



COMMENTARY

Keeping Watch: Protecting Public Housing Authorities' Access to Counsel

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As anyone involved in the legal profession will tell you, the attorney-client privilege is a bedrock principle in American law. The U.S. Supreme Court has recognized the attorney-client privilege as one of the most time-honored and protected institutions in the legal profession.¹ The privilege is recognized as an essential component to ensuring the function of the legal system. It encourages frank communication between attorneys and clients, and thereby promotes broader public interests in the observance of law and the administration of justice.² The Court has recognized the necessity of the privilege, noting that full and truthful disclosure can only be realized in the absence of apprehension of the consequences of disclosure.³ However, despite the importance of this privilege, federal agencies, including the Department of Housing and Urban Development (HUD), have continued efforts to erode this privilege in corporate and organizational contexts. The government often justifies these efforts in the context of a larger search for justice. Asking organizations to waive this privilege helps federal investigators to uncover fraud and allows organizations to be deemed cooperative in the event of further sanctions. However, given the extreme leverage that these federal agencies have over the organizations they monitor and govern, requesting this waiver is coercive and deprives the organizations of the services of counsel.

Attempts to invade attorney-client privilege have been prevalent at HUD in the past few years with regard to public housing authorities (PHAs). Although PHAs are often almost exclusively funded and heavily monitored by HUD, they retain their character as independent state organizations and are entitled to the attorney-client privilege with the lawyers who represent them. The principle of attorney-client privilege extends equally to both private and public entities, including PHAs.⁴ Government agencies have long been afforded the protection of this privilege in communications with their attorneys.⁵ Generally, the scope of the privilege for public entities has been the same as that of private entities.⁶ Indeed, Congress has recognized the

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importance of allowing governmental agencies to maintain the attorney-client privilege by specifically exempting documents that fall under the privilege from Freedom of Information Act requests.⁷ While 24 C.F.R. part 85, the regulations governing administrative functions of federal grant recipients, contains a section requiring all grantee contracts to include an access-to-records clause in all contracts funded with federal funds, there is nothing in the regulation that requires federal grantees to waive any attorney-client privilege that may exist in records possessed by counsel. Indeed the trend at the state court level is to broaden, rather than to restrict, the protection afforded to public agencies, as is HUD's intent.⁸ Thus, despite PHAs' public character, they are still entitled to—and do enjoy—the protections of the attorney-client privilege. HUD enjoys attorney-client privilege with its counsel paid for with federal funds. There is no support in the law for PHAs having to accept a lesser attorney-client privilege.

Moreover, the attorney-client privilege applies even if the PHA uses HUD or other funds to pay for the legal services. The ABA Model Rules of Professional Conduct are clear on the point that if attorneys accept payment from a source other than the client, the attorney must retain professional independence from the source of payment and must uphold the duty of confidentiality owed to the client.⁹ Ultimately, the decision to waive the attorney-client privilege rests with the client—not with the attorney and certainly not with a third party. And the privilege that attorneys have in their own work product should not be subject to coercion by a government agency.

Nonetheless, HUD has persisted in its efforts to get around PHAs' attorney-client privilege. On February 3, 2006, the HUD's Office of Public and Indian Housing (PIH) issued a notice regarding the procurement of legal services by PHAs.¹⁰ The notice contained a provision that attempted to influence the actual legal services contract between a PHA and its attorney. Paragraph seven of the notice urged PHAs to add an addendum to their legal services contracts that voluntarily waives their attorney-client privilege and gives HUD full access to all documents, including detailed billing statements and evidence of payment. When the notice was originally issued in 2003, HUD was responding to a particular set of facts in a specific city and promulgated the notice in reaction to those facts. At the time, the Philadelphia Housing Authority's counsel was objecting, on the basis of attorney-client privilege, to the HUD Office of Inspector General's inquiries and investigation into the housing authority's operations, which caused HUD to then issue the original PIH notice. Following the issuance of the notice, industry representatives met with PIH officials and staff of the HUD Office of General Counsel and the Office of Inspector General's General Counsel. All involved in the discussions believed that the HUD officials understood the concerns and that the notice would be allowed to expire. The reissuance of the notice, more than a year after it had expired, was a disappointing policy decision by HUD. Given the nature of the relationship between HUD and PHAs, even though the notice acknowledges

that these provisions are not mandatory, unwary PHAs may obey the notice for fear of retribution.

Another disturbing aspect of the contract addendum is HUD's effort to insert itself into the attorney-client relationship by permitting HUD to terminate a legal services contract if HUD determines that the attorney is not providing the records HUD seeks and by requiring the attorney to agree to a contract that would allow HUD to sanction the attorney for protecting the attorney's client's records and privileged communications. In addition, the notice seeks to prevent PHA employees from selecting their own counsel in civil and criminal contexts by requiring that the employee seek HUD's permission to select an attorney who may also represent the PHA. State rules of ethics, not HUD rules, govern the issue of whether an attorney may represent an employee of the organization that he or she represents. In some cases, the PHA counsel will be the best person to defend the employee or the PHA. Such representation may require a conflict-of-interest waiver under local professional responsibility rules, but whether to seek or grant such a waiver should be determined by the PHA and not by HUD. This is an incredibly harmful provision that may require an attorney to breach his or her duties under state rules of professional conduct and potentially influence the attorney to act in a manner that is contrary to his or her client's interest in order to avoid sanction from HUD.

HUD has allowed this particular notice to expire, and instead has memorialized the legal services contract addendum in the Procurement Handbook for Public Housing Agencies, 7480.6 REV 2, which was issued March 2, 2007. This move is disconcerting since the Procurement Handbook is the primary resource and guidance for housing authorities on all issues related to procurement. While a close read of the Procurement Handbook reveals that the addendum is not mandatory, the language used is quite strong, and PHA employees could mistake the addendum for a requirement, as opposed to a recommendation, and inadvertently compromise the legal position of their agencies.

Additionally, while not directly related to the attorney-client privilege, HUD has recently taken another troubling position with regard to housing authority employees' access to counsel. HUD has prohibited the use of federal funds to pay for legal costs associated with defending employees against HUD enforcement actions. HUD has determined that the use of federal funds to pay for the defense of employees is impermissible under HUD and OMB regulations because the defense is a personal benefit to the employee. This prohibition applies regardless of the basis for the action against the employees—meaning that even if the enforcement action arises out of the employee's authorized actions within the scope of employment and there are no allegations of fraud or intentional misconduct, federal funds cannot be used for the defense. This position seems to be in direct contradiction to OMB Circular A-87, which governs and sets forth eligible uses for federal funds, as well as judicial authority.

OMB Circular A-87 states in relevant part that "Legal expenses required in the administration of Federal programs are allowable. Legal expenses for prosecution of claims against the Federal Government are unallowable." Further, the Circular permits the use of federal funds for "costs of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill... when reasonable in relation to the services rendered." This language seems to support the use of federal funds for the legal expenses associated with the defense of an employee who is facing HUD enforcement actions arising from conduct that was authorized and within the scope of employment.¹¹ However, HUD does not agree and maintains that these legal services would be a personal benefit and not eligible expenses.

Further, judicial authority also indicates that federal funds may be used when the costs of defending employees against HUD actions is part of normal operation or administration of the federal program. In *Arizona Oddfellow-Rebekah Housing v. HUD*,¹² the Ninth Circuit evaluated the question of the permissibility of using federal funds for an employee's defense. In that case, an owner of an FHA-subsidized housing project was facing claims of discrimination by HUD. The company used its revenues to cover the costs of the legal fees to defend against the discrimination action. The court held that the use of these revenues, which constituted federal funds, were proper and did not constitute a personal benefit to the employee or owner. Rather, because the lawsuit grew out of the operations of the project, the expenditures were eligible. However, despite the language in the OMB Circular and the judicial authority, HUD has maintained a hard line against the use of federal funds for the costs of defending against HUD actions.

This prohibition is especially problematic in light of the lack of resources available to PHAs and their employees. Often these organizations have very little or no nonfederal funds to devote to the defense of these actions. The result is that employees or commissioners of PHAs that face enforcement actions, such as debarments, have little access to funding to mount defenses. Further, PHAs may have no resources to honor contractual indemnification obligations. This leaves both the housing authority and the employee with very few options other than submitting to the HUD enforcement action or expending large amounts of personal resources. This situation seems particularly unfair in light of the fact that HUD routinely pays the legal costs associated with defending its employees in legal actions.¹³

Furthermore, HUD has used this prohibition on the use of federal funds for employee defense to further invade housing authorities' attorney-client privilege. To ensure that PHAs are not using federal funds inappropriately, HUD has requested copies of itemized legal bills from PHAs. While the existence of time records and the amount of legal invoices can be and often are considered facts that are not covered by the attorney-client privilege, detailed explanations constitute communications that are protected to the extent they reveal the nature of the services performed.¹⁴ HUD claims that since it has full authority to access any of the housing authority's records,

including invoices, under the ACC they should therefore have access to legal bills. HUD has this authority under the ACC, but this position blatantly disregards the privileged information itemized legal bills often contain. Yet, because HUD controls the vast majority of funding sources for PHAs, it possesses tremendous amounts of leverage and PHAs have little choice but to turn these documents over to HUD or face additional enforcement actions. Thus, this is yet another mechanism HUD has and will undoubtedly continue to use that may cause unwary and unsophisticated PHAs to waive the attorney-client privilege.

There are several lessons to be taken from these recent HUD actions to invade the attorney-client privilege. PHAs and their attorneys must be aware of their rights and obligations in this context. While any of the activities discussed above may not in an individual instance seem overly invasive, any waiver of attorney-client privilege is dangerous to the privilege as a whole. Partial or selective waivers of the privilege have sometimes been construed as complete waivers.¹⁵ Thus, by agreeing to the contract addendum proposed in PIH Notice 2006-9 and the Procurement Handbook or by disclosing legal bills, housing authorities may inadvertently allow HUD access to additional documents traditionally protected by the privilege. In order to maintain a safe environment that allows for full and candid discussion between PHAs and their lawyers, the privilege must be protected.

PHAs and their attorneys must be on guard and diligent in protecting their attorney-client privilege and keeping HUD out of the attorney-client relationship. Attorneys should advise the PHAs they represent not to adopt the addendum contained in the PIH Notice. Further, attorneys should assist their clients to fight back against any attempt by HUD to infringe upon the privilege and the attorney-client relationship as a whole. This may include adopting practices in which the attorney provides only the most minimal description of services in any legal invoice.

Ultimately, the balance between compliance with actual HUD requirements, maintaining good relationships with HUD, and preserving attorney-client privilege can be very delicate. However, the bottom line is that HUD has absolutely no authority or standing through the open-access statutes or the provision of funds to interfere with the attorney-client privilege or the attorney-client relationship. Because the privilege is so important to the quality and integrity of legal services provided to housing authorities, and because those legal services are increasingly vital to the operations of PHAs, the gradual erosion of the attorney-client privilege and intrusion into the overall attorney-client relationship by HUD, or any federal agency, must not be allowed.

1. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

2. See *id.* at 389.

3. *Id.*

4. See *Bruce v. Christian*, 113 F.R.D. 554, 560 (S.D.N.Y. 1986) (finding that memoranda prepared by housing authority lawyers were protected in order

to prevent hampering of the discussions between project management and attorneys).

5. *See, e.g.,* *Jupiter Painting Contracting Co. v. United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980) (“Courts generally have accepted that [the] attorney-client privilege applies in the governmental context, while expressing apprehension at its pernicious potential in a government top-heavy with lawyers... This concern does not justify application of a different privilege to governmental attorney-client relationships.”); *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (“It is clear that an agency can be a ‘client’ and agency lawyers can function as ‘attorneys’ within the relationship contemplated by the privilege...”).

6. *See* PAUL RICE, *ATTORNEY CLIENT PRIVILEGE IN THE UNITED STATES*, § 4.28 (2d ed. 1999).

7. *See* 5 U.S.C. § 552(b)(5) (1976). Exemption 5 provides that the disclosure requirements do not apply to interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.

8. *See, e.g.,* *Hangartner v. City of Seattle*, 90 P.3d 26 (Wash. 2004) (finding that the attorney-client privilege supercedes the state’s Public Disclosure Act).

9. *See* ABA MODEL RULES OF PROF’L CONDUCT 1.8(f), 5.4.

10. PIH Notice 2006-09, renewing an earlier expired PIH Notice.

11. The argument that these costs are eligible is even stronger in light of OMB Circular A-122, which sets forth cost principles for nonprofit organizations that receive federal assistance. Circular A-122 explicitly lists legal costs for defense against federal government claims as not allowable. This language is conspicuously absent from Circular A-87 addressing the same topic with regard to state and local governments.

12. 125 F.3d 771 (9th Cir. 1997).

13. Federal regulations at 28 C.F.R. § 50.15 provide that federal employees may be provided representation in civil, criminal, and congressional proceedings in which the employee is sued or charged in an individual capacity so long as the actions that give rise to the action were performed within the scope of the employee’s employment. The provision of representation can be by either a lawyer from the Department of Justice or reimbursement to the federal employee for providing his or her own counsel.

14. *See* *United States v. Keystone Sanitation Co.*, 885 F. Supp 672, 675 (M.D. Pa. 1994).

15. *See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002) (finding that when privileged information is provided to a regulator pursuant to a confidentiality agreement, the attorney-client privilege as to all communications on the subject matter is deemed to be waived).