UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF INFORMATION ASSOCIATED WITH THE PREMISES KNOWN AS THE OFFICE OF [redacted] AND THE OFFICES [redacted]	Misc. Action No. 20-gj-35 (BAH) Chief Judge Beryl A. Howell **FILED UNDER SEAL AND EX PARTE**

PARTIAL UNSEALING ORDER

On August 28, 2020, a sealed Memorandum Opinion ("2020 Memorandum Opinion") was filed in the instant sealed matter resolving the government's motion for permission to review certain communications. The order associated with that opinion directed the government to submit a "report advising whether any portions of the accompanying Memorandum Opinion may be unsealed to the public in whole or in part and, if so, proposing any redactions." Order, ECF No. 6.

On November 25, 2020, the government submitted a status report requesting that the Court "maintain the Memorandum Opinion under seal" because it "identifies both individuals and conduct that have not been charged by the grand jury" and declining to suggest any redactions for a publicly available version. Finding this response insufficient, the Court directed the government to explain why each line, "even with redaction of names and persons who have not been publicly charged, must remain under seal." Min. Order (Nov. 25, 2020). The government filed a responsive status report on November 30, 2020, attaching a redacted version of the Memorandum Opinion that may be unsealed.

In light of the government's Second Status Report, ECF No. 9, it is hereby

ORDERED that a redacted version of this Order removing personally identifying information from the caption, along with the Redacted Memorandum Opinion attached to this Order that is a redacted version of the 2020 Memorandum Opinion, ECF No. 7, be unsealed and posted on the Court's website; and it is further

ORDERED that the government shall file, by the earlier of November 30, 2021 or within thirty days of when any public disclosure obviates the need for further sealing, a status report advising the Court whether the 2020 Memorandum Opinion, ECF No. 7, may be further unsealed and proposing any redactions to be made prior to any unsealing.

SO ORDERED.

Date: December 1, 2020

Beryl A. Howell

BERYL A. HOWELL
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF INFORMATION ASSOCIATED WITH THE PREMISES KNOWN AS THE OFFICE OF [redacted] AND THE OFFICES OF [redacted]	Misc. Action No. 20-gj-00035 (BAH) Chief Judge Beryl A. Howell **FILED UNDER SEAL AND EX PARTE**

MEMORANDUM OPINION AND ORDER

Pending before the Court is the government's *Ex Parte, In Camera* Application Seeking Authorization to Review Certain Attorney-Client Communications ("Gov't's Mot.") "between and among [redacted], and their agents, "based on a crime-fraud finding" or, alternatively, "a finding that there was no attorney-client or other privileged relationship protecting communications involving [redacted]." Gov't's Mot. at 1, ECF No. 1. The communications at issue were seized by the government pursuant to search warrants, which were issued in [redacted]. *Id.* at 5.[1] In the course of the ongoing review by the government's filter team of the "over fifty digital media devices, including iPhones, iPads, laptops, thumb drives, and computer and external hard drives

[1] [redacted]. Gov't's Mot. at 5 n.4.

. . (totaling several terabytes of data)" seized, *id.*, email communications have been identified "indicat[ing] additional criminal activity," *id.* at 6, namely: (1) a "secret lobbying scheme," *id.* at 7, in which [redacted] and [redacted] acted as lobbyists to senior White House officials, without complying with the registration requirement of the Lobbying Disclosure Act ("LDA"), 2 U.S.C. §§ 1601 *et seq.*, to secure "a pardon or reprieve of sentence for [redacted]," *id.* at 6, [redacted], *id.* at 7-8 ("LDA scheme"); and (2) a related bribery conspiracy scheme, in which "[redacted] would offer a substantial political contribution in exchange for a presidential pardon or reprieve of sentence for [redacted]," *id.* at 7, using [redacted], "as the intermediaries to deliver the proposed bribe," *id.* ("Bribery-for-pardon scheme"). The government now seeks a court order "so that the investigative team may access these communications, confront [redacted], [redacted], and [redacted] with the facts recited herein, and take any other investigative steps needed to complete its investigation." *Id.* at 6.[2]

[2] The evidence in this matter was seized as part of the government's [redacted]. Gov't's Mot. at 4 n.2.

Upon consideration of the government's initial submission and exhibits, argument presented at an *ex parte* hearing held on August 25, 2020, and supplemental government filing on August 26, 2020, *see* Gov't's Supp., ECF No. 5, the government's motion is granted, based on a finding that, notwithstanding any attorney-client relationship that [redacted] may have had with either [redacted] or [redacted], any communication related to the alleged LDA or Bribery-for-pardon schemes between or among those individuals, in which communications [redacted] was a participant or otherwise a recipient, is not protected by the attorney-client or any other privilege and is therefore reviewable by the government's investigative team.[3]

I. BACKGROUND

[redacted]

[3] The government agrees that "[t]o the extent the government's filter team identifies any communications between or among [redacted], [redacted] and [redacted] that did not involve [redacted], these communications would be withheld from the investigative team, absent a clear waiver of the privilege." Gov't's Mot. at 2 n.1.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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4 [redacted]

[redacted]

II. LEGAL STANDARD

"The attorney-client privilege "'is the oldest of the privileges for confidential communications known to the common law.'" *United States v. Jicarilla Apache Nation,* 564 U.S. 162, 169 (2011) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). As the Supreme Court explained, "[b]y assuring confidentiality, the privilege encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation," and "[t]his, in turn, serves 'broader public interests in the observance of law and administration of justice.'" *Mohawk Indus. v. Carpenter,* 558 U.S. 100, 108 (2009) (quoting *Upjohn Co.*, 449 U.S. at 389). Thus, the privilege covers only communications "between attorney and client if that communication was made for the purpose

[redacted]

of obtaining or providing legal advice to the client." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014); *see also In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) ("[Attorney-client] privilege applies only if the person to whom the communication was made is 'a member of a bar of a court' who 'in connection with th[e] communication is acting as a lawyer' and the communication was made 'for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding.'" (citing *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984))).

To preserve the privilege, the privilege holder "'must treat the confidentiality . . . like jewels – if not crown jewels'" and must "zealously protect the privileged materials, taking all reasonable steps to prevent their disclosure" lest it be waived. *S.E.C. v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997) (quoting *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989)). The law is therefore well established that "[d]isclosure 'by the holder' of the privilege can give rise to a waiver." *Nat'l Sec. Counselors v. CIA*, Nos. 18-5047, 18-5048, 2020 U.S. App. LEXIS 25393, at *11 (D.C. Cir. Aug. 11, 2020) (quoting *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1369 (D.C. Cir. 1984)); *see also In re Sealed Case*, 107 F.3d 46, 49 n.4 (D.C. Cir. 1997) (observing that "in many cases, a third party's access to a communication may destroy the confidentiality required for the attorney-client privilege" (citing *In re Sealed Case,* 877 F.2d at 980)); *Permian Corp. v. U.S.*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (finding client's disclosure to third party prevented subsequent assertion of privilege because "the client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit"); *United States v. American Tel. and Tel. Co.,* 642 F.2d 1285, 1299 (D.C. Cir. 1980) (concluding that "the mere showing of a

voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege"); *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977) ("If the information has been or is later shared with third parties, the privilege does not apply.").

At the same time, no waiver of the attorney-client privilege occurs when privileged communications are provided to third parties "serving as agents of attorneys." *Kellogg Brown & Root*, 756 F.3d at 758. An "agent" can be someone "'employed to assist the lawyer in the rendition of professional legal services,'" *Linde Thomson v. Resolution Trust Corp.*, 5 F.3d 1508, 1414 (D.C. Cir. 1993) (quoting Supreme Court Standards 503(a)(3), 503(b)), such as paralegals, or a third party interpreting information obtained from the client in support of counsel's representation. *See also Kellogg Brown & Root*, 756 F.3d at 760 (finding attorney-client privilege extends to communications incident to an internal investigation by non-attorneys where one of the significant purposes of the investigation was to "obtain or provide legal advice"); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (interpreting attorney-client privilege to apply to memoranda and working papers prepared at attorney's request by hired accountants for the purpose of providing legal advice).

III. DISCUSSION

Each of the email communications submitted by the government in support of the instant motion was directed, copied or forwarded to [redacted], who is not an attorney. The attorney-client privilege applies only when the participants in the communication are the client and the client's attorney, who is a "member of the bar," *In re Sealed Case*, 737 F.2d at 98–99, and thus none of [redacted]'s email communications with [redacted] alone are privileged. Further, none of [redacted]'s email communications in which [redacted] and [redacted] were participants are protected by

attorney-client privilege, unless [redacted] is himself an agent of [redacted], who is an attorney and was retained and paid by [redacted] to provide legal assistance to [redacted].[6] The record before the Court demonstrates that [redacted] was not such an agent.

[redacted], not [redacted], requested [redacted]'s assistance, "as a personal favor," to use his political connections [redacted] Gov't's Mot., Ex. 5, ECF No. 3-4.[7] This political strategy to obtain a presidential pardon was "parallel" to and distinct from [redacted]'s role as an attorney-advocate for [redacted]. *Id.*, Ex. 33, ECF No. 3-32 ([redacted]); *see also*, *id.*, Ex. 6, ECF No. 3-5 ([redacted]); *id.*, Ex. 4, ECF No. 3-3 ([redacted]). The government points out that no communications have been identified "in which [redacted] is requested or instructed to assist the defense team or otherwise be 'formally associated' with the defense," Gov't's Mot. at 37–38, or in which '[redacted] communicate[d] directly with [redacted]'s [redacted] defense counsel in the months leading up to [redacted]'s surrender to BOP custody," *id.* at 38.

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[6] While the record supports a finding of an attorney-client relationship between [redacted] and [redacted], evidence for such a relationship between [redacted] and [redacted] is much weaker, though the government takes a "conservative" approach and assumes, for purposes of the pending motion, that a privileged relationship exists between [redacted] and [redacted]. Rough Hr'g Tr. (Aug. 25, 2020) at 8.

[7] The emails submitted as exhibits by the government do not show any direct payment to [redacted] by [redacted] or [redacted] and instead indicate that [redacted] expected [redacted] to assist in obtaining clemency for [redacted] due to [redacted]'s past substantial campaign contributions [redacted] and [redacted]'s anticipated future substantial political contributions. *See* Gov't's Mot., Ex. 19 at 3, ECF No. 3-18; *id.*, Ex. 24 at 1, ECF No. 3-23; *id.*, Ex. 25, ECF No. 3-24; *id.*, Ex. 28, ECF No. 3-27; *id.*, Ex. 29, ECF No. 3-28. In the government's view, "even if [redacted] did not receive direct financial compensation like [redacted]. [redacted] was nonetheless slated to receive some form of consideration (*i.e.*, 'other compensation') for his lobbying activities on behalf of [redacted] and [redacted]." Gov't's Mot. at 30.

[redacted] was neither hired nor supervised by [redacted], and did not report to [redacted] and thus in no way operated as an agent of [redacted]. At most, [redacted] provided merely a coordinating role, including with the [redacted] and the White House Counsel's office, to help ensure [redacted]'s work on behalf of [redacted]' clemency petition reached the targeted officials. *See, e.g.*, *id.*, Ex. 7 at 2, ECF No. 3-6 ([redacted]); *id.*, Ex. 13, ECF No. 3-12 (same); *id.*, Ex. 7 at 1, ECF No. 3-6 ([redacted]). [redacted] provided no discernable substantive role or interpretive function for [redacted] in service of [redacted]' legal case. *See U.S. v. Singhal*, 800 F. Supp. 2d 1, 7 (D.D.C. 2011) (finding that emails between a client, his attorney and others, including third parties, were not communications protected by attorney-client privilege).[8]

In sum, the attorney-client privilege does not protect communications disclosed to third parties and, here, [redacted] was such a third party to each of the emails submitted by the government.[9]

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[8] [redacted]'s efforts to rename the subject lines of three emails [redacted] sent to [redacted] and [redacted] to signal attorney-client privilege, *see* Gov't's Mot., Ex. 9, ECF No. 3-8; *id.*, Ex. 14, ECF No. 3-13; *id.*, Ex. 15, ECF No. 3-14, are simply unavailing to cloak these communications as privileged when [redacted] was included. *See In re Domestic Airline Travel Antitrust Litig.*, MDL Docket No. 2656; Misc. No. 15-1404 (CKK), 2020 U.S. Dist. LEXIS 121209, at *27 (D.D.C. Feb. 25, 2020) (observing that "many claims of attorney-client privilege involve a situation where a communication was sent to or from an attorney and/or the document was marked as confidential/privileged or attorney-client privileged" but "the law makes clear, however, such designations are not dispositive as to whether or not the attorney-client privilege applies."); *Center for Public Integrity v. U.S. Dep't of Energy*, 287 F. Supp. 3d 50, 62 (D.D.C. 2018) (concluding that the "mere act of placing a confidentiality designation on a document cannot possibly inoculate it from waiver") (citation omitted); *Neuder v. Battelle Pac. Nw. Nat'l Lab.*, 194 F.R.D. 289, 295-96 (D.D.C. 2000) ("The recitation of the phrase 'confidential and privileged attorney-client communication' is not dispositive in determining whether a document is privileged."); *see also Molex v. City & Cty. of San Francisco*, No. 11-cv-1282-YGR (KAW), 2012 U.S. Dist. LEXIS 70006, 2012 WL 1831640, at *3 (N.D. Cal. May 18, 2012) ("[Confidential] [t]reatment of an unprivileged document does not by itself create privilege.").

[9] Since this motion is resolved on alternative grounds, the crime-fraud exception need not be addressed. Nonetheless, it is worth noting that a *prima facie* showing of a purported violation of the LDA may be elusive because, as the government concedes, *see* Gov't's Mot. at 30, insufficient evidence is currently available to show that either [redacted] or [redacted] engaged in "lobbying activities" for twenty percent or more of the time spent on services for that client over a three-month period, to meet the threshold for registration, under 2 U.S.C. § 1602(10), and, indeed, no evidence suggests that [redacted] paid [redacted] any direct compensation for the 100 or more hours [redacted] spent on [redacted]' case, *see id.*, Ex. 19 at 3, ECF No. 3-18. Moreover, while the government addresses as inapplicable one of the nineteen enumerated exceptions from registration for a "lobbying activity," *see* Gov't's Mot. at 30 (arguing that exception in § 1602(8)(B)(xii)), "which applies to contacts with officials at an agency with

IV. CONCLUSION

For the foregoing reasons, email communications between and among [redacted], [redacted] and [redacted], or any agents of these individuals, that were sent, copied or forwarded to [redacted] in connection with the alleged LDA scheme or Bribery-for-pardon scheme described in the government's motion are not covered by the attorney-client or other privilege. The investigative team may therefore review and use any such communications to confront subjects and targets of this investigation. To the extent that the filter team encounters any communications between [redacted] and [redacted] or [redacted], to which [redacted] is not a participant or recipient, that appear to implicate legal advice or representation unrelated to the alleged schemes and crimes described above, they shall be withheld from the investigative team and protected accordingly as required by law.

While cognizant of the sensitive and ongoing nature of this investigation, requiring that this motion be considered under seal and *ex parte*, the government is directed, within 90 days, to submit a report advising whether any portions of this Memorandum Opinion may be unsealed to the public in whole or in part and, if so, proposing any redactions.

An order consistent with the Memorandum Opinion will be filed under seal contemporaneously.

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responsibility over a 'judicial' or 'criminal' proceeding, does not apply to these facts..."), other broad exceptions for requesting "a meeting...or any other similar administrative request" or providing information in writing "in response to an oral or written request by a covered executive branch official," arguably may apply but insufficient evidence is available to make an assessment, *see, e.g.*, 2 U.S.C. § 1602(8)(b)(v) and (viii).

Date: August 28, 2020

BERYL A. HOWELL
United States District Judge