

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA 2020-  
070764729

Grand Jury Action No. 21-23 (BAH)

Chief Judge Beryl A. Howell

UNDER SEAL

MEMORANDUM OPINION

A grand jury is investigating whether Barry Bennett (“Target 1”)—the founder and sole principal of Avenue Strategies LLC (“respondent”), a political consulting firm—Douglas Watts (“Target 2”), and possibly others, violated the Foreign Agents Registration Act (“FARA”), 22 U.S.C. § 612, after they failed to register and disclose that [REDACTED], a purported humanitarian organization that Target 1 created, was actually paid for and established to support the political goals of [REDACTED] a client of respondent and Target 1. *See* Gov’t’s Mot. Compel Produc. Docs. to Grand Jury (“Gov’t’s Mot.”), at 1-2, ECF No. 1. [REDACTED] engaged in widespread media advocacy and high-level political lobbying activities over four months, during which [REDACTED] made monthly payments of \$500,000 to respondent. *See id.* at 1-2, 18-19; *id.*, Ex. 29A (bank transfers from [REDACTED] to respondent, July 2017-May 2018). In response to a grand jury subpoena directing respondent to produce all records related to the work that respondent and [REDACTED] performed for [REDACTED] for the three year period between June 1, 2017 and June 1, 2020, *see id.*, Ex. 1 (Grand Jury Subpoena 2020-070764729), respondent produced [REDACTED] records but withheld, as attorney-client privileged, [REDACTED] responsive documents involving communications with [REDACTED] law firm. *See* Gov’t’s Mot. at 33; *see also* Resp’t’s Opp’n to Mot. to Compel (“Resp’t’s Opp’n”), at 1, ECF No. 7; *id.*, Ex. 5 (declaration of respondent’s counsel at [REDACTED]), at 3. The

government now moves to compel production of these [REDACTED] withheld records asserting that the crime-fraud exception vitiates respondent's claim of privilege. *See* Gov't's Mot. at 2.

As detailed in the government's motion to compel production of the [REDACTED] documents at issue, the government has uncovered highly probative evidence indicating that the activities of [REDACTED]—which included an advocacy campaign across print, TV, and social media, leading a briefing session in Congress, and endeavoring to arrange a meeting with the President of the United States—were in fact funded and directed by [REDACTED], thus warranting disclosure in respondent's FARA filings with the Department of Justice ("DOJ"). The government's extensive factual proffer, supported by 36 exhibits mainly derived from the records already produced by respondent in response to the grand jury subpoena, makes a sufficient *prima facie* showing that the crime-fraud exception vitiates respondent's claim of attorney-client privilege. Accordingly, the government's motion to compel production of records to the grand jury is **GRANTED**.

## **I. BACKGROUND**

The factual background is first summarized before turning to the relevant procedural history.

### **A. Factual Background**

#### **1. Respondent's Work on Behalf of [REDACTED]**

[REDACTED] Resp't's Opp'n at 3.<sup>1</sup> Shortly thereafter, on July 17, 2017, Target 1, on behalf of respondent, signed a contract with [REDACTED]. Gov't's Mot., Ex. 2 (July 2017 consulting agreement

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<sup>1</sup> According to respondent, the [REDACTED]." Resp't's Opp'n at 3.

between respondent and [REDACTED] Agreement”)), at 11-16; Resp’t’s Opp’n at 3. [REDACTED] agreed to compensate respondent at the rate of \$150,000 per month, [REDACTED] Agreement at 12, for a scope of work that included developing a [REDACTED] [REDACTED] and [REDACTED] [REDACTED] *id.* at 16.

About a week later, on July 24, 2017, respondent’s [REDACTED] attorneys filed FARA registration documents with DOJ. Gov’t’s Mot., Ex. 2 (July 2017 FARA filing), at 1-10. According to this filing, respondent would “provide [REDACTED] [REDACTED] services on behalf of the foreign principal [REDACTED] within the United States to promote [REDACTED] engagement between the” two countries. *Id.* at 9. The filing also specified that respondent’s activities in support of [REDACTED] would include “communications with Members of Congress and Congressional staff, Executive Branch officials, the media, and with other individuals and organizations involved in governmental and public policy matters.” *Id.*

The same day that respondent filed its FARA registration with DOJ, Target 1 emailed a [REDACTED] government official suggesting “proactive measures” respondent could undertake on [REDACTED] behalf to “chang[e] the debate” with regards to “four areas of weakness.” *Id.*, Ex. 4. Target 1 explained that he “would be willing to spearhead the creation or affiliation of four entities to conduct four separate and independent efforts to bring public attention inside the United States to these serious issues,” one of which Target 1 described as [REDACTED] [REDACTED] *Id.*; see also *id.* (describing the three other issues of interest as [REDACTED] [REDACTED] [REDACTED] [REDACTED]”). Under the header [REDACTED] Target 1 then described

an “organization [REDACTED]

[REDACTED] *Id.* In support of this goal, Target 1 told the [REDACTED] official that [REDACTED] would engage in a multidimensional media and outreach campaign aimed at influencing American citizens and their government, including use of social media and digital advertising to lobby the President, Congress, and American public, and publication of a daily report to highlight the

[REDACTED] *Id.*

The next day, on July 25, 2017, Target 1 again emailed a [REDACTED] government official with a “Plan for Human Rights Violations in [REDACTED].” *Id.*, Ex. 5. Attached to this email was a memorandum “outlin[ing] a plan to highlight the suffering currently taking place in [REDACTED] as a result to [sic.] the [REDACTED] military intervention in [REDACTED].” *Id.* This memorandum stated that, [REDACTED] [REDACTED]” and that “through the use of social media, advertising, and [REDACTED] [the organization] would highlight the atrocities taking place in [REDACTED] at the hands of the [REDACTED].”

*Id.* “A budget of [\$]350,000 per month would be sufficient” to finance the activities of the proposed organization, but Target 1 indicated to [REDACTED] official that [REDACTED]

[REDACTED] *Id.* Target 1 concluded the memo promising to “manage the entire project quietly.” *Id.*<sup>2</sup>

<sup>2</sup> Around the same time that Target 1 pitched the [REDACTED] proposal to [REDACTED] the government asserts that “[Target 1] was also engaged in a campaign on behalf of [REDACTED] to shame a [REDACTED] third-party entity into registering under FARA.” Gov’t’s Mot. at 9; *see id.*, Exs. 6-9, 36 (press releases and other communications relating to this campaign). In a letter to DOJ’s FARA Unit dated August 18, 2017, Target 1 claimed that [REDACTED]

2. *Target 1 and Target 2 Launch [REDACTED] in September 2017*

On August 28, 2017, Target 1 sent to Target 2 the same memorandum Target 1 had sent about a month earlier, on July 25, 2017, to a [REDACTED] official outlining a [REDACTED] [REDACTED] Gov't's Mot., Ex. 10. Nevertheless, two days later, on August 30, 2017, Target 2 sent a letter to Target 1 that "purported to 'introduce' [Target 1] to [REDACTED] and its mission." Gov't's Mot. at 10; *see id.*, Ex. 12 (Aug. 30, 2017 letter from Target 2 to Target 1). In this letter, Target 2 described [REDACTED] as an "organization committed to highlighting the suffering currently taking place in [REDACTED] resulting from the [REDACTED] military intervention" and requested "a major contribution from [respondent] of \$1.5 million toward our operating budget, and \$1.0 million to fund the associated strategic advertising program," *id.*, Ex. 12—a contribution amount in the same range that Target 1 had conveyed to [REDACTED] in his July 25, 2017 memo as needed to finance a [REDACTED]. *See id.*, Ex. 5. Target 2 described such a [REDACTED] advertising campaign as [REDACTED] [REDACTED] *Id.*, Ex. 12. Based on this chronology, the government reasonably proffers that this was a "fake letter" drafted by Target 1 aimed at feigning "the origin of [REDACTED] as an organization that [Target 1] had suddenly learned about from [Target 2]—rather than an entity that was specifically conceived of and developed by [Target 1] to benefit [Target 1's] client, [REDACTED]." *Id.* at 11.

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[REDACTED] was required to register under FARA because it was owned and operated by a foreign individual and its "activities clearly and directly benefit a foreign principal . . . [REDACTED] *Id.*, Ex. 7 at 3. According to the government, this advocacy campaign "underscores [Target 1]'s understanding of the purpose and requirements of the statute" such that he "undoubtedly understood that a [REDACTED] would be required to file under FARA." Gov't's Mot. at 9.

About six weeks after Target 1 proposed the creation of [REDACTED] to [REDACTED] [REDACTED] was registered in Delaware as a limited liability company on September 6, 2017. *Id.*, Ex. 14. A day earlier, an addendum to the July 17, 2017 contract between respondent and [REDACTED] was executed to increase the monthly fee that [REDACTED] was required to pay respondent from \$150,000 to \$500,000, *id.*, Ex. 13 at 5, reflecting the \$350,000 per month that Target 1 indicated to [REDACTED] on July 25, 2017 would be necessary to finance [REDACTED] [REDACTED] activities, *see id.*, Ex. 5. This addendum would remain in effect for the remainder of 2017. *Id.*, Ex. 13 at 5. Target 2, “a seasoned activist and long-time resident of New York,” was identified as president of the organization. *Id.*, Ex. 11.

On September 8, 2017, two days after formally launching the organization, Target 1 and Target 2 briefed a public relations firm regarding their plans for [REDACTED]. *Id.*, Ex. 15 at 3. [REDACTED]

[REDACTED] *Id.* The public relations firm then submitted a proposal to Target 1 detailing a communications campaign for [REDACTED] that, among other things, would include the [REDACTED] [REDACTED] and identified the client, expressly stating that this messaging would “[e]nsur[e] that [REDACTED] voice is heard and heard clearly and loudly in TV debates on [REDACTED], including [REDACTED] [REDACTED] *Id.*, Ex. 5 at 3-4. A principal of the public relations firm indicated to Target 1 that the cost to develop the “plan” for such a public information campaign would be [REDACTED] [REDACTED] *Id.*, Ex. 5 at 2. A few days later, on September 13, 2017, Target 2 emailed Target 1 requesting his feedback about several logo concepts prepared for

[REDACTED]. *Id.*, Ex. 16. Seemingly unsatisfied with the proposed logos, Target 1 sent Target 2 a five-word reply: “Want to see sick kids.” *Id.* [REDACTED]

[REDACTED] *Id.*

[REDACTED] thereafter engaged, from September 2017 through January 2018, when it ceased operations, Gov’t’s Mot. at 19, “in an extensive social media campaign [REDACTED] [REDACTED] published op-eds in newspapers, distributed flyers, produced a documentary that aired on [REDACTED], and lobbied Congress and former President Trump,” *id.* at 14. For example, just a week after launching [REDACTED] page, Target 2 wrote in a September 22, 2017 memo to Target 1 that the [REDACTED] of the organization’s [REDACTED] page and advertising program “has been phenomenal,” reaching 725,000 users of that social network within days. *Id.*, Ex. 18. A [REDACTED] that Target 2 later emailed to Target 1 in February 2018 detailing performance metrics for one of [REDACTED] [REDACTED] digital campaigns noted that the campaign ultimately resulted in over [REDACTED]

[REDACTED] *Id.*, Ex. 19 (describing the objective of this digital campaign as [REDACTED]

[REDACTED]); *see also* Exs. 20-21 (noting that [REDACTED]

[REDACTED]).

All the while, a spokesperson for [REDACTED] published two opinion pieces in the [REDACTED] describing the humanitarian crisis in [REDACTED], *id.*, Ex. 22, and emphasizing [REDACTED], *id.*, Ex. 23. Both

pieces urged political action by Congress and the Trump Administration to [REDACTED]  
[REDACTED] *Id.*, Ex. 22 (“We can  
urge our political leaders to do more to alleviate the crisis.”); Ex. 23 [REDACTED]  
[REDACTED] *see*  
*also id.*, Ex. 35 [REDACTED]). These articles were  
published after Target 1 and Target 2 jointly decided [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] *Id.*, Ex. 17 (October 3, 2017 email thread between targets).

[REDACTED] was also featured in a 2018 [REDACTED] documentary. In that  
documentary, which was broadcast by [REDACTED] in March 2018, Target 2 described the organization’s  
work as follows: “Our organization . . . is all about raising awareness. We don’t raise money for  
ourselves, we don’t provide relief on the ground in [REDACTED]. We are trying to raise awareness of  
what this crisis is and the scope of it is.” Gov’t’s Mot. at 17; *see also id.*, Ex. 26 (screenshot  
from [REDACTED] depicting documentary segment with Target 2). According to the government,  
a \$250,000 payment that [REDACTED] made to respondent on October 24, 2017, *see id.*, Ex. 29A,  
financed [REDACTED] participation in this documentary. Target 1, however, tried to  
conceal any connection between [REDACTED] and [REDACTED] participation in this  
documentary by [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Gov’t’s Mot. at 17; *id.*, Ex. 27 at 2-4.



media efforts were complemented with a lobbying campaign directed at the White House and Congress. On December 8, 2017, Target 1 emailed a White House official with a letter from [REDACTED] addressed to President Trump. *See id.*, Ex. 24. In this letter, the [REDACTED]

*Id.* [REDACTED] political advocacy activities likewise reached the U.S. Capitol later in December 2017, when Target 2 and the organization's spokesperson hosted a briefing about [REDACTED] humanitarian crisis for congressional staff. *Id.* at 18; *id.*, Ex. 28 (photo depicting Target 2 and spokesperson in congressional briefing).

Recapping respondent's "work for [REDACTED]" in a late November 2017 communication, on respondent's letterhead, Target 1 told an associate [REDACTED] Gov't's Mot. at 16, about several of [REDACTED] activities to date, including Target 2's participation in the [REDACTED] documentary and the [REDACTED] pieces authored by the organization's spokesperson, *id.*, Ex. 25 at 2. This document further described "[REDACTED] [as] the largest organization of its kind focused on [REDACTED] with over 125,000 [REDACTED] fans." *Id.* Around the same time, Target 2 received a text message from a respondent employee acknowledging that [REDACTED] Gov't's Mot. at 22 n.18; *id.*, Ex. 33.

On January 4, 2018, while en route to [REDACTED] embassy in Washington D.C., Target 1 sent a [REDACTED] message to an associate stating that "They are going to stop the [REDACTED] project." Gov't's Mot. at 19; *id.*, Ex. 30. [REDACTED] thereafter ceased its activities and [REDACTED] payments to respondent "reverted to [the] original payment term of \$150,000 per month," as

stated in their July 2017 contract prior to [REDACTED] launch and the September 2017 contract amendment, which had increased [REDACTED] monthly payments to respondent by \$350,000. *Id.* at 19; *id.*, Ex. 29A (detailing bank transfers from [REDACTED] to respondent for \$150,000 from January to May 2018); *see also* Resp't's Opp'n at 5 (noting that "in January [2018], [respondent] received notification that the [September 2017] addendum would not be renewed").

While in operation from September 2017 to January 2018, [REDACTED] received \$773,000 in payments from respondent. Gov't's Mot., Ex. 29B (bank transfers from respondent to [REDACTED], Sept. 2017-Jan. 2018). The government alleges these payments were passed through from the fees that [REDACTED] paid to respondent pursuant to their July 2017 contract as amended in September 2017. Gov't's Mot. at 18-19; *see id.*, Ex. 13 (September 2017 addendum to contract between respondent and [REDACTED] increasing monthly payments to \$500,000). Respondent was the sole funder of [REDACTED]. Gov't's Mot. at 18.

**3. Respondent's FARA Submissions After the Launch of [REDACTED]**

Following the September 2017 launch of [REDACTED], respondent filed three submissions to supplement or amend its July 2017 FARA registration about its work [REDACTED]. These submissions repeatedly failed to "disclose[] the creation of [REDACTED] [respondent's] disbursements to [REDACTED], or [REDACTED] political lobbying and public relations campaign." Gov't's Mot. at 19.

First, on September 18, 2017, respondent amended its FARA registration to disclose the September 5, 2017 amendment to its contract [REDACTED]. Gov't's Mot., Ex. 13 at 3. With the exception of a new sentence stating that "Registrant will also provide strategic public relations consulting and consult on promoting the Image of the [REDACTED]," this filing described respondent's work on behalf [REDACTED] in exactly the same terms as the original FARA

registration filed in July 2017 and made no mention of [REDACTED]. *Id.* at 4; *see also id.*, Ex. 2 (July 2017 FARA filing), at 1-10. [REDACTED] attorney, signed this submission on respondent's behalf. *Id.*, Ex. 13 at 2, 4; *see* Resp't's Opp'n at 5.

Second, on March 2, 2018, respondent filed a supplemental statement to its FARA registration reporting its activities for the six-month period ending on January 31, 2018. *See* Gov't's Mot. at 20; *id.*, Ex. 31. This statement did not disclose the \$773,000 that respondent paid to [REDACTED] or any of [REDACTED] media and political advocacy activities during the reporting period. *See id.*, Ex. 31. The submission stated only that, "[a]s a supplement to the Addendum [to the contract between respondent and [REDACTED]] dated Sept. 5, 2017, the foreign principal would provide an additional \$250,000 in October 2017 for use in supporting the relief of humanitarian suffering in [REDACTED]." *Id.*, Ex. 31 at 10. Target 1 signed this supplemental statement. *Id.* at 9, 11. The government contends that this statement "misleadingly characterized" [REDACTED] "\$250,000 payment . . . transferred to [REDACTED] and used to finance the . . . [REDACTED] documentary [] in which [Target 2] appeared and encouraged viewers to contact their representatives in Congress." Gov't's Mot. at 22.

Lastly, in a March 12, 2018 addendum to the March 2, 2018 supplemental statement, respondent likewise failed to disclose [REDACTED] existence and activities. *See id.*, Ex. 32. [REDACTED] attorney signed this addendum on respondent's behalf. *Id.*

#### 4. [REDACTED] *Grand Jury Subpoena*

Based on the aforementioned FARA submissions, the government is investigating Target 1 and Target 2 for conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and submitting FARA filings that contained false statements and material omissions, in violation of 22 U.S.C. § 612. *See also* 22 U.S.C. § 618(a)(1)-(2) ("Any person who willfully violates . . . or .

... willfully makes a false statement of a material fact or willfully omits any material fact required to be stated therein . . . shall, upon conviction thereof, be punished by a fine of not more than \$10,000 or by imprisonment for not more than five years, or both.”).

In [REDACTED], Target 2 was interviewed twice by the FBI. Gov’t’s Mot. at 22. During these interviews, Target 2 denied knowing that [REDACTED] was funded by [REDACTED] or that this organization was created to benefit that country. *Id.* In addition, Target 2 stated to law enforcement that [REDACTED] did not focus on humanitarian fundraising, acknowledging that the organization’s primary purpose was to raise awareness about the humanitarian crisis in [REDACTED] and that it did not raise or collect funds for humanitarian work. *Id.* at 23-24.

Respondent was served with the subpoena for documents on [REDACTED], with a return date of [REDACTED]. *Id.*, Ex. 1 at 2. The subpoena requested production of eight categories of records, including, as relevant here:

- (1) All records of work performed by [respondent] or its employees, subcontractors (i.e., individuals or companies), or agents on behalf of [REDACTED]  
[REDACTED]
- (2) All records of work performed by [REDACTED]  
[REDACTED] or their employees, subcontractors (i.e., individuals or companies), or agents on behalf of [REDACTED]  
[REDACTED]
- (3) All records of work performed by [respondent’s] personnel or employees, subcontractors (i.e., individuals or companies), or agents on behalf of [REDACTED]  
[REDACTED] *Id.*, Ex. 1 at 4.

#### **B. Procedural History**

In compliance with the subpoena, respondent made four productions to the government totaling [REDACTED] responsive records between [REDACTED] and [REDACTED]. Gov’t’s Mot. at 24; Resp’t’s Opp’n at 7; *id.*, Ex. 5 at 3. On September 15, 2020, respondent reported that production

of all responsive materials had been completed and tendered a privilege log detailing the [REDACTED] documents being withheld as attorney-client privileged. Gov't's Mot. at 24; Resp't's Opp'n at 7; *see also* Gov't's Mot., Ex. 3 (Privilege Log); *id.*, Ex. 34 (September 15, 2020 letter from respondent to government regarding "Fourth and Final Production"). The withheld records pertain to respondent's communications with attorneys [REDACTED] which advised on the preparation of respondent's FARA filings while [REDACTED] was in operation. *See* Gov't's Mot. at 33; *id.*, Ex. 3. The parties conferred between December 2020 and early February 2021 to resolve, without judicial intervention, the instant dispute about the [REDACTED] undisclosed documents. Gov't's Mot. at 24; Resp't's Opp'n at 1; *id.*, Exs. 1-3 (Oct. 2020 to Dec. 2020 correspondence between parties' counsel addressing respondent's assertion of privilege).<sup>3</sup>

On July 7, 2021, after the conferral process proved ineffective, the government filed the pending motion to compel seeking production of "(1) all responsive communications with [REDACTED] during the conspiracy, which lasted at least from [REDACTED] (the date the fake introduction letter was sent [from Target 2 to Target 1]) to at least March 12, 2018 (the date the March 2, 2018 FARA filing was amended), and (2) all communications with any attorney related to [REDACTED] or its activities, irrespective of date." Gov't's Mot. at 35.

In support of the instant motion to compel production, the government argues that respondent's asserted privilege yields to the crime-fraud exception based on the substantial factual proffer of a conspiracy by Target 1 and Target 2 to conceal that [REDACTED] was financed by [REDACTED] and aimed to advance [REDACTED] interests in the United States. In the government's view of the proffered evidence, Target 1 and Target 2 "were engaged in the conspiracy when [respondent] sought legal advice from [REDACTED] attorneys, and used [REDACTED]

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<sup>3</sup> Respondent was dissolved in December 2020. Resp't's Opp'n at 2 n.2.

services to prepare and submit willfully false and misleading FARA filings.” *Id.* at 26. The government asserts that the withheld materials will “likely reveal that [Target 1], [Target 2], and possibly others, intentionally misled [REDACTED] attorneys as to [REDACTED] origin, activities, and funding in an attempt to generate FARA filings that obscured any relationship between [REDACTED] and respondent, thereby obfuscating [REDACTED] relationship to [REDACTED].” *Id.* at 25; *see also* Gov’t’s Reply Mem. Supp. Mot. to Compel Produc. of Docs. to Grand Jury (“Gov’t’s Reply”), at 9, ECF No. 10 (explaining that the withheld records “will allow the government to determine the extent of the conspiracy, including whether [REDACTED] attorneys were also members of the conspiracy, or whether they were misled by [Target 1], [Target 2], or other employees” of respondent).<sup>4</sup>

In response to the Court’s order, *see* Minute Order (July 8, 2021), the parties proposed a briefing schedule, which was adopted, *see* Minute Order (July 9, 2021), and subsequently extended at respondent’s request, *see* Minute Order (Aug. 23, 2021), requiring all briefing to be completed by October 1, 2021, *id.* Before respondent’s opposition brief was due, respondent requested, *ex parte*, to disclose the government’s motion to compel and accompanying exhibits to the [REDACTED] attorneys. Resp’t’s *Ex Parte* Mot. to Disclose Sealed Filings to Counsel, ECF No. 3. Respondent was directed to explain why such a motion had to be “considered on an *ex parte* basis.” *Ex Parte* Minute Order (Aug. 10, 2021). Replying to this directive, respondent indicated that its request to share the government’s submissions with the [REDACTED] firm must be made *ex parte* because respondent, *inter alia*, “has a Due Process Right in the ability of [its] undersigned

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<sup>4</sup> In addition to invoking the crime-fraud exception, the government argues that respondent waived any privilege as to any withheld communications relating to respondent’s March 2, 2018 FARA supplemental statement, as amended on March 12, 2018. *Id.* at 35-36. This waiver argument need not be addressed for reasons explained *infra*, n.9.

counsel to communicate with witnesses without interference from the Government.” Resp’t’s Reply to Aug. 10, 2021 *Ex Parte* Court Order, ¶ 8, ECF No.4. Respondent’s request was granted, subject to the limitations that: (1) “names of any individuals other than [respondent’s] employees shall be redacted from the sealed filings disclosed to [REDACTED] (2) the “disclosed sealed filings and information contained therein may be used by [REDACTED] only to assist Respondent’s current counsel in litigating the Government’s Motion to Compel;” and (3) “any individual at [REDACTED] to whom the sealed filings are disclosed” must be advised of the sealed status of the disclosed documents and that “the information contained therein shall not be further disclosed without court order.” *Ex Parte* Order (Aug. 16, 2021), ECF No. 5.<sup>5</sup>

After having an opportunity, pursuant to the *Ex Parte* Order, to share the government’s motion and exhibits with the [REDACTED] firm, respondent thereafter filed an opposition to the government’s pending motion arguing, without disputing or rebutting the government’s evidentiary proffer, that [REDACTED] activities were not subject to FARA disclosure because they “fall under the humanitarian fundraising exemption” to the statute. Resp’t’s Opp’n at 24; *id.* at 12 (citing 22 U.S.C. § 613(d)(3), which exempts from FARA disclosure the agents of foreign principals who engage in “the soliciting or collecting of funds and contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering”). As such, respondent asserts that the government is unable to establish “a *prima facie* case of either a crime or fraud, as required for overruling a privilege claim.” *Id.* at

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<sup>5</sup> On October 22, 2021, in response to the Court’s *ex parte* minute order directing respondent “to show cause as to why the Court’s August 16, 2021 Order” should not be disclosed to the government since briefing on the motion to compel was now complete, *Ex Parte* Minute Order (Oct. 21, 2021), respondent indicated via an email submitted to the Clerk’s Office, which was docketed by the Court, that no opposition to publication of the August 16, 2021 *ex parte* order to the government would be filed, Resp’t’s Email Resp. to Order, ECF No. 11. The August 16, 2021 *ex parte* order will be released to the government.

10. The instant motion to compel production of the [REDACTED] withheld documents is now ripe for resolution.

## 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)), and “applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client.” *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014). The attorney-client privilege is not absolute, however, and may be vitiated in certain circumstances “to make sure that privileges do not serve ends for which they were not intended.” *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982).

The crime-fraud exception “comes into play when a privileged relationship is used to further a crime, fraud, or other fundamental misconduct.” *Id.*; see also *In re Grand Jury Investigation*, No. 17-mc-23336 (BAH), 2017 WL 4898143, at \*1 (D.D.C. Oct. 2, 2017) (“When a person uses the attorney-client relationship to further a criminal scheme, the law is well established that a claim of attorney-client . . . privilege must yield to the grand jury’s investigatory needs.”). Simply put, “[a]ttorney-client communications are not privileged if they ‘are made in furtherance of a crime, fraud, or other misconduct.’” *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007) (quoting *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)). The crime-fraud exception thus recognizes that “the centrality of open client and attorney communication to the proper functioning of our adversary system of justice” ceases “to operate” when “desired advice refers not to prior wrongdoing, but to future wrongdoing.” *United States v. Zolin*, 491 U.S. 554, 562-63 (1989) (internal quotation marks and citations omitted).



Generally, the crime-fraud exception reaches only communications with a relationship to the crime or fraud. *See In re Sealed Case*, 754 F.2d at 399. As the party seeking to overcome attorney-client privilege, the government has the burden of establishing, first, “a prima facie showing of a violation sufficiently serious to defeat the privilege . . . and second, . . . some relationship between the communication at issue and the prima facie violation.” *Id.* To satisfy this burden, the government “need not prove the existence of a crime or fraud beyond a reasonable doubt,” *id.*, but rather offer “evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud,” *id.* (citing *In re Sealed Case*, 676 F.2d at 815). “The determination that a prima facie showing has been made lies within the sound discretion of the district court,” *id.*, which must “independently explain what facts would support th[e] conclusion” that the crime-fraud exception applies, *Chevron Corp. v. Weinberg Grp.*, 682 F.3d 96, 97 (D.C. Cir. 2012).<sup>6</sup>

### III. DISCUSSION

The only dispute between the parties pertains to the [REDACTED] documents withheld by respondent on claims of attorney-client privilege. Gov’t’s Mot., Ex. 3 (Privilege Log).<sup>7</sup> Most of these documents involve email communications between respondent’s staff, including Target 1, and [REDACTED] attorneys regarding the FARA requirements applicable to respondent, *see id.*, Ex. 3 at

<sup>6</sup> Although “the Supreme Court mentioned in *Zolin* that ‘prima facie’ evokes the concept, familiar in civil litigation, of shifting the burden from one party to another,” *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997) (internal citation omitted) (quoting *Zolin*, 491 U.S. at 565 n.7), “it is altogether clear where the burden in these cases lies—on the party invoking the crime-fraud exception,” *id.*

<sup>7</sup> Respondent describes “[t]he documents being withheld on privilege ground [sic.] [to] include both fact work product and opinion work product,” Resp’t’s Opp’n at 25, but the privilege log only cites attorney-client privilege as the grounds for withholding the [REDACTED] email communications at issue, Gov’t’s Mot., Ex. 3 (Privilege Log); *see* Gov’t’s Reply at 11 (“[Respondent] faults the government’s motion for failing to address attorney work product protections. The government did not do so because [respondent] did not cite attorney work product as a basis for withholding any of the documents on its privilege log.”). Thus, the issue addressed here is whether the crime-fraud exception vitiates respondent’s invocation of the attorney-client privilege to shield these records from production in response to the [REDACTED] grand jury subpoena.

1-9, with a sizable subset described as discussions among respondent's staff and [REDACTED] attorneys about [REDACTED], *see id.*, Ex. 3 at 10-12 (listing email communications between respondent's staff and [REDACTED] regarding "payments for [REDACTED] and documentation necessary to "establish" and "legally wind down" [REDACTED]).<sup>8</sup> As part of the grand jury investigation into whether Target 1 and Target 2 conspired to violate FARA by creating [REDACTED] without disclosing publicly that [REDACTED] was an agent of [REDACTED] *see* Gov't's Mot. at 6, the government asserts that production of the withheld communications will allow a determination of "the extent of the conspiracy, including whether [REDACTED] attorneys were members of the conspiracy or were misled by [Target 1], [Target 2], or other [respondent] employees," Gov't's Reply at 9. The government has thereby moved to compel production of respondent's "(1) responsive communications with [REDACTED] [attorneys] . . . from August 30, 2017 . . . to at least March 12, 2018 . . . and (2) all communications with any attorney related to [REDACTED] [REDACTED] activities, irrespective of date," as included in respondent's privilege log. Gov't's Mot. at 35. Finding that the crime-fraud exception vitiates respondent's privilege claim, the government's motion is granted as to both categories of information it seeks.

Here, the government has satisfied its burden of establishing a *prima facie* case that respondent engaged in the communications at issue with [REDACTED] attorneys "to further a crime, fraud, or other fundamental misconduct." *In re Sealed Case*, 676 F.2d at 807.<sup>9</sup> In the pending

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<sup>8</sup> Eighteen of the withheld documents are described as including communications regarding the FARA requirements applicable to an unidentified "third party," rather than to respondent [REDACTED]. *See* Gov't's Mot., Ex. 3 (Privilege Log), at 9-10.

<sup>9</sup> The government also argues that respondent has waived its asserted attorney-client privilege, contending that "[t]hrough its public filings with DOJ's FARA Unit, [respondent] has waived attorney-client privilege over the substance of its FARA filings as well as over all other communications related to the filings' contents." Gov't's Mot. at 35; *id.* at 39 ("[Respondent] waived attorney-client privilege over communications related to the substance of its filings as well as over any conversations related to the same subject matter.") (citing *In re Grand Jury Investigation*, 17-mc-2336 (BAH), 2017 WL 4898143, at \*11 (D.D.C. Oct. 2, 2017)). Respondent disputes any such

motion to compel and its accompanying 36 exhibits, the government presents details of a scheme by which Target 1 and Target 2 created and directed [REDACTED] interests in the United States, while concealing disclosure of [REDACTED] activities in respondent's 2017 and 2018 FARA filings prepared and filed in consultation with [REDACTED] attorneys. *See* Gov't's Mot. at 26.

In particular, the government has offered plentiful evidence—which respondent attempts to minimize as only consisting of “three items,” Resp't's Opp'n at 27—showing that Target 1 conceived [REDACTED] as part of respondent's work for [REDACTED], *see id.*, Ex. 4 (July 24, 2017 email from Target 1 to [REDACTED] official), Ex. 5 (July 25, 2017 email from Target 1 to [REDACTED] official), and thereafter took steps to conceal the relationship between [REDACTED]. These steps included: (1) creating documentation such that [REDACTED] and Target 2 would appear to operate independently of Target 1 and respondent, when that was not the reality, *see, e.g.*, Ex. 12 (Aug. 29, 2017 letter from Target 2 to Target 1 aimed at feigning origins of [REDACTED]); (2) Target 2 denying to the FBI that he knew [REDACTED] funded [REDACTED], *see* Gov't's Mot. at 22, when documentation shows that he did, *see, e.g., id.*, Exs. 10, 12 (noting Target 2's receipt of Target 1's July 25, 2017 memorandum proposing to [REDACTED] with the same budget scope of [REDACTED] that Target 2 later requested from respondent as a contribution); *id.*, Ex. 15 at 3 (noting the joint participation of both Targets in a briefing regarding a public relations campaign to elevate [REDACTED] voice” in debates about [REDACTED] within the United States); (3) registering [REDACTED] as a distinct corporate entity immediately after respondent secured an increase of \$350,000 in the monthly fee paid by [REDACTED] to respondent,

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waiver. Resp't's Opp'n at 11, 30-33. Since the crime-fraud exception applies to the withheld records at issue, this alternative basis for the government's access to respondent's privileged communications need not be considered.

pursuant to their July 2017 contract, *id.*, Exs. 13-14; (4) the Targets jointly deciding to keep secret [REDACTED] foreign funding from a possible spokesperson for the organization, *id.*, Ex. 17; and (5) engaging [REDACTED] in a high-profile media and political lobbying campaign to influence the U.S. public and government officials without ever disclosing such activities in respondent's relevant FARA submissions to DOJ, *id.*, Exs. 19, 22-24, 28.<sup>10</sup>

This evidence, taken together, presents “a prima facie case of a violation sufficiently serious to defeat the privilege,” *In re Sealed Case*, 754 F.2d at 401, namely, that Target 1 and Target 2 likely violated 22 U.S.C. § 618(a)(2) (making false or misleading statements and omissions “in any . . . document filed with or furnished to the Attorney General” under FARA) and 18 U.S.C. § 371 (conspiracy to commit any offense against the United States or to defraud the United States).

In ascertaining the applicability of the crime-fraud exception, “[t]he point is not to convict anyone of a crime or to anticipate the grand jury, but only to determine whether the possibility that a privileged relationship has been abused is sufficient to alter the balance of costs and benefits that supports the privilege.” *In re Sealed Case*, 676 F.2d at 814. Central to this assessment is the question of whether “the client consult[ed] the lawyer . . . for the purpose of committing a crime or fraud.” *In re Sealed Case*, 107 F.3d 46, 51 (D.C. Cir. 1997). In this case, the evidence supports a reasonable inference “that [Target 1] and [Target 2] provided [REDACTED]

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<sup>10</sup> Ignoring all this evidence—mostly derived from the documents respondent produced in response to the grand jury subpoena—respondent asserts that the government has proffered only “three items of evidence” to establish that the crime-fraud exception applies, identifying “comments in a [REDACTED] documentary about soliciting donations for humanitarian aid; whistleblowing to the DOJ FARA Unit about [REDACTED] noncompliance with FARA; and [a respondent] employee noting that it was funded by [REDACTED].” Resp’t’s Opp’n at 27; *see also id.* at 26. Respondent describes these three items as “not inculpatory, even if believed.” *Id.* at 27. Put bluntly, respondent blatantly ignores and thereby fails to rebut the government’s full factual proffer, consisting of over 150 pages of records presented across 36 exhibits that makes the requisite prima facie showing that respondent’s communications with [REDACTED] attorneys were made in furtherance of a criminal scheme devised and engaged in by Target 1 and Target 2.

attorneys the false documents they each had created to ‘paper’ [REDACTED] origin, and that [REDACTED] attorneys relied upon those documents when providing legal advice and preparing [respondent’s] FARA filings.” Gov’t’s Mot. at 34. The [REDACTED] withheld records at issue are therefore closely related to Target 1’s and Target 2’s prima facie violation of the FARA statute and possibly other federal laws. *See In re Sealed Case*, 754 F.2d at 399 (explaining that at least “some relationship between the communication at issue and the prima facie violation” must exist for the crime-fraud exception to overcome a claim of attorney-client privilege) (emphasis added).

Respondent does not make even a feeble effort to rebut the government’s “overwhelming evidence demonstrating that [Target 1] and [Target 2] created and operated [REDACTED] [REDACTED] without ever disclosing so in its FARA filings. Gov’t’s Reply at 3. Instead, respondent devotes its opposition to arguing that [REDACTED] were subject to FARA’s humanitarian exemption and therefore not reportable. *See Resp’t’s Opp’n* at 6 (noting “issue is whether humanitarian assistance solicited [REDACTED] should have been included in [respondent’s] [FARA] reports. Because the only evidence offered is completely consistent with the exemption of its activities, there can be no fraud or crime.”). This argument is without merit.

The humanitarian exemption excuses from FARA’s registration requirements “[a]ny person engaging or agreeing to engage *only* . . . in the soliciting or collecting of funds and contributions within the United States to be used *only* for medical aid and assistance, or for food and clothing to relieve human suffering.” 22 U.S.C. § 613(d)(3) (emphasis added). By its terms, the exemption is narrow and “the burden of establishing [its] availability . . . rest[s] upon the person for whose benefit the exemption is claimed.” 28 C.F.R. § 5.300.

Respondent fails to meet this burden and “submits no evidence to show that [REDACTED] agreed only to solicit or collect funds . . . for [the] purely humanitarian purposes” identified in the statute. Gov’t’s Reply at 2. To the contrary, the government’s un rebutted evidence—such as Target 1’s communications with [REDACTED] government officials requesting a [REDACTED] budget for [REDACTED] advertising activities, *see* Gov’t’s Mot., Ex. 5, and Target 1’s and Target 2’s political lobbying activities before Congress and the White House, *see id.*, Exs. 24, 28—makes abundantly clear that [REDACTED] activities extended well beyond “charitable fundraising” and “had no conceivable connection to humanitarian aid.” Gov’t’s Reply at 3. [REDACTED] as described by Target 1 himself in a memorandum he shared with both Target 2 and a [REDACTED] official, instead focused on the “use of social media, advertising, and earned media [to] highlight the atrocities taking place in [REDACTED] at the hands of the” [REDACTED]. Gov’t’s Mot., Exs. 5, 10. Indeed, Target 2 admitted in his interviews with the FBI that, although [REDACTED] encouraged contributions to several humanitarian organizations, “it did not collect any money or donations for humanitarian work” and its primary purpose “was to raise awareness of the humanitarian crisis in [REDACTED].” Gov’t’s Mot. at 22-23; *see id.*, Ex. 12 (letter from Target 2 to Target 1 describing the need for [REDACTED] advertising campaign as “urgent and necessary to reach opinion leaders and a public audience sympathetic to the [REDACTED]”). This level of activity places [REDACTED] far outside “*only* soliciting or collecting of funds and contributions within the United States to be used *only* for medical aid and assistance, or for food and clothing to relieve human suffering” as covered by the exemption. *See* 22 U.S.C. § 613(d)(3) (emphasis added).

Nonetheless, respondent insists [REDACTED] actions are covered by FARA's humanitarian exemption due to Target 2's statement, during his participation in the 2018 [REDACTED] documentary, encouraging viewers to "donate to one of the organizations that do provide relief" [REDACTED] Resp't's Opp'n at 14. As respondent construes the statute's text, "[Target 1]'s call to action by soliciting donations . . . falls squarely within the statutory language exempting the 'soliciting *or* collecting of funds and contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering." *Id.* at 15. Respondent reasons that since "raising awareness of a humanitarian crisis is instrumental to soliciting the funds needed for their mitigation," Target 2's use of [REDACTED] documentary to raise awareness of [REDACTED] humanitarian crisis was sufficient to bring [REDACTED] activities under the humanitarian exemption to FARA. *Id.* at 17. The government counters that "under [respondent's] reading, the exemption would swallow the rule—any agent of a foreign principal could avoid registering by claiming that '[a]n essential first step in fundraising for any cause is making potential donors aware of the cause.'" Gov't's Reply at 6 (citing Resp't's Opp'n at 14). This Court agrees with the government that "[s]uch an outcome would render FARA a dead letter, contravening the principle that 'a statute should ordinarily be read to effectuate its purposes rather than frustrate them.'" *Id.* (citing *United States v. Pollard*, 416 F.3d 48, 55 (D.C. Cir. 2005)).

The FARA humanitarian exemption *only* reaches the agents of foreign principals who *only* solicit or collect funds to be used "*only* for medical aid . . . or for food and clothing" to relieve human suffering. *See* 22 U.S.C. § 613(d)(3) (emphasis added). This language, with the narrowing use of the word "only" twice, makes clear that fundraising for humanitarian purposes does not qualify for the exemption "when paired with a campaign to influence the opinion of

U.S. government officials or the American people.” Gov’t’s Reply at 6. The government’s evidence, which respondent fails to rebut, makes apparent [REDACTED] was not engaged in humanitarian fundraising and that its public affairs and political lobbying activities went far beyond any such humanitarian fundraising. *See* Gov’t’s Mot. at 29, n.23.

Finally, respondent suggests the government cannot establish a prima facie showing that the crime-fraud exception applies unless the government requests, and the Court conducts, an *in camera* review of the disputed documents. *See* Resp’t’s Opp’n at 26. This is a red herring. In *Zolin*, the Supreme Court held that “before a district court may engage in *in camera* review” of withheld, privileged information to establish the applicability of the crime-fraud exception, the government “must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the [crime-fraud] exception’s applicability.” 491 U.S. at 574. Where the government has made the requisite prima facie showing that the crime-fraud exception applies based on independent, non-privileged materials, however, the D.C. Circuit has expressly approved employing the exception to order disclosure without necessitating *in camera* review of the privileged documents withheld. *See In re Sealed Case*, 162 F.3d 670, 674 (D.C. Cir. 1998). The government has made that showing here.

#### IV. CONCLUSION

The government’s Motion to Compel the Production of Documents to the Grand Jury is granted. Respondent shall produce to the government the records responsive to the grand jury subpoena that have been described in the Privilege Log as withheld on attorney-client privilege grounds.



In addition, the parties are directed, within 14 days of issuance of this decision, to confer and submit a joint 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 appropriate Order, which is filed under seal, accompanies this Memorandum Opinion.

Date: October 26, 2021

 

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BERYL A. HOWELL  
Chief Judge