UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

v.

JEFFREY SEARLS, in his official capacity Acting Assistant Field Office Director and Administrator of the Buffalo Federal Detention Facility,

Respondent.

Case No. 1:19-cv-00370-EAW

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR LEAVE TO FILE SUBMISSION IN CAMERA AND EX PARTE

PRELIMINARY STATEMENT

The Court has asked government counsel to provide an explanation for serious apparent litigation misconduct. Specifically, Respondent's counsel told the Court, in response to direct questions, that it had turned over all responsive, exculpatory documents when it had not in fact done so, even though some of those documents were in counsel's possession. Indeed, Respondent's counsel proceeded to the very precipice of an evidentiary hearing with apparent personal knowledge of at least some of this exculpatory evidence, but only disclosed it after the hearing had been cancelled. This conduct cries out for explanation, and the Court has demanded one.

The government, however, would prefer to explain itself in private. It asks for this Court's permission to file its entire response both in camera and ex parte, which means that nobody other than the Court will learn any part of it. Petitioner opposes that blanket request. Both the public and Petitioner are owed an explanation for the government's actions. The

government contends that its filing will be "interspersed" with material covered by the attorney-client privilege or work product doctrine. But any departure from the strong presumption of openness and adversarial process must meet a stringent burden of justification. At minimum, the government should be required to submit a public version of its filing that only excises specific portions that are privileged. It can do so either by redacting its filing for public release or preparing a non-privileged summary. In addition, this Court should closely scrutinize any claims of privilege, particularly because lawyers may forfeit the ordinary protection of their work product when they engage in improper conduct that frustrates the adversary process that the work-product privilege is meant to serve.

ARGUMENT

Respondent's motion to file for the Court's eyes must be tested against the strong presumption of openness in our judicial system, as well as against the strong preference for adversarial process. Both the common law and the First Amendment protect the public right of access to judicial proceedings. *See MetLife, Inc. v. Financial Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017); *Lugosch v. Pyramid Co. of Onondaga County*, 435 F.3d 110, 119–20 (2d Cir. 2006).

The present sanctions proceedings—and the government's response to the Court's demand for an explanation—certainly engage the common law right of access, which applies to any court filing that is "relevant to the performance of the judicial function and useful in the judicial process." *Lugosch*, 435 F.3d at 119; *accord MetLife*, 865 F.3d at 666–69.The government's filing is also likely subject to the constitutional right of access, because it is "derived from or . . . a necessary corollary of" the public's ability "to attend the relevant proceedings." *Id.* at 120; *see also In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987)

("[T]he constitutional right of access [applies] to written documents submitted in connection with judicial proceedings that themselves implicate the right of access."). Here, the government's forthcoming filing derives from and will shed light on the public hearing of June 12, 2020, Dkt. No. 220, during which the government misrepresented that it had produced all responsive documents and at which the Court explicitly reserved decision on sanctions for non-disclosure of evidence.

When the First Amendment right applies, documents can be sealed (or filed in camera) only "if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Lugosch*, 435 F.3d at 120. Even if only the common law right applies, the Court must engage in a balancing analysis, first considering the "weight of [the] presumption" by examining "the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts," and then considering any "countervailing factors" against access. *Id.* at 119–20; *accord MetLife*, 865 F.3d at 665.[1]

The public's interest in access here is especially strong. The government's filing will explain how the government came to mislead the Court and failed to disclose exculpatory evidence to Petitioner in a case where it was invoking, for the first time, an extraordinary statutory power to detain a person indefinitely. This apparent misconduct raises grave questions about the candor of Respondent's counsel and/or their clients. It also goes to the integrity of the process the government deployed to invoke this controversial detention authority. Indeed, the

[1] The D.C. Circuit has articulated an explicit six-factor test to balance the competing interests. "Specifically, when a court is presented with a motion to seal or unseal, it should weigh: (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings." *MetLife*, 865 F.3d at 665 (internal quotation omitted).

government sat on undisclosed exculpatory evidence even while it argued to the Court that its factual conclusions were untouchable (a position the government *still* maintains) and that there should be no judicial examination whatsoever of its underlying evidence. *See also* Pet.'s Mem. Regarding Pet.'s Pending Motion for Sanctions at 4 & n.1, 8–12, Dkt. No. 274 (explaining the significance of the late-disclosed evidence regarding Ahmed Abdelraouf and Mohammed Al-Abed). The public is properly concerned to understand how this could have happened and what it means for the integrity of the Department of Justice and Department of Homeland Security officials involved.

On the other side of the ledger, the government contends that its filing will contain privileged material. But a claim of privilege, standing alone, does not necessarily defeat the public's right of access. *See Lugosch*, 435 F.3d at 125. Instead, the Court determines whether the claim of privilege is valid and then whether it is sufficiently compelling to overcome the public's right of access. *Id.* As discussed below, there is reason to believe that at least some of the claims of privilege here will not bear scrutiny. *See infra* 7–8.

Even if some material may be filed in camera, the government has no warrant to throw a blanket of secrecy over its *entire* filing. It must make its filing public to the greatest extent possible, whether through redaction of specific, privileged material or other means, such as preparing a separate public version. *See, e.g.*, *In re N.Y. Times*, 828 F.2d at 116. It is not enough to say, as the government does here, that redaction "would not be practical because the privileged information will be interspersed throughout Respondent's submission." Gov't Mem. at 2, Dkt. No. 283-1. Partially-sealed filings often contain redactions "interspersed" throughout.

The common law and First Amendment do not allow the government to brick up all the windows just because it would be easier than installing glass.[2]

The government's argument for ex parte submission is likewise overbroad and unwarranted. There remains a strong presumption in favor of adversarial proceedings. "As a general matter, reliance on ex parte submissions is disfavored." *Am. Civil Liberties Union v. Dep't of Def.*, No. 09-cv-8071, 2012 WL 13075286, at *1 (S.D.N.Y. Jan. 24, 2012); *accord Chekkouri v. Obama*, 158 F. Supp. 3d 4, 5–6 (D.D.C. 2016). That is especially true where ex parte material is submitted as factual evidence on the merits of a pending motion. This is not the familiar situation where a court adjudicates a discovery dispute by reviewing documents for privilege in camera. *See, e.g.*, Dkt. No. 108 (ordering Respondent to submit disputed documents for in camera review). Nor is this is a situation where "the government has made a demonstration of compelling national security concerns" or where "ex parte review is specifically contemplated by statute." *Chekkouri*, 158 F. Supp. 3d at 6. Instead, the government is asking the Court to rely on its ex parte submission to determine the facts relevant to Petitioner's sanctions motion and the Court's assessment of the government's apparent misconduct. The government bears a heavy burden in seeking to cut Petitioner out of that process—especially given that Petitioner has agreed to a protective order permitting attorneys'-eyes-only disclosures.

[2] It is unclear whether Respondent intends "in camera" filing to mean something different from ordinary filing under seal. Courts sometimes use the term "in camera" to refer to documents that are physically submitted to chambers for the Court's brief inspection—typically to adjudicate a discovery dispute—and then returned to the party without being docketed. *See In re The City of New York*, 607 F.3d 923, 948–49 (2d Cir. 2010). Indeed, in all of the cases the government cites regarding in camera review, the Court contemplated in camera review solely for the purpose of adjudicating whether a privilege properly applied in the first place. *See* Gov't Mem. at 2 (citing *In re The City of New York*, 607 F.3d at 948–49; *Estate of Fisher v. C.I.R.*, 905 F.2d 645 (2d Cir. 1990); *United States v. Zolin*, 491 U.S. 554 (1989)). That procedure would be completely inappropriate here, where the government's filing is meant to shape the factual findings of the Court on an important set of issues. The government's filing should be made part of the record, noted on the docket, and maintained by the Clerk in accordance with the Court's usual practice for sealed filings.

Contrary to the government's argument, Petitioner still has an important role and stake in this sanctions proceeding; Respondent is wrong to suggest that Petitioner's only remaining interest is an award of attorney's fees. Gov't Mem. at 2–3. Petitioner has a strong interest in understanding the apparent misconduct that tainted his detention and habeas litigation. He has an interest in ensuring that appropriate sanctions—including non-monetary sanctions—are imposed both as a means of redress and as a measure of accountability and deterrence.

Perhaps even more importantly, Petitioner has a role to play in developing the factual record for sanctions. Petitioner's counsel are privy to information about the government's conduct in this case, including numerous meet-and-confers, as well as the 20,000+ pages of discovery that are not in the record. Such information may well shed light on the government's explanations for its apparent misconduct. Secret, one-sided proceedings will frustrate the Court's effort to get to the bottom of what transpired here. Rather than file entirely ex parte, the government should to the greatest extent possible disclose a redacted or non-privileged summary of its filing to Petitioner or, at minimum, to Petitioner's counsel. *Cf.* Case Management Order, *In re: Guantanamo Bay Detainee Litig.*, No. 08-mc-0442, 2008 WL 4858241, at *2 (D.D.C. Nov. 6, 2008) (generally requiring the government to provide even classified information to a detainee's counsel and, at minimum, an "adequate substitute" to the detainee himself, in the context of Guantanamo Bay habeas proceedings).

The government's proposal to file in camera, ex parte may also interfere with the Court's ability to fashion appropriate remedies. Petitioner has sought public sanctions such as admonishments, censure, or reprimands that address misconduct either by counsel or agency officials. The purpose of such relief is, in part, to spell out what people did wrong in order to deter future violations. That almost certainly will require explaining what led the government to

violate its obligations. And, indeed, making public findings about what went wrong is an important part of the remedies the Court may wish to order. If the government's explanation for its apparent misconduct is sealed up in chambers, the Court will be hamstrung in fashioning appropriate relief.

To the extent that the Court permits Respondent to file in camera or ex parte on the basis of asserted privileges, Petitioner asks the Court to carefully scrutinize the government's claims to determine if the asserted privileges actually apply, whether they are overcome by countervailing considerations, and whether they are sufficient to defeat the presumption of openness. Respondent asserts, in general terms, that its filing will contain attorney-client privileged communications "between government counsel and agency employees" "explaining how and when documents were discovered," as well as work-product privileged material disclosing "the mental processes of counsel" that may explain "why certain documents were or were not produced at a particular juncture in the litigation." Gov't Mem. at 1-2. But there is reason to believe that at least some of the government's submission may not be privileged. For example, the internal actions or discussions among agency officials with custody of documents may not be not privileged unless perhaps counsel was directly involved. Similarly, if agency officials took unilateral actions that impeded disclosure, that would not likely be privileged either.[3]

In addition, Respondent's counsel's explanations for why they misled the Court on June 12, 2020, by stating that all documents had been disclosed—even though undisclosed information was in their own files—may not qualify for work product protection. Whatever was

[3] Descriptions of agency officials' action to gather and review records are not privileged. Respondent previously filed public declarations describing aspects of its investigation and searches for records without claiming privilege. *See* Dkt. Nos. 184-6, 184-7, 184-8. In other contexts, such as Freedom of Information Act litigation, government officials routinely describe the detailed steps they take to gather, review, and disclose documents. *See, e.g.*, *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 231, 246 (D. Conn. 2012).

going through counsel's mind at that moment and in the days and weeks thereafter (until the documents were disclosed) may not be within the "zone of privacy" that the work-product privilege protects so that "a lawyer can prepare his case free of adversarial scrutiny." *Moody v. IRS*, 654 F.2d 795, 800 (D.C. Cir. 1981). "[T]he courts have stressed that the privilege is 'not to protect any interest of the attorney, who is no more entitled to privacy or protection than any other person.'" *Id.* (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980)). Instead, "[t]he rule is intended to protect the privacy of litigants and their representatives only insofar as their conduct does not erode the integrity of the adversary process." *State of N.Y. v. Solvent Chem. Co.*, 166 F.R.D. 284, 289 (W.D.N.Y. 1996). Where a party engages in misconduct, the Court may therefore consider "all the circumstances of the case" to determine that the work product protection does not apply. *Moody*, 654 F.2d at 801.

Petitioner of course has not seen any version of Respondent's filing or any detailed justification for claims of privilege. Petitioner is thus not in a position to argue the merits of any specific assertion of privilege. Petitioner reserves the right to challenge specific claims, and asks the Court require Respondent to provide a more detailed justification for its privilege claims to facilitate both the Court's and Petitioner's ability to assess them.

CONCLUSION

For these reasons, Petitioner asks the Court to deny Respondent's motion to the extent that it seeks permission to file a response entirely under seal and instead to order Respondent to publicly file a redacted or non-privileged version of its filing. Petitioner further asks the Court to carefully scrutinize Respondent's claims of privilege and to require Respondent to provide a more detailed justification for its specific assertions of privilege for the benefit of the Court and Petitioner.

Respectfully submitted,

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