THE AMERICAN BAR ASSOCIATION: SINCE NSA IS COMMITTED TO THE RULE OF LAW, IT MUST RESPECT ATTORNEY-CLIENT PRIVILEGE

It has taken the American Bar Association almost a week to respond to the reports that Mayer Brown's communications with the government of Indonesia got collected by Australia's SIGINT service.

In a rather stilted letter, it suggests that if the NSA is an agency that respects the rule of law than surely it must respect Attorney-Client privilege.

> While we realize that, under U.S. law, NSA is prohibited from conducting surveillance against American citizens or U.S. based law firms or other organizations without a warrant, it is our understanding that NSA may be authorized, under certain circumstances, to intercept the communications of U.S. citizens and organizations if they are in contact with foreign intelligence targets abroad, subject to specific minimization rules designed to protect their privacy. We were encouraged by recent NSA statements indicating that as a general matter, the agency's Office of General Counsel typically is consulted when issues of potential attorney – client privilege a rise and that **it often recommends** that certain steps be taken to protect the privileged information. **Having you further clarify the principles and policies in this area**

> **would be extremely helpful to the legal community**.
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> The ABA understands the critical role that NSA plays in gathering intelligence information and protecting our national security, and **we acknowledge that during the course of these activities, it is inevitable that certain communications between U.S. law firms and their clients may be collected or otherwise obtained by the agency**. However, irrespective of the accuracy of the recent press reports, we would like to work with NSA on this issue and urge the agency not to actively seek confidential communications between U.S. law firms and their clients. In addition , if NSA obtains such confidential information inadvertently – or such information is obtained by foreign intelligence services or others and then shared with NSA – **we would expect NSA to respect the privilege and take all appropriate steps to ensure that any such privileged information is not further disseminated to other agencies or any other third parties**.
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> We know that NSA, **as a federal agency committed to the rule of law,** recognizes the attorney – client privilege, and thus the agency should act in a manner consistent with the principles underlying the privilege. Therefore, we respectfully request that you clarify and explain NSA's current policies and practices that are designed to protect the attorney – client privileged status of information that it collects or receives, and whether these policies and practices were followed with respect to the alleged interception of privileged communications between the U.S. law firm and its overseas client referenced above. [my emphasis]

One example of the stilted form of the letter is the way in which this organization of 400,000 lawyers could so badly overstate the protections NSA Vanee Vines described in the report.

> An N.S.A. spokeswoman said the agency's Office of the General Counsel was consulted when issues of potential attorney-client privilege arose and could recommend steps to protect such information.
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> "Such steps could include requesting that collection or reporting by a foreign partner be limited, that intelligence reports be written so as to limit the inclusion of privileged material and to exclude U.S. identities, and that dissemination of such reports be limited and subject to appropriate warnings or restrictions on their use," said Vanee M. Vines, the spokeswoman.

Vines didn't say NSA's General Counsel "often recommends" additional minimization for attorney-client communications; she said only that it could.

Which leaves the nation's lawyers essentially asking, pretty please, would the NSA not do what its own minimization procedures — and the recent history of several lawyers representing alleged terrorists — clearly show it is permitted to do, which is spy on Attorney-Client communications (targeted, of course, at the alleged terrorist).

Anyone surprised that it took allegations that a big corporate firm — and not just defense attorneys — got sucked into the dragnet, before ABA wrote a letter?