

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| U.S. DEPARTMENT OF THE | |) | |
| TREASURY, | |) | |
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| Petitioner, | |) | |
| | |) | No. 1:12-mc-00100-EGS |
| v. | |) | |
| | |) | |
| PENSION BENEFIT GUARANTY | |) | |
| CORPORATION, | |) | |
| | |) | |
| Interested Party, | |) | |
| | |) | |
| v. | |) | |
| | |) | |
| DENNIS BLACK, <i>et al.</i> , | |) | |
| | |) | |
| Respondents. | |) | |
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PETITIONER'S RENEWED MOTION FOR STAY AND POINTS AND AUTHORITIES
IN SUPPORT THEREOF

MOTION

Petitioner U.S. Department of the Treasury (Treasury) hereby moves for an order staying the order dated June 7, 2017, ECF No. 53, pending adjudication of the appeal of that order and certain earlier orders that Treasury noticed by ECF No. 54 on June 12, 2017. Counsel for respondents Dennis Black, Charles Cunningham, Kenneth Hollis, and the Delphi Salaried Retiree Association advises that he opposes the stay that Treasury hereby seeks.¹

¹ This motion is styled as a renewed motion for stay to distinguish it from the motion for stay, ECF No. 46, filed by Treasury on April 28, 2017. That motion remains pending.

PROCEDURAL HISTORY

By memorandum opinion dated April 13, 2017, this Court held that 63 documents over which Treasury had asserted the presidential communications privilege were covered by the privilege but that respondents had made a showing of need for the documents sufficient to overcome the applicability of the privilege to the documents. ECF No. 45 at 10-11. By accompanying order dated April 13, 2017, the Court directed Treasury to produce the 63 documents to respondents. ECF No. 44 at 1. By order dated June 7, 2017, the Court modified the order dated April 13, 2017, by directing Treasury to produce to respondents “those portions of the [63] documents that relate to General Motors, Delphi Corporation, or the Pension Benefit Guaranty Corporation” and to make the production “by no later than June 30, 2017.” ECF No. 53 at 3. The order dated June 7, 2017, provides further that “the 63 documents shall remain under seal in Chambers” during “the pendency of any appeal,” *id.*, but does not make it clear whether the initiation of an appeal stays the obligation of Treasury to produce the redacted documents to respondents.

The 63 documents were prepared in connection with the effort of Treasury to determine in 2009 whether billions of additional taxpayer dollars should be invested in two insolvent corporations, General Motors and Chrysler. Except for anything in the documents that relates exclusively to Chrysler, everything in the documents relates in some way to General Motors, Delphi Corporation, or the Pension Benefit Guaranty Corporation. The order dated June 7, 2017, is thus an order that requires Treasury to produce to respondents all or nearly all of the text of the 63 privileged documents. Treasury has therefore appealed that order and certain earlier orders and now moves for a stay pending appeal.

ARGUMENT

TREASURY'S MOTION FOR A STAY SHOULD BE GRANTED.

Treasury's motion is governed by the four factors set forth in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The first of those factors is "whether [Treasury] will be irreparably injured absent a stay." *Id.* That factor favors the granting of Treasury's motion. Where, as here, an order directs an agency to produce privileged documents, compliance with the order "let[s] the cat out of the bag, without any effective way of recapturing it if the district court's directive [is] ultimately found to be erroneous." *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) (quoting *Irons v. FBI*, 811 F.2d 681, 683 (1st Cir. 1987)). Treasury's appeal of the order dated June 7, 2017 thereby will be harmed and the status quo "utterly destroy[ed]" if Treasury must "surrender" now the portions of the 63 documents encompassed by that order. *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). Indeed, the resulting harm to Treasury will be "irreparabl[e]." *Id.*

The second factor that governs Treasury's motion is "where the public interest lies." *Hilton*, 481 U.S. at 776. This factor likewise favors the granting of Treasury's motion. The presidential communications privilege is "inextricably rooted in the separation of powers under the Constitution and fundamental to the operation of government." *United States v. Nixon*, 418 U.S. 683, 708 (1974). Rooted in "constitutional separation of powers principles and the President's unique constitutional role," *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997), the presidential communications privilege protects the President's authority to make confidential decisions. The holding of this Court, ECF No. 45 at 10, that the presidential communications privilege covers the 63 documents means that the privilege "applies to [the] documents in their

entirety.” *Id.* The public thus has a substantial interest in avoiding the unwarranted disclosure of any portion of those documents.

The third factor that governs Treasury’s motion is whether the granting of the motion “will substantially injure [respondents].” *Hilton*, 481 U.S. at 776. This factor favors the granting of Treasury’s motion as well. Treasury argued in the motion for reconsideration that it filed pursuant to the minute order dated May 17, 2017, that respondents had failed to make a showing of need sufficient to overcome the applicability of the presidential communications privilege to the 63 documents. ECF No. 50-1 at 2. Respondents attempted to make such a showing of need in their opposition to Treasury’s motion, ECF No. 51 at 16-28, but did not succeed, as Treasury has demonstrated. ECF No. 52 at 2-7. The failure of respondents to make a showing of need sufficient to overcome the applicability of the presidential communications privilege to the 63 documents means that they will not be injured at all, let alone “substantially,” by the stay of the production of the documents that Treasury seeks by means of its motion.

In addition, the granting of Treasury’s motion “will be detrimental to [respondents] . . . only to the extent that it postpones the moment of disclosure – assuming [respondents] prevail[] – by whatever period of time may be required for [the court of appeals] – to hear and decide [Treasury’s] appeal[.]” *Providence Journal*, 595 F.2d at 890. Treasury remains open, as it has been in the past, *see* ECF No. 46-1 at 5, to minimizing the postponement of the “moment of disclosure” through the expedition of its appeal.

The fourth and final factor that governs Treasury’s motion is “whether [Treasury] has made a strong showing that [it] is likely to succeed on the merits” of its appeal. *Hilton*, 481 U.S. 776. This factor favors the granting of Treasury’s motion as well. The court of appeals should find that this Court did not apply the correct standard when it held, notwithstanding Treasury’s

motion for reconsideration, that respondents had made a showing of need sufficient to overcome the applicability of the presidential communications privilege to the 63 documents.² Moreover, the court of appeals should find that respondents do not have a need for the 63 documents sufficient to overcome the privilege and that, even if respondents' showing of need was sufficient to warrant this Court's *in camera* review of the documents, the definition of relevancy employed in that review was so broad as to negate the purpose of the review entirely.

CONCLUSION

Treasury asks for the foregoing reasons that its motion for stay be granted. Treasury also asks that its motion for stay be ruled upon by June 26, 2017, to permit the Government to seek a stay pending appeal from the court of appeals, if necessary, before the deadline for production under the order dated June 7, 2017. Treasury asks in the alternative that a temporary administrative stay be entered to permit the Government to seek a stay pending appeal from the court of appeals and that the temporary emergency stay be long enough to permit the Government to seek the stay pending appeal from the court of appeals on a non-emergency basis with full briefing.

² See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 384 (2004) (holding that “[t]he distinction [*United States v. Nixon*] drew between criminal and civil proceedings is not just a matter of formalism” and that “[t]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*”); *Sealed Case*, 121 F.3d at 754 (declining to read *Nixon* as holding that information covered by the presidential communications privilege “must be shown to be critical to an accurate judicial determination” because doing so would be “incompatible with the [*Nixon*] Court’s repeated emphasis on the importance of access to relevant evidence in a criminal proceeding”); *Senate Select Comm. on Pres. Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (holding that a congressional committee must show that material is “demonstrably critical” to the functions of the committee to overcome the presidential communications privilege).

Respectfully Submitted,

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s/ David M. Glass

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Dated: June 19, 2017

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2017, I served the within motion and the proposed order on all counsel of record by filing them with the Court by means of its ECF system.

s/ David M. Glass

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[PROPOSED] ORDER

Upon the renewed motion of petitioner U.S. Department of the Treasury (Treasury) for stay, the materials submitted in support of the motion and in opposition to the motion, and good cause having been shown, it is hereby ordered as follows:

1. Treasury's motion is granted.
2. The order dated June 7, 2017, ECF No. 53, is stayed pending adjudication of the appeal of that order and certain earlier orders that Treasury noticed by ECF No. 54 on June 12, 2017.

Dated: _____

UNITED STATES DISTRICT JUDGE