

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5142

September Term, 2017

FILED ON: DECEMBER 8, 2017

UNITED STATES DEPARTMENT OF THE TREASURY,
APPELLANT

v.

DENNIS BLACK, ET AL.,
APPELLEES

Consolidated with 17-5164

Appeals from the United States District Court
for the District of Columbia
(No. 1:12-mc-00100)

Before: GRIFFITH, *Circuit Judge*, and SENTELLE and RANDOLPH, *Senior Circuit Judges*.

J U D G M E N T

These cases were considered on the record from the United States District Court for the District of Columbia and the briefs and arguments of the parties. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d).

The United States Department of the Treasury appeals an order of the United States District Court directing discovery of sixty-three documents over which the Office of the President asserted the presidential communications privilege. For the reasons set forth below, we conclude that the record is inadequate to enable us to conduct appropriate review. It is therefore

ORDERED AND ADJUDGED that the district court's order directing disclosure of the documents be vacated and the matter be remanded for further proceedings consistent with this judgment and the memorandum filed simultaneously herewith.

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Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. See Fed R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail

Deputy Clerk

No. 17-5142**September Term, 2017****MEMORANDUM**

The United States Department of the Treasury (“Treasury”) appeals the district court’s order granting a motion to compel the production of sixty-three documents over which the Office of the President asserted the presidential communications privilege. Respondents-appellees, former employees of the auto-parts manufacturer Delphi Corporation and beneficiaries of the pension plan maintained by Delphi (“Retirees”), moved to compel the production of the sixty-three documents as part of a third-party subpoena of Treasury. The district court ruled that the documents are subject to the presidential communications privilege, but granted the motion to compel on the theory that Retirees’ specific litigation needs fall within an exception to the privilege.

“Ordinarily, this court will review a district court’s ruling on a subpoena for the production of documentary evidence only for arbitrariness or abuse of discretion.” *In re Sealed Case*, 121 F.3d 729, 740 (D.C. Cir. 1997). However, we give no deference “if the ruling ‘rests upon a misapprehension of the relevant legal standard or is unsupported by the record.’” *Id.* (quoting *In re Subpoena Served Upon Comptroller of Currency & Sec’y of Bd. of Governors of Fed. Reserve Sys.*, 967 F.2d 630, 633 (D.C. Cir. 1992)). Thus, we cannot properly review a district court’s decision without “some articulation of the district court’s reasons for its ruling.” *Id.* In this case, the record is not sufficient for us to conduct the required review. We therefore vacate the order of the district court and remand for further proceedings.

It is well established that presidential communications are “presumptively privileged.” *Id.* at 744. “However, the privilege is qualified, not absolute, and can be overcome by an adequate showing of need.” *Id.* at 745. Once the presidential communications privilege has been established, the standard for overcoming the privilege “balance[s] the public interests served by protecting the President’s confidentiality in a particular context with those [public interests] furthered by requiring disclosure.” *Id.* at 753.

In granting Retirees' motion to compel, the district court concluded that although the presidential communications privilege covered all sixty-three documents, Retirees "demonstrated a need sufficient to overcome the privilege." *Dep't of Treasury v. Pension Benefit Guar. Corp.*, 249 F. Supp. 3d 206, 210-13 (D.D.C. 2017). The district court applied the same reasoning that this Court applied in *In re Sealed Case*. *Id.* at 212-13 (citing *In re Sealed Case*, 121 F.3d at 754). But in considering "the need of the party seeking privileged evidence," the district court did not "balance the public interests at stake." *In re Sealed Case*, 121 F.3d at 746. Although the district court cited this Court's opinions in *In re Sealed Case* and *Dellums v. Powell*, 561 F.2d 242, 249 (D.C. Cir. 1977), it did not account for how the public interests in this case differ from those presented in our prior decisions. For example, "the need for information in the criminal context is much weightier" than the need in the civil context. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 384 (2004); *see also In re Sealed Case*, 121 F.3d at 743. And "[a]ssuming arguendo a former President may present a claim of presidential privilege, ... it is entitled to lesser weight than that assigned the privilege asserted by an incumbent President." *Dellums*, 561 F.2d at 245.

In addition to not accounting for how the public interests in this case differ from past cases, the district court failed to explain how it applied the approach for overcoming the privilege. The district court concluded that "for substantially the same reasons advanced by [Retirees], the Court is persuaded that [Retirees] have made 'at least a preliminary showing of necessity for information that is not merely demonstrably relevant but indeed substantially material to their case.'" *Dep't of Treasury*, 249 F. Supp. 3d at 212-13 (quoting *Dellums*, 561 F.2d at 249). Further, the district court explained only that Retirees "represent that the materials are unavailable through any other means, and Treasury does not challenge this assertion in its opposition motion." *Id.* at 213 (citations omitted).

Retirees bear the burden to demonstrate "with specificity" "that each discrete group of the subpoenaed materials likely contains important evidence." *In re Sealed Case*, 121 F.3d at 754, 756. Retirees bear the further burden of demonstrating that the subpoenaed "evidence is not available with due diligence elsewhere," which means that "[e]fforts should first be made to determine whether sufficient evidence can be obtained elsewhere, and the subpoena's proponent should be prepared to detail these efforts and explain why evidence covered by the presidential

privilege is still needed.” *Id.* at 754-55. The district court’s opinion does not explain how Retirees met their burden to demonstrate a need sufficient to overcome the privilege. Instead, the district court relied on unidentified reasons from Retirees’ brief along with Treasury’s purported failure to challenge Retirees’ arguments. Under the circumstances, the district court’s opinion fails to provide sufficient articulation of the reasons for its ruling. We therefore cannot conduct appropriate review.

For the foregoing reasons, we vacate the district court’s decision and remand the case for further proceedings consistent with this opinion. On remand, the district court must balance the public interests at stake and more thoroughly analyze whether Retirees demonstrated a need sufficient to overcome the privilege.