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# Attorney General of U.S. v. Covington & Burling

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## ATTORNEY-CLIENT PRIVILEGE EXISTS UNDER FOREIGN AGENTS REGISTRATION ACT, BUT COURT MUST DETERMINE WHICH DOCUMENTS FALL WITHIN SCOPE OF THE PRIVILEGE.

*Attorney General of U.S. v. Covington & Burling*, 411 F. Supp. 371 (D.D.C. 1976)

The Attorney General of the United States, pursuant to the Foreign Agents Registration Act,[1] sought an injunction ordering the Washington, D.C. law firm of Covington & Burling to permit Justice Department inspection of certain documents concerning the firm's representation of the Republic of Guinea. Covington & Burling had advised and represented Guinea from May of 1967, when the firm initially registered under the Act, until recently, when Guinea terminated the relationship. The firm provided legal counsel to Guinea in connection with that nation's project to exploit its bauxite resources, and aided in arranging financing for the project from the World Bank, the United States Agency for International Development, and the United States Export-Import Bank.

Under the Foreign Agents Registration Act, every agent of a foreign principal must register with the Attorney General and disclose the particulars of the agent's activities on behalf of his principal. To insure the accuracy of the disclosure, the Act requires that the agent retain certain books and records which must be kept open to inspection by a delegate of the Attorney General.[2]

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1. 22 U.S.C. §§ 611–621 (1970).

2. 22 U.S.C. § 615 (1970) provides that:

> Every agent of a foreign principal registered under this subchapter shall keep and preserve while he is an agent of a foreign principal such books of account and other records with respect to all his activities, the disclosure of which is required under the provisions of this subchapter, in accordance with such business and accounting practices, as the Attorney General, having due regard for the national security and the public interest, may by regulation prescribe as necessary or appropriate for the enforcement of the provisions of this subchapter. . . . Such books and records shall be open at all reasonable times to the inspection of any official charged with the enforcement of this subchapter. . . .

In January of 1975, Justice Department officials sought to inspect the Covington & Burling records relative to its representation of the Republic of Guinea. Though the law firm granted the request with respect to approximately 95% of the documents involved, the firm refused to permit inspection of the remaining 5% (about one thousand pages), claiming that these documents related to confidential communications, protected from disclosure by an attorney-client privilege recognized by the Foreign Agents Registration Act. The Attorney General contended that no such privilege exists under the Act.

Confidential attorney-client communications are not excluded from registration or disclosure by the Act, though the presence of § 613, "Exemptions," makes it apparent that Congress considered related problems in drafting the statute. Only two subsections of § 613 are relevant, §§ 613(d)[3] and 613(g).[4] When taken together, these provisions are not as broad in scope as is the attorney-client privilege. Section 613(d) exempts from registration persons engaged "only" in private, non-political, commercial activities for a foreign principal. The court interpreted this to mean that if the agent participates in non-exempt activities for this principal, the exemption does not apply at all, even to the otherwise exempt activities. Section 613(g) exempts attorneys representing foreign principals before a court or governmental

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3. 22 U.S.C. § 613 (1970) provides that:

The requirements of section 612(a) of this title shall not apply to the following agents of foreign principals:

. . . .

(d) Any person engaging or agreeing to engage *only* (1) in private and non-political activities in furtherance of the bona fide trade or commerce of such foreign principal; or (2) in other activities not serving predominantly a foreign interest; or (3) in the soliciting or collecting of funds and contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering. . . . (Emphasis added.)

4. 22 U.S.C. § 613 (1970) provides that:

The requirements of section 612(a) of this title shall not apply to the following agents of foreign principals:

. . . .

(g) Any person qualified to practice law, insofar as he engages or agrees to engage in the legal representation of a disclosed foreign principal before any court of law or any agency of the Government of the United States: *Provided*, That for the purposes of this subsection legal representation does not include attempts to influence or persuade agency personnel or officials other than in the course of established agency proceedings, whether formal or informal.

agency, but does not extend to communications which are not made in contemplation of litigation. Thus Judge Sirica concluded that in certain limited situations, like this one, neither provision will protect attorney-client confidences.

Examination of the § 615 statutory definition of the "Books and Records"[5] which are the subject of the Act reveals little more, since § 615 merely refers to "books of account and other records" which the Attorney General may prescribe by regulation. That regulation[6] defines books and records to include "all correspondence, memoranda, books, records, and documents 'as are necessary properly to reflect the activities for which registration is required.' "[7]

Finding nothing in the Act itself, in its legislative history, or in the Attorney General's regulations to indicate an intent to exclude confidential documents from disclosure, Judge Sirica looked to the purposes of the Act and the attorney-client privilege. The court declared that the purpose of the Foreign Agents Registration Act is to discover what foreign interests are having a substantial effect on American life, but to do so without unnecessarily burdening the agents involved. This was considered in conjunction with the stated purpose of the attorney-client privilege, which is to aid the orderly and efficient administration of justice by encouraging the client to speak frankly with his attorney. The court was concerned that the attorney-client privilege might well be compromised if a foreign principal knew that his attorney's records pertaining to their relationship were subject to scrutiny by the Attorney General or his representatives.

With these purposes and problems in mind, the court concluded that while records of confidential communications definitely may be relevant in determining whether or not an agent has fully informed the government about his activities, certain records should be protected under the shield of an attorney-client privilege. However, the court ruled that only a judicial officer and not the attorney involved can fairly determine what documents actually fall within the attorney-client privilege.[8]

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5. 22 U.S.C. § 615 (1970); *see* note 2 *supra*.

6. 28 C.F.R. § 5.500(a) (1975).

7. Attorney General of the United States v. Covington & Burling, 411 F. Supp. 371, 375, *quoting from* 28 C.F.R. § 5.500(a) (1975).

8. *See* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) where the court adopted a similar procedure to test claims of executive or governmental privilege.

This decision confirms the existence of an attorney-client privilege within the context of the Foreign Agents Registration Act. While the attorney-client privilege will protect some documents and records from disclosure under the Act, it is for the court alone to determine, after an *in camera* inspection, which documents or portions thereof are within the scope of the privilege.

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