

Fusion GPS loses its fight over "privileged" documents

And - how Joffe's "privilege" can be overcome



Techno Fog

9 hr ago

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We've documented the ongoing battle to obtain Fusion GPS e-mails and documents in the Michael Sussmann case. At issue in the Sussmann case are 38 e-mails and attachments between and among Fusion GPS, Rodney Joffe, and Perkins Coie. These 38 e-mails and attachments are among approximately 1,500 documents that Fusion GPS withheld from production to the grand jury based on "privilege."

What Fusion GPS has to produce.

Today, the court in the Sussmann case made an important ruling and rejected, in large measure, Fusion's assertion of attorney-client or work-product privilege:

A. Application of the Asserted Privileges

Applying the two asserted privileges to the 38 emails it has reviewed, the Court finds that Fusion GPS had no valid basis to withhold 22 of the 38 emails, but that it has met its burden to establish privilege over the remaining 16. The Court analyzes each category separately.

Fusion GPS will have to produce these documents to Special Counsel Durham by May 16, 2022. What do these e-mails and documents contain? The court's order provides guidance, stating they relate to:

Internal Fusion GPS e-mails discussing the Alfa Bank data and e-mails circulating draft versions of the Alfa Bank white papers that were “ultimately provided to the press and the FBI.”

Here are some examples of what these e-mails might include. These are privilege logs in Fusion GPS's other litigation relating to the Alfa Bank hoax.

Email	8/30/2016	Peter Fritsch <pfritsch@fusiongps.com>	Ed Baumgartner <ebaumgartner06@gmail.com>	Glenn Simpson <gsimpson@fusiongps.com>		you will see the holes and what this needs	you will see the holes and what this needs.htm
Attachment							Alfa Group Overview.docx
Email	8/30/2016	Edward Baumgartner <edward@edward-austin.com>	Glenn Simpson <gsimpson@fusiongps.com>; Peter Fritsch <pfritsch@fusiongps.com>			Alfa Playbook	Alfa Playbook.htm
Attachment							Alfa Playbook.pdf

Email	5/20/2016	Glenn Simpson <gsimpson@fusiongps.com>	Peter Fritsch <pfritsch@fusiongps.com>; Jake Berkowitz <jberkowitz@fusiongps.com>			DT Russ	DT Russ.htm
Attachment							Trump Russia master .docx
Email	5/20/2016	Peter Fritsch <pfritsch@fusiongps.com>	Jake Berkowitz <jberkowitz@fusiongps.com>			russia final	russia final.htm
Attachment							Trump Russia Memo 5.20.16.docx
Email	5/20/2016	Peter Fritsch <pfritsch@fusiongps.com>	Thomas Catan <tcatan@fusiongps.com>; Jason Felch <jfelch@fusiongps.com>			Fwd: russia final	Fwd: russia final.htm
Attachment							Trump Russia Memo 5.20.16.docx

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The other emails.

This leaves 16 e-mails and documents remaining. For now, Durham will not get them. These are divided into two categories:

1. Eight of the e-mails involve internal communications among Fusion GPS employees. The court was “unable to tell from the emails or the surrounding circumstances whether they were prepared for a purpose other than assisting Perkins Coie in providing legal advice to the Clinton Campaign in anticipation of litigation.” Coming from the court, that’s a long way of saying that the sworn declarations of Fusion/Clinton lawyers (Levy and Elias) were sufficient to meet the “privilege” burden. This doesn’t mean that Durham can’t overcome this hurdle - just that it hasn’t been overcome yet.
2. The other eight e-mails and attachments include those among Fusion GPS’s Laura Seago, Sussmann, and Rodney Joffe. The court observed that the e-mails are consistent with Joffe’s assertion of privilege.

With respect to the Joffe e-mails, we note that he is still a subject - perhaps a target - of the Special Counsel’s investigation. Here’s a portion of the transcript from an evidentiary hearing in the Sussmann case that discusses their ongoing investigation into Joffe:

I'm hesitant, on the public record, particularly in the weeks before trial, to go into any ongoing investigative matters. But as Your Honor's aware, certain statutes of limitations are longer than five years, and it seems that, Your Honor, the efforts to --

THE COURT: Give me an example.

MR. DeFILIPPIS: 18 USC 1031, Your Honor, which involves defrauding the government in connection with procurement and contract matters. There is a DARPA contract, a federal contract, at issue here, which we have been looking at closely.

Because the investigation into Joffe is ongoing, it makes sense that the Special Counsel is hesitant to disclose to the court information that could overcome this purported “privilege.” Keep in mind the crime-fraud exception, where communications are not considered privileged where they “are made in furtherance of a crime, fraud, or other misconduct” (citation omitted). In other words, the Special Counsel may still be able to get Joffe’s e-mails - assuming Joffe is charged under 18 USC 1031. He can also get them through the grand jury process, as we saw with Mueller’s investigation of Paul Manafort.¹

I’ll also add that the fact that privilege applies to some of these documents strengthens the Special Counsel’s argument that Sussmann *was representing a client* when he met with then-FBI General Counsel James Baker in September 2016.

As to the e-mails and documents Durham will obtain, he cannot use them during trial. The court considered Durham’s efforts to be too close to the May 16, 2022 trial date to allow these e-mails and documents into trial. I’m not sure that matters. Sussmann is facing a false statement charge, and the court observed these e-mails are not “particularly revelatory.”

Finally, while “Court takes no position on the other approximately 1500 documents that Fusion GPS withheld as privileged,” we can assume based on this ruling that the majority of those documents would not be privileged. Durham will likely get most of them.

For those interested: After I wrote this post, New York Times reporter Eric Lichtblau filed this [request for a protective order](#). Lichtblau will be called as a witness by Sussmann's attorneys to discuss "communications between Mr. Sussmann and Mr. Lichtblau" - meetings at which Rodney Joffe was present (*that* confidentiality privilege was waived).

The Special Counsel has refused to limit Lichtblau's testimony to that narrow topic:

The Special Counsel, however, has refused to similarly limit the scope of questioning.

Id. ¶ 8. Following a period of consideration, the prosecution on May 2, 2022 stated that it could not provide "any assurance" that cross-examination of Mr. Lichtblau would be confined to his communications with Mr. Sussmann. *Id.* To the contrary, counsel for the government stated that

certain of Mr. Lichtblau's email communications with third parties during the course of his news

reporting were within the prosecution's possession, and that the prosecution might examine

Mr. Lichtblau about aspects of his reporting separate and apart from his communications with

the defendant. *Id.* During discussions, the Special Counsel acknowledged the Department of

Justice's new policy restricting the use of compulsory process to obtain information from

reporters,⁴ but indicated a view that any reporter's privilege was "pierced" by a trial subpoena.

Id.

Durham is taking this position because Lichtblau was in contact with Peter Fritsch (and Glenn Simpson) of Fusion GPS leading up to the 2016 election. Fritsch was feeding Lichtblau Fusion "opposition research" (what we might accurately call *bullshit*), and Lichtblau was at least somewhat receptive, though not salivating like Franklin Foer. These are relevant to the broader "media relations" strategy that Sussmann and Fusion GPS pursued on behalf of the Hillary Clinton campaign.

Here are the e-mails:

From: Peter Fritsch [REDACTED]
Sent: Thursday, November 3, 2016 3:51 PM
To: Lichtblau, Eric [REDACTED]
Cc: Glenn Simpson [REDACTED]
Subject: Re: follow up

On Sep 27, 2016, at 12:26 PM, Lichtblau, Eric [REDACTED] wrote:

Did you say that Millian had an alfa email address, or was that someone else?

Eric Lichtblau
New York Times
Washington Bureau
Reporter

[REDACTED]
[REDACTED]

On Sat, Sep 24, 2016 at 8:59 AM, Peter Fritsch [REDACTED] wrote:

gents, good to see you yesterday. sounded like you might be interested in some of the attached russia-related material. these are internal, open source research drafts. as agreed, pls treat this as background/not for attribution. as you'll see, it's all easily replicated anyway. can also send you a shnaider/toronto memo once i dig it out. I'm skipping over felix sater and bayrock. believe your guys have done that up...leave it to you to distribute internally, or not, as you see fit. don't believe sunny isles/hollywood or panama or toronto have been touched by brands xy or z. amazingly, don't think anyone has done up the trump tower poker ring story either. pretty vivid color there.

saludos, p.

From: Peter Fritsch [REDACTED]
Sent: Wednesday, October 5, 2016 6:32 PM
To: Lichtblau, Eric [REDACTED]
Subject: Re: alfa and trump

no idea. our tech maven says it was first posted via reddit. i see it has a tutanota contact — so someone anonymous and encrypted. so it's either someone real who has real info or one of the donald's 400 pounders. the de vos stuff looks rank to me... weird

On Oct 5, 2016, at 2:23 PM, Lichtblau, Eric [REDACTED] wrote:

thanks. where did this come from?

Eric Lichtblau
New York Times
Washington Bureau
Reporter

[REDACTED]
[REDACTED]

On Wed, Oct 5, 2016 at 1:44 PM, Peter Fritsch [REDACTED] wrote:

fyi found this published on web... and downloaded it. super interesting in context of our discussions

<http://www.mediafire.com/file/qc68pt5k6wn9f64/gdd.zip>

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- 1 “Based on consideration of the factual proffers made by the SCO, as well as the arguments articulated by the SCO, the privilege holders and the Witness over multiple filings and three hearings held during the past two weeks, the Court finds that the SCO has made a sufficient prima facie showing that the crime-fraud exception to the attorney-client and work-product privileges applies.”

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