

## Producing Documents in Government Investigations Without Waiving Privilege



Gary Ronan

July 21, 2010

As part of an investigation, the government comes knocking and wants your company to produce documents pertaining to suspected illegal activity by an employee. You want to comply, but are concerned about protecting your attorney-client privileged and work product documents from disclosure to third parties in later litigation. What to do?

The latest iteration of this situation is currently playing itself out in USA v. Goncalves, D.D.C. Criminal Docket No. 1:09-cr-00335-RJL. The Goncalves case suggests one way in which a company might try to produce its documents without waiving its privileges, but it remains to be seen whether this approach will work.

In 2007, Armor Holdings conducted an internal investigation into possible illegal conduct by an employee and voluntarily disclosed the conduct to the DOJ and SEC. DOJ and SEC thereafter conducted their own investigations into possible violations of law by the employee and others at the company. During these investigations, Armor Holdings produced millions of pages of documents, including documents generated as part of the company's internal investigation. Before doing so, the company applied an electronic filter in an effort to remove privileged and work product documents from its production, and it entered into an agreement with the government under which the parties agreed that any inadvertently produced privileged and work product documents would be returned or deleted without constituting a waiver of any applicable privilege.

Sometime later, the government brought criminal charges against numerous defendants (not including Armor Holdings or the company that later purchased it) alleging conspiracies to violate the Foreign Corrupt Practices Act – charges that had been developed with the assistance of the allegedly criminal Armor Holdings employee. The defendants sought to force the government to produce the documents Armor Holdings had previously produced, arguing that the documents might be essential to their defense and allow them to attack the credibility of the Armor Holdings employee, who would be providing testimony against them. The government and Armor Holdings did not object wholesale, but took the position that Armor Holdings should be allowed to review the documents before they are produced to ensure that they included no privileged or work product documents. The defendants insisted that any privileges that might have applied to the documents were waived when Armor Holdings produced them to a third party (the government) and that the documents therefore ought to be produced in their entirety.

United States District Court Judge Richard J. Leon heard argument on the defendants' motions on June 17, 2010, and has taken the matter under advisement. It therefore remains to be seen whether the protections utilized by Armor Holdings in connection with its production of documents to the government – its electronic screening and the non-waiver agreement – will be sufficient to protect any inadvertently produced privileged documents from the eyes of third parties.