

# Second Circuit Uses Predominant Purpose Test in Upholding Government Attorney-Client Privilege

By Patricia E. Salkin

## Introduction

Communications between attorneys and their clients have historically been protected as privileged under the common law.<sup>1</sup> For the privilege to attach, the communications: 1) must be between a lawyer and his or her client; 2) were intended to be and were in fact kept confidential; and 3) were made for the purpose of obtaining or providing legal advice.<sup>2</sup> The privilege in the government context has presented a series of unique obstacles. For example, the question of who is the client of the government lawyer is not always statutorily stated, and there is scant case law on the subject.<sup>3</sup> The third prong, however, may typically be even more problematic for government lawyers who often combine legal advice with policy advice and/or analysis of alternative scenarios. Such was the case in two recent federal court decisions of interest to New York municipal lawyers.



The Second Circuit was called upon to decide the novel issue of “whether the attorney-client privilege protects communications that pass between a government lawyer having no policymaking authority and a public official, where those communications assess the legality of a policy and propose alternative policies in that light.”<sup>4</sup> The D.C. Circuit Court had noted in 1998 that when attorneys are consulted in capacities other than as a lawyer, e.g., as a policy advisor, media expert, business consultant, etc., such consultation is not privileged.<sup>5</sup> *In re The County of Erie* involved a class action lawsuit challenging the constitutionality of a strip search policy enforced upon every detainee who entered the County Correctional Facility or Holding Center. In the course of discovery, the County withheld the production of certain emails between an assistant county attorney and her county clients, offering a privilege log instead. The emails in question “reviewed the law concerning strip searches of detainees, assessed the County’s current search policy, recommended alternative policies, and monitored the implementation of these policy changes.”

Specifically, the Court categorized the emails as covering six broad issues:

1. Compliance of the County’s search policy with the Fourth Amendment;
2. Possible liability of the County and its officials stemming from the policy;
3. Alternative search policies that could comply with constitutional requirements;
4. Guidance on implementing and funding identified alternative policies;
5. Maintenance of records concerning the original search policy; and
6. Evaluation of the County’s progress implementing the alternative search policy.

The Magistrate Judge had concluded that the emails went beyond the rendering of legal analysis since they contained proposals for changing existing policy to comply with the constitution, and included drafting new policy regulations. The Magistrate opined that drafting and subsequent oversight of the implementation of a new policy crossed the line between legal advice and policymaking and administration. In addition, he believed that “no legal advice was rendered apart from policy recommendations.”

## Predominant Purpose Test

Following a description of recent case law discussing the general existence of a government attorney-client privilege in the civil context,<sup>6</sup> the Second Circuit focused on the question of whether the communications at issue were made for the purpose of obtaining or providing legal advice. Although the County asserted that the assistant county attorney could not have been conveying non-legal advice (since the County Charter specifically limits her authority to that of “legal advisor” and they argued that “only the County Sheriff and his direct appointees ha[ve] policy-making authority for the [Sheriff’s]department”), the Court noted that such limitations on a lawyer’s authority to formulate or approve of policy would not prevent the rendering of such advice to government officials. Recognizing that government lawyers may have dual legal and non-legal responsibilities, the Court noted that the mere lack of formal authority is not compelling proof that the communications should be characterized as legal rather than policy.

The Court said that “[t]he predominant purpose of a particular document—legal advice, or not—may

also be informed by the overall needs and objectives that animate the client's request for advice." Here, the Court concluded that Erie County's objective was to determine how to meet the constitutional limitations on a strip search policy, rather than to determine public policy. In concluding that each of the emails in question was sent for the "predominant purpose" of soliciting or rendering legal advice, the Court noted that "[i]t is to be hoped that legal considerations will play a role in governmental policymaking," and that "[w]hen a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation—or that advocates and promotes compliance, or oversees implementation of compliance measures—is legal advice." The Court stated that such a finding serves to reinforce the notion that the availability of sound legal advice benefits not just the public official, but the public at large.

### Be Careful of Unintended Waivers

Although the Second Circuit determined that the emails satisfied the requirements of the attorney-client privilege, the Court remanded the case to determine whether the distribution of some of the emails to others within the Sheriff's Department constituted a waiver of the attorney-client privilege.<sup>7</sup>

### Southern District of New York follows *Erie*

In March 2007, the Southern District of New York handed down a decision in *MacNamara v. City of New York*,<sup>8</sup> a case arising from the arrest of protestors during the 2004 Republican National Convention (RNC) held in New York City. Similar to Erie County, the City of New York refused to produce certain documents requested during discovery and instructed witnesses not to answer questions during depositions based on several privileges, including the attorney-client privilege, the self-critical analysis privilege and the deliberative process privilege. In preparation for the RNC, the New York City Police Department (NYPD) started planning more than a year in advance by organizing various committees and subcommittees to address various aspects, including legal issues, of arrest processing during the Convention. The Legal Subcommittee was tasked with, among other things, assisting in the development of the NYPD's Mass Arrest Processing Plan (MARP). It is the MARP and its implementation that was the subject of the lawsuit.

### No Self-Critical Analysis Privilege, Deliberative Process Privilege

Following the RNC, the NYPD asked the committees and subcommittees to create a self-critique report (or "after action report") assessing their performance

during the RNC. Other NYPD officials were also asked to complete post-event critiques assessing various field operations during the RNC. In producing these documents during discovery, the City redacted sections that contain recommendations and opinions, and directed at least one witness not to answer questions at a deposition regarding the content of an after action report, contending that such information was protected by the "self-critical analysis" privilege. The City asserted that members of the NYPD would be less forthcoming if their evaluations might later be disclosed in litigation, and "the prospect of public disclosure would chill the candor of the NYPD members in describing mistakes that may have [been] made . . . which in turn would undermine the NYPD's ability to effectively deliver police services at future large-scale events."

Noting that this privilege is an open question in the Second Circuit, the Court said that to the extent the privilege is recognized, the party invoking it is required to:

Demonstrate that "the information . . . resulted from a critical self-analysis undertaken by the party seeking protection; [that] the public [has] a strong interest in preserving the free flow of the type of information sought; [and that] the information [is] of the type whose flow would be curtailed if the discovery were allowed."<sup>9</sup>

In declining to find the existence of the privilege in this case (and indeed, the Judge is doubtful that the privilege should exist at all), the Court concluded that the City failed to offer support for its conclusory allegations. Furthermore, the Court was not convinced that NYPD officials would be less than forthcoming in the future if such post-event analysis were not protected by privilege, and the Court was not convinced that such disclosure would deter the NYPD from investigating the effectiveness of its policing strategies.

The Court was also not persuaded that the deliberative process privilege existed. This privilege exists where communications are predecisional and deliberative, meaning that the communications were generated to assist the decision maker in making a decision.<sup>10</sup> Noting that the privilege is qualified, requiring courts to balance the agency interest in non-disclosure with the public interest in transparency of the government decision-making process, the Court found that the City failed to demonstrate that the redacted comments and recommendations were intended to specifically assist a policymaker in the "formulation or exercise of policy-oriented judgment,"<sup>11</sup> and hence the privilege could not attach.

## Attorney-Client Privilege Exists

Where the City's privilege log indicated that certain redacted documents were privileged where the documents described discussions with NYPD Legal and were transmittal memos between NYPD and Corporation Counsel, the Court found these to be privileged communications. In finding additional documents protected by the privilege (and asking for additional information with respect to two memos), the Court cited to *In re The County of Erie* to explain why the Plaintiff's assertion was flawed (that the documents at issue should not be protected because they implicate the Legal Bureau's roles in formulating NYPD policy). The Court noted that the requested documents consist of communications between the Legal Bureau, the Legal Subcommittee and various NYPD officials regarding policies and procedures that were being considered, the legal implications of those policies, and possible alternatives. Since the information was provided so that the Legal Bureau could render legal advice regarding various policies, the Court determined that the attorney-client privilege attached.

## Crime Fraud Exception

In further asserting that the documents were not protected by the attorney-client privilege, the Plaintiffs suggested that they fell within the crime fraud exception because the communications were made in furtherance of contemplated or ongoing criminal or fraudulent conduct. Specifically, the Plaintiffs alleged the communications demonstrate that the Legal Bureau attorneys had "aid[ed] in the systematic falsification of affidavits by arresting officers." Yet, the Court notes, the Plaintiffs failed to provide evidence to support claims that any false affidavits were created at the direction of the Legal Bureau. Finding no evidence of fraudulent conduct, the Court determined that the crime fraud exception to the attorney-client privilege was inapplicable.

## The Future of the Government Attorney-Client Privilege

At least so far as the Second Circuit is concerned, following its 2005 decision in *In re: Grand Jury Investigation*, which came down firmly on the side of the "well established and familiar principle[s]" supporting the attorney-client privilege,<sup>12</sup> and these recent 2007 rulings, government lawyers in New York can reasonably rest with the notion that the privilege does exist in both the civil and criminal contexts. This privilege is not, however, unchecked. Government attorneys must be clear to identify who their client is, and careful to not inadvertently waive the privilege

by sharing communications with non-client parties. Where appropriate, municipal attorneys should be clear in characterizing communications with government officials as provision of legal advice, and not simply the public policy advice absent a "predominant legal purpose." Uncertainties remain, however, and public policy questions abound regarding the application of the attorney-client privilege in the government context.<sup>13</sup> In the Fall of 2007, the New York State Bar Association's Committee on Attorneys in Public Service will be hosting an invitational summit on the government attorney-client privilege. If you are interested in finding out more about the Summit agenda, please contact Patricia K. Wood at pwood@nysba.org.

## Endnotes

1. For a general discussion, see, Patricia E. Salkin, "Beware: What You Say to Your Government Lawyer May Be Held Against You—The Erosion of Government Attorney-Client Confidentiality," 35 Urb. Law. 283 (2003).
2. See 8 John Henry Wigmore, Evidence in Trials at Common Law, sec. 2290 at 542 (McNaughton rev. 1961).
3. See *Brown & Williamson Tobacco v. Pataki*, 152 F.Supp.3d 26 (S.D.N.Y. 2001).
4. *In re The County of Erie*, 2007 U.S. App. LEXIS 26 (2d Cir. 2007).
5. See *In re Lindsay*, 148 F.3d at 1106 (D.C. Cir. 1998).
6. *Id.* The Court noted that, "[i]n civil suits between private litigants and government agencies, the attorney-client privilege protects most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance" (citing *In re Grand Jury Investigation*, 399 F.3d at 523; *Ross v. City of Memphis*, 423 F.3d 596, 601; and *In re Lindsay*, 148 F. 3d 1100, 1107). The Court further noted that, "[a]t least in civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on a par with the claim of an individual or corporate entity." *Id.*
7. *Id.* Just as this article was going to press, oral arguments were heard in the District Court on this issue.
8. 2007 U.S. Dist. LEXIS 17478 (S.D.N.Y. 2007).
9. *Id.* (citing *Mitchell v. Fishbein*, 227 F.R.D. 239, 252 quoting *Wimer*, 1997 WL 375661, at 1).
10. *Id.* (citing *Marisol A. v. Guiliani*, No. 95 Civ. 10533, 1998 WL 132810 (S.D.N.Y. 1998)).
11. *Id.* (citing *Tigue v. United States Department of Justice*, 312 F.3d 70 (2d Cir. 2002)).
12. *In re Grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005).
13. See Salkin and Phillips, "Eliminating Political Maneuvering: A Light in the Tunnel for the Government-Attorney Client Privilege," 39 Ind. L. Rev. 561 (2006).

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