UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

JANE DOE #1 and JANE DOE #2,

Petitioners,

vs.

UNITED STATES,

Respondent.
_____/

RESPONDENT'S RESPONSE TO PETITIONERS' REASSERTION OF OBJECTIONS TO GOVERNMENT'S ASSERTIONS OF PRIVILEGES

Respondent, by and through its undersigned counsel, files its Response to Petitioners' Reassertion of Objections to Government's Assertions of Privileges (D.E. 265), and states:

I. THE GOVERNMENT'S PRIVILEGE LOGS ADEQUATELY INFORM PETITIONERS AND THE COURT OF THE PRIVILEGE BEING ASSERTED, AS WELL AS THE NATURE OF THE DOCUMENT

The government has provided adequate privilege logs which inform petitioners and the Court of the privilege being asserted, as well as the nature of the documents, in accordance with Fed.R.Civ.P. 26(b)(5)(A)(ii). Petitioners argue that the privilege log is inadequate, and that "[a]s a result of the Government's failures, it is impossible to even begin to determine which of the Government's assertions of privilege are valid." D.E. 265 at 2.

Petitioners' complaints about the privilege log are baseless "[b]ecause the adequacy of privilege log entries depends on whether the other parties will be able to assess the validity of the privilege claim, the entries should be evaluated not in a vacuum, but in light of information that the parties can be presumed to possess." In re Methyl Tertiary Butyl Ether Products Liability Litigation, 898 F.Supp.2d 584, 590 (S.D.N.Y. 2012)(footnote omitted). Petitioners object to

nearly every item on the privilege log on the grounds of "Inadequate Log," and "No Factual Underpinnings." D.E. 265-2. This rote invocation of objections should be rejected because petitioners can be presumed to know what these documents are. The government invoked the work product doctrine for a number of documents, including a file folder entitled, "Mann Act/Travel to Have Sex w/minor," containing attorney research and handwritten notes. D.E. 265-2 at 32. Petitioner's objections include an "Inadequate Log," and "No Factual Underpinnings." Petitioners' attorneys are presumed to know that the criminal case involving Jeffrey Epstein involved allegations that Epstein had improper sexual contact with minors, since their two clients were sexually abused by Epstein. Further, they are presumed to know what the Mann Act prohibits, and how a federal prosecutor might conduct research to determine if a Mann Act violation could be successfully prosecuted against Epstein. Such legal research and handwritten notes, would reflect the mental impressions and strategies of the prosecutor.

The Government's use of categorical privileges, to cover broad classes of documents, is also permitted. In Federal Deposit Ins. Corp. v. Fidelity and Deposit Company of Maryland, 2013 WL 2421770 (S.D.Ind. 2013), the Court stated that "it agrees with FDIC that individually logging and listing the 12,000 electronic documents is unduly burdensome and unlikely to yield additional information as to whether the documents are protected." Id. at *8.

The United States Government is entitled to assert evidentiary privileges like any other litigant, in both criminal and civil litigation. In United States v. Zingsheim, 384 F.3d 867 (7th Cir. 2004), a district court had a standing order requiring the government to provide extra details whenever it requested that a defendant receive a lower sentence due to substantial assistance in the apprehension or prosecution of other offenders. These extra details included

> c) a copy of a recommendation approved and signed by an individual holding a supervisory position in a the law enforcement

> agency with whom the defendant cooperated (multiple agencies require multiple submissions), d) a written recommendation of a supervisor in the office of the prosecutor (e.g. United States Attorney, local district attorney or state attorney general), and e) a written report from the downward departure committee which shall include the names and signatures of the committee members who considered the matter, the date(s) the matter was considered, and the recommendations(s) of the committee together with any dissenting view(s). Failure to adhere to this policy will result in the motion being summarily denied without prejudice.

Id. at 869.

The Seventh Circuit observed that, "[j]udges may not demand that litigants surrender evidentiary privileges as a condition of adjudication: what a 'privilege' means is an entitlement to withhold information even if it would bear on the merits of a disputed issue." Id. at 871. As to specific privileges, the appellate court noted that, "[t]he attorney-client privilege covers conversations between the prosecutors (as attorneys) and client agencies within the government." Id. 871-72(citations omitted). Thus, e-mails between the FBI and the U.S. Attorney's Office, in the Epstein case, are privileged.

II. THE GOVERNMENT HAS VALIDLY INVOKED PRIVILEGES WHICH PRECLUDE DISCLOSURE OF THE DOCUMENTS TO PETITIONERS

A. Attorney-Client Privilege

Petitioners contend that the attorney-client privilege is inapplicable certain instances because communications were sent to the FBI. D.E. 265 at 3-4. In his affidavit, petitioners' counsel assails the adequacy of the privilege log, and contends that the attorney-client privilege has been waived in certain instances. D.E. 265-1 at 13-14. As an example, petitioners contend that the attorney-client privilege has been waived as to the 7/08/08 email from A. Marie Villafana to A. Acosta, J. Sloman, Ki. Atkinson, and FBI re proposed response to Goldberger's letter re victim notification. D.E. 265 at 3-4. They claim the emails were not internal to the U.S.

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Attorney's Office, but were also sent to the FBI, and concludes, "[b]ut the FBI is a law enforcement investigative agency, not an agency that provides legal advice."

The attorney-client privilege applies because the U.S. Attorney's Office is rendering legal advice to a client agency, the FBI, who investigated Epstein and brought the case to the U.S. Attorney's Office for potential prosecution. Zingsheim, 384 F.3d at 871-72("[t]he attorney-client privilege covers conversations between the prosecutors (as attorneys) and client agencies within the government."). In A.N.S.W.E.R. Coalition v. Jewell, 292 F.R.D. 44 (D.C.D.C. 2013), the district court dealt with the invocation of the attorney-client privilege for documents between the Secret Service and an Assistant U.S. Attorney. The court first observed that the D.C. Circuit construed the privilege narrowly "to apply when a 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 the law or (ii) legal services or (iii) assistance in some legal proceeding.'" Id. at 47, citing In re Grand Jury, 475 F.3d 1299, 1304 (D.C. Cir. 2007). Further, the privilege also protects a communication made by an attorney to a client if the communication is "based, *in part at least*, upon a confidential communication to the lawyer from the client." Id. at 47-48(emphasis in original).

P-013282-83 is the 7/08/08 email from AUSA Villafana to U.S. Attorney Acosta, First Assistant U.S. Attorney Jeff Sloman, supervisory AUSA Karen Atkinson, and the FBI regarding "proposed response to Goldberger's letter re victim notification." D.E. 216-1 at 1. "A communication by an attorney working for a government agency is protected, however, when the communication 'relate[s] to some legal strategy, or to the meaning, requirements, allowances, or prohibitions of the law.'" Id. at 48(citation omitted). The email referenced a letter sent by Mr. Goldberger, who represented Jeffrey Epstein, "and a proposed response to Goldberger's letter re

victim notification." Plainly, the email communication is between attorneys in the U.S. Attorney's Office, and the client agency, the FBI, on how to respond to a letter from Epstein's defense attorney about victim notification. Since the CVRA imposes certain requires upon prosecutors and law enforcement agencies, this email pertained to "the meaning, requirements, allowances, or prohibitions of the law." Therefore, it is covered by the attorney-client privilege.

Petitioners can hardly claim that the attorney-client privilege is waived because persons outside the confidential relationship, the FBI, were included in the communication. Petitioners have castigated the U.S. Attorney's Office for allegedly misleading the FBI on how it was going to resolve the criminal case. For purposes of blaming the Government for misleading the law enforcement agency who investigated Epstein, the FBI is a key component in the case which needed to be kept informed. At the same time, for the purposes of rejecting the invocation of the attorney-client privilege, the FBI is not part of any confidential relationship.

Petitioners also contend that, "if the FBI is the client, then many of the documents in question are not in furtherance of providing legal advice to the FBI and thus are not privileged." D.E. 265 at 4. They cite to P-013272 through P-013278, communications between the U.S. Attorney's Office and Executive Office for U.S. Attorney's regarding recusal. Petitioners are mistaken because this is a different attorney-client relationship, between the General Counsel's Office of the Executive Office for United States Attorneys, and the U.S. Attorney's Office for the Southern District of Florida. The client, the U.S. Attorney's Office, was seeking advice and guidance from its attorney, the General Counsel's Office of EOUSA, on whether it needed to recuse itself.

Also inapplicable is the crime-fraud exception to the attorney-client privilege, invoked by petitioners. D.E. 265 at 5-7. The courts apply a two-part test to determine if the crime-fraud

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exception applies to a communication between a lawyer and his client. In re Grand Jury Investigation (Schroeder), 842 F.2d 1223 (11th Cir. 1987). First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtain in furtherance of the criminal or fraudulent activity or was closely related to it. Id. at 1226(citations omitted).

In this case, the counsel are Assistant U.S. Attorneys, supervisory Assistant U.S. Attorneys, the United States Attorney, and Department of Justice attorneys. At issue are confidential communications occurring during the criminal investigation of Epstein conducted by the FBI and the U.S. Attorney's Office. The exception does not apply since neither the U.S. Attorney's Office nor the DOJ were "retained" in furtherance of a crime or fraud. Federal law enforcement agencies do not retain attorneys to prosecute cases they investigate. U.S. Attorneys are appointed and have the duty to "prosecute for all offenses against the United States." 28 U.S.C. § 547(1).

Further, it is not a crime to fail to afford a crime victim a right provided under 18 U.S.C. § 3771(a), nor is it a fraud. Section 3771(d)(6) provides that "[n]othing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages." Since the deprivation of any right under the CVRA cannot be the basis of a claim for damages, there is no monetary value attached to such rights. Without actual injury, petitioners cannot establish a claim for fraud in the inducement. PVC Windoors, Inc. v. Babbitbay Beach Construction, N.V., 598 F.3d 802, 808-09

(11th Cir. 2010).

Petitioners respond by contending that the crime fraud exception also covers misconduct. D.E. 265 at 5-6. No crime, fraud, or tort is committed by not providing a crime victim a right provided in 18 U.S.C. § 3771(a)(1)-(8), assuming that even occurred. Nor do petitioners provide any authority for the view that depriving a crime victim of a CVRA right constitutes the type of "misconduct" encompassed within the exception to the attorney-client privilege. Under petitioner's theory, any time a person consulted with an attorney, and then engaged in conduct which resulted in a legal claim being filed, the attorney-client privilege would not apply due to misconduct being alleged. This would virtually eliminate the attorney-client privilege for any conduct by a person who consulted an attorney prior to engaging in whatever conduct generated the lawsuit.

Petitioners also argue that, because the DOJ's Office of Professional Responsibility collected information about possible improper behavior during the investigation of the Epstein matter, this is "a prima facie of improper behavior." D.E. 265 at 6. The inquiry petitioners refer to was prompted by a December 10, 2010 letter from one of petitioners' attorneys, asking the United States Attorney for an investigation into the handling of the Epstein matter. D.E. 265-1 at 32-33. The request was forwarded to OPR, which gathered information, and declined to open an investigation.

B. Deliberative Process Privilege

Petitioners claim that the deliberative process privilege would only cover the processes by which a decision was made, not the final decision itself. D.E. 265 at 9. The Government agrees that the final decision is not covered by the deliberative process privilege. However, petitioners also contend that "the Government seems to be invoking a deliberative process

privilege that never ends," and asserts that the Government must clearly demonstrate where the deliberative process ended and a final decision was made. Id.

This argument misapprehends how the deliberative process privilege is applied. In Moye, O'Brien, O'Rourke, Hogan & Pickert v. National Railroad Passenger Corporation, 376 F.3d 1270 (11th Cir. 2004), the Eleventh Circuit dealt with an action under the Freedom of Information Act, where a law firm sought documents created by the National Railroad Passenger Corporation (Amtrak) relating to a $321 million dollar contract to design and build a high-speed rail electrification system in the Northeast corridor of the United States. The law firm sought documents from Amtrak associated with twelve routine financial audits conducted by Amtrak's OIG of the two private companies which had been awarded the $321 million dollar contract. Id, at 1273. Amtrak invoked the FOIA exemption at 5 U.S.C. § 552(b)(5), which includes the attorney work product, attorney-client privilege, and deliberative process privileges. The district court rejected Amtrak's assertion of the deliberative process privilege. Id. at 1274.

On appeal, the Eleventh Circuit reversed, finding that the documents sought by the law firm were exempt from disclosure under the deliberative process privilege. Id. at 1278-1282. Like petitioners in this case, the law firm also claimed that the deliberative process privilege did not apply because Amtrak could not point to a specific decision which emanated from the predecisional and deliberative materials for which the privilege was invoked. The Eleventh Circuit observed:

> Contrary, to the district court's finding and the firm's assertion, Amtrak need not cite to a specific policy decision in connection with which the audit work papers and internal memoranda were prepared in order for these documents to be protected from disclosure by the deliberative process privilege. As the Supreme Court has explained:
>
> > Our emphasis on the need to protect pre-decisional

> documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process. Sears, Roebuck & Co., 421 U.S. at 151-52 n.18, 95 S.Ct. 1504;

376 F.3d at 1280. The Government need not point to a specific decision in order to invoke the deliberative process privilege.

Similarly, the government is not required to establish that disclosure of the documents will likely chill the future flow of recommendations and opinions from subordinates to government decision-makers. D.E. 265 at 10. The law firm in Moye made the same argument, which was rejected by the Eleventh Circuit:

> In addition, while it is certainly true that FOIA's purpose is to encourage disclosure, it is equally true that Amtrak's OIG serves a valid public purpose and that this purpose would be hampered if lower level auditors declined to engage in open and frank discussions with supervisors and decision-makers for fear that their comments would be subjected to public scrutiny. Florida House of Representatives, 961 F.2d at 949 ("It defies reason as well as Supreme Court precedent, to then go back and weigh the policies underlying the distinction to decide whether the disclosure would in fact discourage frank discussion in some specific case."

376 F.3d at 1281.[1]

Petitioners argue they have a compelling need for the documents which overrides the

[1] In Florida House of Representatives v. U.S. Dept. of Commerice, 961 F.2d 941 (11th Cir. 1992), the Eleventh Circuit reversed the district court's determination that the deliberative process privilege did not apply in a FOIA case, where the government asserted the exemption in 5 U.S.C. § 552(b)(5). The Eleventh Circuit noted that the district court had relied upon Wolfe v. Department of Health and Human Services, 839 F.2d 768 (D.C. Cir. 1988). 961 F.2d at 948. The Eleventh Circuit found that the district court had improperly applied Wolfe, in a number of respects. Most relevant for this case, the Eleventh Circuit stated that, "Third, in determining whether the information was deliberative, the *Wolfe* court did not venture into a fact-finding thicket to determine whether, in the specific circumstances of this case, the requested disclosure would 'chill discussion' within the agency. Nor should it have for that matter." 961 F.2d at 948.

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Government's assertion of the deliberative process privilege. D.E. 265 at 9-11. They do not explain why they need deliberative materials generated by the Department of Justice's Office of Professional Responsibility (OPR), in May 2011, more than two years after this lawsuit was filed. Further, petitioners have been provided letters written by then-First Assistant U.S. Attorney Jeffrey H. Sloman, dated December 6, 2007, to Jay P. Lefkowitz, one of Epstein's defense attorneys (RFP MIA 000017-000024), and then-U.S. Attorney R. Alexander Acosta, dated December 19, 2007, to Lilly Ann Sanchez, another attorney representing Epstein (RFP MIA 000038-000040), which refer, in part, to the U.S. Attorney's Office's view on the application of the CVRA. These are the positions taken by the U.S. Attorney's Office, which are the culmination of the deliberative process within the office. Petitioners have no need for the opinions and recommendations made by subordinates within the U.S. Attorneys. If they intend to point to a contrary position taken by a subordinate in the U.S. Attorney's Office, then this is the type of harm which the deliberative process privilege is intended to prevent. Such a disclosure would discourage any subordinate from speaking candidly to the decision-maker, for fear that his or her dissenting view would be made public.

C. Attorney Work Product Doctrine

As to work-product, the Zingsheim court noted that, "[t]he work-product privilege applies to many other discussions between prosecutors and investigating agents, both state and federal." 384 F.3d at 872, citing FTC v. Grolier, Inc., 462 U.S. 19 (1983). Therefore, the government is entitled to invoke the work product privilege for written documents and communications prepared in anticipation of the criminal prosecution of Jeffrey Epstein, which contain mental impressions, theories, opinions, factual information, and conclusions regarding the case.

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Petitioners erroneously maintain that documents not prepared in anticipation of the CVRA litigation do not enjoy the protection of the work-product doctrine. D.E. 265 at 7. In FTC v. Grolier, supra, the Supreme Court examined Fed.R.Civ.P. 26(b)(3) and remarked that, "the literal language of the Rule protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation." 462 U.S. at 25(emphasis in original). Frontier Refining, Inc. v. Gorman-Rupp Company, Inc., 136 F.3d 695, 703 (9th Cir. 1998)("Based on the compelling dicta in *Grolier* and the reasoning set out in the circuit court opinions cited above, we conclude that the work product doctrine extends to subsequent litigation."). Therefore, materials prepared in anticipation of the Epstein criminal case are covered by the work product doctrine.

Similarly unavailing is petitioners' contention that the work product doctrine is inapplicable because they are making a claim that public prosecutors violated their public responsibilities under the CVRA. D.E. 265 at 13-14. The first case cited, In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997), was the Office of Independent Counsel's investigation of then President Clinton and the First Lady in the Whitewater investigation. The Office of Independent Counsel had served a grand jury subpoena upon the White House, seeking documents. In response, the White House invoked the attorney-client and attorney work product privileges. The Eighth Circuit rejected the privilege claims, stating that a government agency could not assert the attorney-client and work product privileges in a criminal investigation being conducted by a federal grand jury. In re Grand Jury Subpoena Duces Tecum is completely inapposite since there is no federal grand jury conducting a criminal investigation in this case. This is a civil dispute involving an alleged failure to comply with the CVRA. Moreover, there is no grand jury subpoena, but only a request for production in a civil case.

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Petitioners also rely upon U.S. v. Arthur Young & Company, 465 U.S. 805 (1984), a case involving a summons served by the IRS upon an accounting firm. The IRS summons was issued pursuant to authority granted by 26 U.S.C. § 7602, which authorizes the Secretary of the Treasury to summon and "examine any books, papers, records, or other data which may be relevant or material" to a particular tax inquiry. Id. at 813. The court of appeals found that the tax accrual workpapers prepared by Arthur Young were exempt from disclosure under a work-product immunity.

The Supreme Court reversed as to the work-product immunity. As to § 7602, the Court observed that, "[w]e are unable to discern the sort of 'unambiguous directions from Congress' that would justify a judicially created work-product immunity for tax accrual workpapers summoned under § 7602." Id. at 816. The Court also found no "fitting analogue" to the attorney work-product doctrine because an independent certified public accountant performs a different role than a private attorney. "By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client." Id. at 817.

Arthur Young is inapplicable because a public prosecutor occupies a different role than the independent auditor. Under 28 U.S.C. § 516, "[e]xcept as otherwise provided by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." A Department of Justice attorney takes direction from the Attorney General and his delegates, in the conduct of litigation, rather than serving some abstract public responsibility. The Attorney General determines how to serve the public interest. The work product privilege exists to provide a working attorney with a "zone of

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privacy" within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980). The purpose of the doctrine is to protect the adversary trial process itself, by preventing adversaries from probing each other's thoughts and plans concerning a case. Id.

Communications regarding a case by DOJ attorneys are protected by the work product doctrine. In Menasha Corporation v. U.S. Department of Justice, 707 F.3d 846 (7th Cir. 2013), the Seventh Circuit held that communications between DOJ attorneys from the Environmental Enforcement Section and the Environmental Defense Section, both subcomponents of the DOJ's Environment and Natural Resources Division, were exempt from disclosure under the FOIA because they were covered by the attorney work product doctrine. In doing so, the appellate court rejected Menasha's claim that, because the Environmental Enforcement Section and Environmental Defense Section were representing federal agencies with conflicting interests, the work product privilege was forfeited. Id. at 848-850. The Environmental Enforcement Section represented the interests of the Environmental Protection Agency, which seeks to enforce environmental laws, while the Environmental Defense Section, which defends the United States from suits to enforce environmental laws, represented the interests of the Corps of Engineers. The Seventh Circuit found this to be "of no moment" since the United States was the only federal party and was represented by the Justice Department. Id. at 850. Any conflicts between the two sections within the Environment and Natural Resources Division would be resolved by the Assistant Attorney General heading the Environment and Natural Resources Division. Id. at 850-52.

Noteworthy for this case is the Seventh Circuit's observation that, "[a]ll this is irrelevant to work product privilege, which shields the wrangles within the client's legal team from the

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opposing party." Id. at 852. Petitioners are not entitled to peek at the discussions within the U.S. Attorney's Office regarding the potential prosecution of Epstein, or communications within the U.S. Attorney's Office, or between components of the DOJ and the U.S. Attorney's Office, about the appropriate application of the CVRA.

Petitioners also contend that the work product doctrine does not apply because an attorney's conduct is a central issue in the case. D.E. 265 at 16. They rely in part on In re John Doe, 662 F.2d 1073 (4th Cir. 1981), which was another case involving a criminal investigation being conduct by a federal grand jury. The target of the investigation, a criminal defense attorney, was being investigated for obstruction of justice, conspiracy, and subornation of perjury, in his defense of his client. Id. at 1081. The main witness against the attorney was his former client, who claimed the defense attorney "advised him to lie during his trials, to bribe witnesses and had otherwise engaged in attempts to procure false testimony." Id. at 1076.

The U.S. Attorney's Office served a grand jury subpoena upon the defense attorney and his law partnership, seeking records pertaining to his representation of the former client. The defense attorney and his law partnership objected, invoking the attorney-client privilege and work product doctrine. After an in camera hearing, where the U.S. Attorney's Office provided satisfactory evidence to the district court that it had a prima facie case of fraud, and that it had a need for the records, the district court rejected the claims of privilege.

On appeal, the Fourth Circuit affirmed. The appellate court referenced Fed.R.Civ.P. 26(b)(3), which codifies the work product doctrine, and observed, "[n]o court construing this rule, however, has held that an attorney committing a crime could, by invoking the work product doctrine, insulate himself from criminal prosecution for abusing the system he is sworn to protect." Id. at 1078. This was the basis for rejecting the assertion of the attorney-client

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privilege and attorney work product doctrine by the defense attorney who was the target of the criminal investigation. This is also the basis for finding In re John Doe inapplicable to this case. There is no criminal investigation of an attorney, nor is there a grand jury subpoena.

Petitioner also invokes 18 U.S.C. § 3771(c)(1), and maintains that, because prosecutors are required to use their "best efforts" to protect crime victims rights, the Government should not be withholding documents. D.E. 265 at 13-14. Petitioners have no authority to demonstrate that this one sentence grants them access to government documents which they would not otherwise have, or constitutes a waiver of well-recognized privileges often invoked by the government. Moreover, this litigation is over whether petitioners had specific rights at all, such as the right to confer under section 3771(a)(5). The Government is entitled to invoke applicable evidentiary privileges in such litigation.

D. Law Enforcement Investigative Privilege

The law enforcement investigatory privilege has been recognized and applied by other district courts in the Southern District of Florida. Federal Trade Commission v. Timeshare Mega Media and Marketing Group, Inc., 2011 WL 6102676 at *3 (S.D.Fla. Dec. 7, 2011), and White v. City of Fort Lauderdale, 2009 WL 1298353 at *2 (S.D.Fla. May 8, 2009)("Under federal common law, there is a qualified privilege which protects disclosure of information contained in criminal investigations.")(citations omitted). Further, it was noted in Swanner v. United States, 406 F.2d 716, 719 (5th Cir. 1969).

Petitioners observe that other circuits have "narrowly confined materials such 'as information pertaining to law enforcement techniques and procedures, information that would undermine the confidentiality of sources, information that would endanger witness and law enforcement personnel [or] the privacy of individuals involved in an investigation, and

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information that would otherwise … interfere[] with an investigation." D.E. 265 at 11, citing In re The City of New York, 607 F.3d 923, 944 (2nd Cir. 2010). Petitioners then claim that, "[t]he Government has not attempted to make any such showing with regard to the specific materials over which is (sic) has asserted investigative privilege." D.E. 265 at 11.

On September 3, 2013, the Government filed the Declaration of FBI Special Agent E. Nesbitt Kuyrkendall, in support of its claim of a law enforcement privilege. D.E. 229-1. Special Agent Kuyrkendall specifically addressed the issue of the interviews of the young women believed to have been sexually abused by Mr. Epstein. D.E. 229-1, ¶ 3. These reports contain "highly personal and intimate details which would cause embarrassment to the young women if disclosed to third parties." Id.

These materials, FBI reports of interviews, are specifically being sought by petitioners. D.E. 265 at 11 (P-012624 – P-12653). Redacting the victims' names will not necessarily spare the victims embarrassment, since they will know that personal and intimate details, revealed only to a law enforcement officer in the course of conducting a criminal investigation, was revealed to a third party.

Petitioners also contend that they need materials for which the law enforcement investigative privilege has been invoked to refute the estoppel argument raised by the Government. D.E. 265 at 12. This is not a basis for overriding the qualified privilege covering law enforcement investigatory materials, in a case that is still open. D.E. 229-1 at 3, ¶ 7. What documents were located in a search , materials received pursuant to a grand jury subpoena (D.E. 212-1 at 6), or charts prepared by the FBI, do not make it more or less likely that the U.S. Attorney's Office engaged in a conspiracy with Epstein's attorneys, to prevent petitioners from finding out that a non-prosecution agreement had been entered.

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III. THE PRIVACY ACT REQUIRES A COURT ORDER BEFORE THE GOVERNMENT MAY DISCLOSE PROTECTED INFORMATION

In respondent's Opposition to Petitioners' Motion to Compel Production of Documents That Are Not Privileged, D.E. 229, the government cited Perry v. State Farm Fire & Casualty Company, 734 F.2d 1441 (11th Cir. 1984), which noted that "[r]equests for court orders under § 552(b)(11) should be evaluated by balancing the need for the disclosure against the potential harm to the subject of the disclosure." Id. at 1447(citations omitted).

Petitioners claim the Court has already done so, but cites to no specific order. D.E. 265 at 18. The Government specifically invoked the Privacy Act for memoranda submitted by then First Assistant U.S. Attorney Jeffrey Sloman to the Office of Professional Responsibility, regarding self-reporting. D.E. 212-1 at 21-22 (P-013227; P-013226 through P-013230; P-013231 through P-013239; and P-013240 through P-013247). It also invoked the privacy rights of individuals who are not parties to this action. The conditions of disclosure set out by Congress are provided at 5 U.S.C. § 552a(b)(1) – (12). Unless one of the conditions are satisfied, such as an order of a court of competent jurisdiction, 5 U.S.C. § 552a(b)(11), the Privacy Act does not permit disclosure.[2]

[2] Respondent's counsel will confer with petitioners' counsel to determine which Order they are relying upon.

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CONCLUSION

The Government has asserted valid privileges to petitioners' first request for production. These privileges should be sustained.

DATED: November 14 2014

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 14, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Dexter A. Lee
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Case No. 08-80736-CIV-MARRA/JOHNSON
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