



U.S. Department of Housing and Urban Development

**Office of Inspector General**

451 7<sup>th</sup> St., S.W.

Washington, D.C. 20410-4500

February 25, 2011

Stephen N. Zack, Esq.  
President  
American Bar Association  
321 North Clark Street  
Chicago, IL 60654-7598

Re: ABA Letter of February 8, 2011 on Concerns Regarding HUD's Attorney-Client Privilege Waiver Policies and Practices

Dear Mr. Zack:

We have received and reviewed your February 8, 2011 letter in which you espouse your view of the over-riding necessity of preserving fundamental attorney-client privilege and work product protections. While we agree with that view generally, we respectfully disagree with your position and your request with respect to our agency. Additionally, in your letter you seem to display a fundamental misunderstanding of the relationship between the Department of Housing and Urban Development (HUD) and the Office of Inspector General (HUD OIG). Before I address the substantive portions of your letter from the HUD OIG perspective, allow me fill that void in your knowledge.

The HUD OIG is one of the original 12 Inspectors General authorized under the Inspector General Act of 1978. We are a statutory law enforcement agency. We are committed to our statutory mission of detecting and preventing fraud, waste, and abuse and promoting the effectiveness and efficiency of government operations. While organizationally we are associated with HUD, we operate totally and completely independently. This independence allows for clear and objective reporting to the Secretary and the Congress. Our activities seek to promote efficiency and effectiveness in programs and operations, detect and deter fraud and abuse, investigate allegations of misconduct by HUD employees, and review and make recommendations regarding existing and proposed legislation and regulations affecting HUD. The Secretary of HUD has no authority to direct OIG and its employees as to the conduct HUD OIG operations, or to require HUD OIG to adhere to HUD established policies in the conduct of any HUD OIG activity.

Your letter is obviously generated from some communication you had with or from Sharon Wilson Geno, Esq. of the Washington D.C. office of Ballard Spahr LLP, written in connection with our nearly completed audit of the Philadelphia Housing Authority's (PHA) legal services procurements. As that is truly what is at issue here, we will take this opportunity to use the PHA as an example of why we conduct our audits (and investigations) in the manner we do, the issues we face, and why we on occasion request a waiver of attorney client privilege. While your letter focuses primarily on HUD's policies and procedures, it does request HUD OIG personnel to cease making requests for information that could be viewed as protected by the

attorney-client privilege and work product doctrine. We respectfully advise you that we decline that request.

It appears from your page on the Boies, Schiller & Flexner LLP website that you do not have criminal experience related to fraud in federal programs or experience in overseeing the expenditure of federal funds granted to public housing authorities by a federal agency. While you certainly are a well experienced and qualified attorney, it is my view that, as those activities are exactly what we do on a daily basis, and in fact is our mission, which we accomplish in a stellar manner, that we are in a better position than you, or the ABA, to assess the best way to go about carrying out our duties and responsibilities. We are very mindful of the rights of those we investigate and audit and fully respect and protect those rights. We are also acutely aware of, and strive to protect, the rights of the American tax payer to have the expenditure of their tax dollars closely and jealously monitored. If asking an auditee or subject to waive their attorney client privilege furthers that effort, we have in the past and will continue in the future to do so.

While we understand your concerns we think that, as to HUD OIG, they are misguided. HUD OIG has no ability to compel the waiver of attorney client privilege, and has no means to retaliate against a subject or auditee if they decline a request for waiver. Indeed, our administrative IG subpoenas contain a specific instruction related to how to assert a claim of privilege to documents subject to our subpoenas. Consistent with our obligation to serve the American public to ferret out fraud, waste and abuse and ensure funds designed to assist the less fortunate are not diverted to improper uses or expended recklessly, we will continue to use every legal tool available to us to obtain information needed to support our investigations and audits of Public Housing Authorities and other entities. Additionally, we will expect these authorities to cooperate with our investigations and comply with requests for information. If requesting a waiver of attorney client privilege furthers our efforts, we will continue to do so.

Your quote from an earlier letter to HUD on the subject frankly seems a bit disingenuous. "We previously expressed our serious concerns to HUD in December 2006 regarding the Addendum, noting that it 'is an indirect effort to get unwary and unsophisticated housing authorities to waive their privilege.'" Are you suggesting that the attorneys who represent these "unsophisticated" public housing authorities are equally unwary and unsophisticated? One must assume that, in order to have an attorney client privilege to waive, one is and was actually represented. Certainly Ballard Spahr and other firms retained by the PHA are sophisticated enough to have hampered and obstructed our audit efforts of the PHA for years. They are astute enough to presently advise the PHA to refuse to provide adequate support, which the PHA is required to provide to HUD and HUD OIG by HUD regulations, OMB circulars, and the various agreements and contracts with HUD through which the PHA has accepted billions of dollars in federal grant funding, for its and other law firms' billings to the PHA during the period of our ongoing audit of legal services contracts with the PHA. The basis for this refusal is an ostensible claim of attorney-client privilege to billing records. Oddly, the predecessor firm handling that issue had offered to waive the privilege without our requesting same. Only when Ballard Spahr took over did the billing records become an issue.

Again, it is OIG's duty to inquire into the use of federal funds, and to identify areas in which those funds were mis-spent. Since PHA has expended over \$30.5 million in the past 40

months for 15 outside law firms, money that could have provided a vast amount of housing assistance and other benefits to persons needing housing assistance. As this is more than any other Public Housing Authority spends on outside attorneys, even those four times its size, this seemed an area worthy of inquiry in an audit. A billing statement that reflects 10 hours of legal services, with no indication of subject matter at all, at a certain rate, for a total amount due, does nothing to shed light upon the issue of the necessity of the legal services or the propriety of the payment. Yet this is what we were provided, even after having to resort to subpoenaing billing statements of the PHA's outside law firms. Just having had to resort to the issuance of an IG subpoena to obtain information the PHA is legally required to provide to HUD OIG speaks volumes as to the issues within the PHA and its pervasive use of outside law firms. I have attached a sample of what we were provided by the PHA, through its attorneys, in response to our subpoena for supporting documentation for legal expenses paid for with federal funds.

With regard to our current request to the PHA, which no doubt prompted Ms. Geno's contacting you, I would point out, although you undoubtedly already know, that attorney billing statements and time records do not enjoy *carte blanche* protections of attorney-client or attorney work product protections. Indeed, an excellent article on the subject of attorney-client privilege appeared in the ABA Law Practice Management Section's LawPractice TODAY in December 2006. The article, authored by Ballard Spahr partner Carl Roberts, of the Philadelphia office, makes the point that only communications pertaining to legal advice, not the underlying facts, are protected by the privilege. "Attorney billing statements and time records are protected by the attorney-client privilege only to the extent that they reveal litigation strategy of/or the nature of services performed." (citation omitted). We requested from the PHA the underlying facts related to its use of outside law firms, not anything even remotely protected by attorney-client privilege.

Speaking to an assertion of privilege to attorney billing statements, the United States District Court for the Eastern District of Pennsylvania held:

For example, a typical time sheet may contain several different pieces of information, **such as the attorney's name, the client's name, the general matter being worked on if the attorney has represented the client on more than one matter, the date and time the services were provided** as well as a description of the actual legal services performed. In this example only the last item of information would generally be protected under the attorney-client privilege.  
Leach v. Quality Health Svs., et al, 162 F.R.D. 499, 501 (E.D. Pa. 1995)

The information bolded above is exactly the nature of the information required to ascertain if the legal services billed for were legitimate, necessary, reasonable expenses to be paid for with federal funds. What is privileged is information that divulges strategy, work product or other confidential information. In our view the assertion of privilege in this matter was nothing more than an attempt to not provide the information upon which OIG could determine the appropriateness of the expenditure of federal funds. We can only speculate as to motive.

It is hard to imagine, for instance, what could be privileged in a billing statement of, for example, Schnader, Harrison, Segal & Lewis, LLP and Ballard Spahr, for sending two associate attorneys (sometimes three) to accompany a HUD auditor, a HUD housing quality inspector, and a PHA Housing Quality representative to inspect Section 8 properties over several days for safety and sanitary conditions. This is particularly true as the associates spoke to no-one, asked no questions, answered no questions, and simply took notes. Contrast the Philadelphia experience with our typical experience across the country for similar surveys. We are generally accompanied only by a housing authority housing specialist; never, anywhere else in the country, have we been accompanied by even one attorney.

In light of this type of overuse of outside attorneys, of which there are many, many more examples with respect to the PHA, you would have to admit, Mr. Zack, that it would be prudent for OIG to see what work the PHA was billed for on these occasions, and how much was billed. That is what we attempted to do, and we were stonewalled by the very same outside attorneys doing the work and/or doing the billing and who, in our view, are part of the problem at the PHA. While this may not pose a true conflict of interest, it is problematic and certainly has the appearance of a conflict, when the source of much of the billings is the one attempting to protect those billings from review.

Thank you again for sharing your views with us. If you have any questions regarding HUD OIG's views, please contact me or my General Counsel, Bryan Howell, at (202) 402-3801.

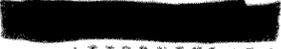
Sincerely,



Michael P. Stephens  
Acting Inspector General

Appendix E

EXAMPLE OF BLOCK BILLING



ATTORNEYS AT LAW



Philadelphia, PA 19103  
(215) 971-1100

Demick Lancaster, Director of Contracts  
Administration  
Philadelphia Housing Authority  
Contract Administration Department  
P O Box 8737  
Philadelphia, PA 19104-9742

Date: October 10 2008  
Invoice Number: 2246782  
Client No: 3008528

For Professional Services Rendered through September 30, 2008

Matter Number	Matter Name	Fee Amount	Cost Amount
3008528 0000	Solicitation No. P 001998 - Legal Advice	\$ 56,730.00	11,126.64
Total Services		\$ 56,730.00	
Total Costs			11,126.64
Total Services and Costs		\$ 67,856.64	
Total Due		\$ 67,856.64	

Please send payments to:   
(Please reference invoice and invoice or check.)

Due upon receipt

Please send payments by wire transfer to:  
CIBC BANK  
BROAD AND WALNUT STREETS  
PHILADELPHIA, PA 19102

Federal tax identification number: 

Please enclose the remittance advice with your payment to ensure proper credit.  
Note that payments received after the invoice date are not reflected.

RECEIVED  
OCT 14 2008  
CONTRACT ADMINISTRATION

Reviewed & approved 10/15/08 by [Signature]  
-H.C. [Signature]  
2008 [Signature]  
Contract [Signature]  
PHH

DRAFT – FOR DISCUSSION AND COMMENT ONLY – SUBJECT TO REVIEW AND REVISION

April 15, 2010  
Bill Number 168434

Page 2

Philadelphia Housing Authority

Through March 31, 2010

RE:  
File Number: PG904.0024

**PROFESSIONAL SERVICES PERFORMED**

<u>Date</u>	<u>Prof</u>	<u>Description</u>	<u>Time</u>	
03/23/10	AFF		0.40	
03/24/10	MHK		1.10	
03/25/10	MHK		1.40	
03/29/10	AFF		0.50	
03/29/10	MHK		0.20	
03/30/10	MHK		0.10	
<b>TOTAL PROFESSIONAL SERVICES</b>				<b>\$1,645.50</b>

**PROFESSIONAL SERVICES SUMMARY**

██████████	2.80 Hrs	1,218.00
██████████	0.90 Hrs	427.50
	<u>3.70 Hrs</u>	<u>\$1,645.50</u>

Please make checks payable to ██████████ and include client and matter number on all checks

Payments for services are due upon receipt. Outstanding bills over 30 days will accrue interest at the rate of 1 1/2% per month (18% per annum) on the unpaid balance. Please contact our Controller to make arrangements for payment by credit card or wire transfer.

\* - Interest Accumulated Since Last Invoice