STATE OF MAINE | BUSINESS AND CONSUMER COURT

Cumberland, ss

Location: Portland
Docket No.: BCD-CV-13-47

JOHN F. MURPHY HOMES, INC.)
)
Plaintiff)
)
v.)
)
STATE OF MAINE)
)
Defendant)

ORDER GRANTING MOTION TO COMPEL

Before the court is the Motion to Compel Production of Documents filed by Plaintiff John F. Murphy Homes, Inc. ("JFMH"), pursuant to M.R. Civ. P. 26(g) and 37(a)(2). JFMH contends that it is entitled to certain documents that the Defendant State of Maine has withheld from its response to JFMH's request for production of documents. The documents at issue are listed on the State's privilege log attached to this Order and are listed on Exhibit B to the Motion to Compel.[1] The State opposes the Motion to Compel on the basis that the documents are protected by the attorney-client privilege.[2]

I. PROCEDURAL BACKGROUND

[1] Exhibit B also lists two documents being withheld by Defendant State of Maine on the basis that the documents contain confidential personnel information. Plaintiff's Motion does not seek to compel production of these documents.

[2] The State does not seek to justify withholding the material in question from discovery on the basis of the work product doctrine. *See* M.R. Civ. P. 26(b)(3) (defining scope of the work product doctrine). Even had the State argued the work product doctrine as an alternate basis for denying discovery of the materials at issue, the court's *in camera* review of the materials does not reveal any ground for deeming any of the material attorney work product.

In the course of discovery in this matter, JFMH submitted a written request for the production of documents to the State. In response, the State produced a significant quantity of documents, but has withheld 35 documents on the basis that they are not discoverable by virtue of the attorney-client privilege. At a Rule 26(g) discovery conference, the court authorized JFMH to file a motion to compel the production of documents as to the allegedly protected documents.

JFMH filed the present Motion; the State has responded, and JFMH has filed a reply memorandum. As provided in the court's Order of March 20, 2015, the State has filed copies of the documents at issue in unredacted form under seal, along with a redacted copy of the documents. The court has conducted *in camera* review of the unredacted filing. Oral argument on the Motion to Compel was held April 21, 2015.

After oral argument, noting that the parties' memoranda discussed the applicable rule of evidence as it was before January 1, 2015, when restyled Maine Rules of Evidence took effect, the court brought the restyling to the parties' attention, and each party filed a supplemental memorandum addressing the restyled rule.

II. ANALYSIS

The general rule of attorney-client privilege confers a client with the right to "refuse to disclose and to prevent any other person from disclosing confidential communications" made in the course of legal representation between and amongst a client, the client's lawyer, and the representatives of either. M.R. Evid. 502(b).

Maine, however, is one of a handful of states that limits the attorney-client privilege as applied to communications between to public officers or agencies and their attorneys. *See* M.R.

Evid. 502(d)(6). "Under our rules of evidence, confidential communications between a public agency and its lawyer are the exception rather than the rule." *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197, 1203 (Me. 1989), *citing* M. R. Evid. 502(d)(6). Maine's deliberate choice to limit the application of the attorney-client privilege to communications between State officers and agencies and their attorneys demonstrates a policy favoring openness and transparency in both State and local government.

Rule 502(d)(6) of the Maine Rules of Evidence, as recently restyled, reads:

> (d) **Exceptions.** The lawyer-client privilege is subject to the following exceptions:
>
> (6) *Public Officer or Agency.* The lawyer -client privilege does not apply to communications between a public officer or agency and its lawyers. However, if the court determines that disclosure will seriously impair the public officer's or agency's ability to process a claim or carry out a pending investigation, litigation, or proceeding in the public interest, the lawyer-client privilege will apply to communications concerning the pending investigation, claim, or action.[3]

M.R. Evid. 502(d)(6) (eff. Jan. 1, 2015)

The previous version of the rule, before restyling, read as follows:

> (d) **Exceptions.** There is no privilege under this rule:
>
> (6) *Public officer or agency.* As to communications between a public officer or agency and its lawyers unless the communications concern a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

The general restyling note from the Advisory Committee on the Maine Rules of Evidence provides in part, "The purpose of the restyling is to make the rules clearer and easier

[3] Why both the restyled rule and the prior version refer to "pending investigation, litigation or proceeding" in one clause and "pending investigation, claim or action" in the other is uncertain. The drafting discrepancy appears to be unintended, and, at least in the present case, immaterial.

of application by adoption of simple and consistent language, style, and format conventions and elimination of ambiguous or obsolete terminology. The recommendations for restyling are intended to preserve the substance of the respective rules without change, but present the respective Maine rules in the language and format consistent with their restyled counterparts in the Federal Rules of Evidence." M. R. Evid., Adv. Comm. Note: Proposed Restyled Rules of Evidence (Jan. 2015). The restyling note for Rule 506 in particular reads: "Maine Rule 502 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule." M.R. Evid. 502, Adv. Comm. Note (2015).

There is no counterpart federal rule of evidence to Rule 506. Moreover, no other state has a rule worded like Rule 502(d)(6), either as restyled or in its previous wording.

B. *The Withheld Material*

Based on the entire record, including *in camera* review, the withheld material is characterized as follows:

It consists of 35 items, some of which comprise an e-mail chain and thus make up a single document. Across the 35 items, the State has made 29 numbered redactions, the numbers being handwritten to the right of the redacted material.

The communications reflected in all 35 items occurred during the period March 2011 through October 2011. All 35 items refer in some way to "seed" funds of the kind that JFMH claims should have been paid to it. However, on their face, none of the withheld items was created or generated in connection with this case or in connection with JFMH's claims for

reimbursement. None of them mentions JFMH by name, although some refer to "special purpose private schools," of which JFMH is one.

Most of the items involve communications among State employees employed in the Maine Department of Health and Human Services (DHHS) and the Maine Department of Education (DOE) and the assistant attorneys general (AAGs) in the Maine Attorney General's office who represented the State agencies in question. However, at least one item—the typed notes of a September 21, 2011 meeting, in the record as redaction No. 20—does not make reference to legal counsel being present or being sent the notes, and several other sets of handwritten notes—redacted as Nos. 4 and 12—do not on their face involve legal counsel.

The State's memorandum indicates that all of the withheld items were created or generated in connection with two matters that were pending in 2011. One was a federal investigation into school-based services provided by the Portland Public Schools during 2006-08. The other matter was what the State refers to as an administrative proceeding in which State of Maine agencies, in response to a formal request for information by the federal Centers for Medicare and Medicaid Services (CMS), made revisions to "the State's procedures related to funding MaineCare services in educational settings." Defendant's Opposition to Plaintiff's Motion to Compel Production at 2.

Neither of the two matters is ongoing, although the State asserts that there is a possibility that either or both might be re-opened, and therefore asserts that they should be considered "pending" for purposes of the attorney-client privilege rule protecting disclosure of material concerning "pending" matters.

C. *Application of the Rule to the Withheld Material*

Under a plain reading of Rule 502(d)(6), as restyled, the initial question is whether the disclosure of a communication among State employees and their legal counsel "will seriously impair" the State's ability to pursue or defend a matter or proceeding in the public interest. If so, the attorney-client privilege attaches to those "communications concerning the pending investigation, claim, or action," meaning communications in the same matter or proceeding. M.R. Evid. 502(d)(6).

As the party asserting the privilege, the State has the burden to demonstrate that the withheld materials are within the scope of the limited attorney-client privilege in Rule 502(d)(6). *See Pierce v. Grove Mfg. Co.*, 576 A.2d 196, 199 (Me. 1990), *citing* 8 C. Wright and A. Miller, Federal Practice and Procedure: Civil § 2016 & n.68 (1970 & Supp. 1979) (burden of establishing privilege lies with the party asserting it). *See also Sawyer Envt'l Recovery Facilities, Inc. v. Baker*, 1999 Me. Super. LEXIS 320 (Kravchuk, J.) (placing burden on public agency to establish privilege).

Based on the entire record, including *in camera* review of the materials, the court finds and concludes that the State has not met its burden to establish that any of the withheld materials is within the scope of the Rule 502(d)(6) limited attorney-client privilege.

First, the plain language of the rule does not support the State's position that the 2011 communications, which were made in the context of other matters, and which do not mention and were not about JFMH or its claims or this case, are within the scope of communications covered by the Rule 502(d)(6) exception. The final clause of Rule 502(d)(6) provides that, when serious impairment is shown, the privilege "will apply to communications concerning the pending investigation, claim, or action." The Advisory Committee Note to Rule 502(d)(6)

makes it clear that, to be privileged, the communications at issue must be about the same matter in which the State's position would be "seriously impaired" by disclosure: "Subsection (d)(6) denies a privilege between public officers or agencies and their lawyers unless the communication concerns a pending matter and the court determines that disclosure would seriously impair the conduct of the proceeding in the public interest." M.R. Evid. 502, Adv. Comm. Note.[4]

An alternate basis for the same conclusion that the State has not met its burden to establish a privilege is that neither of the two matters from 2011 has been shown to be still pending. The court interprets the term "pending" to mean presently pending, i.e. as of when disclosure is sought. Thus, the Rule 502(d)(6) privilege protects communications between public officers or agencies and their attorneys about a pending matter only for so long as that same matter is pending, and the privilege disappears once the matter is concluded. Here, the

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[4] That said, there is some logic in the State's position that attorney-client communications are protected from disclosure, if disclosure would seriously impair the State's ability to pursue or defend a matter, regardless of whether the communications were made in the course of that matter or some other matter. Specifically, given the focus of the rule on whether there is serious impairment of the State's ability to pursue or defend a matter, it might be deemed illogical that, even if disclosure of an attorney-client communication would seriously impair the State's position in a matter, it is automatically not privileged just because the communication was about some other matter and not made in the context of the particular matter that would be impacted by disclosure. Nonetheless, that is how the rule reads and what the Advisory Committee Note says.

The previous version of Rule 502(d)(6), before the restyling, was actually more amenable to the State's position than the restyled version because the last clause referred to "a pending investigation . . ." rather than "the pending investigation . . .," leaving open a possible interpretation that communications concerning one pending matter could be privileged if disclosure would seriously impair the State's position in a different pending matter. The restyled version plainly provides that when the State shows that disclosure would seriously impair its position in a pending matter, the privilege applies only to communications concerning that matter. Thus, the only means of interpreting the rule consistent with the State's position is to interpret the word "concerning" in the last phase of the rule to mean "relevant to" instead of "about," but this would significantly broaden the scope of the privilege in the face of the clear purpose to draw it narrowly.

potential that one or both of the 2011 matters might be reopened is insufficient to demonstrate that they are pending. Moreover, as noted above, any privilege associated with the 2011 communications would apply only to a re-opened investigation of those matters, not to this case.

A third basis for the conclusion that the State has not met its burden is that it has failed to show that disclosure of the 2011 materials "will seriously impair" its defense of this case. The "seriously impair" criterion plainly calls for the court to assess the impact of disclosure on the State's ability to pursue or defend the claim, investigation or case in question. Mere prejudicial effect on the State's position cannot be enough—the impairment must be such as to affect the State's very ability to pursue or defend the matter in the public interest. *See* M.R. Evid. 502, Adv. Comm. Note (privilege exists when "disclosure would seriously impair the conduct of the proceeding in the public interest"). Moreover, the fact that the rule requires a showing that disclosure "will seriously impair" the State's position, rather than "might seriously impair," rules out situations where impairment is speculative or merely possible.

For example, disclosure of communications regarding a pending criminal investigation would "seriously impair" the State's ability to proceed with the investigation if the disclosure would compromise the very purpose and objective of the investigation. In the present case, the "seriously impair" criterion requires a showing that disclosure of the withheld material would in fact have a material adverse effect on the State's ability to defend this case. Such a showing the State has not made. The State's conclusory assertions to that effect are insufficient to support its position.

The court is not persuaded by the State's argument that JFMH's purpose in requesting the materials is relevant. The State cites the Restatement (Third) of the Law Governing Lawyers § 74, cmt. B (2000) for the principle that:

> Members of the public who assert legal interests against a public agency or officer act not in the general public interest but in their private interest. . . . The public acting through its . . . agencies is entitled to resist claims and contentions that the agency considers legally or factually unwarranted. To that end, a public agency or employee is entitled to engage in confidential communications with counsel to establish and maintain legal positions.

The State contends JMFH is seeking the production of public records, not on behalf of the general public interest, but in an effort to gain an advantage over the State in this litigation. However, although this is an action by a private entity presumably for its own purposes, the State "has no autonomous right of confidentiality in communications relating to government business." Restatement (Third) of Law Governing Lawyers § 74 cmt. b. (2000). Though the State argues that it will be at a disadvantage in defending the case if the withheld material is revealed, the State has not shown how or why disclosure will cause serious impairment. Further, disadvantage is not tantamount to serious impairment.

Based on its finding and conclusion, for the several different reasons presented above, that the State has not established that the withheld materials are privileged under Rule 502(d)(6), the court will order disclosure. However, before disclosure occurs, the court will afford any party the opportunity to seek appellate review of this order, if interlocutory appellate review is indeed available[5], under the so-called "death knell" exception to the final judgment

[5] The court takes no position on whether interlocutory appellate review is in fact available, given that the Law Court has granted review in some appeals from orders requiring disclosure of alleged attorney-client communications, and not in others. *Compare In re Motion to Quash Bar Counsel Subpoena*, 2009 ME 104, ¶¶ 8-12, 982 A.2d 330 *with Lewellyn v. Bell*, 635 A.2d 945 (Me. 1993).

rule that the Maine Law Court has held can apply to claims of attorney-client privilege. *See In re Motion to Quash Bar Counsel Subpoena*, 2009 ME 104, ¶¶ 8-12, 982 A.2d 330; *see also Fiber Materials, Inc. v. Subilia*, 2009 ME 71, ¶ 31, 974 A.2d 918.

It is hereby ORDERED AS FOLLOWS:

Based on the foregoing, it is hereby ORDERED as follows:

1. Plaintiff's Motion to Compel Production of Documents is granted.

2. If any party files a timely notice of appeal of this Order, the unredacted version of the withheld documents filed by the State shall remain sealed under further order.

3. If no timely notice of appeal is filed, the State forthwith and without further order shall produce a complete unredacted set of the withheld materials.

Pursuant to M.R. Civ. P. 79(a), the clerk is hereby directed to incorporate this Order by reference in the docket.

Dated May 4, 2015

/s
A. M. Horton
Justice, Business & Consumer Court