UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

MENASHA CORPORATION, and
NEENAH-MENASHA SEWERAGE
COMMISSION,

Plaintiffs,

Case No. 11-C-682

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs argue they are entitled to receive privileged internal communications within the Department of Justice, and among Department lawyers and the federal agencies they represent in the Fox River litigation. This argument is based on a fundamentally flawed premise: that "lawyers at the United States Department of Justice . . . represent separate client agencies with adverse interests." *See* Doc. 20 (Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment) at p.1. To the contrary, Department of Justice lawyers represent a single client in litigation: the executive branch of the United States. There can be no waiver of the privileges based on communications between lawyers for the same client.

In *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (2011), the Supreme Court rejected a case-by-case approach to deciding whether a government lawyer's consideration of multiple interests might foreclose the government's assertion of a legal privilege with respect to

its internal communications. 131 S.Ct. at 2328 (holding that "the conflicting interests the Government must consider are too pervasive for such a case-by-case approach to be workable."). Plaintiffs fail to address the *Jicarilla* decision in any significant depth, alleging only that the focus of the case was narrow and that the case "is simply not applicable to the situation before the Court." Doc. 20, at p. 8. But a close reading of the Supreme Court's opinion shows that its rationale – and in particular its observations about the workability of a communication firewall within DOJ – is directly on point.

Plaintiffs here vastly oversimplify the problems inherent in finding a government privilege waiver based on the nature of the interests a DOJ is representing, and fail to confront many of the practical and legal difficulties with their position. At bottom, the well-established legal and ethical principle that DOJ attorneys represent a single client (the United States) answers the waiver question here and squares with the general rules of waiver in privilege cases.[1] Moreover, a consistent application of this principle ensures predictability in the application of the government's legal privileges and in the professional responsibility obligations of government attorneys.

ARGUMENT

I. Discussions Among DOJ Attorneys Cannot Waive the Government's Privileges Because All DOJ Attorneys Represent the Overall Interests of a Single Client, the United States.

As we establish in our opening brief, DOJ lawyers represent the executive branch of the United States as a whole, not individual agencies. It follows that DOJ attorneys must be free to communicate with each other and with the federal agencies whose interests they represent, just

[1] Even if plaintiffs' theory of waiver were otherwise valid, plaintiffs do not provide any authority that suggests that Exemption 7(A), the law enforcement exemption, can be waived by sharing a document within the federal government. Exemption 7(A) applies to many of the withheld documents here.

as lawyers for a private client may speak with each other and with their client without waiving any privilege.

Plaintiffs, without citing to any binding precedent establishing their proposition, assume that DOJ attorneys represent "independent clients with adverse interests," and claim that there is "no support" for the single client concept.[2] S*ee* Doc. 20 at p. 4. This novel position ignores the substantial body of statutory and other authority summarized in DOJ's opening brief, all of which fully supports the principle that the United States as a whole is the organizational client of all DOJ lawyers. *See* Doc. 19 at pp. 11-14. One source of support for this conclusion is found in the 1982 Office of Legal Counsel Opinion, whose analysis illustrates why the Attorney General and the Department lawyers who work under his or her supervision represent the United States as a whole. Another is the Model Rules of Professional Responsibility, also discussed in DOJ's opening brief. Plaintiffs dismiss these sources without significant analysis, claiming that the 1982 Opinion is "advisory" and consists only of the author's view on how litigation should be conducted within DOJ.

While the 1982 OLC Opinion itself is not binding on the Court, plaintiffs fail to challenge the Opinion's reasoning or confront its conclusion that the Attorney General has full plenary authority over all litigation to which the United States is a party, regardless of any conflicts of position that may exist within and between agencies of the government. As explained in the

[2] Notably, plaintiffs' opposition implicitly acknowledges that DOJ attorneys do, in fact, represent a single client. For example, plaintiffs point out that "a private party waives its privilege as to all agencies of the government if it submits information to one particular government agency." Doc. 20 at p. 6. This is because the federal government is a unitary executive, not an assemblage of "adverse government agencies" as plaintiffs suggest. Thus, the case cited by plaintiffs, *United States v. Massassachusetts Institute of Technology*, 129 F.3d 681, 686 (1st Cir. 1997), actually supports the government's position. Plaintiffs also characterize the proposed consent decree as one "in which the United States seeks to settle with itself." Doc. 20 at p. 1. Using plaintiffs' reasoning, it follows that communications within DOJ and among federal agencies regarding the settlement are similarly the United States' communications "with itself," not with an adverse party.

Opinion, the litigation authority of ENRD – and its litigating sections – is delegated authority, reflecting the judgment of Congress (by statute), the President (by Executive Order) and the Attorney General (by regulation) as to the most effective representation of the United States in court.

Plaintiffs confuse ENRD's decision to divide responsibility for litigating certain types of claims between nine litigation sections – a management decision designed to facilitate the effective and efficient representation of the United States – with the creation or alteration of an attorney-client relationship. As plaintiffs appear to concede, the Attorney General has full authority to resolve inter-agency disputes and to ensure that the United States speaks with one voice in court, and thus represents the executive branch of the United States, as a whole. The Attorney General has delegated the authority to litigate environmental cases to the Assistant Attorney General for ENRD, who has in turn assigned responsibility for different cases and claims to the section managers and line attorneys who serve in the Division. At no point in this series of delegations does the client of the DOJ attorney change: it remains the executive branch of the United States.

Plaintiffs cite a single unpublished district court decision, *Modesto Irrigation District v. Gutierrez*, 2007 WL 763370 (E.D. Cal. 2007) in support of its position that the sharing of confidential communications between different government agencies might waive the attorney-client privilege. In *Modesto*, the court questioned the proposition that multiple agencies can constitute a single client for the purposes of the attorney-client privilege. *Id.* at *15. However, the court nonetheless ***denied*** the plaintiffs' motion for disclosure of the United States' privileged documents, finding that the common interest doctrine protected the documents from disclosure because the agencies "shared the common goal of reaching a mutually acceptable policy decision

that would withstand legal challenge." *Id.* at *18. While the United States disagrees that the common interest inquiry is appropriate here, even applying the *Modesto* court's reasoning this Court should find that all of the federal agencies involved in the Fox River litigation shared a common goal of reaching a fair and appropriate settlement of the United States' liability that would be approved by this Court.[3]

Under any circumstances, the Supreme Court's rationale in *Jicarilla* contradicts the *Modesto* court's suggestion that federal cabinet agencies can have adverse interests that create a waiver of the attorney-client privilege, in part because a case-by-case approach to identifying these allegedly competing interests is unworkable. *Modesto*, decided before *Jicarilla*, did not address this problem at all, and should not be given significant weight here.

II. Plaintiffs' "Separate Clients" Theory Presents Unworkable Obstacles for the Federal Government.

Plaintiffs suggest that because DOJ is representing agencies with "adverse interests" in the Fox River litigation, DOJ should have set up independent lines of supervision within ENRD for each interest, established a wall between them, and prohibited the lawyers assigned to represent each interest from communicating confidential information to each other or to their respective agency clients. *See* Doc. 20, at pp. 6, 10-11. There are a multitude of legal and practical problems with this approach.

This case highlights some of those problems. Under plaintiffs' approach, Randall Stone (for EES) and Joshua Levin (for EDS) would have been required to restrict their communications about the Fox River litigation to their agency "clients," which plaintiffs identify as EPA and the Army Corps of Engineers, respectively. Doc. 20, at p. 6. But EPA is both the agency

[3] Also, the *Modesto* case involved communications between multiple federal agencies; two of the four communications at issue did not involve DOJ attorneys. *Id.* at *14. Here, many of the documents sought were shared only within the Department of Justice. Even under the *Modesto* court's reasoning, it is difficult to conceive how the Department of Justice could have conflicting interests with itself.

responsible for CERCLA enforcement and a potentially responsible party in the enforcement action, by virtue of Menasha's decision to sue EPA for its recycling activities.[4] Thus, EDS lawyers must consult with EPA and its lawyers as well. This overlapping representation of multiple interests, which is quite common in environmental enforcement litigation, would not occur at a private law firm. *See Nevada v. United States*, 463 U.S. 110, 135 n.15 (9183) ("[T]he Government stands in a different position than a private fiduciary where Congress has decreed that the Government must represent more than one interest"). DOJ cannot separate out the competing interests of multiple overlapping environmental issues posed at a contaminated site and assign different lawyers and chains of supervision to each interest.[5] Even if the Court assumes, *arguendo*, that such a division is possible, at the end of the process a single DOJ decision maker controls both sides of the litigation. Thus, if the executive branch did constitute multiple independent clients, plaintiffs' proposed division would not operate to cure the conflict.

In *Jicarilla*, the Supreme Court grappled with many of these same concerns, although in the slightly different context of the United States' trust relationship with an Indian Tribe. The rationale of that decision applies fully to this case. In *Jicarilla*, the Court observed that the "Government may be obliged to balance competing interests when it administers a tribal trust," and the "Government may seek the advice of counsel for guidance in balancing these competing interests." 131 S.Ct. at 2328. Although the Court of Appeals sought to manufacture a way to segregate these multiple interests to limit the application of the fiduciary exception to the attorney-client privilege (essentially as plaintiffs attempt here), the Supreme Court held that "the

[4] Moreover, if plaintiffs' theory is accepted, EPA would also have to separate communications between lawyers handling enforcement and defensive work, further complicating this inquiry.

[5] This is particularly true because an agency's interests with regards to a particular issue may be affected by changes in presidential administrations. Thus, two agencies' interests on an issue could be aligned in one administration, but adverse in the next. Under plaintiffs' theory, DOJ lawyers would have to change their client agencies whenever such a shift occurs.

conflicting interests the Government must consider are too pervasive for such a case-by-case approach to be workable." *Id*.

Plaintiffs' approach to the waiver question is equally unworkable here. In complex environmental enforcement cases, as in Indian trust cases, it is often necessary for DOJ to consider and resolve competing interests in order to represent a single position of the United States in court.[6] As in *Jicarilla*, these conflicting interests are simply too pervasive, and too unpredictable, for the plaintiffs' approach to be workable. On a daily basis, attorneys at the Department of Justice work with multiple federal agencies and subcomponents that have differing views of what position the United States should take in a particular case. Consideration and resolution of differing federal interests is an integral part of a DOJ attorney's job, and there is often not a bright line between when an attorney is considering one federal interest as opposed to another.

In *Jicarilla,* the Court also emphasized that "for the attorney-client privilege to be effective, it must be predictable." The Court explained:

> If the Government were required to identify the specific interests it considered in each communication, its ability to receive confidential legal advice would be substantially compromised. . . . Forcing the Government to monitor all the considerations contained in each communication with counsel would render its attorney-client privilege little better than no privilege at all.

Jicarilla, 131 S.Ct. at 23, 28-29 (internal quotations and citations omitted). Acceptance of plaintiffs' position would lead to great uncertainty within DOJ as to when and how its internal

[6] Although plaintiffs argue that the factual context of *Jicarilla* is different, in fact, it applies directly to the work of ENRD. In addition to the environmental litigation responsibilities at issue in this case, ENRD is also charged with handling Indian litigation – both affirmative cases brought on behalf of the United States in its trust capacity for tribes, and defensive cases in which a tribe is suing the United States. *Jicarilla* affirmed the ability of federal agencies, including the Department of Justice, to represent the many interests of the sovereign in these matters, without waiving the privileges. If plaintiffs' argument is accepted, ENRD's handling of Indian litigation could also be adversely affected.

communications must be segregated, imperiling the Government's ability to properly handle litigation and receive attorney advice. It would also create substantial uncertainty for DOJ attorneys as to how to comply with their professional responsibility obligations. For the same reasons articulated by the Court in *Jicarilla*, the proposal to create separate lines of communication within DOJ for the purpose of avoiding a waiver is simply not practical or legally appropriate.[7]

Plaintiffs' suggestions for how DOJ must reorganize its litigating functions would be a dramatic interference in the litigation authority of the Department of Justice. Each of ENRD's nine litigating sections reports to the same Assistant Attorney General. Furthermore, here, aspects of the proposed consent decree were subject to the approval of the Associate Attorney General. These final decision makers cannot perform their supervisory role unless they can communicate freely with all of the DOJ attorneys assigned to the case. At least twenty of the documents at issue in this case are draft or final versions of confidential, internal briefing materials for the Assistant Attorney General and Associate Attorney General, or internal ENRD communications relating to the preparation of those briefing materials. It is unclear how plaintiffs propose that the privileges would or would not apply to communications with these senior officials, but at a minimum, their theory would throw the ability of DOJ attorneys to communicate with their supervisors into uncertainty. DOJ officials should also be permitted to obtain coordinated and complete advice from the attorneys assigned to handle the case, which

[7] To further support their waiver argument, plaintiffs assert that CERCLA mandates that government PRPs be treated like private PRPs for all purposes, including privilege waiver questions. However, nothing in CERCLA affects the principle that DOJ attorneys represent one client, the United States, in all litigation, or the principle that DOJ lawyers must retain the ability to communicate freely with their agency clients and Justice Department counterparts. And plaintiffs' suggestion that privilege waiver questions should be decided differently based on the nature of the case would only add additional uncertainty to the already nebulous rule the plaintiffs are proposing.

necessitates that all attorneys assigned to a particular matter share information and coordinate recommendations, which would not be permitted if plaintiffs' argument is accepted. In any event, plaintiffs' proposal for separate lines of communication and supervision within certain sections of ENRD would do little to solve to the alleged "problem" of sharing confidential information – it would simply move the issue higher up the chain of authority.

Although plaintiffs try to square their argument with the "unitary executive" theory, a logical outcome of plaintiffs' argument is that each federal agency may need to file separate briefs with the district and appellate courts on many issues. Not only would this create great inefficiencies for the Department of Justice, it would also create unnecessary work for the courts and deprive the court of being able to rely on the government's brief as presenting the views of the United States as a whole. *See United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988) ("Among the reasons for reserving litigation in this Court to the Attorney General and the Solicitor General, is the concern that the United States usually should speak with one voice before this Court, and with a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people.")

In sum, plaintiffs' theory, if applied, would demand a fundamental restructuring of not only the Department of Justice, but also of every executive branch agency that is simultaneously engaged in both enforcement and defensive actions or is otherwise considering multiple interests in its decision making. Such a dramatic and burdensome change is utterly unsupported by the statutory, regulatory, and case law that governs the application of the attorney-client and other privileges within the federal government, and should be rejected.

III. The Declarations and Indices Submitted by DOJ Are More Than Sufficient to Meet Its Burden of Proof, and Plaintiffs Have Offered No Rebuttal Evidence.

Plaintiffs assert that even if no waiver has occurred, DOJ has not met its burden of showing that the withheld documents fall within appropriate FOIA exemptions. This contention is without merit. In this case, DOJ has submitted two declarations setting forth the background of the case, the reasons why the contested documents were created and exchanged within the government, and the basis for the claimed FOIA exemptions. Then, in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), DOJ prepared and filed a detailed Index, describing each of the 440 documents withheld and the basis for withholding.[8]

This is a well accepted and commonly used method for the government to meet its burden of proof in FOIA cases. *See e.g., Canning v. Department of Justice*, 848 F.Supp. 1037, 1042 (D.D.C. 1994) ("Agencies are typically permitted to meet [their] heavy burden by filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed") (internal quotations and citations omitted). The *Vaughn* decision generally requires agencies to prepare an itemized index, correlating each withheld document with a specific FOIA exemption and the relevant part of the agency's nondisclosure justification. *See Vaughn*, 484 F.2d at 827. The purpose of the index is to allow the trial court "to make a rational decision [about] whether the withheld material must be produced without actually viewing the documents themselves . . . [and] to produce a record that will render [its] decision capable of meaningful review on appeal." *King v. Department of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987).

[8] DOJ initially filed a 191-page Index describing over 1100 documents that fell within the scope of Attorney Rabbino's FOIA request. Plaintiffs subsequently agreed to narrow the scope of their request, resulting in the filing of a seventy page index covering the 440 documents now at issue.

There is no set formula for a *Vaughn* Index; instead, it is the function, not the form that is important. *See Gallant v. National Labor Relations Board*, 26 F.3d 168, 172-73 (D.C. Cir. 1994) (holding that the justification for withholding may take any form as a long as the agency offers a "reasonable basis to evaluate [its] claim of privilege"). And, as DOJ has done here, an agency "may submit other materials to supplement its *Vaughn* Index, such as affidavits, to give the court enough information to determine whether the claimed exemptions were properly applied." *People for the Ethical Treatment of Animals v. U.S. Department of Agriculture*, 2005 WL 1241141, at *4 (D.D.C. 2005). If the *Vaughn* Index meets this goal, it is accorded a presumption of good faith. *See e.g., Carney v. Department of Justice*, 19 F.3d 807, 812 (2d Cir. 1994).

In this case, plaintiffs fail to demonstrate any legal insufficiency in the DOJ declarations and its detailed *Vaughn* Index. Indeed, plaintiffs have not pointed out any specific inadequacy in the description of any document, or a defect in the justification for a claimed exemption. Instead, plaintiffs claim only that the United States has "used a broad brush to capture under the general exemption standards essentially every document it has withheld." Doc. 20 at p. 12. A review of the government's submissions, however, shows that they fully meet the purpose of providing the court with information sufficient to determine the propriety of its claimed exemptions, without resort to a review of the documents themselves.

The declarations submitted by DOJ attorneys Stone and Levin first include a summary ENRD's internal structure (*see e.g.*, Stone Dec. ¶¶ 1-4), the background of the Fox River litigation (*Id.* ¶¶ 5-11), the FOIA request at issue (*Id.* ¶ 12), the nature of ENRD's responsive communications and documents, and the manner in which ENRD responded to the FOIA request (*Id.* ¶¶ 13-18). The explanation of the responsive documents includes a description of the kinds of internal communications exchanged within DOJ and with its agency clients (*Id.* ¶ 15).

Next, the declarations provide an overview of the basis for each claimed FOIA exemption, including Exemption 5 (Stone Dec. ¶¶ 19-25), Exemption 7(A) (Stone Dec. ¶¶ 26-30), and Exemption 3 (Stone Dec. ¶ 31). Each section, in turn, provides citations to documents drawn from the *Vaughn* Index to exemplify the legal and factual basis for the exemption claimed. For instance, in addressing the attorney work product privilege (part of Exemption 5), Mr. Stone's declaration explains that "many of the withheld documents are communications among ENRD attorneys discussing litigation strategy and coordinating positions in preparation for filing briefs and conducting negotiations." Stone Dec. ¶ 21. The declaration then provides a citation to six documents listed on the *Vaughn* index as exemplars. One of those documents, DOJ314675, is described on the Index as follows:

> DOJ314675 15-Jul-10
> Email regarding strategy for ACOE [Army Corps of Engineers] documents and proposed settlement
> From: Randall Stone (DOJ-ENRD)
> To: Matthew Oakes (DOJ-ENRD), Joshua Levin (DOJ-ENRD)
> CC: Jeffrey Spector (DOJ-ENRD)
> Ex. 5; Ex. 7(A)
> Attorney work product; deliberative process; disclosure would interfere with ongoing law enforcement proceeding (e.g., United States & State of Wisc. v. NCR Corp. et al., Case No. 10-C-910 (E.D. Wisc.))

Document 19-1, at p. 5. This is just one of many examples drawn from DOJ's *Vaughn* Index. Without going into the actual substance of the email communication itself (which after all is the very reason for the withholding), taken together the declaration and index show the date the email was sent, the authors and recipients (here, all DOJ attorneys), the nature of the privileged communication (involving case and settlement negotiation strategy), and the claimed exemptions. Plaintiffs here do not explain why this is a "broad brush" submission, or why this description fails to provide a meaningful basis for this Court's review. The United States has

fully met its burden under *Vaughn v. Rosen*, and given that plaintiffs have failed to mount any specific rebuttal to these submissions, summary judgment in DOJ's favor is appropriate.

IV. FOIA Does Not Generally Permit a Court to Consider the Alleged Need of a Requestor for the Information It Seeks.

Plaintiffs' brief opens with a discussion about their alleged particular need for the government's privileged information.[9] According to plaintiffs, this information is necessary to determine the fairness of the proposed Consent Decree that would resolve the alleged liability of certain federal agencies. However, as matter of basic FOIA law, the Supreme Court has repeatedly emphasized that a FOIA requestor's access rights are neither increased nor decreased based on the requestor's particular interest in the records sought. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) (recognizing that a requester's "rights under the Act are neither increased nor decreased by reason of the fact that [he or she] claims an interest in the [requested records] greater than that shared by the average members of the public"); *United States Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 771 (1989)("As we have repeatedly stated, Congress clearly intended the FOIA to give any member of the public as much right to disclosure as one with a special interest [in a particular document]") (internal quotations and citations omitted); *see also F.T.C. v. Grolier, Inc.*, 462 U.S. 19, 28 (1983) ("[U]nder Exemption 5, attorney work-product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared.")

[9] Plaintiffs also cite FOIA's goal of government transparency. Doc. 20 at pp. 2-3. Notwithstanding this goal, Congress has recognized that certain documents should be exempt from mandatory disclosure, including those documents that are normally privileged in the civil discovery context. As the Supreme Court has recognized, permitting requestors to "obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. . . . We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801-802 (1984) (internal citations omitted).

Even to the extent the Court views the alleged need for government records as a relevant consideration, there is no compelling reason here to grant plaintiffs special access to the government's privileged material. Plaintiffs appear to assert a special need for this privileged material, allegedly to "shed light on whether the United States' settlement with itself resulted from arms-length negotiations as is required. . . ." Doc. 20 at pp. 1-2. However, as the United States explains in the recently-filed joint reply brief supporting the Consent Decree, the United States has never contended that the Settling Federal Agencies' resolution of their alleged liability is justified by arms-length negotiations between different components of the federal government. *See* Case No. 10-CV-910 (Doc. 278 at p. 22). Instead, the government's position is that all the ENRD lawyers involved in developing the terms of the Decree were working to represent the overall interests of the United States, not the specific interests of a particular agency. Recognizing this, the government fully understands and expects that the settlement will be judged on its own merits, after full adversarial testing and close examination by the Court. *Id.* at pp. 22-23.

Plaintiffs here have opposed entry of the Consent Decree, and have had a full opportunity, using appropriate non-privileged information, to challenge the reasonableness of the Decree before this Court. It is wholly unnecessary for this Court to undermine the unitary executive theory and throw the government's privileges into serious question in order to allow plaintiffs an opportunity to challenge the proposed Consent Decree. Under the circumstances, plaintiffs can establish no special need for the government's privileged documents.

CONCLUSION

For the reasons set forth above, and in the supporting letters, declarations and indices on file, defendant respectfully requests that the Court: (1) find that the communications among DOJ lawyers and other federal agencies in this case did not waive, or preclude the assertion of, any asserted governmental privilege; and (2) enter summary judgment in defendant's favor.

Dated at Milwaukee, Wisconsin, this 28th day of December, 2011.

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