Can Disclosure of Historical Facts Ever Waive the Privilege?

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In his March 27, 2013 “Privilege Points” release, Tom Spahn discusses the need to use care in disclosing historical facts to avoid privilege waiver:

Historical facts do not deserve attorney-client privilege protection, although the privilege can shield from discovery communications between clients and their lawyers about those facts. In situations involving internal corporate investigations, this basic principle normally allows disclosure to the government of historical facts uncovered in the investigation – without fear of waiving any privilege protection.

Unfortunately, some courts' ambiguous language seems to cast doubt on this axiomatic principle. In Lebbon v. City of Peoria, No. CV-12-00921-PHX-GMS, 2013 U.S. Dist. LEXIS 13146 (D. Ariz. Jan. 31, 2013), defendant City of Peoria conducted an investigation. When plaintiff sought documents relating to the investigation, the court held that the City had waived privilege protection when it "disclosed the contents of the 2010 Investigation" to the plaintiff. Id. at *2. The court later reiterated that the City "disclosed the contents of the 2010 Investigation by citing to factual findings from the Investigation." Id. at *3. As in other cases using such imprecise language, it is unclear whether the City actually turned over a portion of the investigation report, quoted from privileged communications that took place during the investigation, or simply recited historical facts that were uncovered or compiled during the investigation. Under standard privilege principles, the first two acts might have waived privilege and work product protection, but simply reciting historical facts should not have waived either protection.

Such ambiguous language in this and other cases is unfortunate, given the importance of internal corporate investigations and the incentive companies frequently have to disclose historical facts to forestall some governmental action.