ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Parsons-UXB Joint Venture	)	ASBCA No. 56481
	)	
Under Contract No. N62742-95-D-1369	)	

APPEARANCES FOR THE APPELLANT: Thomas A. Lemmer, Esq.
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OPINION BY ADMINSTRATIVE JUDGE MELNICK ON THE GOVERNMENT'S MOTION TO COMPEL

Appellant appeals from the denial of its claim for reimbursement of increased general excise taxes (GET) paid to the state of Hawaii. Prior to pursuing the claim, appellant had litigated the extent of its tax liability with Hawaii. The parties have been engaging in discovery in this appeal, and the government has now filed a motion to compel, seeking a determination that appellant has waived attorney-client privilege and attorney work-product protection that might otherwise be applicable to documents arising from its tax dispute with Hawaii. We deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. Appellant is a joint venture (JV) of Parsons Infrastructure and Technology Group Inc. (Parsons) and UXB International, Inc. (compl. and answer ¶ 1). Appellant seeks reimbursement of increased GET assessed against the JV and each of the partners.

2. On 29 July 1997, the Navy awarded appellant Contract No. N62742-95-D-1369, a cost plus award fee, indefinite-delivery, indefinite-quantity contract to clear unexploded ordinance and provide environmental restoration at Kaho'olawe Island Reserve, Hawaii (R4, tab 1).

3. Hawaii imposes GET on all gross revenues derived from business activity in Hawaii (R4, tab 291 at 7099).

4. A dispute arose between Hawaii and both the JV and its partners about the amount of their GET liability (R4, tab 291 at 7099). The dispute led to litigation in the Tax Appeal Court of the State of Hawaii (R4, tab 143).

5. Upon partial settlement of the dispute with Hawaii, appellant submitted an invoice to the Navy for its increased GET liability (R4, tab 285).

6. The contracting officer rejected the invoice on the ground that it sought "costs not currently in place on the contract" (R4, tab 286 at 7092). Appellant subsequently submitted a certified claim for its increased GET costs (R4, tab 291 at 7103). Appellant has now appealed from the deemed denial of that claim.

7. On 7 April 2011, the government filed a motion requesting the Board order the appellant to produce all documents responsive to the government's Document Request No. 7. The government's Document Request No. 7 refers to the advice in a 6 November 2004 letter signed by Larry L. Myers, Esq., counsel to the appellant in its tax litigation with Hawaii. (Gov't mot. at 3) The letter is written to Mr. Gregory Ahlstrom of appellant, and Jeffrey A. Wayne, Esq. of the Navy. It describes the positions of the parties in the Hawaii litigation and the issues presented, providing detailed legal analysis. It also presents a cost benefit analysis, and reviews other considerations. (R4, tab 220) Request No. 7 seeks "all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice." The relevant portion of appellant's response claimed that the information sought was "protected by the attorney client and/or work product privileges." Appellant maintained that the responsive documents subject to the privilege include Mr. Myers' entire case file. (Gov't mot. at 3) However, in its subsequent response to the motion to compel, appellant has indicated that some of the facts known by Mr. Myers may not be privileged, and has said it will produce any non-privileged documents in Mr. Myers' possession (app. resp. at 3).

8. Appellant has not produced a log identifying the documents it claims to be subject to privilege. However, rather than attempt to address documents on an individual basis, the government claims that, regardless of the nature or subject matter of any responsive document in Mr. Myers' possession, appellant has waived its right to assert privilege over it. The government gives three grounds in support of waiver. They are that Mr. Myers' letter intentionally discloses his impressions, opinions, and advice; the appellant has placed its attorney's knowledge and actions at issue in this case; and the appellant seeks its attorney fees from the Hawaii litigation in this appeal.

DECISION

I. Background Principles

A. The Attorney-Client Privilege

The purpose of the attorney-client privilege is to encourage "full disclosure by the client to the attorney." *B.D. Click Co.*, ASBCA Nos. 25609, 25972, 83-1 BCA ¶ 16,328 at 81,173; *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (the privilege is to "encourage full and frank communication between attorneys and their clients"). Although the definition of the privilege has been described differently, *B.D. Click*, 83-1 BCA ¶ 16,328 at 81,172-73, one consistent aspect is that it only protects confidential communications "by clients to their lawyers for the purpose of obtaining legal advice...." *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (*en banc*); *see also Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997). Although a confidential communication from attorney to client can also be privileged, it is only privileged to the extent it would "reflect client communications which fall within the privilege." *B.D. Click*, 83-1 BCA ¶ 16,328 at 81,173; *see also Carter*, 909 F.2d at 1451 (excluding application of the privilege to attorney statements that do "not betray *any* communications between the client and attorney"); *Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987) (interpreting Seventh Circuit precedent to apply the privilege to confidential attorney statements that "reveal, directly or indirectly, the substance of a confidential communication by the client"); *Yankee Atomic Elec. Co. v. United States*, 54 Fed. Cl. 306, 314 (2002) (recognizing the privilege's application to attorney communications revealing "the substance of a confidential communication by the client"). Significantly, the privilege does not apply to documents that were "prepared for distribution to third parties and, therefore, were not confidential, and not privileged." *Id.* at 315 n.10; *see also Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (noting that a fundamental prerequisite to application of the privilege is that confidentiality was expected).

A party may waive the protections of the attorney-client privilege when it discloses previously privileged communications. Such a waiver has been held in the past to encompass all other communications involving the same subject matter. *Yankee Atomic*, 54 Fed. Cl. at 315; *see also Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349 (Fed. Cir. 2005) (applying Seventh Circuit precedent and noting that the scope of a waiver includes communications relating to the same subject matter); *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1374-75 (Fed. Cir. 2001) (applying Eighth Circuit precedent to hold that disclosure of confidential attorney advice also waived the privilege for "documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice"); *Martin Marietta Corp. v. Pollard*, 856 F.2d

619, 623 (4th Cir. 1988) (disclosure of a confidential communication waives the privilege "as to all information related to the same subject matter").

Additionally, waiver has been found when a claimant puts privileged information at issue in its case and preservation of the privilege would deny the opponent access to other information vital to its case. *Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1579-80 (Fed. Cir. 1985). Indeed, a specific version of such a waiver of privilege is when counsel's advice is disclosed to support a claim or defense in litigation. There, selective waiver could lead to the use of the privilege to shield unfavorable advice, while permitting helpful advice to be revealed. To avoid such abuses, waiver of privilege for such purposes applies to all communications on the same subject matter. *In re EchoStar Communications Corp.*, 448 F.3d 1294, 1300-01 (Fed. Cir. 2006). However, there has also been authority holding that waivers occurring outside the course of judicial proceedings, and not thereafter used to gain an adversarial advantage in litigation, are limited to the actual communication disclosed, and do not encompass all other privileged communications on the same subject matter. *In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 24-25 (1st Cir. 2003); *Yankee Atomic*, 54 Fed. Cl. at 315-16.

B. The Work-Product Doctrine

The attorney work-product doctrine protects work-product prepared in anticipation of litigation. *B.D. Click*, 83-1 BCA ¶ 16,328 at 81,176; *Northrop Grumman Corp. v. United States*, 80 Fed. Cl. 651, 654 (2008). It "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). Like the attorney-client privilege, the work-product protection can be waived. Using work-product for testimonial purposes at trial is an example of such a waiver. *Id.* at 239-40. However, a work-product waiver is not as broad as the waiver of attorney-client privilege might be. A work-product waiver has only applied to factual or non-opinion work-product concerning the subject matter of the waiver. *EchoStar*, 448 F.3d at 1302.

C. Federal Rule of Evidence 502

Recently, Rule 502 was added to the Federal Rules of Evidence to govern privilege waivers. Although those rules are not strictly binding upon the Board, we use them as a guideline. *See Ateron Corp.*, ASBCA Nos. 46352, 46867, 94-3 BCA ¶ 27,229 at 135,690. In pertinent part, Rule 502 states the following:

> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

> **(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver.**–When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
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> (1) the waiver is intentional;
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> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
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> (3) they ought in fairness to be considered together.

Rule 502(a) only requires expansion of a waiver to undisclosed communications involving the same subject matter when "they ought in fairness to be considered together." FED. R. EVID. 502(a)(3). Thus, expansion of the waiver "is reserved for those unusual situations" where a party attempts a "selective and misleading presentation of evidence to the disadvantage of the adversary." FED. R. EVID. 502 Advisory Committee Explanatory Note (revised 11/28/2007), Subdiv. (a); *see also Martin v. State Farm Mutual Auto. Ins. Co.*, 2011 WL 1297819, at *5 (S.D.W. Va. April 1, 2011); *Seyler v. T-Systems N. Am.*, 2011 WL 196920, at *3 (S.D.N.Y. Jan. 21, 2011). To the extent Rule 502 departs from prior judicial declarations mandating that a waiver always encompasses all communications concerning the subject matter, the rule supersedes those precedents. *See Avgoustis v. Shinseki*, 639 F.3d 1340, 1343 (Fed. Cir. 2011) (holding that common law rules of privilege as interpreted by the courts apply "except to the extent the rules governing waiver of the privilege codified at Fed.R.Evid 502 differ from the common law").[1]

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[1] Rule 502, which was enacted 19 September 2008, applies "in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment." Pub. L. No. 110-322 § 1(c), 122 Stat. 3537, 3538 (2008). Thus, there is no indication of any intent to categorically exclude the rule's application to waivers that occurred prior to its enactment. Given that this appeal was noticed on 21 July 2008, less than two months before enactment of Federal Rule of Evidence 502, and that no proceedings relevant to the issues presented here occurred during the intervening period of time, we conclude that it is just and practicable to follow the rule in this appeal.

II. The Government Has Failed To Demonstrate That Appellant Has Engaged In A Blanket Waiver Of Attorney-Client Privilege

A. The Government Has Not Shown That Appellant Waived The Privilege Through Disclosure Of Confidential Communications, And Even If It Had, Conditions Would Not Warrant Extending The Waiver To Undisclosed Communications Involving The Same Subject Matter

Given the applicable standards, the government has not demonstrated that appellant engaged in a blanket waiver of the attorney-client privilege. The government contends that Mr. Myers' 6 November 2004 letter has waived the privilege for all other documents in Mr. Myers' case file concerning the same subject matter. However, the government does not suggest that Mr. Myers' letter was ever a confidential communication to appellant, and clearly it was not. The letter is addressed to both appellant and the government, and all indications are that it was provided to both. Non-confidential documents prepared for distribution to third parties are not privileged, and their disclosure does not waive the attorney-client privilege. *Yankee Atomic*, 54 Fed. Cl. at 315 n.10.

Though Mr. Myers' letter itself was not confidential, it is possible that it disclosed information appellant had previously communicated to him in confidence. If it did, then that disclosure might have constituted a waiver. However, the government does not identify statements in the letter that reveal previously privileged communications. Instead, the government simply contends that because appellant's "response admits that Mr. Myers' entire case file was either the basis underlying the disclosed advice and opinions or else communications discussing the disclosed advice, the disclosure of the advice and opinions in fact disclosed the substance of the entire case file" (gov't mot. at 16). In essence, the government suggests that Mr. Myers' letter discloses the allegedly privileged information contained in his case file. We disagree. The fact Mr. Myers communicated certain advice and opinions in his letter does not necessarily mean that he also revealed any privileged information that might have driven the development of that advice. And it certainly does not necessarily reveal the substance of privileged communications he might have had with others about the advice.[2] Accordingly, the government has failed to demonstrate that Mr. Myers' letter provided previously privileged information to the government, waiving

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[2] Additionally, the government is wrong to suggest that because appellant initially stated that Mr. Myers' entire case file is responsive to Request No. 7, then the materials in the file must either form the basis of the disclosed advice or are communications about it. Document Request No. 7 also seeks "all documents considered by counsel in rendering that advice" (gov't mot. at 3). The government conspicuously ignores this additional element of its document request.

the attorney-client privilege. *Am. Standard*, 828 F.2d at 746 (ruling that "the district court did not err determining that the opinion letter...at issue did not reveal confidential communications and therefore was not privileged").[3]

Even if Mr. Myers' letter intentionally disclosed a privileged communication, it was sent to the government almost four years before this appeal was commenced, and evidences an extensive effort to inform the government about appellant's tax dispute in Hawaii. The letter was not provided in the course of litigation with the government, and there is no indication that appellant intends to rely upon the substance of the letter to support its claim here (app. opp'n at 8-9). Given these circumstances, we do not perceive appellant to be attempting a "misleading presentation of evidence" requiring a subject matter disclosure under Federal Rule of Evidence 502(a). *See Seyler*, 2011 WL 196920, at *3 (rejecting waiver of undisclosed information where the single attorney-client communication would not be introduced into evidence); *Martin v. State Farm*, 2011 WL 1297819, at *6 (applying Rule 502(a) to reject a subject matter waiver where there is no indication that the disclosure of a single attorney-client communication constituted an "orchestrated effort to gain an unfair advantage" and the drafter makes no request that it be permitted to introduce it into evidence). Thus, even if Mr. Myers' letter disclosed privileged communications, the waiver would not extend to all other privileged materials involving the same subject matter.

B. The Government Has Not Demonstrated That Appellant Has Placed Privileged Information At Issue, Or That Government Access To Privileged Information Is Vital To Its Defense

We are also not persuaded by the government's contention that it is entitled to review privileged materials relating to the Hawaii litigation because appellant has placed

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[3] The government's principal reliance upon *In re Pioneer Hi-Bred International, Inc.*, is misplaced. In that case, it was first determined that the inclusion of certain legal advice in a party's SEC proxy statement constituted a disclosure of privileged information. Given that disclosure, the court held that "[t]he disclosure of that advice and reliance on that advice waived the attorney-client privilege with respect to all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice." 238 F.3d at 1374-75. Similarly, the finding in *United States v. Cote*, 456 F.2d 142 (8th Cir. 1972), that the privilege's protection of the underlying details of certain privileged tax data was waived, followed an initial finding that the tax data had been disclosed to the government. Here, the government fails to show that Mr. Myers' letter discloses privileged information that might trigger a waiver of privilege for additional material about the same subject matter.

Mr. Myers' knowledge and actions at issue. Essentially, the government suggests that the privilege should be pierced because Mr. Myers' communications with appellant might reveal information relevant to the reasonableness of appellant's claim (gov't mot. at 8-9). Additionally, the government maintains that it must examine attorney-client communications to assess appellant's contention that it kept the government informed about the tax dispute with Hawaii. The government contends that "[a]s long as Mr. Myers' personal knowledge and his records related to the [Hawaii] dispute are shielded from discovery, the [government] will have no chance of disproving the JV's contention that the [government] was informed 'from the inception of each issue of every development and every possible GET scenario'" (gov't mot. at 7). Another variation of the government's argument is that, because appellant has made allegations about the extent of its knowledge of the tax dispute prior to the date of Mr. Myers' letter, his records should be examined to determine whether his "advice in those earlier years reflects his advice in the November 2004 letter..." (gov't mot. at 8).

The fact appellant's counsel might possess knowledge potentially relevant to the merits of the claim does not entitle the government to demand access to materials subject to the attorney-client privilege. The purpose of the privilege is to "encourage full and frank communications between attorneys and their clients...." *Upjohn Co.*, 449 U.S. at 389. An exception for any communications that might be relevant to the client's claim would devour the rule. Indeed, the privilege "promotes 'confidential relations that may well deal with the very suit in question.'" *Zenith Radio Corp.*, 764 F.2d at 1580 (quoting 4 MOORE'S FEDERAL PRACTICE ¶ 26.60[6] (2d ed. 1984)).

To justify piercing the privilege, the government must show that appellant has put protected information at issue. *Id.* at 1579. The government must also show that the information sought is vital to its defense. *Id.* at 1580. The government does not meet those requirements here. Appellant's allegation that it kept the government informed about the tax dispute does not put privileged communications at issue. The allegation turns upon the facts of the Hawaii tax dispute itself and what was communicated to the government about it. Similarly, appellant does not appear to rely upon attorney-client communications to support its claims about what it knew about the tax dispute at various points in time, or to support the reasonableness of its claim for reimbursement of the taxes now.

Additionally, we are not otherwise convinced that it is vital to the government's defense that it examine appellant's attorney-client communications. The government is free to inquire through discovery about all of the facts and history of the Hawaii tax dispute, what appellant knew about the dispute and when, and what was or was not communicated to the government about it. "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney...." *Upjohn Co.*, 449 U.S. at 395. Mr. Myers' knowledge of non-privileged information about these matters is also discoverable. Though access to Mr. Myers' knowledge of privileged communications might be more convenient for the

government, "considerations of convenience do not overcome the policies served by the attorney-client privilege." *Id.* at 396.

C. The Government Has Failed To Demonstrate That Appellant Has Consented To The Disclosure Of Privileged Information By Seeking Attorney Fees Incurred In The Hawaii Dispute

We also disagree with the government's contention that, because appellant has billed the government for the attorney fees it incurred in the Hawaii tax dispute, it has consented to disclose privileged information. The government claims certain contract clauses dictate that conclusion. (Gov't mot. at 18-19) They are FAR 52.246-5(c), INSPECTION OF SERVICES-COST-REIMBURSEMENT (APR 1984) (R4, tab 1 at 77); FAR 52.245-5(c)(2), GOVERNMENT PROPERTY (COST-REIMBURSEMENT, TIME-AND-MATERIAL, OR LABOR-HOUR CONTRACTS) (JAN 1986) (R4, tab 1 at 129); and SECTION E, ¶ E3 of the contract (R4, tab 1 at 78).

FAR 52.246-5(c) grants the government the right to inspect and test services required by the contract. FAR 52.245-5(c)(2) dictates that all property purchased by the contractor for which it is entitled to be reimbursed passes to the government upon delivery. Paragraph E3 of SECTION E provides that "[t]he performance and quality of work delivered by the Contractor, including services rendered and any documentation or written material compiled shall be subject to inspection, review, and acceptance by the Government." *Id.* These three provisions address the rights of the government in relation to the contract's subject matter, providing the government rights to inspect the contractor's performance, and to possess property for which it paid. They say nothing about what information a contractor must disclose to claim reimbursement of professional services fees incurred in relation to the contract, and certainly do not provide that common law privileges arising from retaining such services are inapplicable. The government cites no precedent interpreting the clauses in that manner.

Contrary to the government's contention, the requirements for supporting a claim for reimbursement of professional services fees incurred in relation to this contract are provided by Subpart 31.2 of the FAR (*see* FAR 52.216-7, ALLOWABLE COST AND PAYMENT (AUG 1996)). FAR 31.205-33(f), concerning professional and consultant service costs, requires "evidence of the nature and scope of the service furnished." It proceeds to explain that:

> Evidence necessary to determine that work performed is proper and does not violate law or regulation shall include—
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> (1) Details of all agreements (*e.g.*, work requirements, rate of compensation, and nature and amount of other expenses,

> if any) with the individuals or organizations providing the services and details of actual services performed;
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> (2) Invoices or billings submitted by consultants, including sufficient detail as to the time expended and nature of the actual services provided; and
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> (3) Consultants' work products and related documents, such as trip reports indicating persons visited and subjects discussed, minutes of meetings, and collateral memoranda and reports.

The provision is silent as to whether its requirements extend to privileged information. We have found no interpretations of it stating it does, and the United States Court of Appeals for the Federal Circuit's recent decision in *Avgoustis* indicates it should not be read to do so.

In *Avgoustis*, a veteran seeking attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), before the United States Court of Appeals for Veterans Claims (Veterans Court), objected on the basis of attorney-client privilege to providing a detailed description of his billings. EAJA requires "an itemized statement...stating the actual time expended and the rate at which fees and other expenses were computed." 28 U.S.C. § 2412(d)(1)(B). The Veterans Court held that requiring the description did not violate privilege. *Avgoustis*, 639 F.2d at 1341. In defending that holding on appeal, the government argued that EAJA's requirements for an itemized statement supporting the claim for fees superseded the attorney-client privilege. *Id.* at 1342.

The Court of Appeals noted that Supreme Court precedent establishes as a given that common law principles apply to legislation except when a contrary purpose is evident. *Id.* It then explained that the Supreme Court has also held that "a statute abrogates common law privileges only if 'the language declaring the legislative will [is] so clear as to prevent doubt as to its intent and limit'" *Id.* (quoting *Bassett v. United States,* 137 U.S. 496, 505-06 (1890)). The Court of Appeals observed that two of its sister circuits "have recently held that '[s]tatutes requiring disclosure, but silent on the question of privilege, do not override customary privileges.'" *Id.* (quoting *United States v. Forrester*, 616 F.3d 929, 942 (9th Cir. 2010) and citing *United States v. Danovaro,* 877 F.2d 583, 588 (7th Cir. 1999)). Based upon this authority, the court held that there is a "presumption against abrogating common law privileges absent clear legislative intent...." *Id.* at 1343. The court could not conclude that EAJA's alleged "language declaring [a] legislative will [to revoke the attorney-client privilege is] so clear as to prevent doubt as to its intent and limit." *Id.* Among the reasons the court gave for its conclusion was that EAJA's requirement for an itemized statement "certainly does not speak directly to the attorney-client privilege." *Id.*

We conclude that the presumption against abrogation applied in *Avgoustis* to alleged statutory revocations of common law privileges applies at a minimum to an alleged abrogation of common law privileges by the FAR. Under this standard, FAR 31.205-33(f)'s requirements for supporting a claim for attorney fees incurred in relation to the contract do not extend to privileged information. Like EAJA, FAR 31.205-33(f) fails to "speak directly" to privileges. Also like EAJA, the FAR does not express a disregard for privilege with language "so clear as to prevent doubt as to its intent and limit." Accordingly, we reject the government's contention that appellant's claim for attorney fees requires it to disclose privileged information.

III. The Government Has Also Failed To Demonstrate That Appellant Has Waived Its Work-Product Protection

Finally, we reject the government's argument that appellant has engaged in a blanket waiver of the protections upon Mr. Myers' work-product prepared for the Hawaii tax dispute.[4] "What constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances." *Nobles,* 422 U.S. at 240 n.14. To some degree, Mr. Myers' 6 November 2004 letter, providing analysis and conclusions about the issues in the Hawaii tax dispute, reflect his work-product from that dispute. However, public communication by counsel of analysis and conclusions about a dispute in which their client is involved is a common occurrence, and has not been found to waive the work-product protection. *See Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.,* 62 F.R.D. 454, 457-58 (N.D. Ill. 1974).

Also, like attorney-client privilege, the scope of a waiver of the work-product protection is presently governed by the standards contained in Federal Rule of Evidence 502(a). A waiver flowing from disclosure of particular information would only extend to undisclosed information about the same subject matter when "they ought in fairness to be considered together." FED. R. EVID. 502(a)(3). As we have already observed, given that appellant did not provide the 6 November 2004 letter in the context of judicial proceedings against the government, and does not indicate an intent to rely upon it now to support this claim, we do not perceive any selective reliance upon privileged materials, or other gamesmanship, that would justify finding the blanket waiver of the work-product protection sought here by the government. Additionally, both for this reason, as well as those given above respecting the attorney-client privilege, we do not believe that appellant

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[4] In a telephone conference held on 2 June 2011, government counsel argued for the first time discernable to the Board, and without citation to authority, that attorney work-product generated in the Hawaii litigation is not shielded by the work product doctrine from discovery in this appeal. This contention was not the subject of the government's motion, and not the focus of the briefing. Therefore, we do not address it here.

has placed Mr. Myers' work-product at issue so as to justify piercing the privilege either. Nor is appellant required to disclose its work product as a condition of its claim for its Hawaii attorney fees.

CONCLUSION

For the foregoing reasons, the government's motion to compel, based upon the contention that appellant has engaged in a blanket waiver of privilege, is denied. We note, however, that given our conclusions about Mr. Myers' letter, we would think there are potentially numerous non-privileged documents responsive to Document Request No. 7. Thus, we are skeptical of appellant's initial claim that all of the documents responsive to the request are privileged, and encouraged by its apparent retreat from that position. Mr. Myers' letter is comprehensive, and appears on its face to be based upon a review of numerous non-privileged materials. As previously noted, appellant has not yet produced a log of the documents for which it still claims privilege. Nothing in this ruling is intended to address the validity of those claims. We merely reject the government's contention that appellant has engaged in a blanket waiver of privilege.

In response to the government's motion, appellant has sought a protective order, seeking certain preemptive declarations as to what the government may or may not discover in this appeal respecting Mr. Myers. We deny that request, preferring to address specific issues as they arise. Of course, we encourage the parties to cooperate as much as possible in discovery, including the resolution of any further disagreements.

Dated: 22 July 2011

MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56481, Appeal of Parsons-UXB Joint Venture, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals