

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN THE MATTER OF THE SEARCH OF
THE FORENSIC COPY OF THE CELL
PHONE OF REPRESENTATIVE SCOTT
PERRY

Case No. 22-sc-2144

Chief Judge Beryl A. Howell

MEMORANDUM AND ORDER

In two Minute Orders issued in this sealed docket on February 23, 2023, and February 24, 2023, the Court directed the parties in this matter—the government and Congressman Scott Perry (“Rep. Perry”)—to explain why redacted versions of the judicial records should not be unsealed, in light of the facts that the D.C. Circuit held oral argument open to public, in part, on February 23, 2023 regarding Rep. Perry’s appeal of the Court’s Order Granting in Part and Denying in Part Rep. Perry’s Motion for Nondisclosure, ECF No. 24 (SEALED), and that redacted versions of opinions and orders have been released to certain members of the House of Representatives and the General Counsel and associated staff in the House of Representatives, pursuant to an order permitting such limited disclosure, Amended Order at 2-3, ECF No. 38 (SEALED). *See* Minute Order (Feb. 23, 2023) (SEALED); Minute Order (Feb. 24, 2023) (SEALED) (requesting the parties to address specifically why the judicial records should not be unsealed pursuant to “the common law right of public access to judicial records under the factors set out in *United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir. 1980)”).

The parties responded to the Minute Orders in a joint status report, *see* Parties’ Joint Status Report, ECF No. 40 (SEALED), but took different positions. The government agrees that the redacted versions of certain judicial records already released to members of the House of Representatives and the General Counsel and associated staff in the House of Representatives

“may now be made public,” given public disclosure of facts regarding this matter to the public. *Id.* at 1. At the same time, the government emphasizes “that fully unredacted copies of the documents should not be made publicly available” because “[p]ublic dissemination of completely unredacted documents could impair the Government’s investigation by revealing aspects of the investigation that have not been made public.” *Id.* Meanwhile, Rep. Perry opposes release of even the redacted versions of the judicial records due to concern such release “would severely prejudice him.” *Id.* at 3.

The redacted judicial records already disclosed to certain members of the House of Representatives and the General Counsel and associated staff in the House of Representatives are: (1) Redacted November 4, 2022, Memorandum Opinion and Order, ECF No. 41; (2) Redacted November 28, 2022, Order, ECF No. 42; (3) Redacted December 28, 2022, Memorandum Opinion, ECF No. 43; and (4) Redacted January 4, 2023, Memorandum Opinion.

The Court is persuaded that unsealing of these judicial records in redacted form is justified under the common-law right of public access to judicial records, pursuant to the factors set out in *Hubbard v. United States*. See also *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017) (listing *Hubbard* factors as follows: (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.). As the Supreme Court has instructed, “the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the

particular case,” *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978), and those relevant facts and circumstances here militate in favor of releasing these redacted judicial records.

The first *Hubbard* factor—the need for public access to the materials at issue—weighs heavily in favor of releasing the judicial records in this matter. The powerful public interest in accessing these judicial records cannot be understated. They concern the scope and applicability of the Speech or Debate Clause of the U.S. Constitution to records seized on the cell phone of Rep. Perry, in connection with an ongoing investigation of potential federal criminal law violations stemming from efforts to overturn the 2020 presidential election. *See In re Los Angeles Times Commc'ns LLC*, 28 F.4th 292, 298 (D.C. Cir. 2022) (noting, in applying *Hubbard* factors, the “powerful public interest in learning of a sitting Senator’s potential violation of insider-trading laws based on information acquired in his official capacity”).

The second *Hubbard* factor—the extent of previous public access to the judicial records—also weighs in favor of disclosure. The D.C. Circuit just yesterday held oral argument open to the public, in part, on Rep. Perry’s appeal of this Court’s Order, and, further, redacted versions of the opinions and orders in question have already been released to certain members of the House of Representatives and the General Counsel and associated staff in the House of Representatives to facilitate the participation of the House in Rep. Perry’s pending appeal to the D.C. Circuit. *See* Amended Order at 2-3. The significant disclosure to multiple people of these redacted judicial records thus weighs in favor of disclosure.

The third, fourth, and fifth *Hubbard* factors—which essentially “ask variations of the same question: to what extent harm to legitimate interests, including privacy or law enforcement interests, would result from unsealing,” *In re Los Angeles Times Commc'ns LLC*, No. MC 21-16 (BAH), 2022 WL 3714289, at *7 (D.D.C. Aug. 29, 2022) (cleaned up)—do not weigh against

disclosure. To be sure, the judicial records at issue do provide some information about the contents of Rep. Perry's communications, but the specifics of those responsive records are redacted. Similarly, any specific details concerning the government's investigation, such as discussions of the D.D.C. Warrant, have been redacted, *see, e.g.*, Mem. Op. at 2. n.2, mitigating concerns that disclosure of these judicial records in redacted form would pose harm to the government's ongoing investigation, beyond what has already been the focus of intense media attention. *Cf. In re Los Angeles Times*, 2022 WL 3714289, at *7 (adopting certain "proposed redactions" by the government "because they detail identifying information about third parties and their contributions to the investigation and related law enforcement techniques and processes, the release of which poses significant risk of triggering the harms highlighted by [the Department of Justice]"). Moreover, while the Court is mindful of Rep. Perry's concern that release of the judicial records, even in redacted form, may result in prejudice to him, *see* Joint Status Report at 3–4, the problem with Rep. Perry's argument is that the facts surrounding these judicial records have already been disclosed to the public in the D.C. Circuit's partially open argument yesterday. Moreover, at Rep. Perry's request, the House's intervention into Rep. Perry's appeal of the Order resulted in the release of the redacted judicial records to several other Members of Congress and the House General Counsel's Office. Public release of these redacted judicial records would result in no additional prejudice to Rep. Perry and, if at all, provide greater context to the public.

For the foregoing reasons, it is hereby:

ORDERED that the Clerk of the Court promptly make publicly available by posting on the Court's website the following: (1) the Redacted November 4, 2022, Memorandum Opinion and Order, ECF No. 41; (2) the Redacted November 28, 2022, Order, ECF No. 42; (3) the Redacted December 28, 2022, Memorandum Opinion, ECF No. 43; and (4) the Redacted January 4, 2023,

Memorandum Opinion and Order, ECF No. 44 (collectively, the “Redacted Records”); and this Memorandum and Order; it is further

ORDERED that the parties, **by April 25, 2023**, submit a joint status report to the Chief Judge of this Court, advising the Court whether the Redacted Records be further unsealed, in whole or in part.

SO ORDERED.

Date: February 24, 2022



Beryl A. Howell

BERYL A. HOWELL
Chief Judge