IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE: GRAND JURY INVESTIGATION OF KENNETH PAXTON, et al.,	§ § §	No. 5:20–CR–496–DAE **FILED UNDER SEAL**

ORDER GRANTING IN PART AND DENYING IN PART
SEALED MOTION FOR RELIEF

Before the Court is a Sealed Motion for Relief from the Court's Sealed Order dated October 26, 2020 (the "10/26/2020 Order"), filed by Movant, the Office of the Attorney General of the State of Texas[1] ("OAG" or "Movant") on June 7, 2021. (Motion.) Appended to the Motion are ten exhibits, also filed under seal. (OAG Exhs. 1–10.) On June 10, 2021, the Court ordered the United States Attorney's Office for the Western District of Texas ("USAO") to respond. On June 21, 2021, the USAO timely responded. (Response.) Alongside the Response, the USAO filed eight exhibits under seal (USAO Exhs. A–H), as well as one *ex*

[1]Although the briefing labels suggest otherwise, the Court notes that the Office of the Attorney General (the entity)—not the Attorney General himself (the elected official)—is the party seeking relief in the instant Motion. OAG has given mixed signals regarding when, if ever, it believes the entity and the elected official should be considered separate. (Compare OAG Ex. 9 at 12–14 (transcript pagination) (distinguishing the entity and the elected official to set up argument for dismissing civil lawsuit), with Motion at 1, n.1 (arguing that "there is no such entity [(OAG)] separate and apart from the Attorney General").) At least for this matter, they are not the same. (See Response at 1 ("OAG as an entity is not a target of the inquiry.").)

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parte exhibit under seal (USAO Exh. I).[2] On June 24, 2021, the Court granted OAG leave to file a Reply. On June 30, 2021, OAG filed a Reply, with ten additional exhibits. (Reply; Reply Exhs. 1–10.) Upon thorough review of the evidence, the Court finds a hearing would be unnecessary to resolve the issues presented in the Motion, and thus **DENIES** OAG's request for a hearing. After careful consideration of the relevant memoranda, the Court **GRANTS IN PART AND DENIES IN PART** the Motion, as explained below.

BACKGROUND

The Federal Bureau of Investigation ("FBI") and the USAO are investigating several potential federal crimes involving Ken Paxton ("Paxton"), the Attorney General of the State of Texas, and others, including: (1) obstruction of justice, in violation of 18 U.S.C. § 1512; (2) retaliation against witnesses, in violation of 18 U.S.C. § 1513; (3) bribery, in violation of 18 U.S.C. § 666;

[2] It is beyond dispute that the Court has the power to review this evidence from the USAO without disclosing it to OAG. In re John Doe, Inc., 13 F.3d 633, 636 (2d Cir. 1994) ("[W]here *in camera* submission is the only way to resolve an issue without compromising a legitimate need to preserve the secrecy of the grand jury, it is an appropriate procedure."); In re Grand Jury Proceedings, Thursday Term Special Grand Jury Sept. Term, 1991, 33 F.3d 342, 350–52 (10th Cir. 1994); In re Grand Jury Proceedings, 867 F.2d 539, 540–41 (9th Cir. 1989); In re Grand Jury Subpoena, 884 F.2d 124, 126–27 (4th Cir. 1989) (collecting cases). To preserve the integrity of this grand jury investigation, the Court intentionally avoids discussing the specific contents of USAO Exhibit I, the USAO's sealed *ex parte* affidavit from FBI Special [redacted] which describes some of the fruits of this investigation.

(4) honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346; and (5) conspiracy to commit the four aforementioned offenses, in violation of 18 U.S.C. § 371. (Response; see generally USAO Exh. I.) This grand jury investigation ("Instant Federal Investigation") concerns Paxton's alleged use of his official position and power within OAG to benefit his associate and campaign donor, Natin "Nate" Paul ("Paul"), who is himself the target of a separate, ongoing federal grand jury investigation ("Pre-existing Federal Investigation"), as well as Paxton's purported efforts to thwart both the Pre-existing and Instant Federal Investigations. (Id.)

The briefing on the instant Motion highlights four instances in which the USAO alleges Paxton took official actions on Paul's behalf.[3] (See Response; USAO Exh. I.) First, in August 2019, FBI agents executed a federal search warrant at Paul's home and office pursuant to warrants issued by a federal magistrate judge in the Western District of Texas. (See OAG Exh. 2.) The USAO alleges that in April or May 2020, Paxton directed his staff to find a way to release

[3] The parties are reminded that this is a federal grand jury investigation—not a criminal jury trial, nor a continuation of the separate civil lawsuit brought by OAG's former employees in state court. (See OAG Exh. 9.) Grand juries investigate possible criminal activity. In re Grand Jury Proceedings, 607 F. Supp. 2d 803, 806 (W.D. Tex. 2009) (citing United States v. R. Enters., Inc., 498 U.S. 292, 297–98 (1991)). They do not decide ultimate criminal or civil liability. Matters of privilege may present adversarial issues for the Court in grand jury investigations, but the Court will not conduct a "preliminary minitrial" at this stage. See In re Grand Jury Subpoenas, 144 F.3d 653, 662 (10th Cir. 1998).

documents—including a sealed search warrant affidavit and law enforcement operational plan—from that search to Paul, pursuant to the Texas Public Information Act. Second, in June 2020, Paxton opened a state criminal investigation of several federal law enforcement authorities involved, in various capacities, in the Pre-existing Federal Investigation, and hired Brandon Cammack ("Cammack"), a 34-year-old Houston-based defense attorney, as an "outside independent prosecutor." (See USAO Exhs. A, C, D.) Under Paxton's supervision, Cammack allegedly used a Travis County grand jury to subpoena telephone and email records of confidential sources who had provided evidence against Paul for the Pre-existing Federal Investigation, and sought similar information from Paul's civil litigation opponents and various federal authorities. Third, in June or July 2020, Paxton purportedly directed his employees at OAG to have the agency intervene in litigation between Paul, World Class Holdings ("WCH") (Paul's entity), and the Roy F. and Joann Cole Mitte Foundation ("Mitte Foundation") (a charitable foundation), and to take actions in that lawsuit that would favor Paul and his entity. Fourth, the USAO alleges that in July 2020, Paxton successfully directed OAG employees to issue official guidance limiting the sale of foreclosed properties, again benefitting Paul, whose entity (WCH) had properties set for public auction shortly after the guidance was issued.

On October 26, 2020, after reviewing evidence submitted by the USAO, the Court issued the 10/26/2020 Order, authorizing the USAO to take additional investigative steps with respect to four categories of information regarding these specific allegations. (OAG Exh. 1.) The categories were:

1) Complaints made by Nate Paul and referred by Texas Attorney General Ken Paxton to the Travis County District Attorney's Office on or about June 10, 2020 and September 23, 2020, and any steps subsequently taken by Attorney General Paxton, employees of the Office of the Texas Attorney General, or outside counsel in relation to those complaints.

2) Actions contemplated or undertaken by the Office of the Texas Attorney General which may have come at the request of Nate Paul, or benefited, financially or otherwise, Nate Paul or any entity associated with Nate Paul, including, but not limited to:

   a. Actions contemplated or undertaken by the Office of the Texas Attorney General with respect to litigation between the Mitte Foundation and Nate Paul or any entity associated with Nate Paul.

   b. Requests received and actions contemplated or undertaken by the Office of the Texas Attorney General related to requests by Nate Paul for formal or informal opinions or guidance on the release of federal search warrant materials through the Texas Public Information Act.

   c. Requests received and actions contemplated or undertaken by the Office of the Texas Attorney General related to requests for formal or informal opinions or guidance on limitations of the sale of foreclosed properties while COVID-19 restrictions were in place.

3) The relationship, association, and communications between Texas Attorney General Ken Paxton and Nate Paul or persons and entities associated with Nate Paul.

4) Any actions or communications contemplated or undertaken by the Office of the Texas Attorney General, Texas Attorney General Ken Paxton, or senior executive staff of the Office of the Texas Attorney General to interfere in or obstruct the current Federal investigation into the matters listed in Nos[.] 1–3.

(Id.) The Court further noted

> that any information relating to the four topics identified above [is] not protected from the government's grand jury investigation by the attorney-client privilege. And even if the privilege applied, the crime-fraud exception to the attorney-client privilege obviates any applicable privilege as to any information relating to the four topics identified above.

(Id.) Finally, the Court authorized the federal government "to gather historical evidence and engage in proactive investigative steps relating in any way to the four topics identified above in accordance with this [O]rder and any other applicable federal law." (Id.) The Order was sealed, as is appropriate to preserve the secrecy of the grand jury investigation. (Id.)

On December 9, 2020, the USAO served a subpoena on OAG (the "12/9/2020 Subpoena"), demanding "all records, documents, communications and tangible materials, for the time period October 29, 2018 to present" relating to the four categories previously identified. (OAG Exh. 4.) Although the Court had authorized it to present a copy of the 10/26/2020 Order to witnesses or counsel for witnesses during its investigation, the USAO elected not to alert the USAO to the existence of the 10/26/2020 Order at that time. (Motion; see also OAG Exhs. 4, 5.)

Instead, the USAO asked OAG to assemble a privilege log with the following information regarding each record:

> (1) its date; (2) the name and title of its author(s); (3) the name and title of each person to whom it was addressed, distributed, and disclosed; (4) the number of pages; (5) an identification of any attachments or appendices; (6) a general description of its subject matter; (7) its present location and the name of its present custodian; (8) the paragraph of this subpoena to which it is responsive; and (9) the nature of the claimed privilege or other reason the document is withheld.

(OAG Exh. 4.) On January 20, 2021, OAG timely produced its privilege log to the USAO, asserting privilege over 779 responsive documents, along with an initial production of admittedly non-privileged documents. (See OAG Exh. 5.)[4]

On January 24, 2021, the USAO showed OAG the Court's 10/26/2020 Order—an authorized disclosure of that Order—and "request[ed] immediate production of these [779] documents because a federal court has already ruled that these responsive document are not protected by privilege." (OAG Exh. 5.) In the letter advising OAG of the Order, the USAO demanded: "Due to the time sensitive nature of this matter, the United States requests production or OAG's refusal to fully comply with the subpoena by close of business on January 27, 2021." (Id.)

[4] OAG did not produce that privilege log or any of its purportedly privileged documents for *in camera* review with the instant Motion. Perplexingly, in Exhibit 2 attached to its Reply, OAG claims these 779 documents have been "produced for the Court's review." (Reply Exh. 2.) The Court has not received these 779 documents or the privilege log. While OAG correctly argues that the USAO bears the burden of proving the applicability of the crime-fraud exception, it is *OAG* that *first* bears the burden of proving a document is privileged prior to any such inquiry.

In response, OAG tried to have its cake and eat it, too. (OAG Exh. 7.) Notably, OAG declined to seek relief from the Court from the 12/9/2020 Subpoena in that three-day window, instead informing the USAO that OAG "intend[ed] to fully cooperate with the grand-jury subpoena and with this [C]ourt's orders. Accordingly, and as ordered, we are today producing to the FBI all documents previously withheld as privileged." (Id.) At the same time, OAG asserted that "[t]his production should not be construed as a waiver by the Office of the Attorney General of the privileges previously asserted regarding these documents." (Id.) OAG did not inform the USAO of its refusal to comply or move the Court for relief prior to filing the instant Motion. (OAG Exhs. 5, 7.) OAG's decision to provide responsive documents to the USAO was perhaps rushed but voluntary, nonetheless.

Separately, on December 16, 2020, the USAO issued a grand jury subpoena to Cammack, also seeking information covered by the 10/26/2020 Order. On January 20, 2021, Cammack objected to fully complying with that subpoena, citing privilege objections from OAG. (USAO Exh. D.) First Assistant Attorney General Brent Webster ("Webster") told Cammack and his counsel in October and November 2020 to "assert any applicable privileges arising from the attorney-client relationship [between OAG and Cammack] in response to third-party discovery requests from pending civil litigation *and any ongoing*

federal criminal investigation." (Id. (emphasis added).) Similar to how OAG equivocated in response to the 12/9/2020 Subpoena, Webster and OAG General Counsel Austin Kinghorn ("Kinghorn") informed Cammack of their objection to disclosing attorney-client privileged documents, but OAG also opted not to file a motion to quash the USAO's subpoena to Cammack. (Id.) By contrast, OAG ***did*** file such a motion in civil litigation between Paul, WCH, and the Mitte Foundation to keep Cammack from testifying about the same relationship and contacts.[5] (USAO Exh. E.) The USAO has submitted evidence to suggest that during Paul's own deposition in that same private litigation, Webster instructed Paul to cite the law enforcement investigative privilege in response to questions about his relationship with Paxton and the hiring of Cammack. (USAO Exh. F at 195–97.)

OAG has made multiple productions of responsive documents to the USAO, and faces ongoing production obligations related to the 10/26/2020 Order. (See Motion at 3–4; Response at 28; Reply at 10.) On June 7, 2021, OAG asked the Court to rescind or modify its 10/26/2020 Order, and provide it with avenues for protecting its allegedly privileged records from past and future production obligations, among other relief. This Order addresses that Motion.

[5] Perhaps implicitly, OAG's actions acknowledge the difference between asserting its privilege claims in civil litigation and asserting them in the instant federal criminal investigation involving the official acts of the head of OAG. See infra Discussion.

DISCUSSION

In the instant Motion, OAG seeks wide-ranging relief. Specifically OAG asks the Court to: (1) rescind or modify its 10/26/2020 Order; (2) "order the USAO to return any privileged documents obtained from the OAG (or any current or former employees) and destroy any such documents in its custody, control or possession"; (3) "allow the OAG to be present (through counsel) in any interview involving the OAG's current or former employees so that the OAG may raise any privilege objections and seek the Court's intervention as appropriate"; and (4) in the alternative, "unseal or disclose to OAG the Federal Government's original motion [that led to the 10/26/2020 Order] to allow OAG to provide a more fulsome response." (Motion at 30.) In its Reply, OAG clarifies that the relief it seeks "is not merely tied to its response to [the 12/9/2020 S]ubpoena," but also the USAO's continued use of the 10/26/2020 Order to obtain materials OAG claims are privileged "based on *other* subpoenas or requests for interviews[.]" (Reply at 2.)

The Court construes OAG's Motion as a motion: (1) to reconsider the 10/26/2020 Order and/or quash investigative demands issued based on that Order, (2) for leave to file a ***proper*** motion to quash the required productions rooted in that Order,[6] and (3) for miscellaneous relief described below.

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[6] See Reply at 2 ("OAG did not style its motion as a motion to quash the [12/9/2020 Subpoena] because OAG seeks relief that is not merely tied to its response to that subpoena.").

I. Legal Framework

1. Motion to Reconsider the October 26, 2020 Order

There is no federal rule of criminal procedure or statute that authorizes motions to reconsider in criminal cases, but such motions are routinely accepted as a common-law practice. United States v. Salinas, 665 F. Supp. 2d 717, 720 (W.D. Tex. 2009) (citing United States v. Brewer, 60 F.3d 1142, 1143 (5th Cir. 1995). Federal courts have borrowed different reconsideration standards from the civil context to adapt to various criminal contexts. See generally United States v. Preston, Case No. 3:19-cr-651-K, 2020 WL 1819889, at *2–*3 (N.D. Tex. Apr. 11, 2020) (discussing reconsideration standards in the criminal context before adopting the "as justice requires" standard for reviewing detention decision). Compare Salinas, 665 F. Supp. 2d at 720 (adopting the stricter standard "to correct manifest errors of law or fact or to present newly discovered evidence" for a motion to suppress decision), with United States v. Bruhl-Daniels, Case No. H-18-199-5, 2020 WL 7632258, at *2 (S.D. Tex. Dec. 21, 2020) (applying the broader "as justice requires" standard attributed to Federal Rule of Civil Procedure 54(b) for reconsideration of interlocutory criminal decisions).

Because the 10/26/2020 Order was (appropriately) issued without prior adversarial arguments when first considered, the Court finds the lower standard—"as justice requires"—more appropriate for the instant Motion, to the

extent it constitutes a motion to reconsider.[7] See Salinas, 665 F. Supp. 2d at 720 (justifying decision to apply the higher standard "to discourage litigants from making repetitive arguments on issues already considered").

2. Motion to Quash or Modify Subpoena

A grand jury subpoena may only be quashed "[o]n motion made promptly . . . if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). "[T]he grand jury's subpoena power is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." United States v. Calandra, 414 U.S. 338, 346 (1974); see Fed. R. Evid. 1101. At the same time, "[a] grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991) (quoting Branzburg v. Hayes, 408 U.S. 665, 701 (1972)) (internal citation and quotation marks omitted).

There is a strong presumption of legitimacy accompanying grand jury actions. "[A] grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the

[7] Of course, adopting this standard does not foreclose reconsideration based on the particular bases identified under the alternative standard. On the contrary, those circumstances may present instances in which justice requires reconsideration.

recipient who seeks to avoid compliance." Id. at 301. "A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." Branzburg, 408 U.S. at 701 (internal quotation omitted). "As a necessary function of its investigatory function, the grand jury paints with a broad brush." R. Enters., 498 U.S. at 297.

Grand jury subpoenas "must also properly identify or describe the documents requested." In re Grand Jury Proceedings, 601 F.2d 162, 168 (5th Cir. 1979) (citing Okla. Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946)). "And while the duty [to comply with a subpoena] may be 'onerous' at times, it is 'necessary to the administration of justice.'" United States v. Dionisio, 410 U.S. 1, 10 (1973) (quoting Blair v. United States, 250 U.S. 273, 281 (1919)). "[W]hat is reasonable depends on the context." R. Enters., 498 U.S. at 299 (quoting New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)). "In short, the imposition of some burden does not invalidate a subpoena. All subpoenas have this effect, at least to some extent." In re Grand Jury Investigation, John Doe 1078, 690 F. Supp. 489, 492 (E.D. Va. 1988). "The question is whether the burden is excessive in the circumstances." Id. at 493.

II. Analysis

For reasons described below, the Court **DENIES** the Motion, to the extent OAG seeks complete revocation or structural modification of the 10/26/2020 Order, or the return of any documents or other evidence already produced to the USAO by any party. OAG has not convinced the Court that justice requires reconsidering the Order or clawing back any documents already produced. As explained below, OAG's privilege assertions are, in some cases, too abstract, and in others, highly speculative. Moreover, OAG failed to promptly intervene in this matter to assert its privilege protections for any productions to the USAO to date. OAG has presented no viable basis for clawing back records voluntarily produced thus far. This is particularly true in light of the USAO's robust—and justified—interest in relying on OAG's productions in response to grand jury subpoenas and other litigation requests.

Nevertheless, the Court **GRANTS** OAG's Motion to the extent it seeks an opportunity to raise privilege objections to ***particular*** documents ***not yet produced***, if those documents would otherwise be responsive to one or more of the categories identified in the Court's 10/26/2020 Order. If OAG seeks to meet its privilege burden, it must file an appropriate and timely[8] motion to quash under Rule 17(c)(2), with affidavit or other evidentiary support sufficient to justify a

[8] See infra Conclusion.

viable invocation of privilege with respect to each allegedly privileged document, and comply with all other requirements specified later in this Order. The Court may find *in camera* review appropriate to make a privilege or crime-fraud exception determination, and—with or without such review—may order the record be produced or withheld based on the support particular to that document.

Moreover, while rejecting OAG's invitation to revoke or modify the 10/26/2020 Order, the Court sets out a framework for the types of privilege claims OAG may properly assert in a subsequent motion to quash, noting that many privilege claims are likely foreclosed in this grand jury matter based on the *prima facie* evidence provided by the USAO to support the grand jury's investigative power. This Order also sets forth the procedures and timelines OAG must follow, if it seeks relief regarding any yet-to-be-produced documents related to the 10/26/2020 Order. If OAG fails to abide by those requirements, it must immediately produce all outstanding, withheld documents responsive to investigative demands already made based on the 10/26/2020 Order.

Finally, the Court **DENIES** OAG's request to disclose the USAO's sealed *ex parte* application and evidence that led to the 10/26/2020 Order for OAG's rebuttal, as well as OAG's request to have counsel present at voluntary interviews in which its current and former employees may participate with the FBI. The Court **DENIES WITHOUT PREJUDICE** OAG's request for a Rule 502(d)

protective order over its productions. Regardless of whether such a protective order is in place, the standard grand jury secrecy rules govern this matter by default and protect OAG's disclosures to some degree. See Fed. R. Crim. P. 6.

1. Attorney-Client Privilege and Work Product Doctrine

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications." Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). This privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of the law and the administration of justice." Id. Nevertheless, privileges are exceptions to the demand for "every man's evidence," and are "not lightly created nor expansively construed, for they are in derogation of the search for truth." In re a Witness Before the Special Grand Jury 2000-2, 288 F.3d 289, 291 (7th Cir. 2002) ("Ryan") (citing United States v. Nixon, 418 U.S. 683, 710 (1974)). The attorney-client privilege protects communications made in confidence by a client to his attorney for the purpose of obtaining legal advice. King v. Univ. Healthcare Sys. L.C., 645 F.3d 713, 720 (5th Cir. 2011). The party invoking the privilege bears the burden of proving its applicability. Id. at 720–21.

Ordinarily, "[t]he objectives of the attorney-client privilege apply to governmental clients." United States v. Jicarilla Apache Nation, 564 U.S. 162, 170

(2011). The Supreme Court of the United States has noted that, "in civil litigation," the privilege applies with equal force to clients that are government agencies. Id. But this is not civil litigation. This is not the first time that a federal grand jury investigation has sought allegedly privileged documents from a separate governmental entity. Several circuit courts have considered whether government clients should be treated the same as private clients for purposes of the attorney-client privilege in grand jury investigations, including one since the Supreme Court's Jicarilla Apache Nation decision. In the majority of prior cases, courts have vitiated the attorney-client privilege and work product doctrine to make way for the public's interest in a thorough investigation. Ryan, 288 F.3d 289; In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997); In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998); but see In re Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005). This is especially true when the grand jury investigation pertains to wrongdoing by government agents.

Most recently, the First Circuit held that a state *could* viably assert the privilege in response to a grand jury subpoena. In re Grand Jury Subpoena, 909 F.3d 26, 30–32 (1st Cir. 2018). However, the First Circuit was faced with a different question than this Court. In that case, "the United States made no attempt to persuade the district court that the grand jury's subpoena [wa]s targeted at wrongdoing by government officials themselves." Id. at 32. Moreover, the First

Circuit went out of its way to distinguish the instant factual situation from its holding. Id. at 31–32 ("On the other hand, the United States' argument gathers much more force when the federal grand jury is investigating potential crimes that state officials or employees may have committed themselves."). In other words, the First Circuit held that it is not sufficient to negate the state government's attorney-client privilege for the investigators to simply be seeking evidence of *any* crime in a grand jury investigation; they must be seeking evidence of a crime ***committed by state officials***. Id. Here, the USAO legitimately seeks evidence of a crime committed by one or more state officials at OAG.

"The government attorney-client privilege has no [] deep historical roots." Ryan, 288 F.3d at 292. And there is "no clear principle that the government attorney-client privilege has as broad a scope as its personal counterpart." In re Lindsey, 158 F.3d at 1272. A government agency's attorney-client privilege arguments for withholding documents from a grand jury fall flat when submitted to impede an investigation into the agency's head. See In re Grand Jury Subpoena, 909 F.3d at 31–32. Most relevant to the instant case, in Ryan, the Seventh Circuit rejected attorney-client privilege claims from the Chief Legal Counsel of the Illinois Secretary of State's office in response to a federal investigation of Illinois Governor George Ryan. Ryan, 288 F.3d at 292–95. That court held that, "when another government lawyer requires information ***as part of***

a criminal investigation, the public lawyer is obligated not to protect his governmental client but to ensure its compliance with the law." Id. at 293 (emphasis added). "It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power." Id. Government lawyers have different responsibilities and obligations from those faced by members of the private bar. Id. Compensated by the State and the public fisc, government attorneys "have a higher, competing duty to act in the public interest" under the circumstances at hand. Id. While there is a public interest in facilitating frank discussion between government officials and government attorneys, when the wrongdoing of such officials is the subject of a legitimate grand jury investigation, the privilege cannot stand in the way of the truth. See id.

OAG has no valid claim for attorney-client privilege to avoid complying with subpoenas rooted in the Court's 10/26/2020 Order, such as the 12/9/2020 Subpoena, or for any other reasonable, authorized demand from the USAO for this grand jury investigation. There is no basis for disturbing the 10/26/2020 Order based on the purported applicability of this privilege. And if OAG elects to file a motion to quash based on outstanding or future investigative demands rooted in the 10/26/2020 Order, it cannot base its non-compliance on the

attorney-client privilege.[9] OAG contends that the 10/26/2020 Order was too broad, perhaps even authorizing the USAO to seek documents such as drafts of the instant Motion. That is not the case. Such a document prepared for litigation might properly be withheld under the work product doctrine.[10] However, there is no evidence suggesting that the USAO has actually demanded such information. (See OAG Exhs. 4, 5.)

OAG has failed to present a viable basis for withholding responsive documents on the basis of the attorney-client privilege or work product doctrine. If it returns with a motion to quash consistent with this Order citing such privileges, OAG must provide evidence that the USAO is engaging in the type of abuse it incorrectly claims the Court authorized on October 26, 2020. Otherwise, its speculative claims for these protections will be insufficient as a matter of law.

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[9] See infra note 10; Adams v. Mem'l Hermann, 973 F.3d 343, 349 (5th Cir. 2020) (noting attorney-client privilege is narrower than the work product doctrine).

[10] The work product doctrine protects documents prepared by or for a party in anticipation of litigation. In re Kaiser Aluminum & Chem. Co., 214 F.3d 586, 593 (5th Cir. 2000). Its purpose overlaps with that of the attorney-client privilege. In re Grand Jury Subpoena, 419 F.3d, 329, 335 (5th Cir. 2005). In light of these overlapping purposes, the Court finds the public interest is best served by supporting the grand jury's search for truth regarding alleged wrongdoing by an agency's official, rather than protecting governmental work product claims here. Cf. Roviaro v. United States, 353 U.S. 53, 60 (1957) ("The scope of the privilege is limited by its underlying purpose."). If OAG can provide evidence that the USAO is actually abusing the 10/26/2020 Order to obtain material properly subject to work product protections, such as drafts of this Motion, it may seek appropriate relief in the proper motion contemplated by this Order.

2. Deliberative Process Privilege

One form of executive privilege is the deliberative process privilege, which allows executive agencies to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997) ("Espy") (internal citation omitted). The deliberative process privilege exists to ensure government officials can communicate candidly among themselves, which may be difficult "if each remark is a potential item of discovery and front page news, and [the privilege's] object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8–9 (2001) (internal quotation omitted). This privilege originated at common law, and has since found a home in caselaw interpreting exemption five of the Freedom of Information Act ("FOIA"). See Wolfe v. Dep't of Health & Human Servs., 839 F.2d 768, 773 (D.C. Cir. 1988). There are two essential requirements for the deliberative process privilege to protect a record from disclosure: "the material must be predecisional and it must be deliberative." Espy, 121 F.3d at 737. This privilege "does not shield documents that simply state or explain a decision the government has already made," and it usually does not protect material that is purely factual. Id.

The deliberative process privilege is a qualified privilege that can be overcome by a sufficient showing of need. Id.

> "Each the time the deliberative process privilege is asserted the district court must undertake a fresh balancing of the competing interests," taking into account factors such as [(1)] "the relevance of the evidence," [(2)] "the availability of other evidence," [(3)] "the seriousness of the litigation," [(4)] "the role of the government" [in the litigation,] and [(5)] the "possibility of future timidity by government employees."

Id. (quoting In re Subpoena Served Upon the Comptroller of the Currency, 967 F.2d 630, 634 (D.C. Cir. 1992)). Although this inquiry is fact-specific, critically, "where there is reason to believe the documents sought may shed light on government misconduct, 'the privilege is routinely denied,' on the grounds that shielding internal government deliberations in this context does not serve 'the public's interest in honest, effective government.'" Id. at 738 (quoting Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 885 (1st Cir. 1995)); see also In re Comptroller of the Currency, 967 F.2d at 634 ("[T]he privilege may be overridden where necessary . . . to 'shed light on alleged government malfeasance.'"). Likewise, "[t]he privilege may be inapplicable where the decision-making process itself is at issue." Wagafe v. Trump, Case No. C17-94 RAJ, 2018 U.S. Dist. LEXIS 84934, at *5 (W.D. Wash. May 21, 2018) (citing Greenpeace v. Nat'l Marine Fisheries Serv., 198 F.R.D. 540, 543 (W.D. Wash. 2000); United States v. Lake Cty. Bd. of Comm'rs, 233 F.R.D. 523, 526 (N.D. Ind. 2005); Mr. & Mrs. B v. Bd. of Educ. of Syosset Cent. Sch. Dist., 35 F. Supp. 2d

224, 230 (E.D.N.Y. 1998)). Moreover, "the deliberative process privilege does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must." Karnoski v. Trump, 926 F.3d 1180, 1204 (9th Cir. 2019).

In light of the USAO's *prima facie* proof to support the allegations underlying this grand jury investigation, the Court finds no reason to rescind the 10/26/2020 Order based on this privilege. (See USAO Exh. I.) In fact, there is precedent to support completely foreclosing this privilege based on a showing already made by the USAO. Espy, 121 F.3d at 746 ("Moreover, the [deliberative process] privilege disappears altogether when there is any reason to believe government misconduct occurred."); (see USAO Exh. I). Nonetheless, in light of the federalism principles at play, the Court will not completely foreclose the application of this privilege. In particular, the Court might need to protect OAG's legitimate interest in deliberations ***beyond*** those involved in this investigation in order to keep the USAO within the proper confines of its legitimate inquiry. Thus far, there is simply no evidence that such concerns are implicated in OAG's production obligations. (See id.; Reply Exh. 2.) And by contrast, the USAO has presented strong evidence to suggest government misconduct. (Id.) It appears that the USAO has legitimately sought information regarding deliberations that are

themselves at issue in this matter, but the Court leaves the door open for OAG to prove that is not the case with respect to specific productions.

Therefore, if OAG seeks to withhold any documents under this privilege, it must demonstrate that the balance of the relevant factors supports withholding any particular document from the federal investigators, and that concealing the document is consistent with the precedent cited above. See, e.g., Karnoski, 926 F.3d at 1184; Espy, 121 F.3d at 738, 746; Wagafe, 2018 U.S. Dist. LEXIS 84934, at *5. Like many other privilege routes described in this Order, OAG's path is narrow based on the USAO's *prima facie* evidence, but not foreclosed entirely.

3. Executive Privilege

Executive officials sometimes have a right to withhold documents under a privilege that encompasses more than the deliberative process privilege described above. Espy, 121 F.3d at 736–37. For example, courts have recognized an executive's right to withhold documents that might reveal military or state secrets, or the identity of government informants, depending on a particularized assessment of the circumstances. See Roviaro, 353 U.S. at 59–61; United States v. Reynolds, 345 U.S. 1, 6–8 (1953). This broader executive privilege has also afforded the President of the United States absolute immunity from civil liability for official acts. See Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (finding the

immunity to be a "functionally mandated incident of the President's unique office"). This privilege "safeguards the public interest in candid, confidential deliberations" regarding sensitive executive deliberations, particularly those involving the President. See Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2032–33 (2020); see generally Marbury v. Madison, 5 U.S. 137, 170 (1803). However, "[t]he so-called executive privilege has never been applied to shield executive officers from prosecution for a crime." See Gravel v. United States, 408 U.S. 606, 627 (1972). And the Seventh Circuit has held that "state officials, including state lawyers, [] enjoy ***no immunity*** from disclosing relevant information to a federal grand jury." Ryan, 288 F.3d at 295 (emphasis added). In response to overly broad privilege claims from the Clinton White House in response to the Whitewater investigation, the Eighth Circuit reasoned:

> We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that ***to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.***

In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 921 (8th Cir. 1997) (emphasis added). The fact that a state executive is involved here does not change the result. Whereas the separation of powers may constrain analogous, purely

federal controversies, federalism factors into the determination here. See Mazars, 140 S. Ct. at 2034–36; but see Ryan, 288 F.3d at 295.

As of yet, OAG has cited no reason to extend executive privilege protections over its withheld documents and other materials. There are no military or state secrets at issue in this matter, and OAG has identified no other basis for withholding these communications for executive privilege. With the official acts of the Attorney General at issue in the federal inquiry and the Court narrowly tailoring investigative authorizations for the USAO, the Court is not convinced principles of federalism are offended by the 10/26/2020 Order. As such, the Court will not modify the 10/26/2020 Order on this basis. OAG may argue otherwise with respect to ***particular*** withheld documents in a subsequent motion to quash. But OAG has not identified a cognizable basis for executive privilege, and the policy considerations limiting the other privileges apply equally here, where Paxton's official acts are at the heart of the criminal investigation. In light of the USAO's *prima facie* showing of wrongdoing, OAG faces an uphill battle fitting a document within this privilege. See id.

4. Law Enforcement Investigative Privilege

The Fifth Circuit has recognized the existence of a law enforcement investigative privilege. In re U.S. Dep't of Homeland Sec., 459 F.3d 565, 569 (5th Cir. 2006). This privilege protects some government documents related to ongoing

criminal investigations and "lapses either at the close of an investigation or at a reasonable time thereafter based on a particularized assessment of the document." Id. at 569, 571. The Fifth Circuit has also suggested that

> several types of information probably would not be protected, including documents pertaining to: (1) people who have been investigated in the past but are no longer under investigation, (2) people who merely are suspected of a violation without being part of an ongoing criminal investigation, and (3) people who may have violated only civil provisions.

Id. at 571. Other courts have declined to apply this privilege where a government official's unlawful conduct is at issue—much like the other privilege claims asserted by OAG. See, e.g., Vidrine v. United States, Case No. 07-cv-1204, 2009 WL 1844476, at *2–*3 (W.D. La. June 22, 2009); Doubleday v. Ruh, 149 F.R.D. 601, 607–08, 609–10 (E.D. Cal. 1993). And the Fifth Circuit has noted that "there is a 'special danger' in permitting state governments to define the scope of their own privilege when the misconduct of their agents is alleged." Am. Civil Liberties Union of Miss., Inc. v. Finch, 638 F.2d 1336, 1344 (5th Cir. 1981) (quoting Carr v. Monroe Mfg. Co., 431 F.2d 384, 389 (5th Cir. 1970)).

The USAO argues that the law enforcement privilege cannot apply because Paxton "declared the OAG investigation complete," citing an October 9, 2020 *Texas Tribune* story discussing Paxton's decision to close the investigation. (USAO Exh. C; see also USAO Exh. B.) OAG responds by noting that the investigation remained open in September 2020. (Reply at 9.) The evidence

undermines OAG's contention that the Travis County District Attorney's Office ("TCDAO") attorneys "thought the allegations carries enough merit to warrant their investigation until the Travis County District Attorney notified the OAG via letter on October 9, 2020." (Id.) On behalf of TCDAO, District Attorney Margaret Moore ("Moore") informed OAG in that letter that TCDAO "did not conduct any investigation into the merits of the matters complained of," and that "[t]he referral cannot and should not be used as any indication of a need for investigation, a desire on the Travis County D.A.'s part for an investigation to take place, or an endorsement of your acceptance of the referral." (USAO Exh. B.) OAG further notes a "second referral" from Paul on September 23, 2020, but does not contend that the investigation should be considered ongoing because of this referral, which predates the closure date of October 9, 2020. (Id.; Reply at 8–9; Reply Exh. 7.)

Regardless of these assertions, OAG has not convinced the Court that the 10/26/2020 Order should be rescinded to protect OAG's law enforcement privilege. OAG does not contend that Cammack's investigation into Paul's complaints was ongoing on the day the Court issued the Order (or now). Moreover, in light of Moore's description of the investigation, the Court is skeptical that a "reasonable amount of time" had not passed for the privilege to lapse with respect to any particular document withheld by OAG by October 26,

2020, or (especially) by now. The evidence strongly suggests that the law enforcement privilege should not shield any disclosures from OAG to the USAO. (USAO Exhs. B, C, I.) OAG faces an uphill battle if it attempts to shield documents under this privilege in a subsequently filed motion to quash.[11]

5. Crime-Fraud Exception

The attorney-client privilege impedes the truth-seeking functions of the judicial system. See United States v. Zolin, 491 U.S. 554, 562–63 (1989). Therefore, "it applies only where necessary to achieve its purpose." Id. (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)). In particular, the privilege applies to some communications about past wrongdoing, but it does not shield communications where the desired advice refers to ongoing or future wrongdoing. Id. The privilege emphatically does not apply to communications "made for the

[11] Separately, OAG asserts that its investigation into the allegations and actions of the eight former senior employees who reported Paxton to the FBI is ongoing. (Motion at 3 n.4.) There is no basis for treating that investigation as a continuation of OAG's and the TCDAO's prior investigation. To the extent OAG seeks to cloak documents related to a closed investigation under that ongoing inquiry to extend the application of the law enforcement investigative privilege, the Court is unconvinced. On the other hand, to the extent the USAO seeks to peek into an ongoing investigation unrelated to its core allegations, federalism principles may require protecting the privilege, or separate authorization from the Court beyond the 10/26/2020 Order. When the parties meet and confer regarding outstanding privilege issues following the issuance of this Order, they shall make best efforts to delineate between ongoing and completed investigations to minimize any outstanding law enforcement investigative privilege questions for the Court—just as they shall with all of the outstanding privilege disputes.

purpose of getting advice for the commission of a fraud or crime." Id. (internal quotation omitted).

The Court need only consider the applicability of the crime-fraud exception after the party seeking to withhold a document has demonstrated that the document is properly subject to privilege. See id. at 568–70. Courts may use *in camera* review as a tool for considering privilege exceptions, as well as initial privilege determinations. See id. at 570–72. This is true even if the *in camera* review is conducted at the behest of the party asserting the crime-fraud exception applies. Id. That party need only make a *prima facie* showing of the exception's applicability before the Court can decide whether, in its sound discretion, to conduct *in camera* review of the document. Id. If OAG proves a document is subject to a valid privilege, and the Court needs to reach a crime-fraud determination, *in camera* review could be the best way to determine whether advice was sought in furtherance of an alleged crime. See In re BankAmerica Corp. Sec. Litig., 270 F.3d 639, 646 (8th Cir. 2001) (finding district court abused discretion by declining to review eleven documents before ordering them to be produced under crime-fraud exception);[12] In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995) (recognizing the client's intent is key for the crime-fraud exception).

[12] To this day, OAG has failed to provide evidence to suggest that ***any*** particular responsive document is subject to a valid privilege. Absent any proof to the contrary, the Court's 10/26/2020 Order simply recognizes this fact. (OAG Exh. 1.)

An open legal question remains as to whether the crime-fraud exception applies to the other privileges cited by OAG, but the Court sees no basis for limiting the exception to the attorney-client privilege context. Courts have already extended it to apply in the work product context, and there is no obvious reason to exempt any other privileges based on the exception's policy justifications. In re Grand Jury Subpoena, 419 F.3d at 335 ("The work product privilege is subject to the same crime-fraud exception [as the attorney-client privilege]."); United States v. Edwards, 303 F.3d 606, 618 (5th Cir. 2002); see generally Ann M. Murphy, All the President's Privileges, 27 J. L. & Pol'y 1, 32 (2018). In any case, the Court has already discussed the ways in which courts have abrogated other privileges in this context for similar reasons.

With respect to the four categories of information under the 10/26/2020 Order, the USAO has met its *prima facie* burden for *in camera* review if the Court finds it necessary and appropriate to make a crime-fraud determination. (See USAO Exh I.) By their nature, some of the five potential crimes the USAO is investigating could be ongoing, and the USAO has met its the initial burden to distinguish the potential *in camera* review from a "groundless fishing expedition." Zolin, 491 U.S. at 572. Therefore, in order to streamline the Court's privilege determinations, OAG must be willing to make all outstanding withheld documents available for the Court's discretionary *in camera* review if it

elects to file a motion to quash. See generally id. at 568–69 ("Indeed, this Court has approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for *in camera* inspection . . . and the practice is well established in federal courts."). If necessary, after OAG demonstrates that a privilege applies, the Court will make particularized determinations regarding the applicability of the crime-fraud exception based on the appropriate evidence.

6. Timeliness

The party seeking to quash or modify a subpoena bears the burden of proving compliance would be unreasonable or oppressive. United States v. R. Enters., 498 U.S. 292, 301 (1991). As previously mentioned, "a grand jury subpoena issued through normal channels is presumed to be reasonable." Id. If a party has ***already*** complied with the subpoena, that presumption is stronger. To the extent a party elects to abide by a subpoena's requirements, that compliance not only affords investigators reasonable expectations that they can rely on the productions offered, but also suggests that compliance "w[as] [not] unreasonable or oppressive." See Fed. R. Crim. P. 17(c)(2).

Motions to quash must be made "promptly." Fed. R. Crim. P. 17(c)(2). "There is little caselaw discussing in depth what 'promptly' means" within Rule 17(c)(2). United States v. DNRB, Inc., 257 F. Supp. 3d 1033, 1036

(W.D. Mo. 2017). But judicial interpretations of the promptness requirement have been formulated "to keep the litigation moving." See id. Accordingly, promptness is judged in light of the facts of each case. Id. For example, in DNRB, the court held that DNRB failed to comply with the promptness requirement because its sophisticated counsel made a "deliberate decision" to delay its motion to quash regarding fairly straightforward issues. Id. at 1037. In United States v. Debolt, Case No. 5:09-cr-24, 2010 WL 4281699 (N.D. W.Va. Oct. 19, 2010), the court held that "[b]ecause [the movant] failed to voice its opposition to the subpoena duces tecum until after it had already complied, at least in part, with the subpoena, the motion to quash and motion for protective order must be denied as untimely." Id. at *4.

The facts particular to this case suggest that OAG has partially waived its right to raise a Rule 17(c)(2) motion by failing to move the Court promptly. As the Motion pertains to documents already produced, the Court finds OAG failed to move to quash the subpoena promptly, especially in response to the 12/9/2020 Subpoena. See Fed. R. Crim. P 17(c)(2). The USAO is entitled to rely on all information its has already received from OAG and other sources to pursue its investigation. The alternative, in which a party could comply with a grand jury subpoena before asking a court for permission to claw back materials months later, would impede the proper functioning of grand jury investigations. OAG does not

contend that its disclosures were inadvertent and cites no authority for clawing back voluntary disclosures made to federal investigators as part of a grand jury investigation. Cf. Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 267–68 (D. Md. 2008) (finding privilege waived for documents already disclosed).

Nevertheless, the Court is cognizant of the complexity of the privileges potentially implicated in this matter. On the one hand, important federalism concerns are implicated by the interactions between federal and state prosecutors in this case. See In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 917; but see Finch, 638 F.2d at 1344 (discounting state privilege interests in situations in which the misconduct of a state agent is alleged). It helps that the 10/26/2020 Order was narrowly tailored to areas central to the USAO's ongoing federal investigation, and that there is currently no evidence that the USAO has impeded OAG's ability to exercise sovereign authority on behalf of the State of Texas. On the one hand, the USAO correctly notes that OAG had two prior chances to move to quash subpoenas dependent upon the 10/26/2020 Order: when Cammack was served and asserted privileges on behalf of OAG at Webster's and Kinghorn's request, and between January 24, 2021 (after the USAO informed OAG that it had obtained the 10/26/2020 Order), and January 27, 2021 (when the USAO demanded OAG inform it of its compliance decision regarding its already-complied privilege log in response to the 12/9/2020 Subpoena). (See OAG

Exh. 5; USAO Exh. D.) However, the USAO did not to disclose the 10/26/2020 Order when initially serving the 12/9/2020 Subpoena, and only gave OAG three days to decide how to proceed regarding the documents in its privilege log. In fairness, the Court declines to find that OAG has waived its right to raise privilege objections ***regarding documents yet to be produced***. Considering the complex overlap of privilege claims asserted herein and the need to afford OAG the opportunity to protect the State's own legitimate activities, the Court finds it appropriate to consider prompt arguments from OAG regarding yet-to-be-produced documents. Cf. Younger v. Harris, 401 U.S. 37, 44 (1971).

Therefore, while the USAO has presented a strong argument that OAG has fully waived its right to contest the required productions at issue, the Court finds a limited opportunity for particularized review may still be still appropriate if OAG elects to seek such particularized review in a proper, timely motion.[13]

7. Waivers

A privilege is ordinarily waived when a client fails to legitimately assert the privilege when confidential information is sought in legal proceedings. Nguyen v. Excel Corp., 197 F.3d 200, 206 (5th Cir. 1999). For example, "[g]enerally, a party waives attorney-client privilege when it voluntarily discloses

[13] See infra Conclusion.

privileged communications to a third party, including an adversary in litigation." AHF Comm'y Dev., LLC v. City of Dallas, 258 F.R.D. 143, 148 (N.D. Tex. 2009). Likewise, selectively disclosing the substance of *some* privileged material, or failing to object to all inquiries into privileged matters can imply a broader waiver of the privilege. Nguyen, 197 F.3d at 206–08.

If OAG elects to file a proper motion to quash, it cannot assert privilege claims regarding matters partially disclosed or otherwise waived, through prior disclosures in this case or otherwise. The Court also notes that the Attorney General himself, or his designee, is ***not*** the only person who is entitled to waive privileges held by OAG. (OAG Exh. 9 at 175–82; see Reply at 1.) As Mateer pointed out and the judge agreed in the civil litigation, that approach would yield absurd results and effectively place the elected official above the law for all official acts. (Id. at 180–82.) OAG cannot withhold records from production by limiting the scope of prior disclosures on this basis; its argument on this point is untenable. Cf. Finch, 638 F.2d at 1344 (noting the conflict inherent in controlling the scope of a privilege involving a state agent's own misconduct).

8. Miscellaneous Relief

Beyond wholesale rescission of the 10/26/2020 Order, OAG also asks the Court: (1) to disclose what the Court received prior to issuing the 10/26/2020 Order to give OAG an opportunity to rewind the investigation and rebut that

evidence; (2) to allow counsel for OAG to be present at investigatory interviews with OAG's current and former employees; and (3) for a Rule 502(d) protective order for any privileged materials provided to federal investigators. The Court addresses these requests below.

A. Disclose Motion Preceding the 10/26/2020 Order for OAG Rebuttal

OAG asks the Court to unseal, or otherwise disclose to it, the basis for the 10/26/2020 Order in order to give OAG an opportunity to rebut the evidence supporting the USAO's investigative authority. (See Motion at 30.) Largely for the reasons described above, there is no basis for the Court to take such an extraordinary measure here. Grand jury proceedings are not designed for adversarial fact-finding; they are conducted *ex parte* by design. See In re Grand Jury Proceedings (Vargas), 723 F.2d 1461, 1467 (10th Cir. 1983). "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." United States v. Dionisio, 410 U.S. 1, 17 (1973). Discussing a similar request, the Tenth Circuit upheld a district court's decision to avoid a "minitrial" of grand jury evidence. In re Grand Jury Subpoenas, 144 F.3d 653, 662–63 (10th Cir. 1998) ("The district court did not abuse its discretion in refusing to allow Intervenor to review the contents of the government's *ex parte*, *in camera* submission and in refusing to hear rebuttal

evidence."). OAG cites no authority warranting such relief under these circumstances, and its interests will be adequately protected by the procedures outlined in this Order.

This request is **DENIED**.

B. OAG Presence at Interviews

Under Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct, attorneys may not communicate with a person, organization or entity of government known to be represented by counsel about the subject of the representation, "unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Tex. Disciplinary R. Prof'l Conduct 4.02(a). If the client is an "entity of government" like OAG, the client also includes: (1) those persons presently having managerial responsibility related to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation could subject the client to vicarious liability. Id. 4.02(c). "[T]his Rule does not prohibit a lawyer from contacting a former employee of a represented organization or entity of a government, nor from contacting a person presently employed by such organization or entity whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue." Id. cmt. 4.

The "authorized by law" exception for Rule 4.02(a) is not explained in the Texas Rules. However, under the analogous rule from the American Bar Association's Model Rules of Professional Conduct, the ABA explains that "[c]ommunications authorized by law may [] include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." ABA Rule 4.02, cmt. 5. In this case, the relevant contacts are occurring "prior to the commencement of criminal . . . enforcement proceedings" by the USAO. Id. Interpreting a prior version of the Texas Rule, as well as the ABA Rule, the Fifth Circuit held that government conduct ***prior to indictment*** is exempt from the disciplinary rules limiting contact with represented parties. United States v. Johnson, 68 F.3d 899, 902 (5th Cir. 1995) (citing United States v. Heinz, 983 F.3d 609, 613 (5th Cir. 1993)); see generally United States v. Diaz, 941 F.3d 729, 739 (5th Cir. 2019) (citing Johnson approvingly while analyzing Mississippi conduct rules); United States v. Joseph Binder Schweizer Emblem Co., 167 F. Supp. 2d 862, 866 (E.D.N.C. 2001) ("[F]ederal appellate case law is virtually unanimous in holding that pre-indictment operations against represented targets are not contrary to the rules of professional conduct.") (collecting cases).

The Court is further persuaded by the USAO's argument that permitting counsel for OAG to be present during its interviews would risk

providing Paxton—the target of the grand jury investigation—a unique advantage unavailable to any other grand jury target. The nature of the allegations, particularly those related to witness retaliation, at issue in the Instant Federal Investigation concerns the Court that OAG's presence could thwart the truth-seeking mission of the investigation. Witnesses may be chilled from providing information if they risk retaliation based on the presence of counsel for OAG at their interviews. Not to mention, it appears that OAG has instructed witnesses to assert wide-ranging privilege claims in the related civil litigation to protect information related to that sought by the USAO in this matter. (See, e.g., OAG Exh. 9 at 156–57, 165–66; USAO Exh. F.) OAG can continue to protect its interests by limiting such instructions to viable privilege claims in light of this Order and all applicable law, or by filing a prompt motion to quash. There is good reason for grand jury proceedings to be conducted *ex parte*, and the Rules do not contemplate inviting counsel for third parties to be present for its fact-gathering process. See Fed. R. Crim. P. 6(d)(1); Dionisio, 410 U.S. at 17.

The Court **DENIES** OAG's request to have counsel present at interviews conducted with its former or current employees.

C. Rule 502(d)

Finally, OAG seeks a protective order under Federal Rule of Evidence 502(d) for the documents in its possession, so that its privilege is not waived in

other matters to the extent it must produce documents in response to grand jury subpoenas. (Motion at 4.) Under this Rule, "[a] federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the [C]ourt — in which event the disclosure is also not a waiver in any other federal or state proceeding." Fed. R. Evid. 502(d). Congress added Rule 502(d) to help resolve inadvertent disclosure disputes, and to mitigate the excessive costs involved in avoiding subject-matter privilege waivers. Holloway v. Wells Fargo Bank, N.A., Case No. 3:12-cv-2184-G (BH), 2013 WL 6912690, at *1 (N.D. Tex. Dec. 30, 2013). As other courts have held, Rule 502(d) expressly "applies to documents or other materials that are conclusively privileged, not those that *could* be privileged." Id. at *2 (collecting cases); Olaoye v. Wells Fargo Bank NA, Case No. 3:12-cv-4873-M-BH, 2013 WL 6912691, at *2 (N.D. Tex. Dec. 30, 2013) (same). At this stage, the Court has received no proof of a valid privilege claim from OAG.

While the USAO did not respond to this request from OAG—suggesting it might not oppose the request—OAG has not met its burden to demonstrate that any particular document is subject to privilege. Moreover, the Court is not interested in reviewing additional claw-back requests related to OAG's productions. Not to mention, OAG has had plenty of time to prepare for the required productions stemming from the 10/26/2020 Order, thereby undermining

the need for a Rule 502(d) protective order at this time. Thus, for now, the Court **DENIES WITHOUT PREJUDICE** OAG's request for a Rule 502(d) protective order. Regardless of whether OAG elects to file an appropriate motion to quash, it may re-argue that any yet-to-be-produced records found to be privileged should be subject to a Rule 502(d) protective order, with proposed parameters for the Court's consideration. Regardless, all disclosures to the grand jury investigation are subject to the ordinary secrecy rules for grand jury materials. See generally Fed. R. Crim. P. 6.

CONCLUSION

OAG has presented no rational justification for wholesale reconsideration of the 10/26/2020 Order. There are serious reasons to doubt OAG's various privilege assertions on several grounds. That said, while OAG has not convinced the Court that revocation of the 10/26/2020 Order is necessary, nor that the Order needs to be modified at all, the Court finds that OAG should have an opportunity to assert specific privilege claims with respect to particular, responsive and yet-to-be-produced documents, notwithstanding the 10/26/2020 Order's privilege determination. If OAG demonstrates that a document is subject to a valid, unwaived privilege—in light of this Order and all applicable law—and not subject to the crime-fraud or any other exception, justice may require shielding a document from discovery in spite of the 10/26/2020 Order. See Bruhl-Daniels,

2020 WL 7632258, at *2 (applying the "as justice requires" standard for reconsidering interlocutory orders in criminal matters).

As justice requires, for future disputes (including those in Reply Exh. 2 that OAG has not yet produced to the USAO), the Court may find it necessary to review, *in camera*, particular responsive documents to determine whether they are properly withheld as privileged. Id. At the same time, *in camera* review is generally disfavored, and the Court need not engage in such review if the request is disproportionate or unnecessary. See Acosta v. Austin Elec. Servs. LLC, Case No. cv-16-2737-PHX-ROS, 2018 WL 4963291, at *3 (D. Ariz. Oct. 15, 2018). *In camera* review for a privilege determination is subject to the Court's discretion and will not be permitted as a matter of course. Caruso v. Coleman Co., Case No. 93-cv-6733, 1995 WL 384602, at *1 (E.D. Pa. June 22, 1995). Cf. Zolin, 491 U.S. at 572 (noting the district court can delay or decline *in camera* review in its sound discretion, considering whether it will "unduly disrupt or delay the proceedings").

For instance, 779 documents—the number of documents indicated on OAG's January 20, 2021 privilege log in response to the 12/9/2020 Subpoena—shall not be submitted for *in camera* review. See Nance v. Thompson Med. Co., 173 F.R.D. 178, 181–83 (E.D. Tex. 1997) (reviewing thirty-five documents amounting to 200–300 pages *in camera*). If OAG returns to ask the Court to review that many documents *in camera* based on generalized affidavits that do not

explain how any particular withheld document is privileged, the Court may decline to conduct *in camera* review and order production of all responsive documents. See Diamond State, 157 F.R.D. at 700 (finding *in camera* review inappropriate when privilege proponents "shirk[ed] their duty of justifying the withholding of the documents"). In light of this Order, the Court doubts it will be necessary to resolve many, if any, *bona fide* privilege claims from OAG. The parties must make best efforts to limit the Court's burden for potential *in camera* review, and propose an agreed-upon plan for the Court if *in camera* review were to be necessary, in their forthcoming advisories. See, e.g., Vioxx Prod. Litig. Steering Committee v. Merck & Co., Inc., Case Nos. 06-30378, 06-30379, 2006 WL 1726675, at *2 n.5 (5th Cir. May 26, 2006) (discussing representative random sampling method of reviewing large volumes of allegedly privileged documents); see also United States v. Bollinger Shipyards, Inc., Case No. 12-920, 2015 WL 1638063, at *4 (E.D. La. Apr. 13, 2015).

In camera review "is not to be used as a substitute for a party's obligation to justify its withholding of documents." CSX Transp. Inc. v. Admiral Ins. Co., Case No. 93-132-civ-J-10, 1995 WL 855421, at *5 (M.D. Fla. July 20, 1995) (citing Diamond State Ins. Co. v. Rebel Oil Co., 157 F.R.D. 691, 700 (D. Nev. 1994)). If OAG files a motion that may require *in camera* review, it must submit "affidavit[s] or other evidence identifying each document or

communication claimed to be protected by the privilege and setting forth sufficient facts to allow a judicial determination as to whether the particular communication or document is, in fact, privileged." Diamond Resorts U.S. Collection Dev., LLC v. US Consumer Att'ys P.A., Case No. 9:18-cv-80311, 2021 WL 505122, at *5 (S.D. Fla. Feb. 11, 2021) (quoting Wyndham Vacation Ownership, Inc. v. Reed Hein & Assocs., LLC, Case No. 6:18-cv-2171-Orl-31DCI, 2019 WL 9091666, at *7 (M.D. Fla. Dec. 9, 2019)); see also Nutmeg Ins. Co. v. Atwell, Vogel & Sterling A Div. of Equifax Servs., Inc., 120 F.R.D. 504, 510 (W.D. La. 1988) ("[T]he proponent must provide the court with enough information to enable the court to determine privilege, and the proponent must show by affidavit that precise facts exist to support the claim of privilege.").

"It should go without saying that the court should never be required to undertake *in camera* review unless the parties have properly asserted privilege/protection, then provided sufficient factual information to justify the privilege/protection claimed for each document, and, finally ***met and conferred in a good faith effort*** to resolve any disputes without court intervention." Victor Stanley, 250 F.R.D. at 265–66 (citing Zolin, 491 U.S. at 571–72) (emphasis added). As such, the parties must attempt to resolve all outstanding privilege disputes to reach results consistent with this Order and all applicable law. If its privilege claim for any particular record is foreclosed by this Order, OAG must

produce the record to the USAO in accordance with the deadlines specified below. Likewise, if a privilege claim is obviously applicable for a particular responsive and yet-to-be-produced document, OAG must discuss the basis for such privilege with the USAO and the USAO must withdraw its request for such a document.

It is OAG's burden to prove that a record is privileged, and no such showing has been made for any documents. The USAO obtained the 10/26/2020 Order on a showing sufficient to justify the breadth of the Order, which has only been further supported by the updated *ex parte* affidavit. (See USAO Exh. I.) By contrast, OAG presented no evidence that convinces the Court to discredit the USAO's legitimate, evidence-backed justifications for the 10/26/2020 Order, or that warrants re-opening the Order's wholesale consideration. OAG may have viable privilege claims with respect to particular documents sought by the USAO. But for the reasons described above, OAG's path to successfully withholding a specific responsive document from the grand jury investigation based on any of its cited privilege grounds is slim. OAG is not a target of this investigation. (Response at 1); cf. Ryan, 288 F.3d at 294 ("But the privilege with which we are concerned today runs to the office, not to the employees in that office."). Its privileges will not extend beyond that necessary to protect the entity's sovereign functioning, and cannot be asserted merely to stand in the way of a proper investigation of the alleged wrongdoing of the agency's head.

Accordingly, **IT IS ORDERED** that:

1. **On or before August 27, 2021**, the USAO and OAG must **meet and confer in good faith** to resolve all privilege disputes among the records yet to be produced to the USAO, particularly including all records identified in Exhibit 2 of OAG's Reply. The parties must also discuss the scope and method of appropriate any necessary *in camera* review, if OAG were to file a subsequent motion to quash. Moreover, the parties must remain cognizant of burdens imposed on the Court—OAG will not be permitted to stall the USAO's legitimate grand jury investigation by continuing to assert implausible privilege claims.
2. **On or before August 30, 2021**, the parties must file **joint or separate advisories under seal**, informing the Court of concessions made by each side at the conference (i.e., the number and nature of the documents still outstanding, and whether each document no longer contested was produced by OAG or whether the USAO withdrew its request for the document). OAG must also describe any outstanding privilege issues, in an exhibit similar to Reply Exhibit 2. If OAG seeks to file a motion to quash outstanding subpoenas rooted in the 10/26/2020 Order, the parties

must propose an agreed-upon plan for appropriate *in camera* review that will not drain the Court's resources or stall the USAO's investigation. Compare Nance, 173 F.R.D. at 181–83 (reviewing thirty-five documents *in camera*), with Vioxx, 2006 WL 1726675, at *2 n.5 (requiring parties to establish proper random sampling method to conduct *in camera* review of 2,000 documents).

3. **On or before September 3, 2021**, OAG may file an **appropriate motion under seal,** seeking a privilege determination on any yet-to-be-produced documents for which it maintains a *bona fide* claim of privilege, consistent with this Order and all applicable law, that would be responsive to outstanding subpoenas or other demands from the USAO rooted in the 10/26/2020 Order. Compliance with any future subpoenas or investigative demands is unaffected by this Order. If OAG seeks to quash such demands, it must comply with Rule 17(c)(2). The USAO has produced sufficient *prima facie* evidence to justify ordering OAG to make its documents responsive to the topics covered by the Court's 10/26/2020 Order available for discretionary *in camera* review. (See USAO Exh. I.)

4. Therefore, such a motion **must** include: (a) a privilege log for all still-withheld documents; (b) *ex parte* exhibit(s) with copies of all of those documents, available for the Court's discretionary *in camera* review, paired with the parties' agreed-upon plan for *in camera* review, if necessary; (c) specific, independent evidentiary support—through affidavits or otherwise—supporting OAG's privilege assertion particular to each document; and (d) an explanation of why justice requires departure from the Court's well-supported 10/26/2020 Order (which could simply be that the documents are protected by an important privilege). Again, OAG is advised that *in camera* review is not an absolute prerequisite for the Court to order production to the USAO. If OAG fails to present independent evidence in support of the privilege's applicability to each responsive record, it cannot meet its burden to demonstrate privilege.

5. Regarding any outstanding document responsive to outstanding demands rooted in the 10/26/2020 Order that OAG fails to provide for the Court's discretionary *in camera* review, OAG is **ORDERED** to produce the document to the USAO **on or before**

September 4, 2021, or in compliance with any reasonable extension agreed to by the USAO.

6. Likewise, if no such motion is timely filed by OAG, OAG will have failed, as a matter of law, to prove any applicable privileges with respect to the documents described in its Reply Exhibit 2. At that time, it shall be deemed that OAG is **ORDERED** to comply with its production obligations from outstanding demands issued pursuant to the 10/26/2020 Order, including the 12/9/2020 Subpoena, **on or before September 4, 2021**, or in compliance with any reasonable extension agreed to by the USAO. Based on the USAO's *prima facie* showing, the allocation of the privilege burden on OAG, and the delay already caused by this Motion, the USAO need not move to compel OAG to produce documents ***already requested*** pursuant to the 10/26/2020 Order. The procedures described above represent OAG's last chance to evade disclosure obligations already owed under the 10/26/2020 Order.
7. **Absent extraordinary circumstances that will reduce the Court's burden in reviewing any necessary privilege determinations, there will be no extensions to these deadlines.**

To some extent, the USAO is not opposed to the relief granted herein. (Response at 31 ("To the extent OAG believes this Court's review is necessary before making *future* productions, it is free to seek that relief from the Court.") (emphasis in original).) But the USAO's opposition to any future motion from OAG should not exclusively rely on the existence of the 10/26/2020 Order. OAG must show that justice requires departure from the Order for any particular document to be validly withheld, see Bruhl-Daniels, 2020 WL 7632258, at *2, but it will suffice for OAG to present a valid proof of privilege to quash future compliance that would otherwise be required under the 10/26/2020 Order.

For the reasons described above, the Court **GRANTS IN PART AND DENIES IN PART** OAG's Motion. OAG will not be permitted to derail this grand jury investigation by wavering on its privilege assertions and compliance decisions in response to the USAO's investigative measures. Nor can it belatedly submit a mountain of records for the Court's review to stall the grand jury's investigation. The Court is under no obligation to conduct resource-intensive *in camera* review if OAG returns with vague privilege assertions supported by little to no independent evidence, or attempts to re-assert arguments that are foreclosed by this Order or other applicable law. OAG's path to validly withholding documents from the USAO is quite narrow, but the Court agrees that it should be

permitted to raise privilege objections for outstanding production obligations, if it does so in accordance with the reasonable deadlines set forth in this Order.

IT IS SO ORDERED.

DATED: San Antonio, Texas, August 17, 2021.

David Alan Ezra
Senior United States District Judge