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30 AUG 1978

MEMORANDUM FOR: Cono Namorato
Deputy Assistant Attorney General
Tax Division

Quinlan J. Shea, Jr.
Director
Office of Privacy and Information
Appeals

Re: The Attorney-Client Relationship in Department of Justice Representation of Individual Employees and Release of Information obtained during that Representation under the Freedom of Information Act

We have been asked for our views on a number of questions that have arisen in the context of a request under the Freedom of Information Act, 5 U.S.C. §552 (the "FOIA"), encompassing documents generated in the course of the Tax Division's representation of an I.R.S. agent and a D.E.A. agent sued by the requester for violating his constitutional rights. 1/ The Freedom of Information Act request was granted in part by the Tax Division and the requester appealed to the Office of Privacy and Information Appeals (OPIA) for release of the documents initially withheld.

1/ We understand that the suit against the government agents was dismissed by the trial court and presently is on appeal.

We were asked in a memorandum from OPIA to address certain objections to release under the FOIA raised by the Tax Division staff attorney assigned to represent the agents. We understand from the memorandum that the staff attorney makes the following assertions:

(1) he, not the Division or the Department, is the attorney for purposes of the attorney-client privilege;

(2) the individual agents, not their agencies or the United States, are the clients for purposes of the privilege;

(3) release of documents other than papers filed in court or correspondence to or from the requester violates the Code of Professional Responsibility;

(4) any supplemental release by the Deputy Attorney General will violate the Code of Professional Responsibility.

We were also asked in that memorandum whether the particular documents involved in the administrative appeal are within the scope of the attorney-client privilege and whether OPIA must consult with either the staff attorney or the individual agents before making an FOIA release.

A meeting, chaired by Robert Saloschin, Chairman of the Freedom of Information Committee, and attended by representatives of OPIA, the Tax Division, the Civil Division, the Internal Revenue Service, and the Office of Legal Counsel, was called to discuss these issues. The Tax Division spokesmen indicated that their division as well as OPIA wished to obtain the Office of Legal Counsel's views. 2/

2/ We understand that the issues discussed at the (cont'd)

At that meeting we were also asked to consider the effect of a government attorney's duty to report alleged violations of federal criminal law, see 28 U.S.C. § 535; I.R.C. § 7214, on his professional relationship with the individual employee or employees whose defense the Department has undertaken.

Our discussion of these somewhat interrelated questions starts by outlining the standards applicable to Department representation of individual employees. We then turn to the questions relating to the attorney-client relationship and possible conflicts between that relationship and statutory obligations to report violations of law. The final portions of our discussion address the FOIA issues.

2/ (cont'd) meeting concerning Department representation of individual employees have become of increasing concern to the Department in light of recent case law and statutory developments. See, e.g., Butz v. Economou, 46 U.S.L.W. 4952 (June 29, 1978) (federal officials charged with constitutional violations are entitled to no greater immunity for their acts than state officials); I.R.C. § 7217 (1976) (taxpayer may bring suit for damages against any person who makes an unauthorized disclosure of return information).

We note, however, that the passage of proposed amendments to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, would substantially reduce the number of suits against individuals defended by Department attorneys. Bills pending in the Senate and House Judiciary Committees provide that the defendant in all Federal Tort Claims Act suits would be the United States. Passage of the bills would not affect Department representation of individual employees in state criminal proceedings, Congressional proceedings, or in suits alleging the commission of acts excepted from the coverage of the Federal Torts Claims Act by 28 U.S.C. § 2680.

I. Existing Standards for Department of Justice Representation of Individual Employees

Department regulations provide our starting point in analyzing the contours of the relationship between a Department attorney and an individual government employee whose representation has been undertaken. Section 50.15 of Part 28 of the Code of Federal Regulations addresses "Representation of Federal employees by Department of Justice Attorneys or by private counsel furnished by the Department in state criminal proceedings and in civil proceedings and Congressional proceedings in which Federal employees are sued or subpoenaed in their individual capacities." 3/ The regulatory guidelines provide that Department attorneys may undertake such representation only to the extent that it is in the interest of the United States, and that the employee's actions reasonably appear to have been within the scope of his employment. Furthermore, Department attorneys may not represent an employee on matters relating to a federal criminal proceeding or investigation in which the employee is implicated. The regulation specifically states that:

> Justice Department attorneys who represent employees under this section undertake a full and traditional attorney-client relationship with the employees with respect to the attorney-client privilege. If representation is discontinued for any reason, any incriminating information gained by the attorney in the course of representing the employee continues to be subject to the attorney-client privilege.

28 C.F.R. § 50.15(a)(8). The regulation also provides that an employee's request for representation is subject to the attorney-client privilege. Id., § 50.15(a)(1).

The standards established by the Code of Professional Responsibility of the American Bar Association, which apply

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3/ 28 C.F.R. § 50.16 deals with the provision of private counsel by the Department.

to Department attorneys, 28 C.F.R. § 45.735-1, also are relevant to the questions about the attorney-client relationship that are raised. Canon 4 deals with the preservation of a client's confidences and secrets. "Confidences" under the Canon include information protected by the traditional attorney-client privilege; "secrets" include other information obtained in the professional relationship which the client has requested be held inviolate or which would embarrass the client if disclosed. DR 4-101(A). 4/ An attorney may disclose confidences or secrets only in limited circumstances:

> A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

DR 4-101(C). The purpose of this protection is to assure free and open communications between client and attorney so that the attorney will be better able to represent his client's interest. See EC 4-1.

4/ Briefly stated, the privilege against disclosure is personal to the client and applies to confidential communications between lawyer and client made in the course of their relationship. See, e.g., Mead Data Central, Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 254 (1977); McCormick on Evidence, § 88 (E. Cleary ed. 1972).

With these sources for general guidance, we turn to the specific questions presented to us.

II. Who is the Attorney for purposes of the Attorney-Client Privilege?

The first question presented is whether the staff attorney assigned to represent a federal employee, or the attorney's Division, or the Department of Justice as a whole, should be considered the "Attorney" for purposes of the attorney-client privilege. We do not believe that an acknowledgement that the attorney-client privilege protects from disclosure certain information obtained by a staff attorney assigned to represent an employee provides an adequate answer to that question. The fact that the staff attorney is the one to receive confidential information does not necessarily mean that his opinion concerning whether the information is privileged is conclusive or that he has ultimate control over the conduct of the litigation.

We note initially that whatever attorney-client relationship exists between the individual staff attorney and the employee results only from the Attorney General's assignment. All but certain specialized functions of officers and employees of the Justice Department are vested in the Attorney General. 28 U.S.C. § 509. Moreover, the Attorney General is the official empowered to represent the interest of the United States in litigation. Conduct and supervision of litigation to which the United States, a federal agency or officer is a party, or in which the United States has an interest, are reserved to the Attorney General. 28 U.S.C. §§ 516, 518, 519; see 5 U.S.C. § 3106. The Attorney General also has the authority to direct his staff to attend to the interest of the United States in any pending suit. 28 U.S.C. § 517. The adoption by the Department of a regulation establishing minimum standards and procedures for representation of individual federal employees in cases which involve the interest of the United States does not suggest to us that the Attorney General intended to relinquish control over such litigation or that the final determination of what constitutes the interest of the United States is left to the staff attorney assigned to the case.

It is our view that the Attorney General, not the staff attorney, is more aptly characterized as the "Attorney" when the Department undertakes the representation of an individual government employee. Accordingly, the Attorney General or his designee, not the staff attorney, is ultimately responsible for deciding legal questions with respect to the privileged nature of communications between Department attorneys and the government employees whom they represent. Of course, as a general proposition the staff attorney familiar with the circumstances of the communication should be consulted before a decision about the validity of the privilege is made.

Only where the staff attorney obtains information in confidence from the government employee that plainly is inconsistent with the interest of the United States, such as information tending to show that the employee committed a crime, do we believe that the staff attorney may be characterized as the "Attorney" for purposes of questions arising with respect to the attorney-client privilege. 5/ Canon 4 prohibits an attorney from using the confidences or secrets of his client to the disadvantage of the client. DR 4-101(B)(2); EC 4-5. As a preventive measure to assure that confidential information will not be used against the employee as a basis for prosecution or disciplinary action, we believe that the staff attorney handling the case should not disclose the information either to the Attorney General or to other Department attorneys. 6/ Thus, in that limited

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5/ Of course, the Department regulation would prohibit continued representation of the employee if it becomes apparent that representation would not serve the interest of the United States. 28 C.F.R. § 50.15.

6/ The apparently conflicting duties of a government attorney to disclose information concerning illegal conduct by government employees and to preserve a client's confidences and secrets are discussed in part IV of this memorandum.

situation, the staff attorney would be the only attorney in a position to give counsel or make decisions concerning the privilege.

III. Who is the Client for purposes of the Attorney-Client Privilege?

The Attorney General undertakes representation of government employees only in performance of his duty to represent the interest of the United States. To a certain extent, however, the staff attorney designated to represent an employee may be considered to serve two "clients"--the United States and the individual employee. 7/ As a general rule, the interests of the two clients coincide. But when their interests diverge, as when the employee confides incriminating information to the attorney, the employee must be considered the only client in the sense that information damaging to the employee cannot be used against him by the United States.

7/ Opinion 73-1 of the Committee on Professional Ethics of the Federal Bar Association, a voluntary organization serving federal government attorneys and private attorneys involved in federal court practice, also addresses the question of the identity of a government attorney's client. The opinion concludes that under ordinary circumstances the government agency employing an attorney is that attorney's "client", but that where the attorney is designated to represent another employee, the employee is the "client" and the attorney-client privilege therefore applies to their confidential communications. The Government Client and Confidentiality: Opinion 73-1, 32 Fed. B.J. 71, 72 (1973).

IV. The Effect of a Government Employee's Duty to Disclose Certain Information on the Duty to Preserve Confidences

Canon 4 of the Code of Professional Responsibility, as we have discussed, protects a client's confidences and secrets from disclosure. The Code does not prohibit disclosure in certain circumstances, including a situation in which the disclosure is "required by law." DR 4-101(C)(2). One instance in which disclosure of a client's confidences and secrets may be "required by law" is under 28 U.S.C. § 535(b):

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency . . .

A literal reading of that section suggests that privileged information received by a Department attorney from the employee involved concerning possible violations of federal criminal law must be disclosed. House Concurrent Resolution No. 175, reprinted as an appendix to Part 45 of the Department's regulations, reflects a similar approach, providing: "Any person in Government service should . . .[e]xpose corruption whenever discovered."

It is our opinion, however, that 28 U.S.C. § 535(b) does not override the confidentiality requirements of Department regulation 50.14 and Canon 4. In considering the seeming conflict between § 535(b) and DR 4-104(B) in the past, we indicated that it is possible to read the language of these provisions to eliminate any inconsistency. We have suggested that information relating to violations of Title 18 is not "received in a department or agency" for purposes of 28 U.S.C. § 535(b) when a legitimate, independent shield of confidentiality prohibits the flow of information obtained from the employee to the employee's agency. We also noted that it would be an unfair exercise of prosecutorial discretion for the Department of Justice to bring criminal charges based upon information obtained solely as a result of the Department's representation of the employee.

Moreover, the statute provides that reports to the Attorney General need not be made if:

> As to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation or complaint.

28 U.S.C. § 535(b)(2). This language seems broad enough to allow the Attorney General to exempt information obtained by staff attorneys in the course of representing federal employees from the reporting requirement.

Despite this interpretation of the language of the statute, we would reach a different conclusion with respect to the scope of the reporting requirement if the legislative history supported it. Our search through the legislative history of 28 U.S.C. § 535(b) has uncovered no evidence, however, that Congress intended the measure to supplant the traditional attorney-client privilege. Rather, Congress was concerned in enacting this legislation with putting an end to jurisdictional conflicts within the Executive Branch over the conduct of law enforcement investigations. See, e.g., H.R. Rep. No. 2622, 83rd Cong., 2d Sess. 2 (1954). Without a clear indication that Congress intended to override the confidentiality of the attorney-client relationship, we do not believe such a result should be inferred. 8/

8/ The few commentators who have considered the seeming conflict between the obligations imposed on a government attorney by § 535(b) and Canon 4 agree with our view. See The Government Client and Confidentiality: Opinion 73-1, 32 Fed. B.J. 71, 72 (1973); C.N. Poirier, The Federal Government Lawyer and Professional Ethics, 60 A.B.A.J. 1541, 1543 (1974).

Our attention has also been drawn to the disclosure requirements of § 7214 of the Internal Revenue Code. A violation of that statute, which may result in the imposition of substantial penalties, occurs if:

> Any officer or employee of the United States acting in connection with any revenue law of the United States . . . who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law, fails to report, in writing, such knowledge or information to the Secretary . . . .

For reasons similar to those governing our resolution of the question presented by the reporting requirement of 28 U.S.C. § 535(b), we conclude that § 7214 of the Internal Revenue Code should not be read to impose a duty inconsistent with the duty of confidentiality owed by an attorney to his client. It would be anomalous to assign a Department attorney to represent an Internal Revenue Service agent or other government employee dealing with the revenue laws, yet require that attorney to disclose information which might be used against his client for the purpose of initiating a disciplinary proceeding or criminal prosecution. Furthermore, nothing we have discovered in the legislative history of § 7214 indicates that Congress intended the statute to impose an obligation inconsistent with or superior to the confidentiality traditionally recognized in the attorney-client relationship. We note also that the Deputy Attorney General, in a letter to the Internal Revenue Service dated February 1, 1977, took the position that a government attorney violates no federal criminal statute by failing to report information protected by the attorney-client privilege.

In summary, we conclude that neither 28 U.S.C. §535(b) nor § 7214 of the Internal Revenue Code should be read to conflict with the duty of a Department attorney to preserve the employee's confidences.

V. Release of documents under the Freedom of Information Act

Our advice is also sought on a number of questions with respect to release under the Freedom of Information Act of documents generated in the course of the Department's representation of a government employee. The principal issue is whether the Code of Professional Responsibility limits the Department's authority to release such documents. Additional issues concern the mechanics of release, including whom the Department must consult before making a release, and whether a refusal to give consent precludes release.

As we mentioned above, Canon 4 of the Code of Professional Responsibility protects more than information covered by the attorney-client privilege. Canon 4 is also intended to preserve a client's "secrets"--information obtained as a result of the attorney-client relationship that the client wishes held inviolate or that would embarrass the client if disclosed. DR 4-101(A). Whether the Department guidelines governing representation of government employees also protect "secrets" is unclear. Although Department regulations adopt the standards of the Code of Professional Responsibility, 28 C.F.R. § 45.735-1, the references to "privilege" throughout 28 C.F.R. § 50.15 suggest that a Department attorney must protect only the limited types of communications that the attorney-client privilege would protect from disclosure. It is possible, however, that the guidelines use the word "privilege" in a more general sense and were not drafted with the distinctions of Canon 4 in mind. Thus, it is not clear that Canon 4 and the Department guidelines are co-extensive. Nor is it clear that the standards governing the ethical conduct of Department employees were intended to guide decisions on release under the FOIA.

After careful consideration, we have concluded that Canon 4 should not be read as a limitation on disclosures required by the FOIA. First, we note that DR 4-101(C)(2) permits disclosures of confidences or secrets when "required by law." Moreover, the Department of Justice represents

the interests of the United States in cases involving federal employees, 28 U.S.C. §§ 516, 519, and one such interest would seem to be in compliance with the requirements of the FOIA. 9/ We do not believe that this approach necessarily undermines the protection afforded privileged material by either the Code or the Department's regulations, for the FOIA does not appear to require disclosure of information subject to the attorney-client privilege. See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975), quoting S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965); Mead Data Central, Inc. v. U.S. Dept. of the Air Force, supra, at 252-253 (exemption five of the FOI encompasses the attorney-client privilege.)

The following procedures seem to us appropriate with respect to release under the FOIA of information which may be privileged. First, the Department attorney processing the FOIA request should determine whether the privilege does in fact apply to any of the information. Consultation with both the employee-client and the attorney with whom the employee dealt may be necessary to that determination. Should the FOIA attorney conclude that any of the information is privileged, 10/ yet believe that a discretionary

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9/ The ethical considerations adopted by the Federal Bar Association for the guidance of federal attorneys expressly recognize the obligation of the federal attorney to assist his department or agency in complying with the FOIA. Federal Ethical Consideration 4-4, reprinted in C.N. Poirier, The Federal Government Lawyer and Professional Ethics, 60 A.B.A.J. 1541, 1543 (1974). Although the Department of Justice has not adopted these ethical standards, as it has the standards of the American Bar Association, we believe the federal ethical considerations are worth note.

10/ As we stated above in our discussion of the "Attorney" issue, the Department is not bound to accept the legal conclusions reached on a privilege question by the staff attorney who directly represents the individual client.

release would serve the public interest, the consent of the client should be obtained. Because the privilege is the client's and he alone may waive it, his consent, after full disclosure of the circumstances, is ordinarily a prerequisite to release. 11/ McCormick on Evidence, supra, §§ 92, 93; see DR 4-101(C)(1). The Department should be wary, however, of attempting to coerce the employee's decision in any way.

While it appears that "confidences" are exempt from disclosure under the FOIA, information within the Canon 4 definition of "secret" may not fall within an exemption. To the extent that "secret" information is not exempt, we believe that it should be made available to an FOIA requester. Much "secret" information, however, appears to be protected by exemption six, which covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). 12/

Additional exemptions, such as exemption four, which deals with trade secret and other confidential commercial and financial information, and exemption seven, which protects certain information contained in investigatory files complied for law enforcement purposes, might also

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11/ In certain circumstances, such as where disclosure is necessary for the Department to defend against an accusation of wrongful government conduct, the employee's consent would not be required. DR 4-101(B)(4). Nor would the employee's consent be necessary to make a disclosure in compliance with a court order. DR 4-101(B)(2).

12/ The Department's ability to make a discretionary release of exemption six information is limited. If the Privacy Act, 5 U.S.C. § 552a, also applies to information covered by exemption six, the Department does not have the option to make a discretionary FOIA release. See, e.g., "A Short Guide to the Freedom of Information Act," reprinted in U.S. Dept. of Justice, Freedom of Information Committee, Freedom of Information Case List, February 1978 Edition.

apply to "secret" information. 13/ Moreover, even though the information is not privileged, exemption five may still apply. That exemption also protects attorney work-product material and internal agency deliberative material.

In processing "secret" information within the scope of an FOIA request we believe that the Department should, if at all possible, consult with the government employee involved in order to gain a better appreciation of his interests in the matter. Such consultations would be consistent with the spirit of Canon 4 of the Code, and would not, as we understand it, be inconsistent with administrative practice. 14/ Consent of the client is not, however, a prerequisite to release of "secret" information under the FOIA.

13/ Whether the government has the authority to make a discretionary release of exemption four material is a question presently under consideration by the Supreme Court. Chrysler Corp. v. Schlesinger, 565 F.2d 1172 (3rd Cir. 1977), cert. granted sub nom. Chrysler v. Brown, 46 U.S.L.W. 3555 (1973) (March 6, 1978).

14/ A full consultation between the staff attorney and his employee client should also be undertaken at the beginning of their relationship. The employee should be aware of all the advantages and disadvantages of Department representation before making a decision to forego private counsel. Among the disadvantages, and a factor which might be crucial in a particular employee's decision concerning representation, is the possibility of eventual release of non-exempt information under the FOIA. The Ethical Considerations under Canon 5 of the Code indicate that an attorney requested to undertake representation of multiple clients should fully explain any potential conflicts. For example, EC 5-16 provides in part:

> [B]efore a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients (cont'd)

VI. Applicability of the Attorney-Client Privilege to the Documents Appealed to OPIA

We have been asked whether the three documents presently under consideration in connection with the requester's FOIA appeal are within the purview of the attorney-client privilege. Those documents include: (1) a letter request for Justice Department representation of an I.R.S. agent from the Chief Counsel of the Internal Revenue Service to the Acting Assistant Attorney General of the Tax Division, dated January 17, 1977; (2) a memorandum to files from the Tax Division attorney handling the suit against the I.R.S. agent and a D.E.A. agent concerning developments in the case, dated February 22, 1977; (3) a similar memorandum to files from the attorney, dated April 28, 1977.

The attorney-client privilege, as we noted above, is a limited one. Under the general formulation of the privilege, only confidential communications between attorney and client made in connection with their professional relationship are protected from disclosure. See, e.g., McCormick on Evidence, supra n. 6. Although we cannot be certain without looking further into the facts, our initial

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14/ (cont'd)

> to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

See also EC 5-19. At present, the Department's regulations do not explicitly recognize this duty. We believe that specific written guidelines, more completely defining the relationship between a Department attorney and his employee-client and listing the various matters a Department attorney and an individual employee should discuss before agreeing upon representation, would prove helpful both to the attorney and the client.

reading of the documents at issue suggests that the information they contain was not based upon confidential attorney-client communications. Most of the information simply explains factual and procedural developments in the case, information which may well have been recounted in the course of the Department's presentation of its defense of the agents. 15/ We are reluctant, however, to express a firm opinion about whether any portions of the documents are subject to the attorney-client privilege without knowing more of the details of the case.

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

15/ Of course, the fact that the attorney-client privilege does not protect certain information does not eliminate the possibility that the information is otherwise exempt. Exemption five, for example, protects attorney work-product and internal agency deliberative matter as well as information within the scope of the attorney-client privilege. See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).