

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

JOSEPH GARVEY, et al.,
Plaintiffs,
v.
HULU, LLC,
Defendant.

Case No. [11-cv-03764-LB](#)

**ORDER ON PRIVILEGED
DOCUMENTS**
[ECF No. 273]

INTRODUCTION

This is a discovery dispute. The court finds this matter suitable for determination without a hearing. See Civ. L.R. 7-1(b). The parties disagree over two documents that defendant Hulu, LLC argues are partly covered by the attorney-client privilege. The parties disagree mainly over whether those documents were kept sufficiently confidential. The court has reviewed the disputed material in camera and holds both that the documents were kept confidential and that they otherwise meet the criteria for the attorney-client privilege. The contested information is thus exempt from discovery.

STATEMENT

This dispute involves information contained in two documents, or “tickets,” generated by the “JIRA” system that Hulu uses to track issues with and changes to its software code. (See ECF No.

1 273 at 1.)¹ Hulu has produced both tickets under seal, but has redacted from them their allegedly
2 privileged segments.

3 A brief explanation of the JIRA system will aid this discussion. When a customer or employee
4 identifies a problem with the Hulu service, or when Hulu undertakes a project to change its
5 software code, a Hulu employee who has “administrative permissions” on JIRA will create a JIRA
6 “ticket” to address the pertinent issue. The person who creates a ticket is called the “Reporter.”
7 The Reporter then assigns someone, the “Assignee,” to oversee the work. The Reporter or
8 Assignee may “tag” other Hulu employees needed to resolve the problem; these additional
9 participants are “Watchers.” Any of these people can “tag” other Hulu employees to ask questions
10 relevant to the issue that the ticket covers. A JIRA ticket thus serves both to manage a project and
11 to record that project’s activity. (See ECF No. 273 at 3-4.)

12 The parties’ current dispute centers on who can access JIRA and specific JIRA tickets.
13 According to Hulu: “Only the Reporter, Assignee, and Watchers . . . generally receive
14 notifications via email when the ticket is updated with a new activity.” (Id. at 4.) This apparently
15 does not mean that only these people can access a ticket. Though the parties’ submissions do not
16 nail this point down completely, it seems implicit in their arguments that any Hulu employee
17 authorized to access JIRA can, by purposeful or inadvertent search, find a given ticket and see the
18 communications and activity that it contains. Tickets, in other words, are not wholly restricted to
19 their direct participants. Only Hulu employees, however, can access JIRA. (See id. at 3 (“Hulu
20 employees can access the secure JIRA system using their corporate credentials”)) Hulu says
21 that JIRA is “essential to managing [its] source code and website.” (Id. at 6.)

22 This dispute involves information contained in two JIRA tickets. The first is titled “SR 4328.”
23 The court calls this the “4328” ticket. This ticket involved “a bug that caused a deleted Facebook-
24 connected Hulu account to remain connected to Facebook.” (Id. at 4.) Seven Hulu employees were
25 brought onto the ticket to work on fixing the bug. (Id.) “In the course of addressing the issue,”
26 Hulu writes, one of the participants, a software developer, “tagged Hulu in-house counsel Anne
27

28 ¹ Record citations are to material contained in the Electronic Case File (“ECF”); pinpoint citations
are to the ECF-generated page numbers at the tops of documents.

1 Bradley and, using the JIRA system, asked her for legal advice regarding the Facebook issue,
2 which Ms. Bradley provided.” (Id.) The same developer also asked a Hulu vice president “a
3 question that would enable Ms. Bradley to advise on the legal issue,” and the vice president
4 responded. (Id.) Hulu contends that the “sole purpose” of the exchange with Ms. Bradley was for
5 “securing legal advice.” (Id.) Hulu redacted this material from the filed, sealed version of 4328.

6 The second ticket is titled “CORE 1130.” The court will call this the “1130” ticket. Seven
7 Hulu employees were involved on the 1130 ticket “in either coding or overseeing [a] change” to
8 Hulu’s code that would “remove the episode name from the watch page URLs on Hulu’s website.”
9 (Id.) “In the course of addressing the issue,” a Hulu vice president “noted issues on which he
10 sought legal advice from Hulu’s in-house counsel,” and discussed “the implementation of what
11 Hulu’s in-house counsel [had] told” him. (Id.) Hulu redacted this material from the filed, sealed
12 version of 1130.

13 The parties’ central dispute is over whether Hulu kept these documents sufficiently
14 confidential to bring them within the attorney-client privilege. The technical issues addressed in
15 both tickets, Hulu argues, raised legal questions. The employees needed the legal advice so that
16 they could carry out their duties and fix the given technical issues; they thus turned to in-house
17 counsel for, and obtained, that legal advice. (Id. at 3-5.)

18 The plaintiffs argue (in sum) that confidentiality was destroyed by the fact that the JIRA
19 system is generally accessible to Hulu employees beyond those immediately participating in the
20 4328 and 1130 tickets. (See id. at 2.) The plaintiffs also believe that the redacted information may
21 contain underlying facts relevant to their contention that Hulu knew it was sending Facebook
22 information about the material that Hulu users were watching. (Id. at 1.) The plaintiffs rightly note
23 that the attorney-client privilege does not protect facts contained in otherwise protected
24 communications. (Id. at 3) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981)).

25 GOVERNING LAW

26 The party asserting the attorney-client privilege has the burden of proving each requisite
27 element of the privilege. E.g., *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009). “The
28 attorney-client privilege protects confidential disclosures made by a client to an attorney in order

1 to obtain legal advice, . . . as well as an attorney’s advice in response to such disclosures.” United
2 States v. Bauer, 132 F.3d 504, 507 (9th Cir. 1997) (citing United States v. Chen, 99 F.3d 1495,
3 1501 (9th Cir.1996)). This compact formulation contains the three most essential, and for this
4 discussion most pertinent, parts of the privilege: the communication must be (1) with a lawyer (2)
5 for the purpose of obtaining legal advice and (3) confidential. It is well established that
6 “communications between corporate personnel and their in-house counsel made for the purpose of
7 securing legal advice are protected by the privilege.” See, e.g., Chen, 99 F.3d at 1502.

8 Communications within a corporation are often distributed in ways that draw additional rules
9 from the privilege doctrine. The plaintiffs rightly note that a “need to know” standard generally
10 governs whether the privilege shields communications that are disseminated to corporate
11 employees. E.g., Scholtisek v. Eldre Corp., 441 F. Supp. 2d 459, 463-64 (W.D.N.Y. 2006). The
12 test is straightforward: “[D]id the recipient need to know the content of the communication in
13 order to perform her job effectively or to make informed decisions concerning, or affected by, the
14 subject matter of the communication?” Id. (citing cases). “Only when the communications are
15 relayed to those who do not need the information to carry out their work or make effective
16 decisions on the part of the company is the privilege lost.” Id. at 464 (quoting Andritz Sprout-
17 Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609, 633 (M.D. Pa. 1997)). Furthermore, the privilege
18 can “protect a communication between nonlegal employees in which the employees discuss or
19 transmit legal advice given by counsel. Such communications obviously reveal privileged
20 communications.” United States v. ChevronTexaco Corp., 241 F. Supp. 2d 1065, 1077 (N.D. Cal.
21 2002); see United States v. Dish Network, L.L.C., 283 F.R.D. 420, 423 (C.D. Ill. 2012) (“The
22 privilege also extends to communications about the privileged material between non-attorneys
23 who are properly privy to the privileged information.”).

24 **ANALYSIS**

25 The court’s in camera review of the redacted material confirms that the information, and its
26 dissemination within Hulu, are both as Hulu describes them. The attorney-client privilege shields
27 this information from discovery.

28 The character of the redacted content in both tickets falls within the privilege. The redactions

1 from both tickets are, or discuss, communications with a lawyer made to secure legal advice.
2 Ticket 4328 has Hulu employees directly asking their in-house attorney for, and receiving, legal
3 advice concerning the task that they were working on. Hulu correctly writes that the “sole
4 purpose” of the redacted material in 4328 was to secure legal advice. That is the dead center of
5 what the attorney-client privilege covers.

6 Ticket 1130 does not directly involve a lawyer. It does have Hulu employees “discussing” or
7 “transmitting” legal advice that Hulu’s in-house counsel had already provided. See *Chevron*
8 *Texaco*, 241 F. Supp. 2d at 1077. The people working on the 1130 issue used this information to
9 “carry out their work” and make “informed,” “effective decisions” about the task at hand. See
10 *Scholtisek*, 441 F. Supp. 2d at 464; *F.T.C. v. GlaxoSmithKline*, 294 F.3d 141, 147-48 (D.C. Cir.
11 2002) (holding that privilege covered material disseminated to employees who needed it for their
12 work). This may indeed be said of the legal advice involved in both the 4328 and 1130 tickets. In
13 both cases the redacted material therefore falls under the coverage of the attorney-client privilege.

14 In neither case was the contested information disseminated too widely to maintain
15 confidentiality. The JIRA system is not public. Only Hulu employees may access it. Both tickets,
16 moreover, involved only those employees who were working on the given issues and who, again,
17 sought or discussed the legal advice they needed to effectively address the problems before them.
18 Confidentiality is not destroyed by the possibility that other Hulu employees, not directly
19 participating in the 4328 and 1130 tickets, could have accessed those documents over the JIRA
20 system. *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 142 (D. Del. 1982) (“[T]hat some
21 unauthorized personnel may purposely or inadvertently read a privileged document does not
22 render that document nonconfidential.”). Material need not be “kept under lock and key to remain
23 confidential” for purposes of the attorney-client privilege. See *Dish Network*, 283 F.R.D. at 425.
24 “The privileged communications were properly limited to employees who reasonably needed the
25 information to perform their duties for the corporation.” *Id.* The material was kept sufficiently
26 confidential and is privileged.

27 Finally, no part of the redacted material contains facts suggesting that Hulu knew what user
28 information (if any) was being transmitted to Facebook. The only facts remotely of this sort, in

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either ticket, are conveyed in the respective documents' headlines. That information was not redacted from either sealed ticket so the plaintiffs have it.

CONCLUSION

The court holds that the material that Hulu has redacted from the sealed exhibits to the parties' joint discovery letter (ECF No. 273) is exempt from discovery under the attorney-client privilege.

This disposes of ECF No. 273.

IT IS SO ORDERED.

Dated: January 21, 2015



Laurel Beeler
United States Magistrate Judge