



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

April 26, 2018

BY ECF AND HAND

The Honorable Kimba M. Wood
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Cohen v. United States*, 18 Mag. 3161 (KMW)

Dear Judge Wood:

At the conference scheduled for today at noon, the Government will provide a detailed update on the status of its production to Michael Cohen's counsel of a set of the materials seized during the April 9, 2018 searches of Cohen's premises and electronic devices. As a general matter, the Government expects to report that its production is on schedule, as described in its April 18, 2018 letter to the Court.

The Government also writes, in advance of the conference, to apprise Your Honor that we are prepared to withdraw our objection to the appointment of a Special Master to conduct the review of the potentially privileged materials seized during the April 9 searches, and to propose a compromise position with respect to the privilege review that, we believe, will most efficiently complete the review while honoring the concerns expressed by counsel for Cohen and the intervenors.

Specifically, as set forth in more detail below, we propose that the Special Master directly review the seized materials to determine which appear to be privileged and then hear from both sides before making a final determination. We previously provided the Court with the names of three retired Magistrate Judges for consideration for appointment by the Court as a Special Master in this matter, and have subsequently spoken to some of the candidates we proposed. In that regard, we attach as Exhibit A a letter from retired Magistrate Judge Frank Maas describing his proposed process. The Government supports the process recommended in Judge Maas's attached letter, namely, use of a technology-assisted review ("TAR") process to identify potentially privileged material for review in an efficient manner, with an opportunity for Cohen and the intervenors to be heard and to supplement the documents they claim as privileged. Judge Maas recommends this method based on his experience as providing a "timely and cost-effective" way to accomplish the review. He also notes that TAR is "at least as effective as exhaustive manual review, and far more efficient."

As Judge Maas explains, he would likely engage Maura R. Grossman, a New York lawyer and a research professor in the School of Computer Science at the University of Waterloo, who is renowned in the field of e-discovery and a TAR expert, to assist with the review. In particular, Judge Maas proposes that:

- Each party would have an opportunity to make submissions to Judge Maas including any information necessary to help him identify any privileged or non-privileged material.¹
- Based on that information, and using a technology-assisted review process, Judge Maas and Ms. Grossman would make an initial selection of potentially privileged documents in short order. Judge Maas estimates that barring complications, he would conduct his review on a rolling basis, as documents become available, and that the process of identifying potentially privileged documents could be concluded within two weeks through the TAR process. Although not specified in Judge Maas's letter, the Court could also afford Cohen and the intervenors a certain time period in which to designate any additional privileged documents not originally identified by Judge Maas and Ms. Grossman.
- Judge Maas also describes his expected process with respect to each potential category of non-electronic materials, including recorded telephone calls, cell phones, and hard copy documents. The former two would be formatted to be reviewed using TAR, and the hard copy documents (most of which have already been scanned) could either be reviewed manually or using TAR. Judge Maas would reach his final privilege determination after considering arguments.

If the Court does not select Judge Maas as Special Master, the Government believes that the above-referenced process can be implemented by any of the other retired Magistrate Judges that the Government has proposed to the Court, and that such a process generally provides for the most efficient, expeditious, and neutral review.

We believe that using Judge Maas or another neutral retired former Magistrate Judge familiar with this electronic discovery process and with experience in ruling on issues of privilege will lead to an expeditious and fair review of the materials obtained through the judicially-authorized search warrants. Cohen and the intervenors will have the opportunity to have their claims of privilege considered by a neutral Magistrate before any document as to which they assert privilege is turned over to the Government's Investigative Team, while the non-privileged documents as to which there is no issue will be quickly identified and made available to the Government's Investigative Team for use in the ongoing investigation. Thus, this reasonable compromise procedure will fully honor the attorney-client privilege while

¹ For example, Cohen's counsel could provide a list of clients and attorneys and (on an *ex parte* basis) some background and context regarding the nature of the attorney-client relationships. The Government could provide (similarly on an *ex parte* basis) the search warrant affidavit and some background on the Government's investigation and/or theory of the case, as would be necessary for Judge Maas to make any determinations regarding application of the crime-fraud exception.

ensuring the efficient completion of the privilege review in a manner that recognizes the important law enforcement interests at stake. *See United States v. Grant*, 2004 WL 1171258, at *2 (S.D.N.Y. May 25, 2004) (discussing balance between “public’s strong interest in investigation and prosecution of criminal conduct” and limited incursion into attorney-client privilege).

In particular:

- The Government’s proposed procedure will be more efficient than the proposal offered by Cohen’s counsel, and likely result in an initial batch of potentially privileged documents to be available for a Special Master to review within two weeks.
- The Government’s proposed procedure renders the creation of a privilege log – a cumbersome task that caused substantial delay in the *Stewart* case – unnecessary. While Cohen’s proposal relies on a privilege log as the main tool for the review, Judge Maas observes such logs are “virtually useless.”
- Placing the initial identification of potentially privileged materials in the hands of a neutral party guards against the concern that an interested party making the first selection would be overbroad or underinclusive in their selection of the universe of potentially privileged materials. That, in turn, would cut down on disputes between the parties as to privilege determinations.
- Permitting the Government Filter Team to see the potentially privileged documents identified by the Special Master will obviate the need to review documents as to which the Government does not dispute privilege, and – as to any subset of materials as to which there is disagreement – will enable the Special Master to receive timely and fully informed input both from Cohen and/or the intervenors and the Government’s Filter Team. This will make the dispute resolution process even more efficient and expeditious.

The alternative procedure proposed by Cohen’s counsel is unworkable. Under Cohen’s procedure, neither the Government nor the Special Master will have access to the seized materials in order to properly evaluate privilege. Instead, *Cohen*’s counsel will make the initial review of the seized materials and will provide the Special Master and the Government with nothing more than a privilege log. (4/25/18 Letter at 3). That is essentially the same extraordinarily relief that Cohen asked for in the first instance, and which the Court appeared to reject. And that is the very process that bogged down the *Stewart* case for more than a year, even though the volume of materials seized in that case was likely substantially smaller than in this case. *See United States v. Sattar*, No. 02 Cr. 395 (JGK), 2003 WL 22137012, at *22 (S.D.N.Y. Sept. 15, 2003). What is more, Cohen’s proposal contemplates that the Government Filter Team will *only* be able to review the privilege log, not the actual documents themselves, and that the Special Master would only be called on to review *any* documents if the Government

objects to Cohen's designations.² (4/25/18 Letter at 3). Under such a proposal, the Government will be deprived of the ability to make fully informed objections to Cohen's designations, and Cohen will have effectively turned the Government's search warrant into a subpoena, severely curtailing the role of the Government and a Special Master while maximizing the role played by his own attorneys. *See Grant*, 2004 WL 1171258, at *2. The Government would then have to seriously consider objecting to most documents designated by Cohen as privileged, because otherwise the Special Master would never be called on to make an independent review of the documents. That, coupled with Cohen's clear incentive to be overbroad in his initial designations,³ will result in the Special Master needing to review and adjudicate a far broader set of disputes than if the Special Master were to make the initial selection of potentially privileged materials.⁴

² If Cohen's request for a privilege log were to be granted, there is no reason the Government's Investigative Team could not review the privilege log.

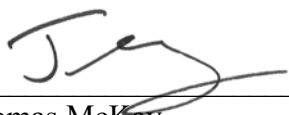
³ As the Court is aware, after originally stating that the Government seized "thousands, if not millions," of pages of privileged documents, Cohen subsequently identified three current clients. Of those three clients, one, Sean Hannity, has since said that "Michael Cohen has never represented me in any matter. I never retained him, received an invoice, or paid legal fees." Another, President Trump, reportedly said on cable television this morning that Cohen performs "a tiny, tiny little fraction" of his overall legal work. These statements by two of Cohen's three identified clients suggest that the seized materials are unlikely to contain voluminous privileged documents, further supporting the importance of efficiency here.

⁴ If the Court does permit Cohen and the intervenors to make privilege determinations in the first instance, Cohen should still be required to provide the Filter Team and the Special Master with the actual documents, and not a privilege log, to effectuate a more efficient and neutral assessment of privilege issues.

For these reasons, the Court should endorse this proposed compromise position. If the Court does so at today's conference, the Government can begin producing materials to the Special Master on the same timeline it is producing materials to Cohen's counsel, such that the Special Master could begin the initial selection of potentially privileged materials on a rolling basis starting immediately.

Respectfully submitted,

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Acting Under Authority Conferred by
28 U.S.C. § 515

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April 25, 2018

Tatiana Martins, Chief
Public Corruption Unit
Office of the United States Attorney
for the Southern District of New York
One St. Andrews Plaza
New York, New York 10007

Re: Cohen v. United States, 18 Mag. 3161 (KMW)

Dear Ms. Martins:

This letter responds to your inquiry as to how a master might conduct the privilege review of the materials seized from Michael Cohen. I see two principal alternatives.

First, a master might simply await a privilege and work product log prepared by the Government's taint team, the Movants' counsel, or both. The master could then review the logged materials to determine whether they are protected and, if so, whether some recognized exception (such as the crime-fraud exception) applies. As part of that process, the master presumably would entertain submissions (probably at least in part *ex parte*) from both the Government and the Movants, and hear oral argument. One of the shortcomings of this process is that it entails the use of privilege logs. Having conducted scores of privilege reviews over the years, I have found that privilege logs often are virtually useless as a tool to assist a judge or master, and their preparation is expensive and can cause delay.

Alternatively, the master could directly review the seized materials to determine which appear to be privileged. The master would then solicit submissions from both sides and hear oral argument before making a final determination. To the extent that the materials are in electronic form, the most effective and efficient way to do this would be through the use of technology-assisted review ("TAR"). A TAR process known as continuous active learning ("CAL") has been shown in several studies to be at least as effective as exhaustive manual review, and far more efficient. *See, e.g.,* M.R. Grossman and G.V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Manual Review*, 17 Rich. J.L. & Tech. 11 (2011); G.V. Cormack and M.R. Grossman, *Navigating Imprecision in*

Relevance Assessments on the Road to Total Recall: Roger and Me, Proceedings of the 40th Int'l ACM SIGIR Conference on Rsch. and Dev. in Info. Retrieval, 5-14 (2017). The effectiveness of TAR, and CAL in particular, has been recognized in this District.

If Judge Wood were to appoint me as the master, I likely would engage Maura R. Grossman, a New York lawyer and research professor in the School of Computer Science at the University of Waterloo, who is renowned in the field of e-discovery, and a TAR expert, to assist with the review. Given the locations searched and the media seized, it appears that the volume of information to be reviewed is unlikely to be overwhelmingly large. Once the seized information has been processed and is available on a review platform, identification of the potentially privileged electronic information using TAR could commence within a day or so. Preliminary privilege determinations would then be fed back to the TAR system, which would identify more potentially privileged data, and so on, until the universe of potentially privileged material is identified. The Movants could assist this process by identifying documents that they consider privileged or otherwise protected.

The process would continue as long as privileged data is identified by the TAR system. Barring complications, the entire technology-assisted review of the electronic data could likely be accomplished in one to two weeks, and would not require the use of contract reviewers or associates. I believe this would be the most effective, efficient, and secure method to accomplish the privilege review in a timely and cost-effective manner. I note that the Government has indicated in a letter to Judge Wood, dated April 18, 2018 (ECF No. 16), that the electronic material will be produced on a rolling basis. If so, the review of that material using Professor Grossman's TAR tool could begin as soon as a reasonable amount of material is available.

I understand from newspaper articles that Mr. Cohen may have recorded certain of his telephone calls. If those recordings are voluminous, the most efficient way to review them would be to convert them from speech to text. The text could then be reviewed in the same manner as the other electronic data.

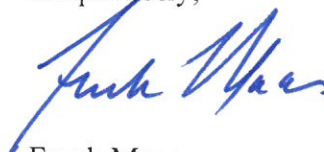
I also understand that the Government has seized certain cell phones. While the extraction and processing of the contents of cell phones can be challenging, once that is accomplished, the resulting text files can be reviewed using the same TAR process.

Finally, I assume there are some hard copy documents. Unless the volume is overwhelming, manual review may be the most efficient means of dealing with that material. In the event that the number of hard copy documents exceeds what can reasonably be manually reviewed, optical character recognition can be applied to the documents, and the resulting data processed and reviewed using TAR.

In sum, while I recognize the importance of this undertaking, whether the Government or a master performs the initial review of the seized materials, the process of identifying those that are privileged and determining whether any privilege exceptions apply should not be inordinately expensive or time consuming. In that regard, even if no master is appointed, I would urge you to consider using Professor Grossman, or someone with similar skills, to assist you with the review.

I hope this is helpful. Please let me know if you have any questions.

Respectfully,

A handwritten signature in blue ink, appearing to read "Frank Maas", written in a cursive style.

Frank Maas