

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF
INFORMATION ASSOCIATED WITH THE
PREMISES KNOWN AS THE OFFICE OF

[REDACTED]

AND THE

OFFICES OF

[REDACTED]

Misc. Action No. 20-gj-35 (BAH)

Chief Judge Beryl A. Howell

FILED UNDER SEAL AND EX PARTE

SECOND PARTIAL UNSEALING ORDER

On August 28, 2020, a sealed Memorandum Opinion (“2020 Memorandum Opinion”) was filed in the instant sealed matter resolving the government’s motion for permission to review certain communications. The order associated with that opinion directed the government to submit a “report advising whether any portions of the accompanying Memorandum Opinion may be unsealed to the public in whole or in part and, if so, proposing any redactions.” Order, ECF No. 6. Since that time, following status reports from the government regarding whether further public release of the 2020 Memorandum Opinion, in whole or in part, was warranted, *see* Gov’t’s Status Reports, ECF Nos. 8, 9, a redacted version of the 2020 Memorandum Opinion was made publicly available on the Court’s website, Order (Dec. 1, 2020), ECF No. 10. The government was directed to advise the Court, “within thirty days of when any public disclosure obviates the need for further sealing[,] . . . whether the 2020 Memorandum Opinion . . . may be further unsealed and proposing any redactions to be made prior to any unsealing.” *Id.*; *see also* Min. Order (Nov. 30, 2021) (same).

On June 6, 2022, the government filed a status report requesting further unsealing of the 2020 Memorandum Opinion following three recent submissions by the government in *United States v. Nickie*

Lum Davis, 1:20-cr-00068-LEK (D. Hawaii), that disclosed information obviating the need for continued sealing of certain aspects of this matter and attaching a redacted version of the 2020 Memorandum Opinion making additional disclosure of portions of that decision. Gov't's Status Report Regarding Unsealing, ECF No. 12. Specifically, the government's public filings in the District of Hawaii disclosed that the communications at issue were found during a review of Elliott Broidy's records; that "Lowell and a third party were retained by a wealthy businessman to engage in what could potentially constitute an illegal lobbying scheme to obtain a pardon for one of the businessman's associates;" and that the "communications also suggested that some combination of the parties may have contemplated the businessman making a sizeable political contribution in exchange for a presidential pardon for his associate." *Id.*, Ex. A at 8.

In light of the government's Status Report Regarding Unsealing, ECF No. 12, it is hereby

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

ORDERED that the government shall file, by the earlier of June 9, 2023 or within thirty days of when any public disclosure obviates the need for further sealing, a status report advising the Court whether the 2020 Memorandum Opinion, ECF No. 7, may be further unsealed and proposing any redactions to be made prior to any unsealing.

SO ORDERED.

Date: June 9, 2022

The image shows a circular official seal of the United States District Court for the District of Hawaii, featuring a shield with a scale of justice and a star. To the right of the seal is a handwritten signature in cursive that reads "Beryl A. Howell".

BERYL A. HOWELL
Chief Judge

ATTACHMENT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF
INFORMATION ASSOCIATED WITH
THE PREMISES KNOWN AS THE OFFICE
OF [REDACTED]
AND THE
OFFICES OF [REDACTED]

Misc. Action No. 20-gj-00035 (BAH)

Chief Judge Beryl A. Howell

FILED UNDER SEAL AND EX PARTE

MEMORANDUM OPINION AND ORDER

Pending before the Court is the government’s *Ex Parte, In Camera* Application Seeking Authorization to Review Certain Attorney-Client Communications (“Gov’t’s Mot.”) “between and among [REDACTED], [REDACTED], [REDACTED], and Abbe D. Lowell, Esq.,” and their agents, “based on a crime-fraud finding” or, alternatively, “a finding that there was no attorney-client or other privileged relationship protecting communications involving [REDACTED].” Gov’t’s Mot. at 1, ECF No. 1. The communications at issue were seized by the government pursuant to search warrants, which were issued in [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. *Id.* at 5.¹ In the

course of the ongoing review by the government’s filter team of the “over fifty digital media devices, including iPhones, iPads, laptops, thumb drives, and computer and external hard drives .

¹ [REDACTED] Gov’t’s Mot. at 5 n.4.

. . (totaling several terabytes of data)” seized, *id.*, email communications have been identified “indicat[ing] additional criminal activity,” *id.* at 6, namely: (1) a “secret lobbying scheme,” *id.* at 7, in which [REDACTED] and Lowell acted as lobbyists to senior White House officials, without complying with the registration requirement of the Lobbying Disclosure Act (“LDA”), 2 U.S.C. §§ 1601 *et seq.*, to secure “a pardon or reprieve of sentence for [REDACTED],” *id.* at 6, [REDACTED], *id.* at 7-8 (“LDA scheme”); and (2) a related bribery conspiracy scheme, in which [REDACTED] would offer a substantial political contribution in exchange for a presidential pardon or reprieve of sentence for [REDACTED],” *id.* at 7, using [REDACTED] [REDACTED] [REDACTED], “as the intermediaries to deliver the proposed bribe,” *id.* (“Bribery-for-pardon scheme”). The government now seeks a court order “so that the investigative team may access these communications, confront [REDACTED], Lowell, and [REDACTED] with the facts recited herein, and take any other investigative steps needed to complete its investigation.” *Id.* at 6.²

² The evidence in this matter was seized as part of the government’s multi-year, wide-ranging investigation into possible violations of Title 18, Title 22, and Title 52 of the U.S. Code, [REDACTED]

[REDACTED] Higginbotham has since entered a guilty plea to a one-count Information charging conspiracy to make false statements to a bank. Gov’t’s Mot. at 4 n.2. [REDACTED]

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

I. BACKGROUND

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

On January 2, 2017, [REDACTED] emailed Lowell, copying [REDACTED] and [REDACTED], requesting an “action plan” for obtaining a commutation of [REDACTED] prison sentence once Donald Trump assumed the presidency. *Id.* On January 18, 2017, [REDACTED] sent another email to [REDACTED] and Lowell, copying [REDACTED], thanking Lowell for “agree[ing] to participate in assisting [REDACTED].” asking that Lowell “be formally associated in the case so that [his] appearance will be recognized by the Court and [he] will be advised of the status of the proceedings,” acknowledging receipt of Lowell’s “first billing” and explaining that it would be paid “forthwith.” *Id.*, Ex. 5, ECF No. 3-4. While Lowell never entered an appearance in [REDACTED] case in the Northern District of California, *see Gov’t’s Mot.* at 10 (citing [REDACTED] Docket), [REDACTED] apparently retained Lowell as legal counsel, at a minimum, to assist [REDACTED] with obtaining clemency, *see id.*, Ex. 6 at 2, ECF No. 3-5 (explaining that the plan to help [REDACTED] included “hir[ing Lowell], a super lawyer”); *see also id.*, Ex. 4, ECF No. 3-3 ([REDACTED] encouraging Lowell to ask [REDACTED] if he can “work with [REDACTED] lawyers to delay incarceration.”); *id.*, Ex. 14, ECF No. 3-13 (Lowell explaining to [REDACTED], on March 4, 2017, that he had spoken with [REDACTED] and his counsel); *id.*, Ex. 16 at 2, ECF No. 3-15 ([REDACTED] referring to Lowell as “outstanding counsel” who can do “nothing from a legal standpoint”); *id.* (Lowell describing plan to confer with [REDACTED] and his attorneys).

[REDACTED] had prior dealings with [REDACTED] as a bundler of political contributions. *See id.*, Ex. 3, ECF No. 3-2 (Jan. 2, 2017 email from [REDACTED] to Lowell, copying [REDACTED] and [REDACTED], stating: “I do feel that I have a personal relationship with Donald and [REDACTED] who initially introduced me.”); *id.*, Ex. 25, ECF No. 3-24 (April 28, 2017 email from [REDACTED] to [REDACTED], stating: “I am fully aware my friend of what I did for you as a bundler and the benefits to you.”). Early on, in a January 8, 2017 email sent only to [REDACTED], [REDACTED] emphasized that [REDACTED] needed a “political” solution

“rather than in the bureaucratic legal framework,” requested that [REDACTED] provide “steps and dates so it will happen shortly after January 20th,” and assured [REDACTED] that this “request is not like for what Hillary did for Mark Rich, followed by a \$450,000 campaign contribution. This commutation should attract no attention.” *Id.*, Ex. 4, ECF No. 3-3. [REDACTED] subsequently stated, in a January 18, 2020 email to [REDACTED] and Lowell, that he would “consider it a personal favor if [REDACTED] . . . pulled out all stops to prevent [REDACTED] incarceration particularly getting Donald to pardon him or commute the sentence so he is not jailed” *Id.*, Ex. 5, ECF No. 3-4. In an email to [REDACTED] the next day, January 19, 2017, [REDACTED] boasted: “. . . we are the largest giver to UCSF and perhaps one of if not the largest donors to a [u]niversity having donated 650 million dollars plus” and emphasized that he was a “major source of further political contributions to aid Donald [Trump] in his remarkable quest.” *Id.*, Ex. 6, ECF No. 3-5. In this same message, [REDACTED] reiterated his expectation, expressed as early as his January 8 email to [REDACTED], that [REDACTED] “work[] on the political through your inside contacts at the Trump core” to obtain a “deal . . . to have a tabula rasa so [REDACTED] would have no fine, no confinement and the slate would be wiped clean either through commutation and/or pardon” *Id.* [REDACTED] was explicit in an email to [REDACTED] copying [REDACTED] on January 19, 2017, stating, “The plan was to reach Donald Trump for the exercise of his powers.” *Id.*, Ex. 32, ECF No. 3-31. By contrast to Lowell, no emails or other record evidence indicates that [REDACTED] actually retained or made any direct payments to [REDACTED] for assistance in this scheme for a presidential pardon in return for political contributions.

Both [REDACTED] and Lowell had contact with the White House Counsel’s office regarding clemency for [REDACTED] shortly after President Trump assumed office. For example, on January 24, 2017, [REDACTED] emailed Lowell to confirm that “all info[rmation] was sent to [REDACTED],” *id.*, Ex. 7 at 2, ECF No. 3-6, whom the government identifies as [REDACTED], [REDACTED], [REDACTED]

White House Counsel, *id.*, Ex. 13, ECF No. 3-12, to which Lowell replied that he had spoken with White House Counsel and had already updated ██████, *id.*

By March 2017, ██████ began expressing frustration with the lack of progress on obtaining a presidential pardon for ██████. This prompted Lowell to describe to ██████ in a short email, on March 4, 2017, his activities relating to ██████ case, including sharing ideas that Lowell had “discussed with the [White House]” with ██████ counsel, *id.*, Ex. 14, ECF No. 3-13, which email Lowell forwarded the same day to ██████ and ██████. While the subject line of the original email was “Status,” when Lowell forwarded the email to ██████ and ██████, the subject line was changed to read “ATTORNEY CLIENT PRIVILEGE, ATTORNEY WORK PRODUCT.” *Id.* ██████ was apparently not satisfied and sent a follow-up email, on March 10, 2017, to Lowell and ██████ critiquing the pace of their approach as too slow. *Id.*, Ex. 15, ECF No. 3-14. ██████ also raised, in an echo of his earlier email January 8, 2017 email to ██████, an alternative of “circumventing the entire process in favor of a more direct strategy” and suggested “revis[ing] our course of action for a more immediate result.” *Id.*, Ex. 15, ECF No. 3-14. Lowell responded, again relabeling the subject line to include the words “Attorney Client Confidential Privileged,” that their approach would require the White House to “talk[] to someone at DOJ to talk to the acting US Attorney to have them not oppose any motion” to reduce ██████ sentence. *Id.*

The next day, on March 11, 2017, ██████ emailed ██████ directly, again expressing impatience with the “present status” of the clemency process and disappointment with “nothing being accomplished as the matter stands now,” noting that he would “regretfully look for a plan ██████ if you cannot help and obtain results...” *See id.*, Ex. 16 at 2, ECF No. 3-15. In this message, ██████ refers again to his “rather considerable resources” and tells ██████ “You are the point

person in center court. It is purely within your domain and we need your help.” *Id.* [REDACTED] forwarded this message to Lowell, posing the question, “Is this at a point where AG Sessions could ask the acting US Attorney in northern CA to do the above,” referring to “asking the gov’t not to incarcerate [REDACTED] for humanitarian reasons,” to which Lowell answered “yes.” *Id.* at 1. [REDACTED] also confirmed with Lowell that he ([REDACTED]) had spoken again to Deputy White House Counsel [REDACTED]. *Id.*

[REDACTED] requested, on March 17, 2017, that Lowell provide “a succinct summary” regarding [REDACTED], *id.*, Ex. 17, ECF No. 3-16, and two days later, on March 19, 2017, Lowell sent [REDACTED] the summary, which [REDACTED] forwarded to [REDACTED], [REDACTED], [REDACTED], describing the document as “prepared by attorney Abbe Lowell for the [REDACTED] – [REDACTED] matter,” *id.*, Ex. 18 at 1, ECF No. 3-17. On March 24, 2017, [REDACTED] emailed [REDACTED] to inform him that [REDACTED] and Lowell were “going to Plan B.” *Id.*, Ex. 21 at 2, ECF No. 3-20. In response, [REDACTED] asked “What is plan B?” *id.*, and [REDACTED] responded, “My suggestion would be for you to speak with Abbe,” *id.* at 1. In the same email chain, later the same day, [REDACTED] addressed [REDACTED], copying [REDACTED] and Lowell, stating that “Our Plan B will be described to you by [Lowell] and can certainly use your influence in addition to what [Lowell] is doing,” and that “Plan A, the one that you are working on for [REDACTED] should still be in play and still depends on your actions,” so “we will have two irons in the fire, each weighted differently, but each hoping fir [sic] a similar outcome.” *Id.*

In April 2017, [REDACTED] remained concerned about the lack of progress on obtaining clemency for [REDACTED] and, given “reports of much turmoil within the insider circle,” questioned [REDACTED]’s access and commitment to help [REDACTED]. *Id.*, Ex. 19 at 3, ECF No. 3-18 (April 5, 2017)

email from [REDACTED] to [REDACTED]). [REDACTED] stated that [REDACTED] “is working independently with [Lowell]” and the email is “directed to” [REDACTED] “because you owe me.” *Id.* [REDACTED] responded that he had “spent more than 100 hours (not including travel time)” on the matter and explained that [REDACTED] case had “been discussed in detail with [the White House] and DoJ.” *Id.* [REDACTED] further stated: “I am trusting you and you are trusting [REDACTED] to use discretion with regard to this matter.” *Id.* In this exchange, [REDACTED] raised a plan to reach out to “[REDACTED],” *id.*, whom the government identifies as [REDACTED], who had been nominated by President Trump to be [REDACTED] [REDACTED], Gov’t’s Mot. at 19 n.19. [REDACTED] forwarded [REDACTED] first response to [REDACTED], *id.*, Ex. 19 at 2, ECF No. 3-18, who encouraged [REDACTED] to go with the “‘nuclear option’ . . . with [REDACTED],” *id.* The next day, [REDACTED] confirmed with [REDACTED] that he had contacted [REDACTED]. *Id.* at 1. [REDACTED] responded that he was “absolutely fine with whomever else [REDACTED] call[ed] including [REDACTED]” *Id.*

On April 11, 2017, [REDACTED] sent a message to the email address [REDACTED], *id.*, Ex. 20 at 1, ECF No. 3-19, an address identified by the government as associated with [REDACTED], who served in the White House as [REDACTED], Gov’t’s Mot. at 17. [REDACTED] forwarded a copy of [REDACTED] district court Motion to Set Aside Conviction and Sentence Pursuant to 28 U.S.C. § 2255, and asked [REDACTED] to send the attachment “to White House Counsel and [REDACTED] contacts at the Department of Justice,” asserting “[t]he goal here is to get attorney[] Abbey Lowell in contact with the right people to get this moving forward.” *Id.*, Ex. 20 at 1, ECF No. 3-19.

On April 12, 2017, [REDACTED] emailed [REDACTED] directly, copying Lowell, [REDACTED] and [REDACTED], referencing their telephone conversation the day before and providing contact information for Lowell. *Id.*, Ex. 22 at 1, ECF No. 3-21. About a week later, on April 20, 2017, [REDACTED] sent a

follow up email to [REDACTED], as well as [REDACTED], Lowell and [REDACTED], explaining the merits of [REDACTED] case for clemency, and reminding them that he “gave a \$6 Million contribution to Donald Trump’s campaign” and “wanted nothing in return under the usual political spoils system. The [REDACTED] issue arose thereafter.” *Id.*, Ex. 23 at 2, ECF No. 3-22. [REDACTED] forwarded [REDACTED] April 20, 2017 email to [REDACTED] with the message “See below Please assist.” *Id.* at 1.

On April 23, 2017, [REDACTED] emailed [REDACTED], copying Lowell and [REDACTED], reminding [REDACTED] that he “unobtrusively gave Six million dollars” to the Trump campaign. *Id.*, Ex. 24, ECF No. 3-23. [REDACTED] went on to state, “To put it bluntly I need your help and the help of those with who [sic] you are in contact for Presidential intervention. There is not only what I contributed patriotically but the future as well because I am an extremely successful businessman” *Id.*

On April 28, 2017, [REDACTED] again expressed disappointment in [REDACTED] efforts, suggesting [REDACTED] had “lost [his] political power base which I assumed so [he] cannot assist or whatever.” *Id.*, Ex. 25, ECF No. 3-24. Later the same day, [REDACTED] emailed [REDACTED], an email the government believes to be used by the [REDACTED], requesting a meeting with [REDACTED] to advocate for [REDACTED]. Gov’t’s Mot. at 20; *id.*, Ex. 26, ECF No. 3-25. In that email, [REDACTED] identified himself as “a major financial supporter of President Trump,” and “had a personal meeting with [REDACTED] and President Trump... at a fund raising [sic] dinner during the campaign.” *Id.* [REDACTED] expressed “an urgent need to speak with [REDACTED] on this issue” (referring to [REDACTED] situation) and that he “was depending on [REDACTED] but unfortunately [had] lost contact with him.” *Id.* This email was forwarded to [REDACTED] by [REDACTED], whom the government identifies as the [REDACTED]. Gov’t’s Mot. at 21. [REDACTED] replied to [REDACTED]: “Odd. Talked with him today. And at least 3x weekly for the last 3 months[.] Call me[.]” *Id.*, Ex. 26, ECF No. 3-25.

On April 29, 2017, [REDACTED] emailed [REDACTED] informing him that [REDACTED] judge had continued [REDACTED] reporting date to June 15, 2017. *Id.*, Ex. 27 at 1, ECF No. 3-26. [REDACTED] forwarded this email to [REDACTED] saying: “. . . we have the desired 45 days to wrap it up. Please update your contacts so we can wrap it up next month.” *Id.*

In email exchanges throughout May 2017, which are the last of the email exchanges submitted by the government, [REDACTED] tried to impress on [REDACTED] and others that his political contributions were contingent on obtaining clemency for [REDACTED]. For example, on May 12, 2017, [REDACTED] reminded [REDACTED] about his capacity to contribute to the RNC, *id.*, Ex. 28, ECF No. 3-27, asserting that he was “perfectly capable of an [REDACTED] [sic] league additional financial contribution[],”⁴ that [REDACTED] would be “given credit for bundling another additional major contribution,” and that his foundation was the “largest donor in the history of UCSF and [its] gifts received a great national attention” *Id.* [REDACTED] closed the email stating that Lowell agreed that their “only route left is political through the pardoning power of the President.” *Id.* [REDACTED] followed-up with another email to [REDACTED], on May 13, 2017, with the subject line “Contributions,” advising [REDACTED] that [REDACTED] “gift to UCSF was five hundred million dollars from my Foundation,” and for [REDACTED], he would “not be satisfied with anything less than a Presidential pardon. This one gift alone of many dwarfs the [REDACTED] [sic] Trump contribution.” *Id.*, Ex. 29, ECF No. 3-28. Later the same day, [REDACTED] responded to inform [REDACTED] that he was “heading [t]o DC tomorrow to work on your project on behalf of [REDACTED].” *Id.*

On May 30, 2017, [REDACTED] emailed [REDACTED] demanding more information from [REDACTED] since the “political solution is our only and last hope,” and referencing an earlier email to [REDACTED] in which [REDACTED] had “mentioned that there is the potential of an [REDACTED] scale donation to the

⁴ The government believes “[REDACTED]” to be a reference to [REDACTED], a prominent political donor. Gov’t’s Mot. at 22 n.20.

cause” in association with the [REDACTED] matter. *Id.*, Ex. 30, ECF No. 3-29 [REDACTED] assured him again that this “is so low profile under the circumstances I honestly feel it will fall below the radar screen” and carry “very little if any risk.” *Id.* [REDACTED] forwarded this email to [REDACTED] with the message “Let’s discuss later.” *Id.*, Ex. 31, ECF No. 3-30.

The government acknowledges that “[a]lthough both [REDACTED] and [REDACTED] had direct access to senior government officials at the time, including possibly President Donald J. Trump, it is unknown whether the bribe offer was ultimately delivered to government officials,” Gov’t’s Mot. at 2, but ascertaining “[w]hether this solicitation was relayed to individuals beyond the intermediaries remains a pressing matter” for the government’s investigative team to pursue, *id.* at 36. In any event, the alleged schemes for a pardon set out in the government’s pending motion were not successful and [REDACTED] served his sentence from [REDACTED] [REDACTED]. Gov’t’s Mot. at 24; *id.*, Ex. 34, ECF No. 3-33.⁵

II. LEGAL STANDARD

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

⁵ [REDACTED]

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

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

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

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

III. DISCUSSION

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

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

[REDACTED], not Lowell, requested [REDACTED]'s assistance, "as a personal favor," to use his political connections by "getting Donald to pardon [REDACTED] or commute the sentence so he is not jailed." Gov't's Mot., Ex. 5, ECF No. 3-4.⁷ This political strategy to obtain a presidential pardon was "parallel" to and distinct from Lowell's role as an attorney-advocate for [REDACTED]. *Id.*, Ex. 33, ECF No. 3-32 ([REDACTED] stating, "[REDACTED] and [Lowell] should continue on [their] parallel work . . . [t]hen with a little luck, we may also have an excellent result with [REDACTED]"); *see also*, *id.*, Ex. 6, ECF No. 3-5 ([REDACTED] explaining that the plan to help [REDACTED] included "hir[ing Lowell], a super lawyer); *id.*, Ex. 4, ECF No. 3-3 ([REDACTED] encouraging Lowell to ask [REDACTED] if Lowell can "work with [REDACTED] lawyers to delay incarceration."). The government points out that no communications have been identified "in which [REDACTED] is requested or instructed to assist the defense team or otherwise be 'formally associated' with the defense," Gov't's Mot. at 37-38, or in which "[REDACTED] communicate[d] directly with [REDACTED]'s [REDACTED] defense counsel in the months leading up to [REDACTED]'s surrender to BOP custody," *id.* at 38.

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

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

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

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

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

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

IV. CONCLUSION

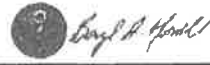
For the foregoing reasons, email communications between and among [REDACTED], [REDACTED] and Abbe Lowell, or any agents of these individuals, that were sent, copied or forwarded to [REDACTED] in connection with the alleged LDA scheme or Bribery-for-pardon scheme described in the government's motion are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

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

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

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

Date: August 28, 2020

A circular stamp containing a question mark is positioned to the left of the signature. The signature itself is written in a cursive script.

BERYL A. HOWELL
United States District Judge