

appeal the order dated April 13, 2017, is a decision for the Department of Justice as well as a decision for Treasury.

The order dated April 13, 2017, should be stayed until any appeal of the order has been adjudicated. The criteria for a stay are met. Not only does the required balance of hardships favor a stay but Treasury will have a strong likelihood of success on the merits if it appeals the order.

STATEMENT OF FACTS

The 63 documents over which Treasury has asserted the presidential communications privilege are responsive to a third-party subpoena in *Black v. Pension Benefit Guaranty Corporation*, No. 2:09-cv-13616 (E.D. Mich.). ECF No. 1, Ex. J at 1. Respondents issued the subpoena to Treasury in 2012. *Id.* Respondents allege in *Black* that interested party Pension Benefit Guaranty Corporation (PBGC) acted wrongfully when it entered into an agreement with Delphi Corporation (Delphi) in 2009 to terminate an underfunded pension plan (Delphi Salaried Plan) maintained prior to that time by the long-insolvent Delphi. ECF No. 1, Ex. E, ¶¶ 8-56. The termination of the Delphi Salaried Plan implemented the determination of PBGC under 29 U.S.C. § 1342(c), a provision of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 88 Stat. 829, “that the Plan must be terminated in order to avoid any unreasonable increase in the liability of the PBGC insurance fund.” ECF No. 15-2; *see* ECF No. 1, Ex. B, ¶ H (provision of the termination agreement referencing the determination).

The termination of the Delphi Salaried Plan permitted respondents Black, Cunningham, and Hollis and the members of respondent Delphi Salaried Retiree Association to begin receiving an estimated \$2.1 billion from the PBGC insurance fund to cover benefits that the Delphi Salaried Plan would not have had the resources to pay them. *See* ECF No. 1, Ex G, Att.

C, Encl. ¶ 10. Respondents nonetheless ask in *Black* that the termination of the plan be set aside. ECF No. 1, Ex. E, Prayer ¶ D.

The documents over which Treasury has asserted the presidential communications privilege “can be grouped into four categories”:

(1) drafts of presidential speeches; (2) personal requests for information by President Obama; (3) draft memoranda from staffers to Dr. Lawrence Summers, the Director of the National Economic Council, Assistant to the President for Economic Policy, and co-chair of the Presidential Task Force on the Auto Industry; and (4) electronic mail conversations among Auto Team members concerning advice to be provided to the President.

ECF No. 45 at 4 (abbreviation & footnotes omitted). By memorandum opinion dated April 13, 2017, the Court held that “all four categories” of documents were “covered by the presidential communications privilege,” *id.* at 10, but also held that respondents had made “‘at least a preliminary showing of necessity for information [in the documents] that is not merely demonstrably relevant but indeed substantially material to their case [in *Black*].’” *Id.* at 11 (quoting *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977)). The “showing of necessity” to which the Court referred consisted of “[r]espondents[’] assert[ion] that they need the withheld material because it may show pressure exerted by Treasury or the White House to terminate the Delphi Plan for impermissible or political reasons, an issue at the [alleged] core of the parties’ dispute in [*Black*].” *Id.* at 10-11.

ARGUMENT

Motions for stays pending appeal are governed by four factors:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 777 (1987). These factors justify a stay of the order dated April 13, 2017, until any appeal of the order has been adjudicated. Not only does the required balance of hardships favor a stay but Treasury will have a strong likelihood of success on the merits if it appeals the order.

I. THE REQUIRED BALANCE OF HARDSHIPS FAVORS A STAY OF THE ORDER DATED APRIL 13, 2017, UNTIL ANY APPEAL OF THE ORDER HAS BEEN ADJUDICATED.

Where, as here, an order directs an agency to produce privileged documents, compliance with the order “mak[es] the issue of privilege effectively moot,” *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1210 (D.C. Cir. 2004) (Garland, J.) (quoting *United States v. Philip Morris Inc.*, 314 F.3d 612, 619 (D.C. Cir. 2003)), because compliance with the order “let[s] the cat out of the bag, without any effective way of recapturing it if the district court’s directive [is] ultimately found to be erroneous.” *Judicial Watch, Inc. v. Dep’t of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) (quoting *Irons v. FBI*, 811 F.2d 681, 683 (1st Cir. 1987)). The right of Treasury to appeal the order dated April 13, 2017, thus “will become moot” once it “surrender[s]” the documents over which it has asserted the presidential communications privilege because the surrender of the documents will cause “confidentiality [to] be lost for all time,” thereby “utterly destroy[ing] the status quo.” *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979). The resulting harm to Treasury will be “irreparabl[e].” *Id.*

The public interest will also be harmed by the surrender of the documents. The purpose of the presidential communications privilege is to “preserve[] the President’s ability to obtain candid and informed opinions from his advisors and to make decisions confidentially.” *Loving v. Dep’t of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008). “Special considerations [thus] control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the

confidentiality of its communications are implicated.” *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 385 (2004). All of the documents over which Treasury has asserted the presidential communications privilege have been held by this Court to be covered by the privilege. ECF No. 45 at 10. The surrender of the documents to respondents prior to the adjudication of any appeal of the order dated April 13, 2017, will thus be an injury to the public at large as well as an injury to Treasury.

Respondents, by contrast, will not be injured significantly by a stay of the order. “[T]he granting of a stay will be detrimental to [respondents] . . . only to the extent it postpones the moment of disclosure – assuming [respondents] prevail – by whatever period of time may be required for [the court of appeals] to hear and decide [any] appeal[.]” *Providence Journal*, 595 F.2d at 890. Treasury is open to minimizing the postponement of the “moment of disclosure,” if any, by expediting any appeal of the order dated April 13, 2017.

II. TREASURY WILL HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS IF IT APPEALS THE ORDER DATED APRIL 13, 2017.

The presidential communications privilege is “more difficult to surmount” than the deliberative process privilege or other “qualified privileges.” *See In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997). A criminal defendant who seeks to overcome the privilege must show that “each discrete group of the subpoenaed materials likely contains . . . evidence . . . [that is] directly relevant to issues that are expected to be central to the trial.” *Id.* at 754. A civil litigant who seeks to overcome the privilege must make a stronger showing of need than a criminal defendant because “[t]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance of . . . [information sought by] criminal subpoena requests.” *See Cheney*, 542 U.S. at 384.

“[N]on-relevant material” is never subject to production from documents covered by the presidential communications privilege, irrespective of any “showing of need” for the documents that a litigant may make. *Sealed Case*, 121 F.3d at 745. Respondents assert in this case that they need the documents over which Treasury has asserted the presidential communications privilege because the documents “may show pressure exerted by Treasury or the White House to terminate the Delphi plan for impermissible or political reasons.” ECF No. 45 at 10-11. Treasury disagrees that the exertion of any such pressure would have rendered the termination of the Delphi Salaried Plan wrongful. The point is academic, however, because none of the documents over which Treasury has asserted the presidential communications privilege contains any indication that any such pressure was ever exerted.

CONCLUSION

For the foregoing reasons, Treasury’s motion for stay should be granted.

Respectfully Submitted,

CHAD A. READLER
Acting Assistant Attorney General
CHANNING D. PHILIPS
United States Attorney
JACQUELINE COLEMAN SNEAD
Assistant Branch Director

s/ David M. Glass

DAVID M. GLASS, DC Bar 544549
Senior Trial Counsel
Department of Justice, Civil Division
20 Massachusetts Ave., N.W., Room 7200
Washington, D.C. 20529
Tel: (202) 514-4469/Fax: (202) 616-8470
Email: david.glass@usdoj.gov
Attorneys for Petitioner

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