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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

KRISHNA PRASAD ADHIKARI, ET AL § CASE NO. 4:16-CV-02478  
§ HOUSTON, TEXAS  
VERSUS § WEDNESDAY,  
§ NOVEMBER 17, 2021  
KBR, INC., ET AL § 10:05 A.M. TO 11:59 A.M.

DISCOVERY HEARING

BEFORE THE HONORABLE DENA HANOVIC PALERMO  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES: (SEE NEXT PAGE)

ERO: Olivier L.

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1        HOUSTON, TEXAS; WEDNESDAY, NOVEMBER 17, 2021; 10:05 A.M.

2                THE COURT: Good morning everybody. We are here  
3 on the case of Krishna Prasad Adhikari versus KBR, Inc.,  
4 Case No. 4:16-2478.

5                Can I have the appearances of counsel for the  
6 Record?

7                MR. JACQUES: Nicholas Jacques, Cohen Milstein  
8 Sellers and Toll for the Plaintiffs.

9                MR. HARRISON: Good morning, Judge.  
10                Geoff Harrison and Michael Brightman of Susman  
11 Godfrey for KBR.

12                THE COURT: Okay. We are back here again on  
13 privilege again. All right. So it's KBR's Motion so I  
14 guess I will let you start.

15                So, Mr. Brightman, are you going to be doing it?

16                MR. BRIGHTMAN: Yes, Your Honor.

17                THE COURT: Please stand at the podium and make  
18 your arguments from there.

19                And, Carol, are we using our electronic evidence  
20 stuff or not?

21                THE CLERK: They said they don't need any, right?  
22 You said you don't need any?

23                MR. BRIGHTMAN: No, that's fine. I'm sorry.

24                THE COURT: Okay, perfect. Because I have the  
25 book.

1 MR. BRIGHTMAN: Okay.

2 THE COURT: And I've read everything.

3 MR. BRIGHTMAN: Okay, great. And, Your Honor,  
4 just before I get started, would you like me to keep the  
5 mask on during argument or remove it?

6 THE COURT: Yeah. I hate to tell you this, but  
7 I'm leaving for Thanksgiving and my mother is 94 years' old  
8 so I can take anything.

9 MR. BRIGHTMAN: Completely understood. Not a  
10 problem at all. So in accordance with Your Honor's  
11 November 1st Order, KBR sorted the disputed privileged  
12 documents into categories and submitted no more than three  
13 exemplar documents from each category for in camera review.  
14 I'm happy now to talk over each category and each exemplar  
15 document to demonstrate that they are, in fact, subject to  
16 attorney-client privilege.

17 The first category at issue is communications  
18 relating to legal advice regarding the LOGCAP III Contract.  
19 And here just by way of background LOGCAP III, that's short  
20 of Logistics Civil Augmentation Program III. That was a  
21 contract that the Army awarded KBR in 2001 and under that  
22 Contract, KBR provided the Army with all manner of key  
23 logistical aid so everything from beds and food service to  
24 laundry and utilities all over the world wherever the Army  
25 needed it.

1           And the Contract bound KBR to an intricate and  
2 complicated web of duties and understanding those duties  
3 required candid conversation between KBR and its lawyers and  
4 that's why the communications in this category are  
5 privileged.

6           Now the Plaintiffs object to this category on the  
7 ground that the communications, as they put it, were not  
8 made primarily to or from an attorney. First of all, in  
9 many cases, that's just false but regardless, in the context  
10 of a corporate client, the privilege is of course not  
11 limited to communications to or from an attorney. I believe  
12 we discussed this principle last year.

13           The privilege extends, for example, to non-lawyer  
14 employees' discussion and reflection of legal advice from  
15 counsel, the privilege extends to one non-lawyer employee's  
16 relaying of the advice of counsel to another non-lawyer  
17 employee charged with acting on that advice, and the  
18 privilege extends to the efforts of non-lawyer employees to  
19 compile information at the request and direction of counsel  
20 to enable his rendition of informed legal advice. So where  
21 the communications in this category are not directly to or  
22 from an attorney at least one of those three conditions is  
23 plainly satisfied.

24           THE COURT: Uh-huh.

25           MR. BRIGHTMAN: Okay. The first document in this

1 category, this is No. 25777 and this is a redacted document  
2 and this document arises from a Freedom of Information Act  
3 or FOIA request received by the DCMA. Now the DCMA stands  
4 for the Defense Contract Management Agency. That was a  
5 federal agency charged with overseeing defense contractors  
6 like KBR under LOGCAP III.

7 And so here you can see that the email thread  
8 begins with DCMA discussion of the FOIA request and, of  
9 course, KBR produced those communications because they  
10 involve third parties, DCMA officials.

11 THE COURT: Uh-huh.

12 MR. BRIGHTMAN: Ultimately that FOIA request is  
13 forwarded from DCMA to KBR and that's when KBR begins  
14 claiming privilege over certain of these emails.

15 So you can see on February 25th, 2007 -- this  
16 is on page 3 of the email -- KBR project manager,  
17 Raymond Burkhart, requests KBR legal counsel, Michael Peck's  
18 legal advice on responding to the FOIA request. Okay.

19 Attorney Peck then sought additional information  
20 from KBR contract administrator, Charles Wilson, in order to  
21 inform his legal assessment and Wilson responded and sought  
22 further legal advice from Mr. Peck. That's at the bottom of  
23 page 2. And then Mr. Peck, at the top of page 2, provides  
24 legal advice to Mr. Burkhart on responding to the FOIA  
25 request.

1 Continuing to page 1, KBR senior contract manager,  
2 Mary Wade, chimes in. She discusses and reflects Mr. Peck's  
3 legal advice and adds additional information again to  
4 facilitate his legal assessment. Ms. Wade then forwards the  
5 thread to two very important KBR in-house lawyers, assistant  
6 general counsel and then at this time vice-president legal,  
7 Chris Heinrich, and KBR senior legal counsel, Michael Hatch,  
8 in order to obtain their legal advice on the same subject.  
9 And at the top of the thread, attorney Heinrich responds  
10 transmitting legal advice on KBR's obligation to address the  
11 FOIA requests sent to DCMA.

12 THE COURT: Okay. Let's save argument.

13 Did you want to say anything else on that?

14 MR. BRIGHTMAN: No, that's all on this document.

15 THE COURT: Okay. So let's go ahead and hear what  
16 your argument, Mr. Jacques, is in response to that.

17 MR. JACQUES: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. JACQUES: Plaintiffs do not necessarily  
20 dispute a lot of the legal principles on this category that  
21 KBR advances. We do agree that advice with regards to KBR's  
22 obligations under the LOGCAP Contract could be legal advice  
23 and we do agree that under certain circumstances, non-  
24 attorneys may between themselves engage in privileged  
25 conversations.

1           However, we ask the Court to hold KBR to its  
2 burden in showing that these sorts of communications meet  
3 the necessary elements to show that the communication is  
4 privileged. And there's certainly an extra impetus on KBR  
5 in situations in which there are these non-attorneys  
6 engaging in communications either exclusively amongst  
7 themselves or primarily amongst themselves to submit the  
8 evidence to show that they are advancing their communication  
9 in order to secure legal advice for KBR.

10           So on Document 25777, the document Mr. Brightman  
11 was just speaking of, of course we do not know what is  
12 behind these redactions, but the email that stands out to  
13 Plaintiffs is one on page 2 of the email chain -- that's  
14 Bates No. 177067 -- where we have non-attorney  
15 Charles Wilson sends an email to non-attorney Mary Wade,  
16 non-attorney Mike Mayo and attorney Michael Peck and  
17 crucially the salutation, which KBR left unredacted, says,  
18 "Mary/Michael/Mike."

19           So this, as the Plaintiff said here, is a  
20 communication that Mr. Wilson is making to a mix of  
21 attorneys and non-attorneys and that certainly suggests to  
22 us that there may be a non-legal purpose to that email. So  
23 while, of course, we don't know what's in that email, that's  
24 where our suspicion comes from. Thank you, Your Honor.

25           THE COURT: Okay. Do you want to respond to that?



1 MR. BRIGHTMAN: Yes, Your Honor. Just quickly on  
2 that point, so counsel for the Plaintiffs points out that  
3 the email on the bottom of page 2 is directed to Mary,  
4 Michael and Mike and counsel's correct that Mary Wade and  
5 Mike Mayo are non-attorneys, but that, of course, does not  
6 destroy the privilege for reasons that we were just  
7 discussing. In fact, it was vital that Mary Wade and  
8 Mike Mayo be copied on these communications because  
9 Mary Wade is a senior contract manager. Mike Mayo is a  
10 procurement manager.

11 The substance of the Freedom of Information Act  
12 request touched issues for which Ms. Wade and Mr. Mayo were  
13 responsible and so therefore it was crucially important that  
14 these individuals be copied on these communications so that  
15 they could be privy to legal advice provided by Mr. Peck and  
16 then by Mr. Hatch and Mr. Heinrich so that they could  
17 understand the nature of KBR's legal obligations if any with  
18 respect to this request.

19 And I'll just point out, just beyond the  
20 salutation and email, the substance of the email itself  
21 clearly requests legal advice. It's clearly legal in  
22 nature. We believe KBR's met its burden.

23 THE COURT: Okay. So I read the document and I  
24 understand you don't know what's behind the black box so  
25 it's hard for you to make your argument when you're just

1 looking at what could be a problem, but this entire string  
2 is privileged so there's not even a question about it as far  
3 as (indiscernible).

4           The one I thought this bordered on is this really  
5 a request for information? I think it really is, but we  
6 really have to do on page 3, the top email from Peck, but  
7 it's Peck asking the question so I think that that falls  
8 under privilege. I don't understand the question really,  
9 but it asks a legal question so I think that all falls under  
10 privilege. I think this has properly been withheld in the  
11 redacted form.

12           Okay. So let's go on to the next one.

13           MR. BRIGHTMAN: Thank you for that, Your Honor.  
14 So the next document is also a lengthy thread. I did want  
15 to at the outset just clarify for the Court so the Court  
16 knows exactly which components of this lengthy thread are at  
17 issue today or disputed between the parties.

18           So KBR only claims privilege over the bottom four  
19 or the first four in time emails in this thread. The  
20 remainder of the emails in this thread have been produced  
21 and are not in dispute today.

22           THE COURT: Okay. Let me tell you where I have a  
23 little bit more question.

24           MR. BRIGHTMAN: Okay.

25           THE COURT: Being that Plaintiff can't see these

1 and doesn't really know what's in here --

2 MR. BRIGHTMAN: Okay.

3 THE COURT: -- and I've read them so it looks  
4 like -- because this is a long string with a lot of stuff.

5 MR. BRIGHTMAN: It is.

6 THE COURT: The first box I have no problem with  
7 at all.

8 The second box no problem with it at all.

9 Third box, no problem with it at all.

10 Fourth box, I don't have a problem with what's on  
11 page 5. I had a little bit of a question about what's at  
12 the bottom of page 4.

13 MR. BRIGHTMAN: Okay.

14 THE COURT: So you address yourself to that.

15 And I think the middle one to me is questionable.

16 MR. BRIGHTMAN: So I should add, Your Honor, that  
17 middle one from Mr. Rosenbaum --

18 THE COURT: Uh-huh.

19 MR. BRIGHTMAN: -- that I think is the fifth email  
20 in this thread. That has been produced in other  
21 communications.

22 THE COURT: Okay.

23 MR. BRIGHTMAN: It's not at issue before the Court  
24 today. It's that bottom -- the email from Ms. Chilcott on  
25 September 7th, 2006 at the bottom of page 4 --

1 THE COURT: Uh-huh.

2 MR. BRIGHTMAN: -- that is the fourth email in the  
3 thread. That's the final email over which KBR claims  
4 privilege in this thread. Everything that follows that has  
5 been produced.

6 THE COURT: Okay. Even those they're in the boxes  
7 you've produced those?

8 MR. BRIGHTMAN: That's correct. They've been  
9 produced in other versions. KBR produced many versions of  
10 each email thread, each iterative version. And so here,  
11 those communications have been produced in other documents.  
12 I think Plaintiffs actually acknowledge that in their  
13 opposition papers.

14 THE COURT: Okay. So the big issue then is just  
15 around this one on page 4 -- at the bottom of page 4 going  
16 to the top of page 5.

17 MR. BRIGHTMAN: Uh-huh.

18 THE COURT: Okay. So tell me why the stuff on the  
19 bottom of page 4 is privileged as opposed to just kind of  
20 (indiscernible).

21 MR. BRIGHTMAN: Yeah, that's right. I think that  
22 provides the -- first of all, I think it reflects -- and if  
23 we were to provide that, I think it would threaten to reveal  
24 the substance of the legal advice that Ms. Chilcott has  
25 relayed from assistant general counsel Chris Heinrich. I

1 also think it provides crucial information and context that  
2 informed Mr. Heinrich's advice. So I think that that is --  
3 this is important information that I think reflects the  
4 advice provided by counsel and provides crucial context by  
5 which that advice was rendered.

6 THE COURT: Okay. So having looked at it, there's  
7 nothing in here that you need to see so I'm going to hold  
8 the privilege to it, but let me just tell you, it's nothing  
9 so it doesn't matter.

10 Okay. What else? Is that it in this document?

11 MR. BRIGHTMAN: Yes, for that -- for this  
12 document, that's it.

13 THE COURT: Okay. So let's go on to 89266.

14 MR. BRIGHTMAN: Sure. So this is short one.

15 Here, we start with the same individual we left off with in  
16 the last document, that's KBR senior manager for government  
17 compliance Karen Chilcott. She asks for information on  
18 complying with a statute called the "Military  
19 Extraterritorial Jurisdiction Act." That's a statute that  
20 essentially provides jurisdiction or authority for US  
21 prosecutors to prosecute or pursue government contractors  
22 acting abroad. And so KBR is, at least potentially, subject  
23 to the statute as contractor --

24 THE COURT: (Indiscernible).

25 MR. BRIGHTMAN: -- to it under LOGCAP III.

1           In response, Janet Brooks, who is a Human  
2 Resources supervisor, responds by, as you can see, copying  
3 and pasting --

4           THE COURT: Uh-huh.

5           MR. BRIGHTMAN: -- legal advice from assistant  
6 general counsel Chris Heinrich on complying with the Act and  
7 in particular complying with a new Department of Defense  
8 regulation. That's DOD Instruction 5255.11. I think that's  
9 quintessentially privileged as a communication  
10 (indiscernible).

11          THE COURT: Agreed. Okay. So that's fine.

12          MR. BRIGHTMAN: And that does it for Category 1.

13          THE COURT: Okay.

14          MR. BRIGHTMAN: Category 2 involves communications  
15 relating to legal advice regarding the 2006 Federal  
16 Acquisition Regulation or FAR and fragmentary order or  
17 FRAGO. These are two regulatory provisions promulgated by  
18 the Department of Defense in 2006 for the purpose of  
19 addressing alleged trafficking in persons committed by  
20 hundreds of government and military subcontractors abroad  
21 among other alleged misconduct.

22                 The promulgation of these regulations raised a  
23 host of legal questions for KBR including, for instance, the  
24 substantive requirements of these provisions and their  
25 application to KBR. So as with the first category,

1 understanding the nature and sweep of these provisions  
2 required uninhibited discourse between KBR and employers.

3           And by the way just as a reminder, last year  
4 during our first privilege hearing, KBR claimed privilege  
5 over 20 documents relating to this subject matter,  
6 compliance with the 2026 FAR and FRAGO. Your Honor upheld  
7 all 20 of those privilege claims, 19 in full, the other one  
8 in part. So KBR's privilege claims in this category find  
9 strong support in Your Honor's rulings.

10           The first document here I believe is also  
11 quintessentially privileged. Here, assistant general  
12 counsel Chris Heinrich sets forth his interpretation of the  
13 2006 FAR, which incidentally was incorporated into the  
14 LOGCAP III Contract and so became vitally important for KBR  
15 employees to understand and conform to. Mr. Heinrich also  
16 explains which measures KBR ought to take to bring itself  
17 into compliance with the new regulations.

18           And in the following email, vice-president for  
19 KBR's Human Resources Department, Eric Lannen, forwards and  
20 reflects or paraphrases, describes Mr. Heinrich's legal  
21 advice to his subordinates in the HR Department who were  
22 responsible for acting on that advice.

23           At the top, by the way, there's no content in that  
24 top email, but the Plaintiffs did draw some attention to it  
25 in their brief.

1 THE COURT: Uh-huh.

2 MR. BRIGHTMAN: So this is from KBR vice-president  
3 Jill Pettibone --

4 THE COURT: Uh-huh.

5 MR. BRIGHTMAN: -- to KBR director of operations  
6 for the government and infrastructure business unit,  
7 Steven Rank (phonetic). These are two individuals who are  
8 part of the KBR's trafficking in persons or TIP counsel,  
9 which Ms. Pettibone testified about in her declaration,  
10 Exhibit 2 to KBR's brief. They played vital roles in that  
11 body whose chief responsibility was to ensure KBR's  
12 compliance with these new requirements. So again it was  
13 vitally important that both Ms. Pettibone and Mr. Rank be  
14 privy to Mr. Heinrich's legal advice on these matters.

15 THE COURT: Okay. Do you want to argue on that?

16 MR. JACQUES: Briefly, Your Honor. Quickly,  
17 Your Honor, once again on this category, we don't dispute  
18 necessarily the general legal principles that KBR lays out.  
19 We just ask the Court to KBR to its burden with each email.

20 On this email, we similarly just ask KBR -- or the  
21 Court to hold KBR to its burden as to each of these  
22 communications between these non-attorneys in this thread  
23 indeed are necessary for conveying the legal advice, reflect  
24 the legal advice and that the redactions -- this was an  
25 entirely withheld document. If you redacted, it would be



1 narrowly tailored only to exclude those communications that  
2 do meet that burden.

3           There was a little bit of inconsistency from our  
4 perspective on how this email was described to us.  
5 Mr. Brightman just explained that the top email from  
6 Ms. Pettibone to Mr. Rank was blank. That was what was  
7 listed on the privilege log. Counsel had initially raised  
8 their suspicions about this one where we still ask the Court  
9 to hold KBR to its burden with those non-attorney emails.

10           THE COURT: I get it. It's hard -- privilege logs  
11 are almost useless in some cases and so it is very difficult  
12 from a log and from some low-level associate's description  
13 of what is in the document, try to figure out is it really  
14 privileged or not. This is really privileged, no question.

15           MR. JACQUES: Okay. Thank you, Your Honor.

16           THE COURT: Okay. So 9479 is gone.

17           So let's go to 3557.

18           MR. BRIGHTMAN: I did just want to add one point  
19 if I may, Your Honor? Because you were describing privilege  
20 logs and kind of the meet-and-confer process between the  
21 parties. I did just want to say that the parties didn't  
22 just stop asserting a privilege log. We engaged in  
23 multiple --

24           THE COURT: I know. You did confer and you've  
25 narrowed it. I read the briefs. And I appreciate that

1 you're not coming in here with 2,000 documents because  
2 believe me I would be a raving maniac if I had to review  
3 2,000 documents.

4 (Laughter.)

5 MR. BRIGHTMAN: Thank you, Your Honor.

6 THE COURT: And mind you you'd be standing here  
7 watching me review them. So just for the future for the  
8 next dispute, which I'm sure there will be another, that's  
9 why I hold these hearings in person so that you have to  
10 suffer as much as I am.

11 MR. BRIGHTMAN: I'm having fun here, Your Honor.

12 THE COURT: Good.

13 (Laughter.)

14 MR. BRIGHTMAN: So document 35567, so this  
15 document is redacted. KBR produced portions of it. In the  
16 beginning, Debra Hoakman (phonetic) -- she's a KBR contract  
17 administrator -- she receives a request from what's called a  
18 "QAR." That stands for Quality Assurance Representative  
19 working for DCMA, again an agency that oversees KBR's  
20 performance of the LOGCAP III Contract. And the QAR  
21 requested certain information from Ms. Hoakman regarding  
22 working conditions of subcontractors' workers in Iraq and  
23 KBR produced the communications from DCMA.

24 KBR begins withholding communications on page 2.  
25 That's the March 1st, 2007 email from Ms. Hoakman, the

1 recipient of the DCMA request, to Mr. Peck, the KBR in-house  
2 lawyer we discussed in the last category, and she asks  
3 essentially about the QAR's legal authority to issue such a  
4 request and in response -- and KBR's obligation to respond.  
5 And in response to Ms. Hoakman's email, follow contract  
6 administrator, Charles Wilson, chimes in conveying the  
7 advice of KBR's Legal Department on KBR's duty to respond to  
8 the QAR.

9           Mr. Peck then follows up with additional legal  
10 advice on the same subject matter. I understand that  
11 counsel for the Plaintiffs takes issue in particular with  
12 Mr. Wilson's email at the bottom of page 1. He is relaying  
13 the advice of the Legal Department on KBR's duties under the  
14 FAR and FRAGO. You can tell that in part because his advice  
15 is reminiscent or reflective of the legal advice we saw  
16 Mr. Heinrich provide in the prior document on KBR's  
17 obligations under FAR and FRAGO. So even though Mr. Wilson  
18 is communicating the advice, the advice originates with KBR  
19 Legal and is therefore privileged.

20           THE COURT: Okay. And do you want to make a  
21 response argument?

22           MR. JACQUES: Yes, Your Honor. As Mr. Brightman  
23 alluded to, Your Honor, our issue here is with this Wilson  
24 to Heckman (phonetic) email. KBR says that this comes from  
25 Legal. We don't have declaration evidence on this

1 particular document. This is one of those instances where I  
2 believe that -- whatever the ultimate truth might be, KBR  
3 simply has not met its burden to show that this  
4 communication from non-attorney to non-attorney comes from  
5 the Legal Department and is a properly privileged  
6 communication reflecting legal advice.

7           This is reminiscent of Your Honor's Opinion in the  
8 *Nasso* (phonetic) case in which there are several emails  
9 there in which a non-attorney was relaying advice that came  
10 from an attorney. I think in one or two instances, there  
11 was evidence that that had indeed come from an attorney. In  
12 another, there was not. Your Honor held that the party in  
13 that case had not met its burden to show privilege.  
14 Plaintiffs' position is that the same is true here.

15           As for the other emails on the chain, harder to  
16 say from our perspective. However this one email is not  
17 privileged that we've raised at least some questions about  
18 the overall subject of the conversation. Thank you,  
19 Your Honor.

20           THE COURT: Okay. So how do you want to respond  
21 to the fact that it doesn't exactly say, "Heinrich tell me  
22 this"?

23           MR. BRIGHTMAN: I'm sorry, Your Honor.

24           Do you mind just repeat the question one more  
25 time?

1 THE COURT: Well, so the content of Wilson's email  
2 reflects attorney advice but without saying for this  
3 attorney though.

4 MR. BRIGHTMAN: Correct, that's correct.

5 THE COURT: And so --

6 MR. BRIGHTMAN: Again the way that we know this is  
7 first of all, the substance of Mr. Wilson's email is as  
8 legal as it gets. It directly addresses how these new  
9 regulations apply to KBR, what KBR is bound to do under the  
10 law and how those legal obligations apply to Ms. Heckman's  
11 request. Mr. Wilson is not himself a lawyer, but he was  
12 required to be well versed in these new regulations by  
13 virtue of his position as contractor administrator.

14 When he is speaking to Ms. Heckman copying  
15 Mr. Peck, he is relaying advice that he was given from the  
16 Law Department. That's where all this originates.  
17 Mr. Wilson is not himself a lawyer or qualified to compile  
18 and gather and understand this information. This only came  
19 from the Legal Department and Mr. Wilson was simply a  
20 mouthpiece. And as we've established, that maintains the  
21 privilege in the corporate client context.

22 THE COURT: Yeah. And it seems to me like what  
23 he's doing by saying all this, which is all very legal  
24 sounding, so it sounds like he's a lawyer even though you're  
25 saying that he's not a lawyer, that by copying Peck on it

1 and then Peck's response is basically to confirm that what  
2 he's saying and his interpretation of what's been told to  
3 him is correct.

4 MR. BRIGHTMAN: Exactly.

5 THE COURT: So I think it's all privileged so that  
6 one is okay.

7 MR. BRIGHTMAN: Correct. Okay. So that was  
8 document -- that was exemplar No. 2 on category No. 2.

9 Exemplar No. 3, so here again -- I noticed by the  
10 way -- Your Honor asked for KBR to select the exemplar  
11 documents and I didn't just want to sort of pick the easier  
12 ones. I wanted to pick the ones that went directly to  
13 Plaintiffs' objections about, for example, lack of attorney  
14 communications just to demonstrate that KBR's privilege  
15 claims even without attorney communications are proper and  
16 should be upheld and this is a great example of that.

17 THE COURT: Okay.

18 MR. BRIGHTMAN: So in this document, attorneys are  
19 copied but I don't believe any attorney actually speaks.  
20 Nevertheless, the document is privileged because the bottom  
21 email here, the first-in-time email from Timmy Doster was  
22 produced.

23 THE COURT: Okay.

24 MR. BRIGHTMAN: And then the following three  
25 emails we have KBR Logistics coordinator, Claudia Peterson,

1 and then --

2 THE COURT: Wait. Let me ask one question.

3 MR. BRIGHTMAN: Of course.

4 THE COURT: The bottom email that refers to an  
5 attachment, was the attachment produced also?

6 MR. BRIGHTMAN: I'm not at this time whether the  
7 attachment was produced. I don't believe that that document  
8 is in dispute today. I can check --

9 THE COURT: Yeah. I'm just curious. Okay.

10 MR. BRIGHTMAN: Sure. But as to this email, the  
11 three messages that KBR redacted are from logistics  
12 coordinator, Claudia Peterson; senior contract manager,  
13 Mary Wade; and security manager, John Stewart. And while  
14 none of them are lawyers, they're all again reflecting or  
15 relaying, conveying legal advice from KBR's Law Department  
16 here on KBR's duty to establish or proceed with a  
17 trafficking in persons or TIP training program, which was  
18 mandated under these 2006 regulatory provisions.

19 So again because these emails speak directly to  
20 KBR's legal obligations as communicated by the Legal  
21 Department, as advised by the Legal Department, they are  
22 privileged.

23 (Pause in the proceedings.)

24 THE COURT: Okay. So the only question I have is  
25 on the top email.

1 MR. BRIGHTMAN: Uh-huh.

2 THE COURT: Again seems like background to me as  
3 opposed to the conveying of legal advice.

4 MR. BRIGHTMAN: So I think, number one, the top  
5 line discloses legal advice on whether KBR's obligated to  
6 proceed with the training program and it's a quote directly  
7 from the Legal Department.

8 THE COURT: Okay.

9 MR. BRIGHTMAN: And then the final two lines  
10 explains just exactly why Legal is providing that advice.  
11 It explains the issues and concerns and Legal is wrestling  
12 with as it provides this advice. So I guess in one sense it  
13 is background, but in another sense it's inextricably bound  
14 up with the Legal Department's analysis on this issue and  
15 therefore privileged.

16 THE COURT: I think it's privileged.

17 Do you have anything else you want to say on that?

18 MR. JACQUES: No, Your Honor.

19 THE COURT: Okay.

20 MR. BRIGHTMAN: Okay. So now we're on Category 3  
21 of 6. This is a category where I believe the parties do  
22 have more of a kind of disagreement in principle rather than  
23 purely an application so I do want to discuss that.

24 First of all, this is the category dealing with  
25 legal advice pertaining to internal investigations.



1 Unfortunately for our purposes, there is a lot of well-  
2 established and illuminating authority on this topic.

3           Now Plaintiffs' chief objection to this category  
4 of documents is that they contain not legal advice, but  
5 rather, as they put it, "purely factual information." The  
6 problem with that argument is that, of course, once again  
7 the privilege extends beyond legal advice to purely factual  
8 information that is conveyed to counsel to facilitate the  
9 rendition of informed legal advice and advocacy.

10           Again there's lots of authority on this point. I  
11 think the most important one is the Supreme Court's decision  
12 in *Upjohn v. United States*, I think the gold standard for  
13 privilege log, which incidentally itself arises from an  
14 internal investigation. So Upjohn is a pharmaceutical  
15 company. It catches wind of allegations that its subsidiary  
16 is making illicit payments to a foreign government.  
17 Upjohn's lawyers commence an internal investigation into  
18 those allegations. In follow-up litigation, the Government  
19 seeks to compel production of materials pertaining to the  
20 investigation. The Supreme Court holds that even the purely  
21 factual information generated during the investigation is  
22 privileged saying, quote:

23           "The privilege applies to the giving of information to  
24 the lawyer to enable him to give sound and informed  
25 advice. The first step in the resolution of any legal

1           problem is ascertaining the factual background and  
2           sifting through the facts with an eye to the legally  
3           relevant. A lawyer should be fully informed of all the  
4           facts of the matter so that his client can obtain the  
5           full advantage of our legal system.”

6           So clearly the privilege extends to purely factual  
7           information of the sort which Plaintiffs object.

8           There’s more authority on this topic. A follow-up  
9           case from the DC Circuit called in “In re KBR,” an extremely  
10          important case for a couple of reasons. First of all, it  
11          addresses communications that are nearly identical to those  
12          at issue in this category, namely, communications pertaining  
13          to investigations launched by KBR to ensure compliance with  
14          Department of Defense regulations and KBR’s own code of  
15          business conduct.

16          The DC Circuit reviews those materials and  
17          concludes that the investigations were privileged for two  
18          reasons: first, they were conducted by counsel; second, they  
19          were undertaken for a legal purpose. And because the  
20          investigations were privileged, all communications relating  
21          to the investigation were likewise privileged.

22                 THE COURT: Wait. They were conducted by counsel.

23                 What was the second piece?

24                 MR. BRIGHTMAN: Conducted by counsel and  
25          undertaken for a legal purpose, namely, to ensure compliance

1 with Pentagon regulations and KBR's own code of business  
2 conduct. And I mention this because it's rare to have such  
3 a prominent authority be this squarely on point.

4           And here, Your Honor, KBR's former vice-president  
5 legal and assistant general counsel testified in his  
6 declaration, paragraph 16 through 21 -- this is Exhibit 1,  
7 Docket Entry 246-1. Mr. Heinrich says just as in *In re KBR*,  
8 the investigations at issue in this category were conducted  
9 by counsel, supervised and overseen by counsel for a purely  
10 legal purpose, namely, for compliance reasons, to ensure  
11 compliance with essentially the very same regulatory  
12 provisions at issue in the *In re KBR* case and to assess or  
13 detect or analyze any liability or potential civil  
14 enforcement exposure to KBR.

15           I want to mention one other thing, if that's all  
16 right, before getting into the specific documents and that  
17 is Plaintiffs' counter that the privilege does not apply to  
18 underlying facts and they sort of echo that refrain  
19 throughout their brief.

20           I'm not sure that they understand the meaning of  
21 that argument because the *Upjohn* Court actually explains  
22 this so-called underlying facts rule, okay? And what does  
23 the *Upjohn* Court say? It says there's a distinction between  
24 a fact on the one hand and a communication about that fact  
25 on the other. The privilege applies to communications but

1 does not apply to underlying facts and therefore, the *Upjohn*  
2 Court concludes, the Government is free to learn the  
3 underlying facts by, for example, questioning the *Upjohn*  
4 employees who communicated with counsel, okay?

5           Now KBR completely agrees with that. Plaintiffs  
6 are not entitled -- just as in *Upjohn*, Plaintiffs are not  
7 entitled to these privileged communications, but what they  
8 may attempted to do is pursue the facts underlying these  
9 communications by, for instance, deposing the relevant  
10 witnesses, but what the Plaintiffs cannot do is distort this  
11 underlying facts principle beyond recognition to pierce  
12 KBR's valid claims of privilege.

13           THE COURT: All right. And so I get that, I  
14 understand that. And I'm -- there's one document in  
15 particular that's not in this -- the last of all documents,  
16 but the question I had is: have the Plaintiffs had the  
17 opportunity to discover those facts elsewhere because -- and  
18 we'll get to that document when we get to it, but I  
19 understand the issue.

20           MR. BRIGHTMAN: Okay.

21           THE COURT: The facts themselves are not  
22 privileged. It's just the communication to counsel for the  
23 rendition of legal advice that cloaks it in a privilege  
24 (indiscernible). I understand that.

25           MR. BRIGHTMAN: Okay, great. So we can go now --

1 did you want me to address the last document or did you want  
2 to go --

3 THE COURT: No, no, no, no.

4 MR. BRIGHTMAN: Okay.

5 THE COURT: We'll get there when we get there.

6 MR. BRIGHTMAN: Okay.

7 THE COURT: I'm just saying I already thought of  
8 the problem so.

9 (Laughter.)

10 MR. BRIGHTMAN: Okay.

11 THE COURT: Let's go to 4923.

12 MR. BRIGHTMAN: Sure. So 4923 begins with  
13 allegations from a KBR employee named Rodney Mike Land.  
14 He claimed that certain unnamed labor brokers charged  
15 allegedly excessive recruitment fees to third country  
16 national workers -- that just means -- that phrase just  
17 means a worker who is not from the host country, Iraq, or  
18 from the United States but from some third country -- for  
19 work in Iraq. And KBR disclosed most of the communications  
20 in this thread including the allegations. Mr. Mayo, a  
21 procurement manager for KBR, met with Mr. Land, discussed  
22 his allegations. KBR proceeded all of that.

23 The only email that KBR did not produce is the top  
24 or last-in-time email in this thread. That's on page 1.  
25 And the reason why that's redacted is because Ms. Pettibone

1 relays legal advice from KBR in-house counsel, Ron Allen,  
2 upon KBR's investigation into Mr. Land's allegations. And  
3 it's particularly the line -- I guess it's five lines down  
4 in the email --

5 THE COURT: Yeah.

6 MR. BRIGHTMAN: -- that begins with "First."

7 THE COURT: Right. And when I was reading this,  
8 the first question I had is whether Ron Allen was an  
9 attorney.

10 MR. BRIGHTMAN: He is.

11 THE COURT: In fact, his name wasn't highlighted  
12 like the names to and from the email. I did see somewhere  
13 else in the documents later on that Ron Allen is an  
14 attorney.

15 MR. BRIGHTMAN: Yes.

16 THE COURT: So I see that.

17 MR. BRIGHTMAN: Okay.

18 THE COURT: Okay.

19 MR. BRIGHTMAN: And also just for further  
20 support, Exhibit 2 in KBR's brief is the Declaration of  
21 Jill Pettibone.

22 THE COURT: Uh-huh.

23 MR. BRIGHTMAN: She testifies at paragraph 8 that  
24 she was indeed relaying the legal advice of Ron Allen.  
25 That's Docket Entry 246-2, paragraph 8.

1 THE COURT: Okay. Do you have anything you want  
2 to say on that one?

3 MR. JACQUES: Yes, briefly, Your Honor. Just to  
4 reply to some of the general arguments that Mr. Brightman  
5 made first about investigations, I don't think we're quite  
6 as far apart as Mr. Brightman makes us out to be. We do not  
7 necessarily dispute that investigations when they meet the  
8 correct circumstances can be privileged communications. We  
9 don't dispute that just because a fact is communicated in a  
10 course of an investigation that that makes it unprivileged.

11 Sort of two points that animate our concerns with  
12 this category. One of them is that to the extent in some of  
13 these communications that there are documents that were  
14 preexisting that have been sent to counsel as part of an  
15 investigation, I know on KBR's original privilege log, they  
16 withheld dozens of email chains that in some cases dated  
17 years before the communication to the attorney. These  
18 documents clearly were not created for the purpose of  
19 seeking legal advice. Just because they are passed along in  
20 the course of an investigation does not cloak  
21 (indiscernible) privilege.

22 The other concern is that just because a document  
23 relates to an investigation and not -- aspects of that  
24 investigation may otherwise be privileged, that does not  
25 mean that all documents relating to that investigation are

1 also privileged.

2           There are two cases in the Northern District of  
3 Texas, the *Navigant Consulting versus Wilkinson* and the  
4 *Cybercorp versus KPMG* (phonetic) case, relate that KBR must  
5 still meet their burden with regard to each specific  
6 document. And I imagine we'll discuss the issue of  
7 Plaintiffs' opportunity to discover underlying information  
8 in more detail when we get to the particular document  
9 Your Honor had concerns about.

10           I will say by way of a little bit of background,  
11 this is something the Plaintiffs are particularly sensitive  
12 to because we have had a difficult time conducting document  
13 discovery in this case due to a large (indiscernible) of  
14 KBR's ESI data being made unavailable. That's an issue  
15 that's been briefed and argued extensively in front of the  
16 District Court with a motion of ours still pending.

17           THE COURT: District Judge --

18           MR. JACQUES: A district --

19           THE COURT: -- here in District Court.

20           MR. JACQUES: The district judge, yes, Your Honor.

21           THE COURT: Okay.

22           MR. JACQUES: And so that's why we are especially  
23 sensitive in ensuring that KBR is not using the privilege in  
24 order to protect information that otherwise might be  
25 discoverable because it was passed along to its attorneys.



1           With regard to document 4923, I would just say  
2 that there has been some inconsistency here as far as KBR's  
3 privilege log originally stating that this was from --  
4 Ms. Pettibone's email was requesting legal advice from  
5 attorneys Heinrich and Hatch. KBR later told me -- told us  
6 that Ms. Pettibone was requesting legal advice and relaying  
7 Allen's legal advice. KBR is now saying that she's just, in  
8 this case, relaying Allen's legal advice. Of course we  
9 don't know what's in that email, but that raises some  
10 concern for us. That's all I have on this one. Thank you,  
11 Your Honor.

12           THE COURT: Okay.

13           MR. BRIGHTMAN: Your Honor, if I may? I'd like to  
14 just address some of the issues that counsel just raised.  
15 He raised a number of different issues. The first related  
16 to certain unidentified nonspecific documents that  
17 Plaintiffs believe were privileged simply because they were  
18 later sent to counsel. Again I don't know which documents  
19 counsel's referring to.

20           What I can say is that under no circumstances did  
21 KBR conduct privilege analysis in that way. KBR did not  
22 withhold a document merely because it was sent to counsel.  
23 None of my arguments here today, in the brief or last year  
24 for that matter relied on that kind of privilege analysis.  
25 Each document by themselves clearly satisfies KBR's burden

1 for privilege often for a whole number of reasons. That's  
2 the first one.

3           The second point is counsel again mentioned this  
4 time his frustration locating relevant documents for the  
5 case. As he mentioned correctly, that issue has been  
6 extensively litigated before Judge Ellison, multiple round  
7 of briefing including a motion for reconsideration, two oral  
8 arguments that were extremely lengthy.

9           What was the outcome of that dispute?  
10 Judge Ellison held on the Docket publically KBR need not  
11 provide any more document discovery at this juncture and  
12 Judge Ellison encouraged the Plaintiffs to start taking  
13 depositions.

14           Judge Ellison also noted on the Record that the  
15 document discovery has occurred. He was right about that.  
16 KBR has produced tens of thousands of documents in this case  
17 from, I believe, 26 different document custodians. That's  
18 on top of a predecessor case called "Adhikari I" on which  
19 KBR won summary judgment on all claims. The Fifth Circuit  
20 affirmed and the Supreme Court denied cert. KBR also  
21 produced I think about 100,000 pages of documents in that  
22 case, which are also made available here to this nearly  
23 identical case.

24           Judge Ellison said -- and this is a virtual quote  
25 from the transcript on that hearing, "The document discovery

1 has occurred and it has not advanced the Plaintiff's case."  
2 That's the status of these proceedings. That's why  
3 Plaintiffs are frustrated, not because KBR has not met its  
4 obligation to provide documents.

5 Now turning to these particular documents, again  
6 this document is privileged because Ms. Pettibone conveyed  
7 the legal advice of Mr. Allen. I don't believe that counsel  
8 for Plaintiffs actually provided any argument on this  
9 document whatsoever. I think KBR has clearly met its  
10 burden.

11 (Pause in the proceedings.)

12 THE COURT: Okay. So let me ask this question:  
13 why can't you produce that paragraph and just delete, redact  
14 out the line with what Ron Allen said? What's AJL?

15 MR. BRIGHTMAN: So that refers to Halliburton.  
16 That was KBR's parent company at this time.

17 THE COURT: Okay.

18 MR. BRIGHTMAN: I think for the same reason that  
19 we discussed with some of the other documents, namely, the  
20 provide context and information surrounding the legal advice  
21 that Mr. Allen gave. I think, as we've been discussing, the  
22 privilege is not confined just to legal advice itself but  
23 also extends to facts and context bound up with that legal  
24 advice and that's what's provided here.

25 And again KBR has been very transparent on this

1 issue. It produced all the other emails in this case, the  
2 interview with Land, the allegations from Land, et cetera.

3 THE COURT: Yeah. I'm going to leave the  
4 privilege on it. There's really nothing in here that --  
5 even -- it's just a different explanation of the background  
6 and there's nothing in here that you need to see to make  
7 your case so I'm going to leave it privileged. Okay.

8 MR. BRIGHTMAN: Okay.

9 THE COURT: Let's go to the next one.

10 MR. BRIGHTMAN: Sure. So the next document, this  
11 is 18187. This is a document that KBR withheld in full.  
12 This starts with allegations from a third-party consultant  
13 who complained that a KBR subcontractor did not pay its  
14 workers and did not submit invoices with the requisite  
15 supporting documentation.

16 And just in the interest of full disclosure, the  
17 consultant here is Dwayne Banks. His allegations were  
18 discussed at great length in the Adhikari I case. They've  
19 been discussed at some length in this case as well.  
20 Plaintiffs are aware of them. And KBR has produced many  
21 documents about Mr. Banks' allegations.

22 KBR has withheld this particular document because  
23 it clearly consists of first, an email from assistant  
24 general counsel, Chris Heinrich, requesting information from  
25 senior vice-president, Jill Pettibone, about Mr. Banks'

1 allegations and about KBR's and the Army's response to the  
2 allegations. Those --

3 THE COURT: This is clearly a privileged document.  
4 I mean, there's clearly -- the head legal guy at KBR is  
5 requesting information on something having to do with this  
6 allegation and he's getting the facts and the justification.  
7 So there is no question that this is (indiscernible).

8 MR. BRIGHTMAN: And let me add, Your Honor,  
9 Plaintiffs know that and that's why Plaintiffs argue in  
10 their brief not that this document is not privileged in the  
11 first instance, but rather that KBR waived privilege by  
12 using this document as a sword and a shield. That was my  
13 exact reaction, Your Honor.

14 THE COURT: Yeah. And so I'm not sure -- I saw  
15 that in the briefing and I wasn't really -- the sword and  
16 shield argument is always a very complicated one and --

17 MR. BRIGHTMAN: Uh-huh.

18 THE COURT: -- I wasn't really sure from looking  
19 at that how this is being used as a sword and shield.

20 MR. BRIGHTMAN: Look, I'm happy to explain why it  
21 very clearly isn't. So first of all, there are many  
22 problems with the sword/shield argument raised by  
23 Plaintiffs, which I was frankly surprised to see. For  
24 starters, as I mentioned, KBR first claimed privilege over  
25 these documents in January. The parties have been working

1 through these privilege issues all year long.

2           Judge Ellison has consistently directed the  
3 parties to meet and confer before raising discovery issues  
4 with the Court and he's been especially emphatic on that  
5 point with regard to privilege issues. Yet despite those  
6 repeated directives, Plaintiffs never so much as suggested  
7 that KBR committed sword/shield waiver with respect to this  
8 document until raising the issue for the first time in their  
9 opposition brief last week when they knew KBR would not have  
10 an opportunity to respond in writing. That was  
11 inappropriate, that was prejudicial, that was inconsistent  
12 with Judge Ellison's directive.

13           THE COURT: All right. That's fine. Let's get to  
14 the heart of the matter.

15           MR. BRIGHTMAN: The heart of the matter, Your  
16 Honor, is that Plaintiffs' chief authority in support of  
17 sword/shield is a case called "*In re Itron*." They cite it  
18 on page 14 of their opposition brief. *In re Itron* provides  
19 no support to Plaintiffs' theory whatsoever. It's a Fifth  
20 Circuit case. It applies Mississippi law to counsel -- and  
21 now I'm quoting to the holding of Plaintiffs' chief  
22 authority, quote:

23           "Because Itron's complaint mentions no attorneys, no  
24 attorney-client communications and no attorney-client  
25 relationships it cannot be said to use the attorney-

1 client privilege as a sword," end quote.

2 That's apparently the best Plaintiffs' got.  
3 Clearly sword/shield waiver does not apply. Sword/shield  
4 waiver applies unusually in two circumstances. The first  
5 circumstance is where a party actually discloses a portion  
6 of a privileged communication to advance their case. When  
7 they do that, typically the party waives privilege over the  
8 communication as a whole, perhaps other communications  
9 touching the same subject matter. KBR never disclosed any  
10 part of its communication. Plaintiffs do not claim  
11 otherwise. That ground for sword/shield waiver is totally  
12 inapplicable.

13 The other circumstance in which sword/shield  
14 waiver might apply is where a party places the advice of  
15 counsel at issue and the classic example is in patent  
16 litigation where a defendant is accused of willful  
17 infringement and the Defendant affirmatively defends that  
18 when engaging in the alleged infringement, he relied on the  
19 advice of counsel precluding any willfulness. Usually by  
20 mounting that kind of an affirmative defense, the Defendant  
21 may be found to have placed the advice of counsel at issue  
22 waiving privilege over related communications.

23 Here, KBR never invoked the advice of counsel in  
24 mounting any claim for affirmative defense in this case and  
25 Plaintiffs do not claim otherwise. Your Honor, Plaintiffs'

1 sword/shield argument is as unpersuasive as it is untimely.

2 THE COURT: Okay. Mr. Jacques, you can go now.

3 MR. JACQUES: I'll try to be brief, Your Honor.

4 Quickly first on the timeliness issue, the reason that we  
5 raised it when we did was not to trap KBR in any --

6 THE COURT: That's fine. I don't -- I'm not  
7 even -- I don't care.

8 MR. JACQUES: All right. Very well. Our position  
9 here is that KBR has put these communications in issue,  
10 specifically communications relating to the investigation  
11 into the Banks allegations. The reason there is because KBR  
12 has argued that the Banks allegations have been debunked,  
13 that the US-based KBR employees whose knowledge Plaintiffs  
14 needs to prove knowledge of the human trafficking, the  
15 forced labor going on at the military bases in Iraq.

16 Plaintiffs have to prove in order to meet the  
17 elements of alien tort statute aiding and abetting  
18 liability. They've argued that because this investigation  
19 took place and debunked these allegations, Plaintiffs cannot  
20 show that they had knowledge, also cannot show that the KBR  
21 US employees were involved with covering up these  
22 allegations. They said there has been an independent  
23 investigation that turned up nothing.

24 The problem is that KBR is now -- has not produced  
25 any documents relating to this investigation, has claimed no



1 documents relating to this investigation exist and is now  
2 using the privilege to withhold documents that it says  
3 relates to this investigation. So as we see it, KBR has put  
4 in the issue of the investigation that it supposedly  
5 undertook independently into the Banks allegations and yet  
6 has refused to provide that information to the Plaintiffs.

7 THE COURT: Okay. But you know who was involved  
8 in the investigation, correct?

9 MR. JACQUES: We know many of the people that were  
10 involved in the investigation.

11 THE COURT: And so can't you just depose them on  
12 these questions?

13 MR. JACQUES: We are planning to do so. We do  
14 worry that KBR will raise this exact privilege investigation  
15 when we do and, of course, something -- that's something  
16 that will --

17 THE COURT: But the facts are the facts.

18 MR. JACQUES: Uh-huh.

19 THE COURT: So Banks made certain allegations.  
20 What was his allegation?

21 MR. JACQUES: He alleged that when he was  
22 investigating -- or he was hired to audit KBR subcontracts,  
23 that a number of third-country nationals came to his living  
24 quarters and raised issues with him such as them not being  
25 properly paid, having been deceived into take their

1 employment there, getting their passports withheld among  
2 other issues.

3 THE COURT: Right. So he had raised an issue  
4 about the tens, right, the tens coming to him and --

5 MR. JACQUES: Yeah.

6 THE COURT: -- saying they weren't getting paid  
7 timely or at all and that their passports had been seized.

8 So aren't you entitled to just interview or depose  
9 the witnesses who were involved in the underlying facts of  
10 that without looking at the investigation? So they're not  
11 using the investigation -- I don't think they're using the  
12 investigation to preclude you from making the claim.  
13 They're just saying, "Prove it, but our investigation has  
14 debunked it." So that's what I'm understanding here.  
15 They're saying, "We looked into it. We didn't find any  
16 merit to it so we didn't have knowledge that there was these  
17 misactions going on, this bad behavior going on in this  
18 location."

19 And you are free to depose all the fact witnesses  
20 who have the actual knowledge of the underlying facts. You  
21 don't need to see their investigation summaries because  
22 that's what's privileged, but you get to go to the  
23 underlying people and depose them.

24 Now if there's something disastrous like all of  
25 the people are no longer available or everybody's holding on

1 saying, "Privileged," and they're refusing to testify, then  
2 come back to the Court and see at that point if we're not  
3 going to make them disclose these documents because you're  
4 not able to get the information from the underlying people.  
5 And in that circumstance, you would have your ability to get  
6 that information. And so I think it would be maybe a  
7 different calculus. I don't want to prejudge it because it  
8 would require argument and briefing, but at this juncture,  
9 they're just saying -- you've got the information on Banks.  
10 Go do the discovery.

11 MR. JACQUES: Your Honor, we certainly expect and  
12 hope that we will be able to discover without issue a lot of  
13 the factual information underlying this. I think the issue  
14 here is that they have used the investigation specifically  
15 and the fact that they have conducted this what they have  
16 called an "independent investigation."

17 THE COURT: But how are they using that? Where  
18 are they using that?

19 MR. JACQUES: So, Your Honor, in the prior  
20 litigation, the Adhikari I litigation, Plaintiffs raised the  
21 issue that these allegations had been brought up and had  
22 been transmitted to KBR employees in the United States. At  
23 the time, the law (indiscernible) had been changing and the  
24 Plaintiffs in that case were trying to amend their complaint  
25 in order to bring in aiding and abetting allegations. And

1 so there is this whistleblower and essentially his -- with  
2 the participation of employees in the United States, his  
3 allegations were suppressed.

4 KBR came back with a document showing that  
5 Ms. Pettibone, KBR's -- one of KBR's vice-presidents, said,  
6 "We will conduct an independent investigation," and that  
7 satisfied the District Judge that there was no wrongdoing  
8 from KBR US employees.

9 The problem is we have now with the opportunity to  
10 conduct further discovery based on the US-based conduct, we  
11 have seen no evidence that this investigation has actually  
12 taken place. So the issue is the using the fact that the  
13 investigation took place to absolve the KBR US employees of  
14 wrongdoing with regards to covering up Mr. Banks'  
15 allegations. We think that KBR has put that in issue by  
16 (indiscernible) privilege to withhold communications  
17 relating specifically to the investigation.

18 THE COURT: But they put in issue in a different  
19 lawsuit.

20 MR. JACQUES: Well, they have brought it up again  
21 here. They brought it up in their Motion for Summary  
22 Judgment, which had been deferred for further discovery.

23 THE COURT: How'd they bring it up in a motion for  
24 summary judgment?

25 MR. JACQUES: Well, we -- Plaintiffs had raised

1 the issue of the Banks allegations and they cited back to  
2 the District Court's holding from the first lawsuit with  
3 reference to the documents or evidence that was cited there.  
4 I believe we do cite KBR's Reply Brief in our briefing here.

5 THE COURT: Okay. So what's your response to  
6 that?

7 MR. BRIGHTMAN: So first of all, I don't --  
8 Plaintiffs are mounting a sword/shield waiver argument.  
9 They have not cited any authority that supports their  
10 position nor have they cited any record evidence that  
11 supports their position.

12 We're talking now about filings that Plaintiffs  
13 haven't even put into the Record that no one's had an  
14 opportunity to review with sword/shield waiver in mind.  
15 That's part of the improper way in which Plaintiffs have  
16 raised this argument.

17 Getting to the heart of the matter, sword/shield  
18 waiver, as I mentioned, applies when -- may apply when a  
19 communication is placed at issue. Now KBR doesn't -- or  
20 excuse me -- Plaintiffs don't allege that KBR actually  
21 disclosed any part of this communication so that ground for  
22 sword/shield waiver is off the table. I don't think  
23 Plaintiffs dispute that.

24 What instead Plaintiffs are saying is that they  
25 put it at issue by arguing that KBR investigated the

1 allegations. First of all, that doesn't qualify for at-  
2 issue waiver because typically at-issue waiver or  
3 sword/shield waiver requires placing the information at  
4 issue to advance a claim or affirmative defense.

5 Here, there is no claim or affirmative defense.  
6 The investigation isn't part of any claim or affirmative  
7 defense. KBR's just saying, "We looked into it. We didn't  
8 find anything to substantiate the allegations." That's not  
9 an affirmative defense. KBR's allowed to defend itself and  
10 in so doing isn't using information as a sword. That's the  
11 first problem.

12 The second problem is that just as Your Honor  
13 said, the Fifth Circuit says even in the *In re Itron* case  
14 that Plaintiffs rely on that just because information may be  
15 relevant to a particular claim or defense in a lawsuit does  
16 not mean that the party has placed the information at issue.  
17 Otherwise there's no logical end in sight to the Plaintiffs'  
18 argument. I mean, how would KBR be able to have privileged  
19 discussions with counsel about investigations?

20 And KBR, by the way, we went -- Your Honor asked,  
21 well, why can't Plaintiffs just depose the relevant  
22 witnesses, which of course they can. They haven't in years.  
23 They haven't deposed anyone about the Banks investigation  
24 since the Adhikari I case was filed in 2008, but that's not  
25 for want of KBR making witnesses available. But KBR's gone

1 beyond that.

2           Plaintiffs said to Your Honor just now that KBR  
3 has produced no documents relating to the investigation.  
4 That's just not true. KBR's produced many documents related  
5 to the investigation. That's how Plaintiffs learned about  
6 it. That's why the parties have briefed it so extensively.  
7 That's why the Court reviewed it when he concluded that  
8 Plaintiffs failed to raise a genuine issue of material fact  
9 in the Adhikari I case. And that's why the Court said again  
10 here that the document discovery is not advancing their  
11 case.

12           I'll add just one final point about this -- these  
13 Banks allegations. So this Court found that the Banks  
14 allegations were insufficient, legally insufficient as a  
15 matter of law to support the Adhikari I Plaintiffs' case.  
16 And the Banks allegations were much more important to that  
17 case because they arose from the very base at which the  
18 Adhikari I worked, namely, Al Asad.

19           This case one respect in which it is different  
20 from the predecessor case is that it has nothing to do with  
21 Al Asad. These Plaintiffs never set foot at this base.  
22 These Plaintiffs were at two entirely different locations to  
23 which Banks' allegations have no application. So for a  
24 whole host of reasons, Your Honor, the sword/shield argument  
25 should be rejected.

1 THE COURT: Okay. Well, I'm going to reject it  
2 for now. And if down the road you have some other issue  
3 with sword/shield, you can come back and rebrief that  
4 specifically, but for now I'm finding that 1817 is  
5 privileged.

6 MR. BRIGHTMAN: Thank you, Your Honor. The final  
7 document --

8 THE COURT: Wait one -- let me make sure I'm  
9 saying it right, 18187 is privileged.

10 MR. BRIGHTMAN: Thank you very much. The final  
11 document in this category, document 19236. This is withheld  
12 in full. It's an email from Rick Chapman, who is an in-  
13 house lawyer for Halliburton. KBR at this time was a  
14 wholly-owned subsidiary of Halliburton. I know this issue  
15 wasn't raised in the briefs. The parties have discussed it.  
16 Because KBR was a wholly-owned subsidiary of Halliburton at  
17 this time, they're effectively treated as one client so  
18 discussion between Halliburton and KBR like we see here does  
19 not vitiate the privilege. Plaintiffs do not argue  
20 otherwise.

21 And in this communication, Mr. Chapman asks KBR  
22 assistant general counsel, Chris Heinrich, for legal advice  
23 on pending KBR internal investigations into allegations  
24 having nothing to do with this case, namely, allegations of  
25 unethical subcontract bidding and in response, Mr. Heinrich



1 provides his legal assessment of the investigative findings  
2 and whether they support any kind of legal, regulatory,  
3 ethical or other violation, again quintessentially  
4 privileged communications.

5 THE COURT: Yeah, I think this is clearly  
6 privileged. Okay.

7 MR. BRIGHTMAN: Okay.

8 THE COURT: So there we go. Then we're in the  
9 next category.

10 MR. BRIGHTMAN: Yes, another interesting category.  
11 So this is the category of privileged documents related to  
12 legal advice on drafts, preliminary drafts sent to counsel  
13 for legal review.

14 THE COURT: Okay.

15 MR. BRIGHTMAN: Now Plaintiffs' position with  
16 respect to this category is -- and this is virtually quoting  
17 from their list of privilege challenges in Exhibit 3 to  
18 KBR's brief where they say, "Drafts intended for eventual  
19 public release are not privileged." I think that's  
20 Plaintiffs' position stated verbatim.

21 The problem with that view is that this Court has  
22 already squarely rejected it. The case is *Apex Municipal*  
23 *Fund versus N. Group Securities*. That's 841 F.Supp. 1423,  
24 Southern District of Texas, 1993. The relevant page is  
25 1428. And there this Court held -- and I'm quoting:

1           "Preliminary drafts of documents and communications  
2           made between attorney and client during the drafting  
3           process are privileged. Only those parts of attorney-  
4           client documents that ultimately appear in published  
5           documents are outside the privilege," end quote.

6           This is devastating authority for the Plaintiffs  
7           because it undercuts their central position. Actually, as  
8           this Court held, drafts intended for eventual public release  
9           remain privileged. Only documents that are actually  
10          publically released fall outside the privilege.

11          Now Plaintiffs quote in -- I think it's page 15 of  
12          their opposition brief, they quote a line from the *Apex* case  
13          that on its face appears to support the Plaintiffs' view and  
14          that quote is:

15          "When a client intends to disclose information to third  
16          parties, the communication of that information to his  
17          attorney does not make it privileged."

18          The problem is when you read *Apex*, you see that in  
19          that part of the case, the Court is discussing a Fifth  
20          Circuit case called *United States versus Pipkins*. That's  
21          actually another case that the Plaintiffs cite in their  
22          opposition brief. What happened in *Pipkins*? Well, there  
23          the Court -- the Fifth Circuit held that the Defendant's  
24          handwriting sample were not privileged because the Defendant  
25          had already divulged them to the Government. And, in fact,

1 the Apex Court distinguished the draft public offering  
2 statements at issue there from the handwriting samples at  
3 *Pipkins*. And the Court explained unlike in *Pipkins*, here  
4 the draft public offering statements were not divulged to  
5 third parties.

6           So Plaintiffs' reliance on Apex amounts to nothing  
7 more than the sort of unremarkable proposition that  
8 communications divulged to third parties tend not to be  
9 privileged. That has not application to this category.  
10 None of these communications were divulged to third parties.  
11 Plaintiffs do not claim otherwise. Therefore under a  
12 straightforward application of *Apex Municipal Fund*, these  
13 are draft documents and communications between attorney and  
14 client during the drafting process and are privileged,  
15 simple as that.

16           The first document in this category is 4219.  
17 Here, a KBR government operations manager named Jim Morrison  
18 receives an inquiry from an Army contracting officer, or  
19 ACO, again another official that oversaw KBR's performance  
20 under the LOGCAP III Contract, and the ACO asks Mr. Morrison  
21 about specific steps that KBR has taken to address  
22 allegations of fraud, bribery and false statements among  
23 unnamed former employees and subcontractors and, of course,  
24 KBR produced that communication from the ACO.

25           Mr. Morrison then emails vice-president legal

1 Chris Heinrich asking for his legal assistance on responding  
2 to the ACO. Mr. Heinrich responds by providing legal advice  
3 on addressing the ACO and Mr. Morrison then sends a follow-  
4 up request for legal advice to Mr. Heinrich. So note that  
5 this falls squarely within the category of privileged under  
6 *Apex*.

7 THE COURT: Okay. Any argument on that,  
8 Mr. Jacques?

9 MR. JACQUES: If I may respond briefly on the  
10 Plaintiffs' drafts generally? A few things on the *Apex*  
11 case. First off it dealt specifically with the issue of  
12 draft public securities offerings. It also noted that even  
13 within that specific issue, it was coming down on the  
14 minority side of a circuit split, one which the Fifth  
15 Circuit did not expressly weigh into although it did note  
16 the *Pipkins* case, which it seems just at least in other  
17 context holds that that draft communications may be  
18 unprivileged.

19 As far as the other authority, the Court noted  
20 that the Fourth, the Seventh, the Eighth and I believe the  
21 Second, although it wasn't cited in *Apex*, also held that  
22 these sort of draft securities disclosures are not subject  
23 to be privileged whereas the *Apex* Court sided only with the  
24 Tenth Circuit at that time.

25 Also I would direct the Court to the case of

1 *Lofton v. Bonday* (phonetic) from the District Court in the  
2 District of Columbia, which notes that drafts standing alone  
3 are not communications so they are not normally within the  
4 attorney-client privilege, though it notes that sometimes  
5 otherwise privileged information may be reflected in drafts.

6           So here we would just ask the Court to take an  
7 individualized review of the communications that KBR argues  
8 are privileged drafts. If the circumstances of those  
9 communications are such that KBR was intending information  
10 to be kept confidential or otherwise relays confidential  
11 information, then we acknowledge that they may be  
12 privileged. However we believe that KBR here is over-  
13 reading the *Apex* case and that there's no such  
14 (indiscernible). Nothing specific on the (indiscernible).  
15 Thank you, Your Honor.

16           THE COURT: All right. So the first document is  
17 privileged. (Indiscernible) privileged (indiscernible).

18           All right. Let's go to 4459.

19           MR. BRIGHTMAN: Yes, Your Honor.

20           THE COURT: And this is a document you withheld.  
21 Let me see, this is the -- okay. This one I did have a  
22 question on because it's a --

23           MR. BRIGHTMAN: Sure.

24           THE COURT: -- well, I'm assuming -- you said it's  
25 a draft of the subcontract general position.

1 MR. BRIGHTMAN: Exactly.

2 THE COURT: But what -- I'm looking at this  
3 document. What shows me it's a draft and that it was  
4 communicated to anyone? Because it's just a draft.

5 MR. BRIGHTMAN: That's correct.

6 THE COURT: So how do I know it's a draft and how  
7 do I know it was communicated among counsel or between  
8 whoever it was communicated?

9 MR. BRIGHTMAN: Sure. So first of all, the next  
10 document in this category --

11 THE COURT: 17019.

12 MR. BRIGHTMAN: Correct. Is a request for legal  
13 advice from a woman named Julie Rifa (phonetic). She was a  
14 senior legal counsel in KBR's Law Department. She's working  
15 on these draft general subcontract conditions and she sends  
16 a request for Mr. Heinrich's legal advice addressing  
17 precisely this document. So I thought it would be helpful  
18 in this category to see not only the communications  
19 exchanged between attorney-client seeking advice on the  
20 draft, but also to see the draft itself.

21 And again when KBR conducted privilege analysis in  
22 this category, it just -- it followed *Apex* and so it claimed  
23 privilege over both, as *Apex* said, the attorney-client  
24 communications during the drafting process. That's document  
25 17019. And it also claimed privilege over the drafts

1 themselves, which Apex says are also privileged and that is  
2 document 4459.

3 THE COURT: Okay. And so was 4459 then attached  
4 to her email?

5 MR. BRIGHTMAN: 4459 I don't believe was attached  
6 to that email. I believe that 4459 was attached to another  
7 email that is not at issue today, but it was -- it came  
8 before the document that follows it and so clearly the  
9 general conditions had not yet been published. They were  
10 still in the drafting process, as the next document reveals.

11 THE COURT: Okay. So I have nothing in front of  
12 me then that show me that this is a privileged communication  
13 so this document I'm going to hold aside and let you produce  
14 other documentation to prove to me that this document is, in  
15 fact, a draft that was communicated for legal advice draft.

16 MR. BRIGHTMAN: Okay.

17 THE COURT: But I have nothing -- it wasn't  
18 attached to the following email, which that was the question  
19 that I had because your brief mentioned something to this  
20 effect that I have --

21 MR. BRIGHTMAN: Uh-huh.

22 THE COURT: -- following email refers back. If it  
23 wasn't attached to that email, I need to see what it was  
24 attached to --

25 MR. BRIGHTMAN: Okay.

1 THE COURT: -- to see if the privilege applies.

2 MR. BRIGHTMAN: Okay.

3 THE COURT: So on 4459, you'll need to provide  
4 follow up.

5 MR. BRIGHTMAN: Okay.

6 THE COURT: Okay. So that takes us to the  
7 10179 [sic], which is -- I look at --

8 MR. BRIGHTMAN: Sorry, Your Honor.

9 Are we talking about 17019?

10 THE COURT: Yeah, 17019. Sorry, my eyes are old.  
11 Okay. So in this document, you withheld this whole  
12 document.

13 MR. BRIGHTMAN: Yes.

14 THE COURT: The first paragraph in that chain,  
15 what particular RFP is she talking about in this one here?

16 MR. BRIGHTMAN: So I'm not sure what particular  
17 RFP she is referring to. It looks like what KBR is doing is  
18 they're working on sort of engaging a subcontractor and  
19 applying a new set of conditions they've been drafting.  
20 That's a previous document.

21 We withheld this top communication from Ms.  
22 Ritondale to Mr. McConn simply because Ms. Ritondale is  
23 relaying the advice of Mr. Heinrich on the drafting process,  
24 on the revisions that KBR is making to the general  
25 subcontract conditions. I think that's reflected in the



1 first and second lines of Ms. Ritondale's email.

2 THE COURT: Okay. The RFP is not in question at  
3 all. It's just the chain of emails talking about it.

4 MR. BRIGHTMAN: Correct.

5 THE COURT: Okay. Clearly privileged. All right.

6 MR. BRIGHTMAN: So next category -- and this is  
7 one that we discussed at great length both in our briefing  
8 this round and last year, as we remember. I think it's  
9 everyone's favorite category. And KBR cited in its brief  
10 extensive case law about how responding to the media carries  
11 important legal implications, a reality Your Honor  
12 recognized in your December 29th, 2020 Order.

13 KBR also cited authority that a client acts at its  
14 extreme peril when it excludes counsel from important  
15 decisions like whether to speak to the media, whether to do  
16 so directly or through representatives, how to acknowledge  
17 allegations from the media, so on. I won't belabor those  
18 points here. Those are all in KBR's brief.

19 I would like to add I think just three additional  
20 points in response to Plaintiffs' opposition brief. The  
21 first point is, as I recall from our hearing together last  
22 year, Your Honor was especially interested in authority from  
23 this Court and insight that this Court had to offer on this  
24 thorny media inquiry issue and I believe that the case that  
25 we just reviewed, the *Apex Municipal Fund* case, may just be

1 that authority.

2 Now it's true that the *Apex Municipal Fund* case  
3 does not specifically address media inquiries, that's true,  
4 but the *Apex* case actually relies on a broader more general  
5 principle that would capture this category, namely, that  
6 again preliminary drafts of documents and communications  
7 between attorney and client during the drafting process are  
8 privileged. Only those portion of communications that are  
9 ultimately published are non-privileged.

10 How does that apply here? Well, lo and behold,  
11 most of the requests for legal advice in this media category  
12 involved drafts, like they're draft responses to media  
13 inquiries. Usually a communication person presents a draft  
14 to the Legal Department and said, "Please review to ensure  
15 that this is legally compliant and acceptable and does not  
16 invite undue legal risk," and the attorney provides legal  
17 advice in return. That's I think squarely protected under  
18 the *Apex* case. So that's just one additional authority atop  
19 the deluge that KBR offered in its brief.

20 THE COURT: And as I recall that Mr. Heinrich --  
21 it was an affidavit. I don't remember if it was this one or  
22 the prior one that I reviewed, but he actually directed  
23 everyone to pass the media drafts through the Legal  
24 Department to get legal advice so that was his requirement  
25 that it had to come to them for legal advice.

1 MR. BRIGHTMAN: Well, that's correct and that  
2 specifically -- so Mr. Heinrich issued that directive  
3 specifically with regard to media inquiries involving  
4 alleged misconduct committed by government and military  
5 subcontractors abroad, exactly the kind of media inquiries  
6 the Plaintiffs are interested in that KBR has produced in  
7 this litigation and that are at issue in this category.  
8 Those are ones that clearly raised legal issues for KBR,  
9 raised legal risks for KBR and for which it was important  
10 for KBR to engage in protected communications with counsel.

11 A second point I just wanted to make quickly is  
12 the *In re KBR* case, which was important to the  
13 investigations category, is also important here because it  
14 holds that even where a communication is motivated by a  
15 business purpose or for our purposes here a PR purpose, so  
16 long as it is also animated by a legal purpose, it is  
17 privileged.

18 Your Honor cited that proposition favorably in the  
19 *Nalco v. Baker Hughes* case from 2017. Your Honor again  
20 applied that principle in your December 29th, 2020 Order in  
21 this case last year. Plaintiffs never objected to that  
22 holding. KBR does not believe that any of the  
23 communications in this category do seek PR advice, but even  
24 if they had such an mixed purpose, they would still be  
25 privileged.

1 THE COURT: Okay.

2 MR. BRIGHTMAN: Third quick point -- and this is  
3 just a -- sort of a practical kind of logical point -- KBR  
4 or at this point its parent company, Halliburton, had a  
5 Communications Department whose exclusive function was to  
6 offer PR advice. So when KBR employees wanted PR advice,  
7 they went to Communications. When they wanted legal advice,  
8 they went to the Legal Department. And it just -- it just  
9 would have been kind of nonsensical for KBR employees to  
10 seek PR advice from Legal when they had a whole department  
11 devoted exclusively to that function.

12 And, in fact, many of the KBR employees seeking  
13 legal advice in this category were themselves Communications  
14 employees so like PR experts, employees well versed in PR  
15 who reached out to Legal not for PR advice, but for legal  
16 advice. That's just a simple sort of logical point.

17 Turning to the documents themselves, the first  
18 involves a draft, right? This is a draft response to a  
19 media inquiry alleging subcontract among nonspecific  
20 unnamed subcontractors and a KBR Communications employee,  
21 Heather Brown, circulates a draft response. And you can see  
22 on page 3, the header is "Proposed KBR Statement." That's a  
23 draft. She circulates this draft to some important figures:  
24 to KBR CEO William Utt, to CFO Cedric Burgher, to executive  
25 vice-president Bruce Stanski and to general counsel

1 Andrew Farley seeking Mr. Farley's legal advice.

2 Mr. Utt then presents an additional request for  
3 Mr. Farley's legal advice. Mr. Farley runs Utt's request by  
4 KBR vice-president legal, Chris Heinrich. Mr. Heinrich  
5 provides the legal advice sought by Mr. Farley. And then  
6 Mr. Farley communicates Heinrich's legal advice back to  
7 Ms. Brown.

8 THE COURT: Okay. Any argument on this document?

9 MR. JACQUES: Yes, Your Honor. Your Honor, there  
10 is substantial case law that we've cited in our briefing --  
11 I won't go through all of it right now -- that does draw  
12 distinctions between the sorts of advice that counsel are  
13 often asked to provide in response to media inquiries and  
14 draws certain nuanced distinctions between those that do  
15 rise to the level of legal advice, those that do not rise to  
16 the level of legal advice.

17 In particular relevant here, you have the *Fox News*  
18 *versus Department of Treasury* case, also the *Riddle*  
19 *Concussion Reduction* litigation case. Both say that when  
20 counsel is essentially acting as a facts checker, when  
21 counsel is ensuring that the response that is provided to  
22 the media inquiry is accurate, that is not legal advice.  
23 It's something that counsel may often be asked to perform  
24 because it is a task that attorneys are particularly asked  
25 to perform. It's sort of analogous to legal advice.

1 However these cases distinguish those from the cases where  
2 it is more traditional mitigating liability. Same response  
3 to a potential worry about a defamation claim and -- in  
4 response to the legal advice.

5           And so that is relevant here because Mr. Heinrich  
6 throughout his Declaration says that his role was to ensure  
7 that the responses were complete, truthful, accurate. And  
8 with regard to this first document in particular, 5496,  
9 Mr. Heinrich says that Mr. Farley requested, he reviewed the  
10 press release to ensure, quote, "KBR's response was  
11 truthful, complete, consistent with KBR's public  
12 representations."

13           This is the exact sort of attorney involvement in  
14 responding to media inquiries that the *Fox News* case and the  
15 *Riddell Concussion Reduction* litigation case both said are  
16 not privileged communications.

17           THE COURT: And which courts are those cases from?

18           MR. JACQUES: The *Fox News* case is the Southern  
19 District of New York. And the *Concussion Reduction*  
20 litigation is the District of New Jersey.

21           Also as far as Fifth Circuit litigation goes,  
22 there is the *Freeport Martin* (phonetic) case, which we cited  
23 in our brief, does not discuss this particular issue of  
24 communicating factual information but does make the point  
25 that when counsel is weighing in on press releases

1 generally -- in that case, there's a press release that had  
2 been circulated to a number of employees including counsel,  
3 that that does not necessarily mean it is privileged  
4 communication. And that case is from the Eastern District  
5 of Louisiana within the Fifth Circuit. Thank you,  
6 Your Honor.

7 THE COURT: Okay. And what is your response to  
8 that, Mr. Brightman?

9 MR. BRIGHTMAN: Thank you, Your Honor. So the  
10 Plaintiffs talked about some of the authority that they  
11 cite in their brief on this media issue. The lead case  
12 that they cite in their brief, the first case that they cite  
13 is on page 18 of their opposition brief. It's called  
14 "*In re Signet*." It's a Southern District of New York case  
15 and it addresses communications between the client and a  
16 third-party public relations firm.

17 It does find those communications to be not  
18 privileged, but that holding has no application here where  
19 none of these communications involved third-party firms.  
20 These are all straightforward KBR attorney-client  
21 communications. And that's the best case they've got.

22 Moreover, Plaintiffs insinuate that Mr. Heinrich  
23 and KBR lawyers were asked to engaged in some kind of  
24 journalistic fact-finding exercise. That's not at all what  
25 was going on. Again KBR had other individuals who could

1 engage in those kinds of fact checking exercises. That's  
2 not what the Legal Department was hired to do, that's not  
3 what Mr. Heinrich or Mr. Farley was asked to do in this  
4 communication or any others in this category.

5           When they are asked about accuracy of certain  
6 statements and when they provide legal advice about the  
7 accuracy of certain statements, that's not journalistic  
8 fact-finding. That's legal analysis based on the  
9 fundamental reality that statements made to the public carry  
10 legal consequences.

11           They can establish knowledge on behalf of the  
12 client. They can establish an affirmance or denial of  
13 particular allegations, which of course carry legal weight.  
14 They can contradict other representations that the client  
15 has made and, for example, SEC disclosures and other  
16 important legal documents. That's why these lawyers were  
17 brought into the mix. It was not, of course, to engage in  
18 some kind of journalistic fact-finding. It's to do their  
19 job, which was legal analysis given the important,  
20 difficult, sensitive, complicated issues raised by the media  
21 inquiries on their face.

22           THE COURT: Yeah. I think that Farley's response  
23 indicates that it -- seems to indicate that it's really a  
24 legal analysis. And a legal analysis giving of advice, it's  
25 cryptic but it's there.



1           So I think that this falls under privileged as  
2 opposed to just being a fact checker.

3           MR. BRIGHTMAN: Thank you.

4           THE COURT: Okay. Let me tell you, I have a hard  
5 stop at noon and we are making a lot of progress. That's  
6 why I started a little bit earlier, but I am going to have  
7 to recess at noon so.

8           MR. BRIGHTMAN: Okay.

9           THE COURT: And I do have a 2:00 o'clock so we're  
10 running out of time.

11           MR. BRIGHTMAN: Okay. There are four documents  
12 left. I'm happy to proceed however Your Honor would like.  
13 We can continue going in order, as we were. We can visit  
14 other documents that Your Honor's especially interested in.

15           THE COURT: Yeah. I mean, 5609, tell me what  
16 the -- just a two sentence on what 5609, which is redacted.

17           MR. BRIGHTMAN: Correct. KBR withheld only  
18 Chris Heinrich's second email from the top, which provides  
19 legal advice in response to a request from a Communications  
20 employee named David McArthur (phonetic). Again we have a  
21 draft response to which Apex applies. We have attorney-  
22 client -- internal attorney-client communications on the  
23 legal proprietary of a draft that we have Mr. Heinrich  
24 transmitting legal advice in response.

25           THE COURT: Okay.

1 MR. BRIGHTMAN: And KBR here I think actually was  
2 more transparent than perhaps it even needed to be under law  
3 but --

4 THE COURT: I would have redacted more.

5 MR. BRIGHTMAN: Yeah, exactly.

6 THE COURT: So I had to look at this email several  
7 times because what was disclosed I wouldn't not have  
8 disclosed (indiscernible) given the --

9 MR. BRIGHTMAN: Uh-huh.

10 THE COURT: -- given what the advice is.

11 MR. BRIGHTMAN: Uh-huh.

12 THE COURT: So the things withheld is definitely  
13 privileged.

14 MR. BRIGHTMAN: Okay.

15 THE COURT: Okay. And here, we have a similar  
16 situation. So this begins with a media inquiry from the  
17 same kind of independent media outfit called "CorpWatch."  
18 CorpWatch contacts not KBR directly, but a representative of  
19 a KBR subcontractor named First Kuwaiti. That individual's  
20 name is Wadih al-Absi. He's mentioned on page 3. KBR  
21 produced all those communications because they involve third  
22 parties, First Kuwaiti internally.

23 And then operations manager, Remo Butler  
24 (phonetic), asks about potential opportunities to coordinate  
25 Mr. al-Absi's response to CorpWatch since First Kuwaiti was

1 a KBR subcontractor. KBR in-house counsel, Ron Allen, on  
2 page 2 -- and this is the first redacted document,  
3 Mr. Allen's August 9th, 2005 email -- he gives legal advice  
4 on KBR's legal options for coordinating with Mr. al-Absi in  
5 response to CorpWatch. He also requests additional  
6 information to guide his legal assessment from procurement  
7 manager, Penny Battles, and Ms. Battles provides that  
8 information in response. That's the top of page 2.

9 Mr. Allen then again provides further legal advice  
10 on possibilities for coordination at the bottom of page 1.  
11 And then KBR again actually again produced the top email.  
12 Perhaps again being even more transparent than it was  
13 obligated to be.

14 THE COURT: Oh, so you did produce this whole top  
15 email.

16 MR. BRIGHTMAN: Yes.

17 THE COURT: Okay. So I have no question about  
18 anything except the top email.

19 MR. BRIGHTMAN: Great.

20 THE COURT: So this is clearly all privileged.

21 MR. BRIGHTMAN: Okay. And finally we have this  
22 last category. Here, we have extensive testimony in the  
23 Declarations about these documents because I think these  
24 are -- the privilege over these documents is even more  
25 manifest and even more important.

1           In Exhibit 1 -- that's Mr. Heinrich's  
2 Declaration -- he testified at great length about these  
3 communications. You can find that testimony at Exhibit 1,  
4 Docket Entry 246-1, paragraphs 29 through 33.

5           Jill Pettibone, KBR vice-president for operational  
6 excellence, also testified extensively about these documents  
7 in her Declaration. That's Exhibit 2, Docket Entry 246-2,  
8 paragraphs 13 through 16.

9           And the context here is as a government contractor  
10 under LOGCAP III, KBR occasionally during the LOGCAP III  
11 term and, as Mr. Heinrich and Ms. Pettibone testified to  
12 extensively, KBR would occasionally receive subpoenas from  
13 Congress to offer testimony on issues pertaining to the  
14 Contract. Those are the kinds of communications that we're  
15 dealing with here.

16           And to prepare responses to those subpoenas and to  
17 prepare congressional testimony at the hearings that  
18 followed each subpoena, KBR did not, in contrast to the  
19 other categories, merely engage in-house counsel. KBR also  
20 retained outside counsel including two Vinson and Elkins  
21 attorneys, Craig Margolis and Christine Durney, and that's  
22 why Vinson and Elkins is referenced repeatedly in these  
23 documents. The first --

24           THE COURT: Okay. So it seems like to me --  
25 before you go any further.

1           What are the Plaintiffs' objections to this? Let  
2 me let the Plaintiff tell me. What are -- we've got outside  
3 counsel, we've got preparation of congressional testimony,  
4 we've got response to a subpoena. What is the real  
5 objection here?

6           MR. JACQUES: Yeah. I think, Your Honor, we do  
7 agree with a lot of again the legal arguments that KBR  
8 makes. With these two documents, the congressional  
9 inquiries one, we mostly just want to ensure that the  
10 information being forwarded to counsel there isn't any  
11 otherwise discoverable information that is tucked within  
12 there that we have not been able to discover in other  
13 context and has been withheld from this communication  
14 because it is being sent to outside counsel.

15           THE COURT: Okay. All right. So let's look at  
16 the first document then, Mr. Brightman, the 18645. I've  
17 looked at it. So you withheld this whole document.

18           MR. BRIGHTMAN: Correct, withheld both of these in  
19 full.

20           THE COURT: And so the first one is between  
21 Pettibone and (indiscernible)?

22           MR. BRIGHTMAN: Yeah. It's among -- Pettibone is  
23 sort of the leader of this conversation, but she also  
24 includes a number of procurement personnel including  
25 procurement director, Sharon Steele, including procurement

1 managers Cheryl Ritondale and Dwayne Bourque. She does that  
2 because they are the relevant KBR personnel with knowledge  
3 about the particular questions at issue.

4           So here, the congressional subpoena and the  
5 congressional hearing that would follow addressed living and  
6 working conditions of various subcontractor workers in Iraq.  
7 As Jill and Sharon note at the beginning of this exchange,  
8 counsel -- outside counsel, Christine Durney of Vinson and  
9 Elkins, sought certain information from KBR to help her  
10 prepare for the subpoena and for the hearing. That's  
11 information that was -- it resided uniquely in the hands of  
12 KBR's Procurement Department, which is why Ms. Steele,  
13 Ms. Ritondale and Mr. Bourque are involved, and they  
14 worked --

15           THE COURT: Let me tell you what my problem is  
16 with the first several emails.

17           MR. BRIGHTMAN: Sure.

18           THE COURT: The first -- page 4 and page 3, it's  
19 clear that there are communications going back and forth  
20 between the employees on rounding up the information.

21           MR. BRIGHTMAN: Correct.

22           THE COURT: But there is no disclosure of anything  
23 that I see as being privileged. It's clear that they're all  
24 acting at the behest of V&E to get information and they're  
25 trying to figure out who's the right person to get the

1 information and who's on point basically.

2 Why is all that privileged?

3 MR. BRIGHTMAN: Because I think their  
4 conversations, the work that they're doing even the  
5 particular departments that are engaged and personnel with  
6 knowledge, all of that is -- falls within KBR's legal  
7 approach and legal response to being engaged by a  
8 congressional subpoena and congressional hearing.

9 All of these conversations reflect and threaten to  
10 expose sensitive privileged communications between Vinson  
11 and Elkins and KBR because they reveal the kind of  
12 information and the kind of facts that Ms. Durney sought in  
13 order to provide her legal advice. And as we discussed at  
14 the outset of this hearing, *Upjohn* case being the prime  
15 example, the privilege is not narrowly confined to legal  
16 advice itself. It expands beyond that to the gathering of  
17 facts exchanged with counsel to inform counsel's sound legal  
18 advice and advocacy.

19 Again resolving any legal problem begins with  
20 ascertaining the relevant factual background, sifting  
21 through the facts for the legally relevant. That's what  
22 Vinson and Elkins and KBR are discussing here and that's  
23 what KBR is doing. It's sifting through the factual  
24 background at counsel's direction and that's privileged  
25 under *Upjohn*.

1 THE COURT: Well, I think that on page 2, that  
2 email from Dwayne Bourque to Jill, is clearly privileged.

3 MR. BRIGHTMAN: Yes.

4 THE COURT: I have no problem with that one.

5 MR. BRIGHTMAN: Yes.

6 THE COURT: The response is nothing. I don't know  
7 that it's really -- I don't know that it really falls in  
8 privilege.

9 The next one, the one from Jill Pettibone back to  
10 Dwayne Bourque I'm not really sure that this is really  
11 privileged in the top one. I think the top one -- I just  
12 don't think there's a -- I think all this reveals frankly if  
13 I disclosed it, you're not really getting a whole hell of a  
14 lot. All it's revealing to me other than the one that I  
15 think is privileged on page 2 and maybe the bottom of page  
16 1, the rest of this is just saying who are the ones who are  
17 gathering the information. I am not really sure that that  
18 itself is privileged.

19 MR. BRIGHTMAN: Yes, Your Honor. The reason why  
20 its privileged is that, as I mentioned, not only is the  
21 gathering of factual information to enable legal advice  
22 clearly privileged under *Upjohn* and a whole host of other  
23 authorities, but in the Southern District of Texas and in  
24 the Fifth Circuit's case in El Paso, they say that  
25 communications related to legal advice are also privileged



1 so they would cast the net even wider.

2           And I think this email is clearly capturing an  
3 important conversation, which Ms. Durney is working to  
4 compile a factual basis to which to apply the law so that  
5 KBR can be prepared for a very important legal event.  
6 That's why it's privileged.

7           THE COURT: Well, I'll leave it privileged for now  
8 just because I don't think disclosure really gives you  
9 anything, but if you want to -- if you think it's important  
10 and you want to further brief it, I would consider it, but I  
11 don't really think it's worth your time because I don't  
12 think -- there's nothing of substance in here except for the  
13 part that's clearly privileged that I will not disclose.  
14 But the rest of this stuff is just who's going -- chickens  
15 running around trying to get the pieces of paper. I just  
16 don't see that as really being all that privileged, but I  
17 will leave it as privileged for now.

18           MR. BRIGHTMAN: And the privileged -- the one that  
19 you refer to that's clearly privileged is the December 19,  
20 2006 email from Dwayne Bourque to Jill Pettibone on page 2.

21           THE COURT: Right. And the one that is the  
22 response from her to him.

23           MR. BRIGHTMAN: Got it. Okay.

24           THE COURT: Those two are clearly privileged and  
25 those will not be disclosed. But the other ones I'll apply

1 to privilege, but it's really not that important.

2 MR. BRIGHTMAN: Great.

3 THE COURT: Okay.

4 MR. BRIGHTMAN: Okay.

5 THE COURT: All right. Then the last document,  
6 494361.

7 MR. BRIGHTMAN: So this document begins with  
8 Chris Heinrich, vice-president of Legal for KBR, requesting  
9 information sought by both himself in the Legal Department  
10 and outside counsel at Vinson and Elkins for the purpose of  
11 preparing a response to a congressional subpoena and a  
12 congressional hearing.

13 The subject matter of this particular subpoena was  
14 slightly different than the previous one. This one  
15 addresses a particular subcontractor, one who is not  
16 connected to this case, namely, First Kuwaiti who we  
17 discussed in some other documents, and KBR withheld the  
18 document in full because all of the conversation that  
19 follows is directly in response to Mr. Heinrich's request  
20 for information designed to facilitate the legal review of  
21 both in-house and outside counsel.

22 THE COURT: Okay. So I have reviewed. I think  
23 that everything in her is clearly under the claim of  
24 privilege.

25 The only question that I have is whether --

1 MR. BRIGHTMAN: Okay.

2 THE COURT: -- the facts that are disclosed on the  
3 last page by Jill Pettibone whether those facts have been  
4 discovered elsewhere or available to be discovered  
5 elsewhere? That paragraph on page -- on the last page.

6 MR. BRIGHTMAN: Okay. Sorry, so the last page --

7 THE COURT: Last page, second paragraph.

8 MR. BRIGHTMAN: So, I'm sorry, are you talking  
9 about for July 6th, 2007 3:58 p.m. email or a different  
10 email?

11 THE COURT: Yes.

12 MR. BRIGHTMAN: Okay. And you want to know  
13 whether the underlying facts --

14 THE COURT: Yes.

15 MR. BRIGHTMAN: -- have been produced elsewhere?

16 THE COURT: Right.

17 MR. BRIGHTMAN: So I can say this: I mean, the  
18 subject matter of what she's talking about absolutely. KBR  
19 has produced -- KBR did not in its ESI production sort of  
20 limit documents to, for example, the particular  
21 subcontractor at issue in this case named Daoud and  
22 Partners. KBR produced lots of documents on issues arising  
23 from other subcontractors including First Kuwaiti.  
24 Plaintiffs, I imagine, are intimately familiar with First  
25 Kuwaiti because there are lots of documents of them both in

1 this case and in the other case.

2 KBR has produced documents about IG  
3 investigations, Department of Defense and Army  
4 investigations into subcontractor, Man Pants (phonetic).  
5 Those documents have all been produced. Plaintiffs are  
6 familiar with them. Plaintiffs have even started to use  
7 them in depositions.

8 Let's see, what else? Obviously KBR has produced  
9 certain facts about the promulgation of FAR and FRAGO and  
10 Plaintiffs are familiar with the compliance steps that KBR  
11 took pursuant to those regulations. So I think, yes, KBR  
12 has provided factual information touched on in this email.

13 But this email is privileged because it's -- and  
14 there's lots of testimony about this in the Declarations.

15 THE COURT: Look, I've read the Declarations.

16 MR. BRIGHTMAN: Okay.

17 THE COURT: I am saying it's privileged.

18 MR. BRIGHTMAN: Okay.

19 THE COURT: What I am -- in all the documents that  
20 you have produced to me now and last year, this is the only  
21 paragraph that I have found to be interesting.

22 MR. BRIGHTMAN: Okay.

23 THE COURT: So I want to make sure that the  
24 Plaintiffs have the opportunity to get the information in  
25 here elsewhere.

1 MR. BRIGHTMAN: Let me say, for example, if --  
2 there are documents we produced in this case that Plaintiffs  
3 have presented at deposition where a colonel for the Army  
4 tools a KBR employee, "You need to get your subcontractor's  
5 act together," documents like that, for example, those are  
6 the kinds of documents that KBR has produced because they're  
7 obviously not privileged. And obviously today is not the  
8 day. We have strong responses to those documents.

9 But I hope that that just reassures Your Honor  
10 about how transparent KBR has been and that it's not using  
11 the privilege in any kind of manipulative or strategic way.  
12 It's been transparent because I think we've acknowledged  
13 over the course of today.

14 THE COURT: Okay. All right. Well, that's  
15 everything I have.

16 Did you want to make any further statement,  
17 Mr. Jacques?

18 MR. JACQUES: Yes, Your Honor, just briefly  
19 because I know we are running out of time.

20 THE COURT: We're running out of time.

21 MR. JACQUES: As we just -- we did note in our  
22 brief that we do not believe that the categories KBR chose  
23 are all encompassing of the documents at issue. We did flag  
24 some documents that don't really we think fit into any of  
25 these categories. So the Plaintiffs are just hoping through

1 whatever procedure the Court finds fit that there will be  
2 opportunity to review especially those documents, but also  
3 the remaining. And of course I understand the Court's  
4 approach and wanting to begin with exemplar documents to  
5 just --

6 THE COURT: Right. So the remaining documents --  
7 I mean, there were 150-ish that you're disputing. So it  
8 seems like to me that these rulings should clarify for KBR  
9 and should clarify for you -- I get it, you say they took  
10 their best documents. They're saying they took the hardest  
11 documents. There's no way for me to know that without  
12 reviewing all the documents.

13 If I can review 150 documents, the three of you  
14 are sitting in this courtroom with me as I read each  
15 document. I read every document yesterday and last night.  
16 You saw I was prepared. I've made my rulings. If you can't  
17 figure it out and you've got to come back to me with a  
18 handful more, I'm here. If I go read 150 documents, we'll  
19 spend three days sitting in my courtroom while I read each  
20 friggin document and you have to tell me why you think that  
21 it's not privileged.

22 With regard to the other documents, if there are  
23 specific documents that you can put your hands on and say,  
24 "These 10 additional documents are things that we think are  
25 potentially problematic," even given all the rulings, I will

1 look at them. I mean, that's what I'm here for, that's my  
2 job. If you need me, I am here. But what I don't want is  
3 for you to just dump all the work onto me that you two can't  
4 figure out and say, "Now you figure it out, Judge," because  
5 that is not my job.

6 So figure it out. Go back and work together. Let  
7 KBR -- I mean, I think that based on what I'm seeing and  
8 based on the rulings that I made the last time, I think that  
9 you can extrapolate for that. And I'm not just sitting here  
10 trying to help KBR protect itself. I am looking at these  
11 documents and looking to see if there's attorney-client  
12 privileged information that requires protection and I'm  
13 ruling on that. And, I mean, I -- literally in this entire  
14 notebook, there were very few questions.

15 So based on that, I think that you're down to the  
16 number of documents that seemingly are protected. If there  
17 are specific ones, come back and if you can identify ones  
18 that you really have a question about, I can review  
19 documents, not that big of a deal. But I think that I've  
20 made the rulings pretty clearly about what's privileged.

21 MR. JACQUES: Absolutely. Thank you, Your Honor.

22 MR. BRIGHTMAN: Thank you, Your Honor. I just  
23 want to add I'm confident that we can, based on your  
24 rulings, work out the remainder of our disputes.

25 THE COURT: Okay, good. So the only one that

1 you're going to resubmit to me is that one of the draft we  
2 see --

3 MR. BRIGHTMAN: 4453, Your Honor.

4 THE COURT: Right. And at your leisure whenever  
5 you want to do it and I will look at it. I probably won't  
6 need to have another hearing just to look at that one  
7 document if you attach the right things to that, okay?

8 MR. BRIGHTMAN: Sure. No problem.

9 THE COURT: All right. Thank you all for coming  
10 in.

11 (The parties thank the Court.)

12 THE COURT: Hopefully one day we'll get beyond the  
13 mess, but today's not that day.

14 (Hearing adjourned at 11:59 a.m.)

15 \* \* \* \* \*

16 *I certify that the foregoing is a correct*  
17 *transcript to the best of my ability due to the condition of*  
18 *the electronic sound recording of the ZOOM/video/telephonic*  
19 *proceedings in the above-entitled matter.*

20 */S/ MARY D. HENRY*

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