

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
RICHARD G. CONVERTINO)	
)	
Plaintiff,)	Civil Action No. 04-00236 (RCL)
)	
v.)	
)	
UNITED STATES DEPARTMENT OF JUSTICE,)	
<i>et al.</i>)	
)	
Defendants.)	
_____)	

**JONATHAN TUKEL’S MOTION AND MEMORANDUM OF LAW
TO INTERVENE TO ASSERT VARIOUS PRIVILEGES
IN RESPONSE TO PLAINTIFF’S MOTION TO COMPEL PRODUCTION
FROM DEFENDANT UNITED STATES DEPARTMENT OF JUSTICE**

Pursuant to Local Rule 7(j) and Federal Rule of Civil Procedure 24(b), Jonathan Tukul respectfully requests leave of the Court to intervene in the above-caption action. To that end, Mr. Tukul files this Motion and incorporated Memorandum of Law to Intervene in order to assert the attorney-client privilege and invoke the work product doctrine with respect to certain documents sought in connection with plaintiff Richard G. Convertino’s Motion to Compel Production from Defendant United States Department of Justice (“DOJ”) (“Motion to Compel”).

Mr. Tukul was named as a defendant to Count I of the Complaint filed in the above-captioned action on February 13, 2004. Subsequently, on October 19, 2005, the Court dismissed Count I of the Complaint, and in doing so, dismissed the suit against Mr. Tukul.¹ In the spring of 2009, the only defendant remaining, the DOJ, was served with discovery requests and in

¹ At present, only Count II of the Complaint survives; Count II asserts a claim against the DOJ for violations of the Privacy Act. Mr. Tukul ceased being First Assistant U.S. Attorney in May 2005, and thus, per Federal Rule of Civil Procedure 25(d), he was automatically dismissed as an official capacity defendant at that time.

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Bankruptcy Courts

response, asserted various privileges, including the attorney-client privilege, over approximately 3,500 pages of documents. *See* Motion to Compel at 1. Within the 3,500 pages are approximately 37 e-mail communications between Mr. Tukul and his personal counsel, Cadwalader, Wickersham & Taft LLP (“Cadwalader”), sent via his DOJ-provided e-mail address. *See* Motion to Compel, Ex. A at DOJ6000414-419, DOJ6000469-504, DOJ6000508-555, DOJ6000615-616, DOJ7000401, DOJ7002894-2980.

As Mr. Tukul is the holder of privileges regarding these documents, he respectfully seeks to intervene in this case in order to assert all applicable privileges concerning documents DOJ6000414-419, DOJ6000469-504, DOJ6000508-555, DOJ6000615-616, DOJ7000401, DOJ7002894-2980, and any other privileged communications between Mr. Tukul and his personal counsel (“Privileged Documents”). Mr. Tukul’s grounds for asserting these privileges are fully briefed in his Motion and Memorandum of Law in Opposition to Plaintiff’s Motion to Compel, attached hereto as Exhibit A.²

ARGUMENT

Federal Rule of Civil Procedure 24(b) provides for permissive intervention, upon timely motion, “when an applicant's claim or defense and the main action have a question of law or fact in common.” Fed. R. Civ. P. 24(b)(2). In exercising its discretion to consider a motion for permissive intervention, “the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Fed. R. Civ. P. 24(b)(3). Mr. Tukul meets Rule 24(b)’s prerequisites for permissive intervention.

² Also attached to the instant motion is the Notice of Appearance for James K. Robinson, counsel to Mr. Tukul. *See* Exhibit B.

First, Mr. Tukul's motion is timely. It was not until the spring of 2009 that Mr. Tukul received notice that the plaintiff's document requests to the DOJ called for production of the Privileged Documents. Upon receiving such notice, Mr. Tukul immediately sought to identify and assert all applicable privileges relating to the Privilege Documents.

Second, the privileges that Mr. Tukul seeks to assert are directly implicated by the discovery requests made by the plaintiff. As the plaintiff's Motion to Compel indicates, he argues that the success (or failure) of his case is inextricably intertwined with the Privileged Documents. *See* Motion to Compel at ___. Further, as recognized by the plaintiff in his Motion to Compel, Mr. Tukul is the sole holder of the privileges. *Id.* at ___. Thus, no current party to the litigation can effectively assert the attorney-client privilege and invoke the work product doctrine on his behalf.

Finally, allowing Mr. Tukul to intervene in this action for the limited purpose of asserting his attorney-client privilege and invoking the work product doctrine as to the Privilege Documents will not unduly delay the litigation or prejudice the rights of the existing parties. This case, although filed in 2004, has not progressed past the point of initial discovery. Thus, ample time still exists for the parties to work cooperatively to produce all non-privileged material relevant to the matter. To that end, Mr. Tukul stands ready to cooperate in any way he can to assist in the efficient and timely production of such material.

Thus, Mr. Tukul respectfully requests that the Court grant his intervention in this case for the limit purpose of asserting his attorney-client privilege and invoking the work product doctrine regarding the Privileged Documents.

Dated: July 31, 2009

Respectfully Submitted,

By: /s/ James K. Robinson
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ATTORNEY FOR JONATHAN TUKEL

CERTIFICATE OF SERVICE

I hereby certify that I have this date caused one true and correct copy of the within documents to be served in the above-captioned case by regular mail on all parties of record.

/s/ James K. Robinson

Exhibit A

to Jonathan Tukul's

Motion and Memorandum of Law to Intervene

to Assert Various Privileges in Response to

Plaintiff's Motion to Compel Production from

Defendant United States Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
RICHARD G. CONVERTINO)	
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Plaintiff,)	Civil Action No. 04-00236 (RCL)
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UNITED STATES DEPARTMENT OF JUSTICE,)	
<i>et al.</i>)	
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Defendants.)	
_____)	

**JONATHAN TUKEL’S MOTION AND MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF’S MOTION TO COMPEL**

COMES NOW Jonathan Tukul, who files this Motion and incorporated Memorandum of Law in opposition to plaintiff Richard G. Convertino’s Motion to Compel Production from Defendant United States Department of Justice (“DOJ”) to assert the attorney-client privilege and invoke the work product doctrine concerning documents DOJ6000414-419, DOJ6000469-504, DOJ6000508-555, DOJ6000615-616, DOJ7000401, DOJ7002894-2980, and any other privileged communications between Mr. Tukul and his personal counsel (“Privileged Documents”) and preclude the production of such documents and states as follows:

On February 13, 2004, the plaintiff filed an action against the DOJ for violations of the Privacy Act, 5 U.S.C. § 552a and for injunctive relief under the First Amendment to the United States Constitution, the Lloyd Lafayette Act and the Administrative Procedures Act. *See generally* Complaint (Dkt. 1). In addition to the DOJ, the Complaint brought a cause of action against Mr. Tukul and others in their official capacity. *Id.* at ¶ 7. The plaintiff alleged that the DOJ, Mr. Tukul, and others disclosed sealed court records to the Detroit Free Press and used sealed court transcripts to attack the plaintiff’s credibility in retaliation for the plaintiff making

statements to Washington, D.C. government officials and testifying before the United States Senate Finance Committee concerning *United States v. Koubriti*. *Generally id.* As to Mr. Tukul, Count I of the Complaint alleged that he, with the DOJ, disclosed confidential, false and misleading information about the plaintiff to the press and failed to properly safeguard confidential personnel records relating to the Office of Professional Responsibility's investigation of the plaintiff. *Id.* at 20-21.

On October 19, 2005, the Court dismissed Count I of the Complaint, and in doing so, dismissed the suit against Mr. Tukul.¹ Subsequently, the only defendant remaining, the DOJ, was served with discovery requests and in response, asserted various privileges, including the attorney-client privilege and work product doctrine, over approximately 3,500 pages of documents. *See* Motion to Compel at 1. Within the 3,500 pages are approximately 37 e-mail communications between Mr. Tukul and his personal counsel, Cadwalader, Wickersham & Taft LLP ("Cadwalader"), sent via his DOJ-provided e-mail address. *See* Motion to Compel, Ex. A at DOJ6000414-419, DOJ6000469-504, DOJ6000508-555, DOJ6000615-616, DOJ7000401, DOJ7002894-2980; *see also* June 15, 2009 Declaration of Jonathan Tukul ("Tukul Decl.") ¶¶ 5, 6. The Privileged Documents span a short time frame, August 2004 and December 2004, and comprise no more than 5% of the total number of privileged documents. Motion to Compel, Ex. A. None of the Privileged Documents have been shared with third parties.

ARGUMENT

I. COMMUNICATIONS BETWEEN MR. TUKEL AND CADWALADER ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

¹ Count II of the Complaint has not been dismissed. Count II only asserts a claim against the DOJ for violations of the Privacy Act.

Communications between Mr. Tukul and Cadwalader are protected by the attorney-client privilege. Mr. Tukul retained Cadwalader in anticipation of litigation in or around 2004. Tukul Decl. ¶ 5. All of the Privileged Documents are between Mr. Tukul and Cadwalader only – no third parties are included on any communications – and are for the purposes of securing legal advice relating to litigation issues implicating Mr. Tukul. Tukul Decl. ¶¶ 5, 7, 8; *see e.g., In re Sealed Case*, 737 F.2d 94, 316-17 (D.C. Cir. 1984) (quoting *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950)). Furthermore, the DOJ has produced a sufficiently descriptive privilege log to the plaintiff (Motion to Compel, Ex. A) which fully and accurately describes the nature of the Privileged Documents. *See* Fed. R. Civ. P. 26(b)(5). Mr. Tukul has not waived the attorney-client privilege that exists between him and Cadwalader. Tukul Decl. ¶¶ 8, 9.

II. MR. TUKEL HAS NOT WAIVED THE ATTORNEY-CLIENT PRIVILEGE WITH RESPECT TO COMMUNICATIONS WITH CADWALADER.

Contrary to the plaintiff's argument, Mr. Tukul's attorney-client privilege was not waived by virtue of his use of his DOJ-issued e-mail account and computer. Indeed, "[a]ssuming a communication is otherwise privileged, the use of the company's e-mail system does not, without more, destroy the privilege." *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 251 (S.D.N.Y. 2005).

Federal Rule of Evidence 502(b)² states that no waiver of the attorney-client privilege or

² Rule 502(b) is applied to matters filed prior to September 19, 2008 (the enactment date) where it is "just and practicable" to do so. Pub. L. No. 110-322, 122 Stat. 3537 (Sept. 19, 2008). Here, the request for and production of documents post-dates the enactment of Rule 502(b). Thus, prior to that request and production no privilege issues arose and it is "just and practicable" for this Court to apply the limitations set forth in Rule 502(b) to the Privileged Documents. Consequently, all of the cases cited by the plaintiff in his Motion to Compel are inapposite as all of them pre-date the enactment of Federal Rule of Evidence 502(b) which expressly addresses inadvertent disclosures of otherwise privileged material.

work product doctrine occurs where “(1) the disclosure is inadvertent;” and “(2) the holder of the privilege or protection took reasonable steps to prevent disclosure.” Fed. R. Evid. 502(b) (2008). The Advisory Committee Note to Rule 502(b) provides the following “guidelines” to assist in assessing whether an inadvertent disclosure waived the privilege: “the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness” as well as “the number of documents to be reviewed and the time constraints for production.” Fed. R. Evid 502(b) advisory committee’s note (2008) (citing *U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985)).

To the extent any disclosure of privileged material occurred, it was most certainly inadvertent. At all times, Mr. Tukul’s e-mail was password protected; thus, no third parties could access any material in his e-mail other than through a collection of data from DOJ’s electronic servers. Tukul Decl. ¶ 4. Although, Mr. Tukul understood that DOJ Information Technology personnel accessed his DOJ-issued computer in connection with maintaining and upgrading the DOJ’s electronic systems, he was aware that performing systems maintenance and upgrades did not involve accessing personal files, including e-mail. Tukul Decl. ¶ 4. Mr. Tukul has not shared any of the Privileged Documents with any third parties. Tukul Decl. ¶ 8.

In addition, Mr. Tukul deleted all e-mail sent or received from Cadwalader from his e-mail inbox immediately after reading it, and it would have been his practice to empty the electronic trash bin where deleted messages are temporarily stored. Tukul Decl. ¶ 10; *see also Curto v. Med. World Commc’ns, Inc.*, No. 03-CV-6327, 2006 WL 1318387, *9 (E.D.N.Y. May 15, 2006) (holding that because plaintiff took affirmative steps to delete personal privileged communications and company had no direct access to her computer, combined with ambiguous nature of company’s policies plaintiff’s privilege remained intact). Thus, he was unaware that

copies of his privileged communications with Cadwalader were located in any DOJ electronic system until receiving notice from DOJ counsel in April 2009 that privileged correspondence had been collected in connection with this case. Tukul Decl. ¶ 10. Consequently, Mr. Tukul reasonably expected that his communications with Cadwalader were confidential and were not being disclosed to any third parties, including the DOJ. *In re Asia Global Crossing, Ltd.*, 322 B.R. at 258 (“the question of privilege comes down to whether the intent to communicate in confidence was objectively reasonable.”); *Id.*

Moreover, “the objective reasonableness of [Mr. Tukul’s] intent will depend on the [DOJ’s] e-mail policies regarding use and monitoring, its access to the e-mail system, and the notice provided to the employees.” *Id.* at 251, 258; *Curto*, 2006 WL 1318387 at *2, 4-5, 7. The DOJ policies concerning e-mail and Internet usage expressly *allow* employees to use their DOJ-provided e-mail mail accounts for personal use. Tukul Decl. ¶ 2. Prior to the collection of the Privileged Documents for this case, Mr. Tukul was not aware that e-mail sent from his DOJ account was monitored by the DOJ, even though DOJ policy permits monitoring under some circumstances not applicable here. Tukul Decl. ¶ 12. Indeed, he was not aware that, in practice, the DOJ randomly audited or monitored employees’ e-mail even though DOJ policy permits monitoring for some purposes. Tukul Decl. ¶ 13; *see also Curto*, 2006 WL 1318387 at *5 (holding that a determination of whether the company enforced its electronic usage policy assists in assessing the reasonableness of the precautions taken by the employee to prevent inadvertent disclosure). Finally, Mr. Tukul was not informed that his e-mail was being collected by anyone

within the DOJ prior to such a collection,³ Tukul Decl. ¶ 14, and therefore, prior to this time, he did not have the opportunity to assert the attorney-client privilege.

In light of Mr. Tukul's understanding that DOJ policies permitted his personal use of his DOJ e-mail address and his reasonable belief that the steps he took to ensure the confidentiality of his communications with Cadwalader were effective, Mr. Tukul's attorney-client privilege has not been inadvertently waived. Thus, the plaintiff is not entitled to the production of the Privileged Documents.

III. COMMUNICATIONS BETWEEN MR. TUKEL AND CADWALADER CONTAIN MATERIAL PROTECTED BY THE ATTORNEY WORK PRODUCT DOCTRINE.

Federal Rule of Civil Procedure 26(b)(3) protects from discovery "documents and tangible things that are prepared in anticipation of litigation . . . by or for another party or its representative (including the other party's attorney . . .)." Work product only may be disclosed upon a showing of "substantial need" and the inability to obtain the "substantial equivalent" without undue hardship. *Id.* Courts "must take particular care to protect the 'mental impressions, conclusions, opinions, or legal theories of an attorney'" which may be reflected in correspondence or "countless other tangible and intangible ways." *Banks v. Office of the Senate Sergeant-At-Arms and Doorkeeper*, 236 F.R.D. 16, 19 (D.D.C. 2006) (citations omitted). Thus, opinion work product is "entitled to special protection" and as a result, a "stronger showing of necessity" is required to overcome the protections of the attorney work product doctrine. *Id.* (quoting *Byers v. Burleson*, 100 F.R.D. 436, 439 (D.D.C. 1983) (citing Fed. R. Civ. P. 26(b)(3))

³ Notably, Mr. Tukul has never provided (or been asked to provide) his DOJ-issued computer to anyone within the DOJ, including anyone in the United States Attorney's Office for the Eastern District of Michigan, DOJ Criminal Division, Executive Office of U.S. Attorneys, Executive Office of U.S. Trustees, or Assistant Attorney General for Administration. Tukul Decl. ¶ 11.

and *Upjohn Co. v. United States*, 449 U.S. 383, 400-01 (1981)); *In re Sealed Case*, 856 F.2d 268, 273 (D.C. Cir. 1988)).

In this case, many of the e-mails exchanged between Mr. Tukul and his counsel include highly confidential opinion work product which should not be disclosed. Indeed, the majority of the Privileged Documents included on the DOJ's privilege log directly pertain to drafts and responses, crafted by Cadwalader and Mr. Tukul, to the Office of Inspector General's ("OIG") draft investigation report.⁴ See Exhibit A to the Motion to Compel entries DOJ7002894-2938 and DOJ7002944-2980. E-mail communications between Mr. Tukul and his counsel exchanging drafts of responses or letters concerning the OIG investigation report constitute opinion work product which should be protected from disclosure. See *Banks*, 236 F.R.D. at 21 (finding that exchanges of drafts between the Office of Sergeant-at-Arms of the United States Senate and its counsel were "clearly" opinion work product because they "tend[ed] to reveal counsel's opinions and mental impressions" and were thus, protected from disclosure).

Furthermore, these documents unquestionably were created in anticipation of litigation. See also Tukul Decl. ¶ 7. At the time of the communications (August to December 2004), the instant suit had already been filed. Moreover, Mr. Tukul retained Cadwalader to represent him in connection with issues directly relevant to this suit and in anticipation of potential litigation surrounding those issues. Thus, all communications between Cadwalader and Mr. Tukul were made in anticipation of litigation.

Finally, the plaintiff cannot demonstrate a substantial need for the protected material. The OIG's investigation report has been made available to the plaintiff. See Dkt. 47 at 4.

⁴ The OIG provided individuals named in or interviewed for the report with the opportunity to comment on a draft of the report prior to it being finalized.

Because Mr. Tukul did not draft the report and was not responsible for compiling the information contained directly therein, any responses or commentary from Mr. Tukul to the report are not likely to assist the plaintiff in proving its case against DOJ and are thus, irrelevant. Indeed, any communications he had with his counsel concerning the report, which were not shared with third parties, would not assist the plaintiff in proving the “existence of a coverup.” *See* Motion to Compel at 17. Because Cadwalader is not part of the United States government (including the DOJ), it stands to reason that communications solely with Cadwalader would not prove the existence of a cover-up by the DOJ.

CONCLUSION

For the foregoing reasons, Mr. Tukul respectfully requests that the Court deny the plaintiff’s Motion to Compel the production of documents DOJ6000414-419, DOJ6000469-504, DOJ6000508-555, DOJ6000615-616, DOJ7000401, DOJ7002894-2980, and any other Privileged Documents.

Dated: July 31, 2009

Respectfully Submitted,

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