

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1232 (TPJ)

STATE OF NEW YORK *ex rel.*
Attorney General ELIOT SPITZER, *et al.*,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (TPJ)

**PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS OR, IN THE
ALTERNATIVE, FOR AN *IN CAMERA* INSPECTION OF DOCUMENTS**

Plaintiffs move for an order compelling defendant Microsoft to produce documents withheld on the grounds of privilege or in the alternative for an *in camera* inspection of particular documents. Plaintiffs also request that the defendant be ordered to provide a privilege log for documents withheld on the grounds of privilege. Plaintiffs request that Microsoft be ordered to produce for *in camera* inspection by close of business on June 16, 1999, all withheld documents related to Defendant Exhibit 2533, which Microsoft used at trial on June 14, 1999 and attempted to introduce in evidence.

I. BACKGROUND

On April 1, 1999, plaintiffs served a subpoena on defendant Microsoft seeking documents in Microsoft's possession relating to AOL's acquisition of Netscape and the related agreement with Sun. (Attached as Ex. A hereto). The subpoena required Microsoft to provide a privilege log for documents withheld on the grounds of privilege. (Ex. A, Instructions, ¶3). Although Microsoft withheld and redacted certain responsive documents on the grounds of privilege, it never provided a privilege log.

On June 14, 1999, during the examination of David Colburn, Microsoft counsel offered Defendant Exhibit 2533, which Microsoft counsel described as "an email from Bill Gates to his executive staff dated December 1, 1998." (6/14/99 p.m. Tr. 41). The email is a self-serving summary of Microsoft's arguments in this case relating to AOL and other matters. DX 2533 had been produced in discovery by AOL and bore AOL production numbers. Describing DX 2533 as a "very interesting document to have produced from AOL," Microsoft counsel proceeded to ask the witness if he knew how the document came to be in AOL's files. (Tr. 42) Microsoft counsel continued with a number of questions about the document, including whether Mr. Colburn reviewed the document in preparation for his testimony, and if he knew why the document had been marked as highly confidential, as well as some substantive questions about whether the witness agreed with Mr. Gates' statements in the email. (Tr. 42-43)

In fact, as Microsoft counsel was aware from documents produced by Microsoft, the December 1, 1998 email had been prepared for the purposes of this litigation and had been distributed to the press the day it was dated. *See* GX 2244 and GX 2245 (attached hereto). The

reason that this purported Microsoft internal email was in AOL's files was that Microsoft had distributed it to the public.

Indeed, on December 3, 1998, Bill Gates complained that his purported email had not been distributed widely enough. (GX 2245) Redacted from the email thread is the body of a December 1, 1998 email from Greg Shaw, one of Microsoft's public relations representatives, to Microsoft executives Gates, Maritz and Nielsen. (See GX 2245) The redacted email is said to relate the December 1, 1998 Gates email prepared for public relations purposes; it is neither to nor from an attorney. A separate Microsoft email thread (GX 2244) shows that Shaw provided Gates' December 1 email to a reporter from Associated Press, and instructed another public relations person to provide the email to other reporters who asked for it.

Plaintiffs yesterday requested Microsoft to produce now either the redacted material or provide a privilege log relating to the redaction. In addition, plaintiffs requested a complete privilege log as soon as practical. Microsoft counsel refused the first request and referred the second to "lawyers in Redmond."¹ Microsoft counsel indicated that the material redacted from GX 2245 was an email from a lawyer. Microsoft counsel did not provide any further information, refused to provide a written claim of privilege as requested, and said that the plaintiffs should file a motion if they disagreed with his position. (Exhibit D).²

¹While plaintiffs originally requested the complete privilege log by COB June 15, plaintiffs made clear that they would be willing to negotiate with Microsoft on the complete privilege log, provided that Microsoft would provide the privilege log related to GX 2245 last night so that this issue could be resolved promptly. This offer was not accepted. The correspondence between plaintiffs' and Microsoft's counsel is attached as Exhibits B-D.

²A further review of Microsoft's production shows that at least four other Microsoft emails embedding or attaching the December 1, 1998 Gates email were withheld or redacted on grounds of privilege: MS98 0241168, MS98 0241170, MS98 0241172-73, and MS98 0241175.

II. ARGUMENT

In order to receive the protection of attorney-client privilege, a communication must, *inter alia*, be made for the purpose of securing primarily either (i) an opinion on law, (ii) legal services, or (iii) assistance in some legal proceeding. *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984). The privilege does not extend to the provision of business or other non-legal advice simply because a lawyer happens to be involved. Communications with a lawyer that relate primarily to non-legal purposes, for example, business, technical or corporate public relations purposes, are not privileged. *See, e.g., Fine v. Facet Aerospace Prods. Co.*, 133 F.R.D. 439, 444 (S.D.N.Y. 1990) (report not privileged where communications by in-house counsel were likely made for general business purposes and the report contained no legal advice); *United States Postal Service v. Phelps Dodge Ref. Corp.*, 852 F.Supp. 156, 163 (E.D.N.Y. 1994) (communications relating to lobbying and legislative activities between in-house counsel and law firm retained to lobby not privileged). Under these principles, it is clear that if, for example, a Microsoft lawyer merely forwarded the Gates email to Shaw with instructions to have it published, the communication would not be privileged.

The party asserting a privilege has the burden of establishing the privilege. *Dorf & Stanton Communications, Inc. v. Molson Breweries*, 100 F.3d 919, 922 (Fed. Cir. 1996); *Continental Coatings Corp. v. Metco, Inc.*, 50 F.R.D. 382, 384 (N.D. Ill. 1970). The Federal Rules of Civil Procedure require that a party's claim of privilege shall be made expressly and "supported by a description of the nature of documents . . . that is sufficient to enable the demanding party to contest the claim." Fed. R. Civ. Pro. 45(d)(2). The April 1 subpoena to Microsoft specifically sets forth the information required to claim privilege. (Exhibit A,

Instructions, ¶3). Microsoft has not attempted to meet that burden. In light of its use of the Gates' email at trial, the defendant's refusal to promptly produce an overdue privilege log related to the email is patently unreasonable and should be considered a waiver of the privilege. *See Dorf & Stanton*, 100 F.3d at 923.

In the alternative, the defendant should provide the contested documents to the court for *in camera* review. In this case, where the volume of documents currently contested is not large and the defendant has not carried its burden of establishing privilege, *in camera* review to determine whether the documents are in fact privileged is appropriate. *See, e.g., In re Fish and Neave*, 519 F.2d 116, 118 (8th Cir. 1975); *Continental Coatings*, 50 F.R.D. at 384; 5 Moore ¶45.05(2), at 1723-24. ("documents which are claimed to be privileged should normally be produced for inspection by the judge in camera.").

III. REQUESTED RELIEF

The government requests that Microsoft be ordered to provide immediately unredacted copies of MS98 02241166-67 (GX 2245), MS98 0241168, MS98 0241170, MS98 0241172-73, and MS98 0241175. In the alternative, the plaintiffs request that Microsoft provide these documents to the Court for *in camera* review on the issue of privilege. The plaintiffs also request that the Court order Microsoft to produce by June 21, 1999 a privilege log for the remaining documents that it has withheld under claim of privilege.

DATED: June 16, 1999

Respectfully submitted,

_____/s/_____
Christopher S Crook
Chief
Phillip R. Malone
John F. Cove, Jr.
Attorneys
David Boies
Special Trial Counsel
U.S. Department of Justice
Antitrust Division
325 7th Street, NW, Rm. 615
Washington, DC 20530
(202) 514-8276