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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Chuck Hoskin, Chief of Staff

Opinion Number: 2012-CNAG-01

Date Decided: February 10, 2012

This office has been asked for an opinion answering the following:

- I. Whether the detailed billing statements of legal counsel are releasable under FOIA, and specifically whether the disclosure of such information would violate the attorney client and work product privileges.***

The detailed billing statements requested of legal counsel are privileged and not subject to release under FOIA.

Cherokee Nation Councilwoman Julia Coates, through the Cherokee Nation Freedom of Information Act (hereinafter "FOIA"), requested copies of the "detailed billing statements for any contracts (sic) with Jason Aamodt" through February 6, 2012.

Chief Baker identified a number of documents that were responsive to this request and provided redacted copies to Councilwoman Coates pursuant to the FOIA. Councilwoman Coates objected to the copies of the records that were provided. Councilwoman Coates renewed her FOIA request, specifically asking that un-redacted copies of the billing statements be provided. Chief Baker, through his Chief of Staff, Chuck Hoskin, requested that the Office of the Attorney General address whether the information sought by Councilwoman Coates, which may reveal what matters Mr. Aamodt was working on for his clients, is exempt from disclosure under the

FOIA based upon the attorney-client privilege in existence between Deputy Chief Crittenden and Principal Chief Baker and their attorney, Mr. Aamodt.

The Cherokee Nation FOIA was enacted by the Tribal Council in LA #25-01 and amended by LA #24-04 and LA #25-07. Legislative Act #25-01, §2(A) states that, “it is vital in a democratic society that public business be performed in an open and public manner. Toward this end, provisions of this chapter must be construed so as to make it possible for Cherokee citizens, or their representatives, to have [access to] their public officials and governmental activities at a minimum cost or delay to the persons seeking access to public documents or meetings.” While acknowledging this purpose, the Act goes on to exempt certain matters from disclosure. Among several other exemptions, “[a] public body may, but is not required to, exempt from disclosure the following information...[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.” *Id.* at 6(A)7.

There is no guidance on interpretation of this statute from Cherokee Nation courts at this time. This issue is certainly not unique to the Cherokee Nation, though, and an examination of federal laws regarding disclosure of documents protected by the attorney-client privilege in the context of a FOIA request provides meaningful interpretation of the issue. This is not a perfect analogy: the United States freedom of information laws differ from the laws of the Nation. However, the rationale for allowing an exemption for information that is protected by the attorney-client privilege has been frequently addressed by federal courts.

The opinion of even the finest attorney, however, is no better than the information which his client provides. In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the attorney-client privilege assures him that confidential communications to his attorney will not be disclosed without his consent.

Mead Data Cent., Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977).

Without the exemption of attorney-client privileged communications from the FOIA, officers and employees of the Cherokee Nation will have incentive not to share information freely with his or her attorney, knowing that such information can be brought into the public forum more easily under those circumstances than if he or she had never sought out legal advice at all.

To determine the applicability of the attorney-client privilege exemption under Cherokee Nation's FOIA, the information that was redacted from the documents provided to Councilwoman Coates must qualify as "correspondence or work products or legal counsel for a public body" or "any other material that would violate attorney-client relationships." Mr. Aamodt has no claim that he is "legal counsel for a public body." A public body is defined by the FOIA as,

[A]ny Cherokee Nation board, commission, agency, authority, any public or governmental body or political subdivision of the Nation, including any organization, corporation, or agency supported in whole or in part by public funds under the authority of the Cherokee Nation or expends public funds under the care of the Nation, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the Nation, the business enterprises of the Nation and its political subdivisions, including, without limitation, bodies such as the Public Several authority, the Port Authority, and any corporation for profit or non-profit.

LA #25-01(4)(B).

Deputy Chief Crittenden initially retained Mr. Aamodt to provide legal services to him in his capacity as Acting Chief on September 4, 2011. On October 20, 2011 Principal Chief Baker retained Mr. Aamodt to provide legal advice and representation to him in his capacity as Principal Chief. At no time has he been retained to represent a public body within the Cherokee Nation.

If the information redacted from the billing statements is to be considered exempt under the FOIA, it must be classified as “any other material that would violate attorney-client relationships.” LA #25-01, §2(A). Several courts have held that the information contained in an attorney’s billing statements is privileged based upon the content, although invoices and other documents that only offer information regarding the fees collected by the attorney are generally not privileged.

The courts that have considered whether the attorney-client privilege applies to attorney bills and related documents have made a distinction between documents that reveal the nature of the services provided and those that merely reveal the amount of the fee paid, such as invoices.

Gonzalez Crespo v. Wella Corp., 774 F. Supp. 688, 689 (D.P.R. 1991)(emphasis added).

While this particular case deals with attorney-client privilege in a discovery dispute and not in the context of a FOIA request, the courts have acknowledged that the two situations represent a ‘rough analogy’ and have generally extended similar reasoning in determining whether a claimed attorney-client privilege exists¹. Courts have also found that the information in a billing statement may qualify for attorney-client privilege protection even if it is part of a billing statement and is not a pleading, letter, or other document prepared by the attorney.

[T]he law firm statements also qualify as privileged. Their detailed itemization of persons contacted and locations visited on particular days, research memoranda prepared on specific topics, and precise amounts of attorney time spent on identified issues, frequently relates to matters of past, present or potential future litigation...[s]uch communications are entitled to protection as attorney work product.

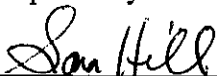
¹ “Although Congress clearly intended to refer the courts to discovery principles for the resolution of exemption five disputes, the situations are not identical, and the Supreme Court has recognized that discovery rules should be applied to FOIA cases only “by way of rough analogies.” Mead Data Cent., Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977)(citing Envtl. Prot. Agency v. Mink, 410 U.S. 73, 86, 93 S. Ct. 827, 835, 35 L. Ed. 2d 119).

Indian Law Res. Ctr. v. Dep't of Interior, 477 F. Supp. 144, 148 (D.D.C. 1979).

In her request, Councilwoman Coates specifically states that she is seeking a “detailed statement” that would reveal the “specific activity of an attorney.” The type of information she is seeking is exactly the type of information that the attorney-client privilege protects; information that both Mr. Crittenden and Mr. Aamodt have held out as privileged attorney-client communications. Councilwoman Coates cannot, using the FOIA, override that privilege simply because it is contained in a billing statement.

It was common practice for the previous administration to mark as confidential billing statements in response to a FOIA request. Chief Baker’s partial redaction left all relevant financial information for the Tribal Council and any other interested parties to review. The Principal Chief could have been no more transparent in providing information without violating the attorney-client privilege.

Respectfully Submitted by:



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