UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MATTHEW POLLACK, et al., individually and as next friends of BP,	)	
Plaintiffs,	)	
v.	)	2:13-cv-00109-NT
REGIONAL SCHOOL UNIT NO. 75, et al.,	)	
Defendants	)	

ORDER ON PLAINTIFFS' REQUEST FOR DOCUMENTS

In the course of pretrial discovery, Plaintiffs requested certain documents that Defendants declined to produce based on Defendants' assertion of the attorney-client privilege. In accordance with the July 22, 2015, Report of Telephone Conference and Order, the parties filed memoranda in which they addressed Defendants' assertion of the attorney-client privilege. Defendants also provided the Court with a privilege log and the documents that are the subject of the dispute.

Following a review of the parties' arguments, the privilege log, and the documents for which Defendants claim the privilege, the Court sustains Defendants' assertion of the privilege.

DISCUSSION

Federal Rule of Evidence 501 defines, in the first instance, the application and scope of the attorney-client privilege. The Rule provides:

> The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:
>
> • the United States Constitution;
>
> • a federal statute; or
>
> • rules prescribed by the Supreme Court.

> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Fed. R. Evid. 501. As the Rule reflects, where state law applies to the claim or defense, the privilege would likely be governed by state law. In this action, Plaintiffs allege that Defendants violated rights protected by federal law, in particular the Individuals with Disabilities Education Act, the Rehabilitation Act, and the Americans with Disabilities Act.[1] Plaintiffs' operative pleading, the second amended complaint (ECF No. 51), does not assert a state law claim. Because federal law governs the claims in this case, federal common law controls Defendants' assertion of the attorney-client privilege. *Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2002); Fed. R. Evid. 501.

"The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It is designed to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* "By safeguarding communications between attorney and client, the privilege encourages disclosures that facilitate the client's compliance with law and better enable him to present legitimate arguments when litigation arises." *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 23 (1st Cir. 2011). However, "the privilege is not limitless, and courts must take care to apply it only to the extent necessary to achieve its underlying goals." *In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 22 (1st Cir. 2003). A relatively narrow construction is appropriate because the privilege "comes with substantial costs and stands as an obstacle of sorts to the search for truth." *Id.*

[1] Plaintiffs also allege violations of the First Amendment and the Fourth Amendment in claims brought under 42 U.S.C. § 1983.

The attorney–client privilege applies:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Cavallaro, 284 F.3d at 245 (quoting 8 J.H. Wigmore, *Evidence* § 2292, at 554 (McNaughton rev. 1961)). Where these conditions exist, the federal common law attorney-client privilege ordinarily is available to governmental entities as well as private entities. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2321 (2011). As the party invoking the privilege, Defendants "must show both that it applies and that it has not been waived." *Lluberes*, 663 F.3d at 24. Once established, the burden of proving an exception to the rule is placed on the proponent of the exception. *Vicor Corp. v. Vigilant Ins. Co.*, 674 F.3d 1, 17 (1st Cir. 2012).

As the issue has been framed by the parties, Plaintiffs do not challenge Defendants' assertion that the documents represent communications between counsel and representatives of Defendant Regional School Unit No. 75 regarding legal issues related to Plaintiffs.[2] Under Federal Rule of Evidence 501, therefore, the documents would be within the scope of the privilege and thus not discoverable.[3] Citing the Maine Freedom of Access Act, 1 M.R.S. § 402(3)(B), however, Plaintiffs argue that documents that reflect communications within two discrete periods of time are subject to disclosure because the documents are "public records" as a matter of state law. [4]

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[2] Defendants' privilege log and memorandum assert, and the Court's in camera review has confirmed, that the subject documents contain communications between attorney and client that were made for the purpose of securing legal advice, and that the circumstances do not raise the prospect of a waiver. Moreover, the communications were made in confidence, i.e., under circumstances that would give rise to an expectation that they would not be shared with anyone outside the bounds of the attorney-client relationship.

[3] For purposes of federal common law, the fact that the client in this case is a governmental entity and its agents does not erode the privilege. *Jicarilla Apache Nation*, 131 S. Ct. at 2321; *In re Grand Jury Investigation*, 399 F.3d 527, 534 – 35 (2d Cir. 2005).

[4] Plaintiffs also rely on *In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65, 72 (1st Cir. 2011). In that opinion, the First Circuit held that the attorney-client privilege did not attach to documents and records that were created for a public

Specifically, Plaintiffs maintain that the documents that reflect communications in (1) 2010 through October 2011 and (2) January 26, 2012, through September 11, 2012, are not privileged because no litigation was "pending" between the parties during the time periods.

The Maine Freedom of Access Act (FOAA) defines "public records" broadly, but excepts from the definition "[r]ecords that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding." 1 M.R.S. § 402(3)(B). According to Plaintiffs, the phrase "recognized by the courts of this State in civil or criminal trials" necessarily incorporates the attorney-client privilege found in Maine Rule of Evidence 502, which includes an exception to the attorney-client privilege for "communications between a public officer or agency and its lawyers [unless] 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[.]" Me. R. Evid. 502(d)(6). Plaintiffs contend that the documents generated during the two time periods are discoverable as public records because no matters were pending at the time the documents were created.

Whether Defendant RSU 75 would be required to disclose the documents in response to a FOAA request is not the pertinent inquiry. The issue for the Court is whether under federal common law, the documents are protected by the attorney-client privilege. Not insignificantly, Plaintiffs have cited no authority for the proposition that Maine's FOAA is incorporated in the

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transaction. The documents in that case were HUD statements, a real estate closing statement, and similar records prepared by counsel for a real estate closing between the target of a grand jury subpoena and another individual. *Id.* The court ruled that, by their basic nature, such documents could not be regarded as confidential. *Id.* The court additionally observed that the proponent of the privilege made no independent showing that any of the documents was created to provide legal advice. *Id.* The rationale of *In re Grand Jury Subpoena* is not applicable here. The communications between Defendants and counsel that are the subject of this Order were neither prepared for public disclosure nor in fact disclosed as part of any transaction or proceeding. They are, therefore, unlike the documents considered by the court in *In re Grand Jury Subpoena*.

federal common law privilege.[5] The exception to the privilege included in Maine Rule of Evidence 502, therefore, is not an exception to the attorney-client privilege recognized under federal common law.

Even if the Court accepted Plaintiffs' argument and applied the exception to the attorney-client privilege set forth in Maine Rule of Evidence 502, the documents that reflect communications within the two time periods are within the scope of the attorney-client privilege. Under Rule 502, the privilege does not apply to communications between counsel and public officers or agencies unless "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." Me. R. Evid. 502(d)(6). Plaintiffs maintain that because no official matter was pending during the two time periods, the documents are not privileged. Plaintiffs thus urge a rather restrictive interpretation of the term "pending." As suggested by the Maine Supreme Judicial Court in the analogous context of the Maine work-product privilege, an investigation, litigation, or proceeding should be regarded as "pending" if it is objectively reasonable for the party engaged in attorney-client communication to anticipate it. *Springfield Terminal Ry. Co. v. Dep't of Transp.*, 2000 ME 126, ¶ 16, 754 A.2d 353, 357. In other words, a court must assess the particular circumstances to determine the applicability of the privilege. Given the sound and important reasons for the attorney-client privilege, such an approach is reasonable. Here, without commenting on the merits of any of the proceedings initiated by

[5] To the extent that Plaintiffs argue that the Court should incorporate Maine's FOAA in the attorney-client privilege in this particular case, Plaintiffs' argument is unpersuasive. Under federal common law the attorney-client privilege, when established, has not been treated as subject to case-by-case balancing in the absence of well-recognized and time-honored exceptions. *Swidler & Berlin v. United States*, 524 U.S. 399, 404 (1998) ("Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege."); *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

Plaintiffs or any of Plaintiffs' filings, Plaintiffs have frequently challenged the decisions and actions of Defendant RSU No. 75, and have demonstrated a willingness to pursue aggressively all available administrative and legal processes to prosecute their challenges. Under the circumstances, Defendant RSU No. 75 representatives understandably consulted counsel upon contact from Plaintiffs, and the disclosure of documents that reflect communications between representatives of Defendant RSU No. 75 and counsel would "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." Me. R. Evid. 502(d)(6). Accordingly, the attorney-client privilege would protect the documents even if the Court applied Maine law with respect to the attorney-client privilege.[6]

CONCLUSION

Based on the foregoing analysis, Plaintiffs' request for the documents that reflect communications between counsel and representatives of Defendant RSU No. 75 between (1) 2010 through October 2011 and (2) January 26, 2012, through September 11, 2012, is denied.

CERTIFICATE

Any objections to this Order shall be filed in accordance with Fed. R. Civ. P. 72.

/s/ John C. Nivison
U.S. Magistrate Judge

Dated this 24th day of August, 2015.

POLLACK et al v. REGIONAL SCHOOL UNIT NO 75 et al	Date Filed: 03/27/2013
Assigned to: JUDGE NANCY TORRESEN	Jury Demand: Both
Referred to: MAGISTRATE JUDGE JOHN C.	Nature of Suit: 448 Civil Rights:

[6] In a recent submission, Plaintiffs argue that if Defendant RSU No. 75 intends to assert a particular position regarding its response to Plaintiffs' request for certain educational records, Defendant has waived the attorney-client privilege. Because Plaintiffs' argument is apparently contingent on Defendant's assertion of a particular position either in motion practice or at trial, the waiver argument is not ripe for the Court's consideration at this point.

NIVISON
Member case:
2:14-cv-00215-NT
related Case: 2:14-cv-00215-NT
Cause: 20:1401 Education: Handicapped Child Act

Education
Jurisdiction: Federal Question

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