either within or outside of the company. In fact, on occasion, in her senior role at her employer, Ms. Dunleavy has been involved in incidents where the company did need to get access to an employee's email. Such incidents have taken place under extraordinary circumstances and required sign off by the company's counsel. Further, . . . company emails not specifically marked for retention are automatically deleted by the system after a short time period—approximately 180 days.

Appellant's Response to the Motion to Compel at 3.

FNF's Code of Business Conduct & Ethics (the Code) states:

> Occasional personal use of email is acceptable. However, you should have no expectation of privacy if you send email using Company computers. You also must abide by all Company policies when using Company computers. You must never send harassing or inappropriate emails, chain letters, personal advertisements or solicitations.

Respondent's Motion to Compel, Exhibit 3 at 25.

II. Emails from a Trustee to a Beneficiary

Another trustee, Patricia Gowell, sent emails to one of the Trust's beneficiaries containing communications from the Trust's counsel. The Trust asserts that the redacted portions of these emails contain information protected by the attorney-client privilege and/or the work product doctrine. According to the Trust, the beneficiaries take an active and involved role in decisions regarding the Trust.

Discussion

I. Communications from Trust Counsel to Trustee's work email address

GSA argues that the attorney-client privilege does not apply to emails sent to Ms. Dunleavy's work email address because she had no reasonable expectation of privacy.

GSA asserts that the FNF Code put Ms. Dunleavy on notice that any emails sent or received from her work email address would be accessible by a third-party, thereby rebutting any reasonable expectation of confidentiality. "Assuming a communication is otherwise privileged, the use of the company's e-mail system does not, without more, destroy the [attorney-client] privilege." *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 251 (Bankr. S.D.N.Y. 2005).

The question of privilege comes down to "whether the [employee's] intent to communicate in confidence was objectively reasonable." *Asia Global*, 322 B.R. at 257-59 (identifying four factors to determine reasonableness: "(1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?"); *see also Convertino v. United States Department of Justice*, 674 F. Supp. 2d 97, 110 (D.D.C. 2009). The majority of circuits consider "whether the client reasonably understood the [conversation] to be confidential" in determining whether communications are privileged. *Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1176 (S.D. Cal. 2022) (citing *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) (quoting *McCormick on Evidence* § 91, at 189 (1972), and numerous other cases)). "Determining the client's intent hinges on the circumstances of the communication, such as whether disclosure to third parties was intended or considered." *Id.* at 1177 (citing *In re LTV Securities Litigation*, 89 F.R.D. 595, 603-04 (N.D. Tex. 1981)). "In light of the variety of work environments, whether the employee has a reasonable expectation of privacy must be decided on a case-by-case basis." *Asia Global*, 322 B.R. at 257 (citing *O'Connor v. Ortega,* 480 U.S. 709, 718 (1987)); *see Convertino*, 674 F. Supp. 2d at 110.

We find that it was reasonable for Ms. Dunleavy to expect to communicate in confidence with the Trust's counsel through her work email. The FNF Code does not ban personal use of the work computer system but allows "occasional personal use." Moreover, while the Code explicitly states that an employee should not expect privacy, it refers only to emails "sent" from the work computers, not those received by the work computers. The emails at issue here were sent to, not from, Ms. Dunleavy's work email address.

There is also no indication that the company monitored the employee's computer or emails, or even reserved the right to do so, and the Code is silent as to third-party access. Although Ms. Dunleavy indicated that in rare circumstances the company had accessed employee emails, such access seemed extraordinary, not routine, and the basis for accessing those emails is unknown. Considering the *Asia Global Crossing* factors and the circumstances here, we conclude that Ms. Dunleavy reasonably understood the emails sent from the Trust's counsel to be confidential. Therefore, the attorney-client privilege has not been destroyed as a result of the Trust's counsel sending emails to Ms. Dunleavy's work email account.

II. Emails from Trustee to a Beneficiary

GSA argues that the trustee waived the attorney-client privilege by disseminating otherwise privileged information to a beneficiary—a nonparticipant in trust management without a need to know the privileged information. The Trust argues that the beneficiaries of the Trust had a need to know this information and that they may assert the attorney-client privilege over the communications because the beneficiaries are the clients and privilege holders, not the trustee.

The common law fiduciary exception to the attorney-client privilege "prevents a trustee from withholding from trust beneficiaries attorney-client communications relating to the administration of the trust." *Western Shoshone Identifiable Group v. United States*, 158 Fed. Cl. 633, 685 n.32 (2022); *see United States v. Jicarilla Apache Nation*, 564 U.S. 162, 170-73, 190 (2011). This exception is based on the idea that the trustees obtain legal advice on behalf of the beneficiaries because the trustee has "a fiduciary obligation to act in the beneficiaries' interest when administering the trust." *Jicarilla Apache Nation*, 564 U.S. at 172 (citing *Riggs National Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976)); *see In re Vogel Living Trust*, No. 288837, 2010 WL 2136643, at *5 (Mich. Ct. App. May 27, 2010).

For that reason, the beneficiaries are the true "clients" of the Trust's attorney and, as such, are the proper holders of the attorney-client privilege. *Riggs*, 355 A.2d at 713-14 ("The fiduciary obligations owed by the attorney at the time he prepared the memorandum were to the beneficiaries as well as to the trustees."). "[T]he fiduciary exception is not an 'exception' to the attorney-client privilege at all. Rather, it merely reflects the fact that, at least as to advice regarding plan administration, a trustee is not 'the real client' and thus never enjoyed the privilege in the first place." *Advanced Physicians, S.C. v. Connecticut General Life Insurance Co.*, 431 F. Supp. 3d 857, 862 (N.D. Tex. 2020) (internal citations omitted).

The fiduciary exception supports a finding that the beneficiaries, not the trustee, are the "clients" here and, therefore, the privilege holders. "In cases applying the fiduciary

exception, courts identify the 'real client' based on whether the advice was bought by the trust corpus, whether the trustee had reason to seek advice in a personal rather than a fiduciary capacity, and whether the advice could have been intended for any purpose other than to benefit the trust." *Jicarilla Apache Nation*, 564 U.S. at 179 (citing *Riggs*, 355 A.2d at 711-12). Assuming that, here, the Trust paid for the attorney, the trustee sought advice in her fiduciary capacity, and the advice was intended to benefit the Trust, the real client was the beneficiary, not the trustee. As such, the attorney-client privilege was not waived or defeated.[1]

III. Work Product Doctrine

The Trust asserts that the attorney work product doctrine would protect the emails from disclosure to GSA. "[A]bsent waiver, a party may not obtain the 'opinion' work product of its adversary." *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 294 (6th Cir. 2002). The work product doctrine protects the work product created by attorneys in anticipation of litigation but does not protect the facts contained within or underlying attorney work product. *TAS Group, Inc. v. Department of Justice*, CBCA 52, 07-2 BCA ¶ 33,641, at 166,604 (citing *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947), and *In re Unilin Decor N.V.*, 153 F. App'x 726, 728 (Fed. Cir. 2005)); Fed. R. Civ. P. 26(b)(3) (the scope of the privilege is limited to "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including the other party's attorney)"). The Trust need not produce attorney work product, even if the emails were sent to Ms. Dunleavy at her work email address or the emails were sent to the Trust's beneficiaries.

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[1] We also find this situation analogous to that of a corporation sharing privileged attorney communications with its employees. The attorney-client privilege extends to a corporation's employee if the employee had a need to know the privileged information or was securing legal advice. *See Upjohn Co. v. U.S.*, 449 U.S. 383 (1981); *Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 514 (S.D. Cal. 2003); *Williams v. Spring/United Management Co.*, 238 F.R.D. 633, 642 (D. Kan. 2006). We find the privilege preserved here because the beneficiary, as a result of the fiduciary relationship between the beneficiary and the trustee, had a need to know the information.

Decision

The motion to compel is **DENIED**.

Erica S. Beardsley
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Board Judge