IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al., *Plaintiffs*, v. THE UNITED STATES, *Defendant.*	No. 13-465C (Judge Sweeney)

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO REMOVE THE "PROTECTED INFORMATION" DESIGNATION FROM DEFENDANT'S MARCH 20 PRIVILEGE LOG

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May 27, 2015

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PRELIMINARY STATEMENT

Perhaps realizing that its unprecedented decision to designate standard, run-of-the-mill privilege logs as "Protected Information," and thus to significantly restrict the use of such logs by Plaintiffs Fairholme Funds, Inc., et al. ("Plaintiffs" or "Fairholme"), was unsupportable and improper, the Government hints repeatedly throughout its response that the Court need not trouble itself with the present motion because the Government intends, at some unspecified time in the future, to produce a public "version" of its "final" privilege log.[1] The Government even goes so far as to complain that, given its intent to eventually produce a public version of its privilege log, Fairholme's motion is "a waste of the Court's and the parties' time." *Id.* at 1.

The Government neglects to mention that not once during the parties' exchanges that led up to the filing of the present motion did the Government even hint that it intended to eventually produce public versions of its privilege logs. Instead, as we have recounted, the Government simply declared that it would not "de-designate" its privilege logs and refused to explain how any information in those logs either qualified as Protected Information or differed in any relevant respect from the information contained in its earlier, non-designated, logs.[2] Perhaps, had the Government notified Fairholme that it would promptly produce a complete public version of its privilege logs, the need for the present motion might have been obviated. To the extent the Court's time has been wasted, therefore, it is not Fairholme who has been doing the wasting.

Of course, it speaks volumes that the Government studiously avoids promising that it will produce a *complete* public final privilege log; all it will say is that it intends to produce a "public,

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[1] *See* Defendant's Response to Plaintiffs' Motion to Remove the "Protected Information" Designation from Defendant's Provisional Privilege Logs at 1, 3, 8 (May 18, 2015) (Doc. 154) ("Response" or "Resp.").

[2] *See* Plaintiffs' Sealed Motion to Remove the "Protected Information" Designation from Defendant's March 20 Privilege Log at 6–7 (Apr. 23, 2015) (Doc. 148), ("Motion" or "Mot.").

non-designated *version*" of that log. Resp. at 8 (emphasis added). As discussed below, the Government's defense of its designation of *some* of its so-called "provisional" logs as Protected Information makes clear that it now considers such standard privilege log information as the names of individuals who sent or received documents, and even the subject matter addressed by such documents, as confidential. *See, e.g.,* Resp. at 5 n.2; *id.* at 11. The Government will thus presumably seek to redact these standard columns from its public privilege log, disclosing little more than the date of each withheld document, its Bates number, and the privilege asserted; and, needless to say, the parties will find themselves right back before this Court contesting the propriety of the Government's designation of the complete logs as protected. The Government's assurance that it intends to produce, someday, a "public version" of its "final" privilege log must be seen for what it is: the latest gambit in the Government's long-running, transparent strategy of preventing public disclosure of as much information as possible, for as long as possible, that relates to the Government's conduct at issue in this case.

In any event, the Government's defense of its designation of its privilege logs as protected is utterly meritless. Distressingly, that defense depends in large part on the Government's misrepresentation of the relevant facts and mischaracterization of the relevant inquiry under the Protective Order, as we demonstrate in detail below.

ARGUMENT

1. The Government places much weight, in defending its designation of the March 20 Log and subsequent logs as Protected Information, on its characterization of those logs as "provisional." *See, e.g.*, Resp. at 1, 4–5. Because the logs were "provisional" and "preliminary," according to the Government, they were not intended to enter the public domain and are therefore "confidential" within the meaning of the Protective Order. *See id.* at 4. As we discuss be-

low, however, the Government is relying upon an improperly broad understanding of "confidential" that the Court specifically rejected. Beyond seeking to link the "provisional" status of the logs to its incorrect definition of "confidential," the Government does not even attempt to show how the logs' "provisional" status qualifies them as Protected Information. "Provisional" or not, the logs at issue contain no information whose disclosure could cause any legally cognizable harm to anyone, and they are therefore unprotected. That is the end of the matter. Given the emphasis that the Government places upon its narrative about these so-called "provisional" logs, however, it is worthwhile to note that much of that narrative is based on fiction.

The Government represents to the Court (1) that it was *Fairholme* who "requested that the Government provide provisional privilege logs on a periodic basis," (2) that "[i]mplicit in this arrangement . . . was an understanding that the production of provisional privilege logs was solely for Fairholme's convenience and to facilitate the parties' discussions regarding privilege disputes," and (3) that "the parties understood that the Government's assertions were preliminary and subject to change pending the preparation of a final privilege log after document production [was] complete." Resp. at 2–3. At least to the extent that these statements purport to describe what Fairholme intended or understood, ***they are all false***, and together they paint a very misleading picture of what actually happened.

Tellingly, the Government points to *no* evidence that Fairholme requested the production of "provisional" privilege logs, because none exists. Nor does the Government point out that *none* of its privilege logs were labeled as "provisional." Nor does it cite to *any* evidence that the parties "understood" that the Government's privilege assertions were "preliminary," and could not be relied upon. It is true that Fairholme requested that, rather than wait until document productions were complete, the Government produce privilege logs on a rolling basis so that Fairholme could assess, and if necessary address, any issues arising from any Government decisions

to assert privilege that had already been made. But it simply does not follow that Fairholme "understood," let alone "requested," that any such privilege logs would be "provisional." After all, Fairholme also made the standard request that the Government's document productions be made on a rolling basis, and no one – not even the Government – has suggested that this necessarily meant that all of the Government's document productions to date have been "provisional."

It is undisputed that the first time that the Government informed Fairholme that its privilege logs were "provisional" was in February of this year – six months after the Government produced its first privilege log – when Fairholme raised concerns it had about many of the Government's privilege assertions and the Government sought to avoid addressing the vast majority of those concerns by claiming that it was premature to do so because the logs it had produced were "provisional." Fairholme immediately objected to the Government's recharacterization of its logs as provisional and then promptly brought this issue to the Court's attention. *See, e.g.*, Transcript of February 25, 2015 Status Conference at 8:3–5 (noting that Government's February communication was the first time Plaintiffs were told by Government about "provisional" nature of the Government's privilege assertions). While the Government has succeeded in its transparent strategy of putting off dealing with most of the issues raised by its privilege assertions until such time as it produces a "final" privilege log, the Court should not be fooled by the Government's suggestion that the provision of preliminary, "provisional" logs was Plaintiffs' idea all along.[3]

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[3] Nor should the Court be fooled that the Government's renaming of its logs as "provisional" portends widespread withdrawals of or changes to its privilege assertions. The Government notes that it has to date withdrawn or modified "a number" of its privilege assertions, Resp. at 3, but it doesn't reveal that that "number" has been quite low, especially when compared to the number of documents it has withheld. To date, the Government has asserted privilege with respect to thousands of documents. Although the Government has not made it easy for Fairholme to precisely track all of the revisions the Government has made to its assertions of privilege, by our count, the Government has thus far specifically identified fewer than 75 documents for which it has withdrawn or modified those assertions. While Fairholme and the Court can always hold out hope that the Government reassesses its apparently aggressive approach to asserting

Once the Government's misleading narrative regarding this issue is corrected, the Government's "explanation" for why it never designated its first three privilege logs as protected makes even less sense. The Government suggests that it never labeled the early logs as protected because it assumed that Fairholme would not publicly disclose such preliminary, provisional documents. Resp. at 5 n.3. Leaving aside the illogic of the Government's explanation – which amounts to the contention that it never took the very simple action *necessary* under the Protective Order to protect information because it expected Fairholme to just treat the documents as though it had in fact taken that required action – the explanation is premised upon the Government's false claim that Fairholme not only understood that the logs would be treated as provisional but *requested* such treatment.

The Government's disingenuous explanation is also belied by the fact that shortly after receiving each of the first three privilege logs, Fairholme's counsel specifically asked for, *and received*, confirmation from the Government that the logs were not to be treated as protected. Thus, after receiving the first FHFA privilege log in August 2014, Fairholme's counsel sent Government counsel an email seeking to confirm "that this privilege log is not covered by the protective order given its content and given that it has not been marked as protected," and Government counsel responded that indeed the log was not protected. *See* E-mail from G. Schwind to D. Thompson (Sept. 2, 2014) (reproduced and appended hereto as Exhibit I). Similarly, Government counsel confirmed, in response to another inquiry, that the Government's second FHFA privilege log, produced in October 2014, was "not subject to the protective order." *See* E-mail from G. Schwind to D. Thompson (Oct. 29, 2014) (reproduced and appended hereto as Exhibit

privilege, the chances that its "final" privilege log will differ meaningfully from its so-called "provisional" ones appear to be quite small.

J). Finally, after producing the first Treasury privilege log in January of this year, Government counsel answered in the affirmative when Fairholme's counsel asked whether Fairholme could "safely assume that this document is not subject to the protective order[.]" *See* E-mail from G. Schwind to D. Thompson (Jan. 16, 2015) (reproduced and appended hereto as Exhibit K). Notably, the Government made no mention in any of these exchanges that its privilege logs were preliminary or "provisional."

In short, even if it were probative of whether the privilege logs at issue contain Protected Information, which it is not, the Government's false narrative regarding the "provisional" nature of the logs is inexcusable.

2. The Government also accuses Fairholme of seeking to reverse the burden of persuasion governing disputes over the designation materials as Protected Information. Resp. at 4. ***This is false***. Fairholme fully acknowledged that under the Protective Order, the "burden of persuasion rests with the moving party," Mot. at 4, and we devoted multiple pages of our brief to demonstrating why the Government's March 20 privilege log did not contain proprietary, confidential, trade secret, or market-sensitive information or any other information that was protected from public disclosure under applicable law. *Id.* at 8–11. Far from attempting to shift the burden of persuasion to the Government, Fairholme met its burden of persuasion with respect to the dispositive issue: whether the information in the March 20 Log (and subsequently produced logs) qualified as Protected Information.

Of course, our attempt to meet our burden was made more difficult by the Government's refusal to provide *any* justification of its designation decision or *any* explanation of why it designated as protected the same types of information that it had not so designated in its prior privilege logs. By pointing out that the Government's silence on this critical point spoke volumes about the propriety of its actions, *see* Mot. at 11, we were appealing to common sense and logic,

not attempting somehow to switch the burden of persuasion. Significantly, the Government does not dispute that this Court explicitly premised its decision to place the burden of persuasion on Fairholme on its expectation that the Government would fully explain the basis for its decision to make the Protected Information designation in the first place. *See* Mot. at 11 n.8.[4] It comes with poor grace for the Government to (falsely) accuse Plaintiffs of seeking to shift the burden of persuasion when the Government does not even attempt to defend its failure to fulfill the very condition that led the Court to assign the burden of persuasion as it did.

3. The Government's main argument in support of its designation of the March 20 Log (and subsequent logs) as protected is its claim that those logs contain "confidential" information. Resp. at 4–5. But it can make this claim only by proposing a definition of "confidential" that this Court ***specifically rejected***. According to the Government, so long as the information in the logs was not in the public domain, it meets the Protective Order's definition of "confidential." *Id.* at 4. *See also id.* at 5 (information "was neither shared nor intended to be shared with the public"). And the Government criticizes Fairholme for stressing that for information to be protected as "confidential" under the Protective Order, its release must be likely to cause some type of legally cognizable harm. *Id.* at 7.

What the Government completely ignores, however, is that at the July 16, 2014 hearing devoted in large part to the parties' dispute on this very issue, the Court made quite clear that it agreed with Plaintiffs' position and disagreed with the Government's. The pivotal exchange be-

[4] *See, e.g.*, Transcript of July 16, 2014 Status Conference at 17:18-21 ("July 16 Tr.") (reproduced in the appendix to the Motion at Exhibit H) ("THE COURT: I mean, you're required to have the discussions. So, *the Government has to lay out all its reasons as to why the material is properly designated under the protective order*.") (emphasis added).

gan with the Court's observation that Fairholme's proposal did not include the term "confidential" in its definition of Protected Information:

> THE COURT: But you did not agree with the word "confidential."
>
> MR. COLATRIANO: . . . *I don't think we would have a problem with that word as long as it weren't meant to describe anything that's not publicly – that hasn't publicly been released is, therefore, protected. We don't think that's the standard. In the case law, confidential, in this context, usually means something whose disclosure could cause some harm. So, the mere fact that it hasn't already been publicly released is not sufficient.*
>
> THE COURT: *Yes.*
>
> MR. COLATRIANO: And, so, it's not –
>
> THE COURT: *No, I agree with you*. I did – I was having difficulty understanding, though, why Plaintiff opposed "confidential." So, that's –
>
> MR. COLATRIANO: That was added literally at the – by the Government at the last minute on Friday and they added it as a stand-alone category. *And if what they meant was it hasn't been publicly – if it hasn't already been publicly released, it should never be publicly released or it should have these restrictions, then we don't agree with that.* But –
>
> THE COURT: Well, *I don't think that's the understood definition of confidential*.
>
> MR. COLATRIANO: And with that understanding, if it's something that (inaudible) disclosure would cause these types of legally recognizable harm, I don't think Plaintiffs would have a problem with that. It was a last-minute addition and, so, we just didn't sweep it up in our proposal. But with that understanding, I don't think we would have a problem with that type of amendment to our proposal.

July 16 Tr. at 10–12 (emphases added).

The above exchange alone establishes that the Court rejected the Government's current position.[5] But there's more. The Government also fails to acknowledge that it had *unsuccessfully* proposed a separate Protective Order provision that was effectively identical to its current

[5] This colloquy also demonstrates that the Government's suggestion that Plaintiffs resisted the addition of the word "confidential" to the Protective Order, Resp. at 4, ***is false***. And it also shows that the Government's statement that we are asking the Court "to limit 'Protected Information' to 'sensitive' information whose disclosure would cause 'real competitive harm' or 'market-distorting effects,'" *id.* at 5, ***is also false***. We made quite clear both at the hearing and in

position. Specifically, the Government proposed that "Protected Information also means any information disclosed in this litigation that has not been released to the public previously." Joint Status Report Regarding Proposed Protective Order at 7 (July 11, 2014) (Doc. 69). The Court could not have been more clear in rejecting that proposal:

> MR. COLATRIANO: . . . But we also have the Government's catchall provision that says any information that has not been publicly released is, by definition, protected. We think that's way too broad.
>
> THE COURT: *Right*. I can tell you, . . . that also jumped out at me immediately . . . . And I was very – well, the Government attorneys are very good advocates and, so, I – and I do respect that. *But that one didn't slide by me and that's not going in the order*.

July 16. Tr. at 32–33 (emphasis added).

In arguing that all that is necessary for information to be confidential within the meaning of the Protective Order is that it not already be in the public domain, and in disclaiming any need for public disclosure of the information to cause some type of legally cognizable harm, the Government does exactly what it (falsely) accuses Plaintiffs of doing: advocating for a position that the Court rejected when it issued the Protective Order. The Government may wish to pretend that the Court did not consider and reject its current position, but the record proves otherwise.

Ultimately, under the Government's definition of "confidential," *all* meaningful discovery in this action would take place under a shroud of secrecy. After all, there is no need for Plaintiffs to "discover" information that is already in the public domain. Almost by definition, therefore, any meaningful discovery must focus upon information that is not in the public domain. According to the Government, that very fact transforms all such nonpublic information –

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our motion that all that is required for information to be considered confidential within the meaning of the Protective Order is the likelihood that public release of the information would cause "*some type* of legally cognizable harm." *See* Mot. at 10 (emphasis added). We have not argued that competitive harm or harm to financial markets is the only type of legally cognizable harm that could justify treating information as protected.

no matter how old, how stale, or how innocuous it may be – into Protected Information and triggers the Protective Order's strict restrictions on disclosure and use. While that result may suit the Government just fine, it cannot be squared with what this Court intended when it issued the Protective Order.[6]

4. Under the correct understanding of how information qualifies under the Protective Order as confidential, the Government's defense of its designation decision falls apart. Because the Government disclaims any need to explain how the release of the privilege logs at issue would cause harm to any legally cognizable interest, Resp. at 7, it doesn't even attempt to do so. Nor could it. Although the Government suggests that such standard privilege log information as the names of authors and recipients of documents, their government email addresses, and the general descriptions of the subjects addressed in the documents, may meet its broad (and rejected) definition of "confidential," Resp. at 5 n.2, there can be no credible argument that the release of such run-of-the-mill information would cause *any* harm, let alone the types of legally cognizable harm that the Protective Order is designed to guard against. It bears noting that the Government has not cited a single decision that supports the designation of such standard information as protected.[7]

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[6] In seeking to distinguish some of the case law cited in our motion, the Government suggests that the "good cause" standard governing the issuance of protective orders has "nothing to do" with our motion because the "Court already found good cause for the designation of 'Protected Information' when it issued the protective order." Resp. at 10. This argument simply begs the relevant question, which is whether the information that the Government has designated in fact meets the Protective Order's definition of Protected Information. The Court most certainly did not rule, when it issued the order, that good cause existed for the Government to permanently designate as protected any information it desired, including information that came nowhere close to satisfying the standard established by that same order.

[7] Tellingly, the Government does not dispute that *Vaughn* indices, the analogue in FOIA litigation to standard privilege logs in other civil litigation, are typically public documents. *See* Mot. at 10 n.7. It suggests, however, that FOIA law is irrelevant to this dispute. Resp. at 10 n.4. But while the Government is correct that the Court did not specifically list FOIA as a relevant

And the Court need not speculate on this point. As we've discussed, the Government's first three privilege logs were not designated as protected, and portions of them were publicly disclosed. Resp. at 3; Mot. at 8 n.4. The Government then decided to designate subsequent privilege logs as protected even though it cannot identify *any* harm to it, to any Government officials, to the financial markets, to the public, or to anyone else, that resulted (or conceivably could have resulted) from the public disclosure of the early logs. Since the logs it now designates as protected do not differ in any relevant respect from the previous, unprotected logs (and the Government does not even claim otherwise), the conclusion is inescapable that none of the logs meet the Protective Order's definition of Protected Information.

5. The Government contends that we have argued that its earlier production of unprotected logs "operates as a waiver as to all future provisional privilege logs," an argument that is, according to the Government, barred by the Protective Order. Resp. at 5. ***This is false***. One can scour our motion without finding any reference to waiver. Waiver presupposes that certain documents were or could be properly designated as protected, but that the producing party could voluntarily disclaim the protections of the Protective Order with respect to such documents. Protective Order ¶ 15. We have made no such contention. Our point, rather, is that the fact that the Government did not designate early logs as protected confirms that the information in those logs – information which the Government agrees is essentially identical to the information in the

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source of applicable law governing disclosure, it ignores that the Court also noted its agreement with the proposition that the fact that a member of the public would be entitled to a document under FOIA is highly relevant to whether that same document should be considered Protected Information. *See, e.g.*, July 16 Tr. at 33–34, 38–40. The Government also ignores its own concession, at the same hearing, that "we would never maintain a protected designation on a document that's been released in FOIA." *Id.* at 34:24–25. The Government may attempt to draw a distinction between a document that's been *released* under FOIA and one that's *releasable* under FOIA, but such a distinction serves little purpose here in light of the *undisputed* fact that documents that are the FOIA equivalent of privilege logs are routinely released under FOIA.

March 20 and subsequent logs – was not confidential and therefore was not deserving of protection in the first place. *See* Mot. at 11. Making this common sense point does not run afoul of *any* provision of the Protective Order.

6. Finally, we must briefly respond to the Government's argument that the motion should be denied because Fairholme has not been prejudiced by the designation of the logs as protected. *See* Resp. at 3, 7–10. Of course, even if the Government were right that Fairholme has suffered no prejudice, it would not matter. The only question under the Protective Order is simply whether the information at issue falls within the order's definition of Protected Information. If the information does not so qualify, it cannot be treated as though it does, regardless of whether or not such treatment causes prejudice to the receiving party.

But the Government is simply wrong when it contends that Fairholme has suffered no prejudice from the designation of the logs at issue here as protected.[8] The Government's primary argument is that because "the Government has withheld no information from counsel and other persons with access under the protective order," Resp. at 3, Fairholme cannot suffer any actual prejudice. In addition to being irrelevant, the Government's argument is a non-sequitur. *By definition*, the only people who may be provided information designated as protected are those to whom access to Protected Information is given under the Protective Order. If that fact were enough to defeat any claim of prejudice arising from the improper designation of information as protected, it would be impossible for anyone to ever demonstrate prejudice.

[8] In the interest of brevity, we devote the bulk of this discussion to the prejudice arising from Fairholme's inability to review the designated logs, and we are content to rest on our discussion in our opening brief of the public's separate interest in information relating to this litigation. *See* Mot. at 12–13. We must point out, however, that nowhere in the Government's response does it deny that the subject matter of this litigation remains a matter of public concern, dealing as it does with governmental decisions that have critical implications for public policy.

The Government's perfunctory and cavalier dismissal of any notion that Plaintiffs suffer prejudice from being foreclosed from sharing Protected Information with their clients, Resp. at 8, is particularly striking. Fairholme, of course, is the party who has been directly affected by the Government actions at issue in this case, actions that it contends had the effect of expropriating its vested property interests. Fairholme therefore has an undeniable interest in the conduct of this action, including the Government's efforts to withhold thousands of documents from scrutiny and to otherwise shroud its actions in secrecy. To be sure, Fairholme is represented by counsel, and, to be sure, it is often necessary in litigation for clients to be barred from having access to truly confidential information produced in discovery. But it is ludicrous for the Government to suggest that when relevant information that is *not* confidential is nevertheless designated as protected, a client – the injured party – suffers no prejudice at all when it is not allowed to see that information and is thereby blinded to information relevant to its own action to protect its own property rights.

The Government's suggestion is even more preposterous in the circumstances here, since Fairholme's officials include sophisticated analysts and businessmen who would almost certainly be able to assist counsel in assessing the Government's thousands of privilege assertions (including but not limited to, assisting in determining, from document descriptions and the identification of authors and recipients, which improperly withheld documents may be worth fighting about). And it is no answer to suggest that because Fairholme can hire and pay expensive experts to assist counsel, no prejudice can be shown. Resp. at 7. Unnecessarily increasing Fairholme's litigation expenses, which is what would result if Fairholme were forced to ask paid experts to help

assess information that has been improperly designated as protected, does not *relieve* the prejudice to Fairholme; it *compounds* such prejudice.[9]

CONCLUSION

For the reasons discussed above and in our initial brief, there is no question that the Government's designation of its March 20 Log and subsequent logs as Protected Information was improper. The motion, therefore, should be granted.

Date: May 27, 2015

Respectfully submitted,

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[9] We must comment briefly on the Government's suggestion that the fact that Fairholme published a letter containing "verbatim excerpts" from the Government's earlier non-designated privilege logs was somehow "improper." Resp. at 9. The Government points to no law, rule, order, or other authority that foreclosed Fairholme from disclosing and commenting upon materials that had *not* been designated as protected in communications intended to keep Fairholme's 170,000 mutual fund shareholders apprised of litigation that directly affects their interests. Nor does the Government otherwise explain how the disclosure of "verbatim excerpts" from the logs was inappropriate or prejudicial. The Government no doubt was not pleased to see its actions in this litigation disclosed to and discussed in the public, but it is the Government's continuing attempts to shroud in secrecy information that does not qualify for such protection under this Court's order that is improper.

EXHIBIT I

David Thompson

From:	Schwind, Gregg (CIV) <Gregg.Schwind@usdoj.gov>
Sent:	Tuesday, September 02, 2014 4:56 PM
To:	David Thompson
Cc:	Hosford, Elizabeth (CIV)
Subject:	RE: Fairholme v. United States; Privilege Log 001 (FHFA)

David:

We have not designated the FHFA privilege log "protected" under the Protective Order in this case. However, we reserve our right to do so with future privilege logs as appropriate. Thanks.

Gregg

From: David Thompson [mailto:dthompson@cooperkirk.com]
Sent: Tuesday, August 26, 2014 8:36 AM
To: Schwind, Gregg (CIV)
Subject: Fwd: Fairholme v. United States; Privilege Log 001 (FHFA)

Gregg,

I am assuming that this privilege log is not covered by the protective order given its content and given that it has not been marked as protected. But please let me know if I'm wrong. If you could get back to me today, I'd appreciate it.

Best regards,
David

Begin forwarded message:

> **From:** "Schwind, Gregg (CIV)" <Gregg.Schwind@usdoj.gov>
> **Date:** August 22, 2014 at 5:43:46 PM EDT
> **To:** "vcolatriano@cooperkirk.com" <vcolatriano@cooperkirk.com>, "Brian Barnes (BBarnes@cooperkirk.com)" <bbarnes@cooperkirk.com>, "dthompson@cooperkirk.com" <dthompson@cooperkirk.com>, "Nicole Moss (nmoss@cooperkirk.com)" <nmoss@cooperkirk.com>
> **Cc:** "Hosford, Elizabeth (CIV)" <Elizabeth.Hosford@usdoj.gov>
> **Subject: Fairholme v. United States; Privilege Log 001 (FHFA)**
>
> Vince et al:
>
> Attached please find a cover letter and Privilege Log 001 (FHFA).
>
> Gregg

EXHIBIT J

David Thompson

From: Schwind, Gregg (CIV) <Gregg.Schwind@usdoj.gov>
Sent: Wednesday, October 29, 2014 1:02 PM
To: David Thompson
Cc: Vince Colatriano; Nicole Moss; Hosford, Elizabeth (CIV)
Subject: RE: Fairholme v. US; Privilege Log 002

Thanks, David. The log is not subject to the protective order.

Gregg

From: David Thompson [mailto:dthompson@cooperkirk.com]
Sent: Tuesday, October 28, 2014 9:30 PM
To: Schwind, Gregg (CIV)
Cc: Vince Colatriano; Nicole Moss; Hosford, Elizabeth (CIV)
Subject: Re: Fairholme v. US; Privilege Log 002

Gregg,

I plan to share this with my client since it's not stamped subject to the protective order, but if I'm missing something, please let me know by tomorrow at noon.

Many thanks,
David

On Oct 28, 2014, at 5:11 PM, "Schwind, Gregg (CIV)" <Gregg.Schwind@usdoj.gov> wrote:

> Vince:
>
> Attached please find a cover letter, Privilege Log 002, and corresponding name list. If you have any questions, please let us know. Thanks.
>
> Gregg
>
> **Gregg M. Schwind**
> Senior Trial Counsel
> U. S. Department of Justice
> (202) 353-2345
>
> Overnight address:
> 1100 L Street, N.W.
> Washington, D.C. 20005

EXHIBIT K

David Thompson

From: Schwind, Gregg (CIV) <Gregg.Schwind@usdoj.gov>
Sent: Friday, January 16, 2015 4:00 PM
To: David Thompson; Vince Colatriano
Cc: Hosford, Elizabeth (CIV); Brian Barnes
Subject: RE: Fairholme v. United States (No. 13-465); Treasury Privilege Log

Correct.

From: David Thompson [mailto:dthompson@cooperkirk.com]
Sent: Friday, January 16, 2015 3:58 PM
To: Schwind, Gregg (CIV); Vince Colatriano
Cc: Hosford, Elizabeth (CIV); Brian Barnes
Subject: RE: Fairholme v. United States (No. 13-465); Treasury Privilege Log

Gregg,

May I safely assume that this document is not subject to the protective order?

Regards,
David

From: Schwind, Gregg (CIV) [mailto:Gregg.Schwind@usdoj.gov]
Sent: Friday, January 16, 2015 3:57 PM
To: Vince Colatriano
Cc: Hosford, Elizabeth (CIV); David Thompson; Brian Barnes
Subject: Fairholme v. United States (No. 13-465); Treasury Privilege Log

Vince:

Attached please find the first Treasury privilege log resulting from our continuing review of documents in this case. We will provide a list of the small number of persons on the log who are not Treasury employees next week. Attorneys are indicated on the log with an asterisk.

You have inquired as to the status of certain Grant Thornton documents. We expect many of these documents to appear on a future Treasury privilege log as protected by the deliberative process privilege.

Let us know if you have any questions related to the log. Have a good holiday weekend.

Gregg