

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: POSSIBLE VIOLATIONS OF
TITLE 18, UNITED STATES CODE,
SECTIONS 1031, 1956(a)(2)(A); TITLE 50,
UNITED STATES CODE, SECTION 1705

Grand Jury Case No. 18-18 (BAH)

Chief Judge Beryl A. Howell

FILED UNDER SEAL

MEMORANDUM AND ORDER

Pending before the Court is the government's *Ex Parte, In Camera* Motion to Determine the Applicability of the Crime-Fraud Exception to the Attorney-Client Privilege ("Gov't's Mot."), ECF No. 1, with respect to an ongoing investigation of [REDACTED]

[REDACTED]

[REDACTED] *id.* at 1. The government is investigating [REDACTED] for illegal conduct related to [REDACTED]

[REDACTED]

[REDACTED] . *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* Following review of the government's motion and the twenty-five attached exhibits, which represent a portion of the "emails, audio recordings, and cooperator statements about written or oral communications" [REDACTED] that relate to the conduct under investigation, *id.* at 1 n.1, the Court finds [REDACTED] was not acting as legal counsel in the communications at issue, such that no privilege applies to the communications. In

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■

II. DISCUSSION

At the outset, the D.C. Circuit has “approved the use of ‘*in camera, ex parte*’ proceedings to determine the propriety of a grand jury subpoena or the existence of a crime-fraud exception to the attorney-client privilege when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings.” *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1179 (D.C. Cir. 2006) (quoting *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998)). Nevertheless, “*in camera, ex parte* submissions generally deprive one party to a proceeding of a full opportunity to be heard on an issue, and thus should only be used where a compelling interest exists.” *In re Sealed Case No. 98-3077*, 151 F.3d at 1075 (internal citation and quotations omitted). Given the fact that the investigation underlying the pending motion is ongoing and that evidence has already been uncovered that targets of the investigation have

engaged in fraudulent conduct to cover-up their illegal conduct, proceeding to resolve this motion on an *ex parte* and *in camera* basis is both warranted and necessary.

The evidence submitted by the government's filter team shows [REDACTED] was not acting as an attorney [REDACTED] and, further, [REDACTED] he may have been acting as legal counsel [REDACTED], the crime-fraud exception to attorney-client privilege applies.

A. [REDACTED]

[REDACTED] "Where one consults an attorney not as a lawyer but as a friend or as a business adviser or banker, or negotiator . . . the consultation is not professional nor the statement privileged." *In re Lindsey*, 158 F.3d 1263, 1270 (1998) (quoting 1 MCCORMICK ON EVIDENCE § 88, at 322–24 (4th ed. 1992) (alteration in original)); see also *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014) (stating that a communication to or from an attorney is privileged only if it was "made for the purpose of obtaining or providing legal advice"). "The attorney-client privilege applies only if, *inter alia*, 'the communication relates to a fact of which the attorney was informed . . . by his client . . . for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.'" *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007) (quoting *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984) (alterations in original)). As succinctly explained by other Judges, "[t]he possession of a law degree and admission to the bar is not enough to establish a person as an attorney for purposes of determining whether the attorney-client privilege applies . . . the lawyer must not only be functioning as an advisor, but the advice given must be predominately legal, as opposed to business, in nature." *Boca Investering's P'ship v. United States*, 31 F. Supp. 2d 9, 11–12 (D.D.C.

1998) (quoting *North Am. Mortgage Investors v. First Wisconsin Nat'l Bank*, 69 F.R.D. 9, 11 (E.D. Wis. 1975) (alteration in original)).

The attorney-client privilege thus does not apply to [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; see, e.g., *United States v. Singhal*, 800 F. Supp. 2d 12, 16–17 (D.D.C. 2010) (holding that “topics such as specific wire transfers between companies and individuals; dealings involving a company . . . used to invest in other companies; payments for publications of the type used in scalping schemes; investments [the attorney] made at [the client’s] suggestion; financial transactions in which [the client] was involved; [the attorney’s] familiarity with another lawyer the FBI was investigating; [the attorney’s] limited understanding of the schemes in which [the client] was involved” were not privileged (internal citations omitted)).

In applying these principles to the facts presented by the government, the record reflects [REDACTED] acted in a business capacity in communications regarding [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

The government has proffered evidence [REDACTED] was not acting as an attorney [REDACTED]

[REDACTED]

[REDACTED] Indeed, when [REDACTED], added “an attorney-client privilege designation” to emails

[REDACTED] that adding that language [REDACTED] “did not provide any sort of privilege protection.” [REDACTED]

Accordingly, none of the communications involving [REDACTED]

[REDACTED]

Ballard, 779 F.2d 287, 292 (5th Cir. 1986) (“The privilege for communications between client and attorney ceases when the purpose of the privilege is abused, when the lawyer becomes either the accomplice or the unwitting tool in a continuing or planned wrongful act.”). Generally, the crime-fraud exception reaches communications or work product with a “relationship” to the alleged crime or fraud. *In re Sealed Case*, 754 F.2d at 399 & n.4. Two conditions must be met for the crime-fraud exception to apply: “First, the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act. Second, the client must have carried out the crime or fraud.” *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997) (footnote and citations omitted). “The privilege is the client’s and it is the client’s fraudulent or criminal intent that matters.” *Id.*

As the party seeking to overcome attorney-client privilege, the government has the burden of establishing “a prima facie showing of a violation sufficiently serious to defeat the privilege.” *In re Sealed Case*, 754 F.2d at 399. To satisfy this burden, the government may offer “evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud.” *In re Grand Jury*, 475 F.3d at 1305 (internal quotations omitted). “The determination that a prima facie showing has been made lies within the sound discretion of the district court,” *In re Sealed Case*, 754 F.2d at 399, 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).

As noted, the government has proffered evidence, [REDACTED]

[REDACTED]

[REDACTED] in

violation of 18 U.S.C. §§ 1031 and 1956(a)(2)(A), and 50 U.S.C. § 1705.¹ [REDACTED] was acting as an attorney, [REDACTED] “further[ed] a crime, fraud, or other fundamental misconduct,” *In re Sealed Case*, 676 F.2d at 807, by acting as an “accomplice . . . in a continuing or planned wrongful act,” *Ballard*, 779 F.2d at 292. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Any communications relevant to this investigation by, to, or otherwise involving [REDACTED] were therefore “used to further a crime, fraud, or other fundamental misconduct.” *In re Sealed Case*, 676 F.2d at 807. On the evidence presented here, the government has made “a prima facie showing of a violation sufficiently serious to defeat the privilege.” *In re Sealed Case*, 754 F.2d at 399.

[REDACTED]
[REDACTED]

¹ Section 1031 makes it unlawful to “knowingly execute[], or attempt[] to execute, any scheme or artifice with the intent . . . to defraud the United States . . . in any . . . contract.” Section 1956(a)(2)(A) makes it unlawful to “transport[], transmit[], or transfer[], or attempt[] to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States . . . with the intent to promote the carrying on of specified unlawful activity.” Section 1705 makes it unlawful to violate the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. § 1701 *et seq.*, [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

III. CONCLUSION

Through its *ex parte* submission, the government has shown that [REDACTED] was not acting as an attorney in communications relevant to the ongoing investigation of [REDACTED]

[REDACTED], [REDACTED]
[REDACTED] the government has met its burden of making a *prima facie* showing that the crime-fraud exception applies based on possible violations of Title 18 and Title 50 of the U.S. Code.

Accordingly, it is hereby
ORDERED that the government's motion is GRANTED; and it is further

ORDERED that any communications [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED], are not privileged, even if [REDACTED] were acting as an attorney, and, therefore, the investigative team may review any such communications and use them as they see fit in the course of this investigation; and it is further

ORDERED that the Motion and attached exhibits, Proposed Order, and this Order shall be filed and maintained under seal, but such sealing is limited to permit disclosure by the government to any parties to whom the government believes disclosure is required pursuant to law.

SO ORDERED.

Date: April 2, 2018



Beryl A. Howell

BERYL A. HOWELL
Chief Judge