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June 23, 2017

via Electronic Mail

Hon. Charles E. Grassley
Chairman
U.S. Senate Committee on the Judiciary
ceg@judiciary-rep.senate.gov

Re: Fusion GPS

Dear Chairman Grassley:

After seeking most of the same information from the Federal Bureau of Investigation ("FBI"),[1] you sent Fusion GPS a March 24, 2017, letter seeking the voluntary production of documents and information. In the March 24 letter, with reference to an article from *The New York Times*, you stated that Fusion and one of its subcontractors were working on behalf of a Republican and then later Hillary Clinton's presidential campaign to help them perform opposition research on Donald Trump during the primary and general election campaigns of 2016. You sought from Fusion GPS information and documentation about this alleged relationship, as well as the interactions of Fusion GPS and one of its subcontractors with the FBI, in furtherance of that political work during the 2016 presidential campaigns. Among other things, you have asked Fusion GPS to name its clients.

The gravamen of your oversight investigation is whether the FBI complied with its own policy on working with paid informants. The FBI can answer those questions, without forcing Fusion GPS to waive its constitutional and common law privileges and rights or those of its clients.

[1] *See* Letter from Chairman Charles E. Grassley, U.S. Senate Committee on the Judiciary, to Director James B. Comey, Jr., Federal Bureau of Investigation (Mar. 6, 2017), *available at https://www.grassley.senate.gov/sites/default/files/judiciary/upload/2017-03-06%20CEG%20to%20FBI%20%28Arrangement%20to%20Pay%20Steele%29.pdf.*

On April 7, 2017, we sent you a letter, preserving the privileges of Fusion GPS and its clients. On June 7, 2017, you sent a second letter, raising questions about those privileges and seeking clarification of them.

With due respect to the Committee's authority and right to perform oversight of the FBI, we, on behalf of a private party, are required to protect that private party's privileges and rights, as well as those of its clients. We have worked to balance the Committee's interest with the privileges being asserted. Fusion GPS has preserved documents and, through counsel, has corresponded with the committee staff and has asserted privileges. In response to a request for the voluntary production of documents and information, Fusion GPS has met its obligations under the circumstances. Consistent with Fusion GPS' cooperation with your inquiry, we will, through this letter, respond to the points addressed in your June 7, 2017, letter. Nothing herein shall be construed as an admission or waiver by Fusion GPS.

A. <u>History of Communications with Staff</u>

Based on the June 7, 2017, letter's characterization of communications between staff and counsel for Fusion GPS, permit us to clarify them:

1. On March 6, 2017, you sent the FBI Director a letter seeking information and documents from the FBI about the FBI's interactions with Christopher Steele.

2. On March 24, 2017, you sent Fusion GPS a letter requesting the voluntary production of much of the same information and documents sought from the FBI.

3. On April 7, 2017, counsel for Fusion GPS responded in writing. In the April 7 letter, we stated that the information and documentation requested are protected by the First Amendment privilege of Fusion GPS and its clients, and that we lacked the authority to waive that privilege. We also stated that some of the material was covered by the work product doctrine, the attorney-client privilege and confidentiality agreements.

4. In a follow-up call with your staff, on April 27, 2017, we responded to staff's questions.

    a. First, staff asked us about the First Amendment privilege that we were asserting. We explained that the material and information requested were protected by the First Amendment privilege, and we specified a variety of bases for asserting that privilege (*e.g.,* the right to engage in political activity and political speech, the right to free association, the right to press freedoms). Staff, in response, challenged the legitimacy of the First Amendment privilege in this instance because, nearly three

years ago, a D.C. Superior Court judge found that enforcement of a subpoena against Glenn Simpson would not violate his First Amendment privileges, in a completely separate matter. We stated that the matter, to which staff referred, involved different circumstances, different assertions under the First Amendment, and has no application to Fusion GPS or its clients, who are asserting First Amendment claims here. Also, the Superior Court judge's decision remains pending on appeal.

b. Second, staff asked about our attorney work product claim. We clarified our April 7, 2017, response to explain that *some* of the information and documents being requested were protected by the attorney work product doctrine because they related to material created at the direction of counsel, in anticipation of litigation. Staff asked what the "litigation" was. We informed staff that we would consult our client, and that, at a minimum, government investigations into the same factual matter would have been reasonably foreseeable, if not ongoing at the time.

c. Third, staff asked about our claim of attorney-client privilege. We clarified our April 7, 2017, response to inform staff that Fusion GPS was not asserting an attorney-client privilege over its own communications with its clients.

d. Fourth, staff asked to review the confidentiality agreements, and we said we would discuss the matter with our client.

e. Fifth, staff questioned whether any of the privileges being asserted had been waived because of certain news articles. We explained that no waiver had occurred, as, *inter alia*, anyone who may have spoken to the media about privileged matters was not authorized to do so.

f. Staff did not set a deadline by which it wanted counsel to respond to its questions.

5. After that phone conversation, the only follow-up question or request that we received from staff, prior to receiving the June 7 letter, was on May 11, 2017, to ask whether staff could review confidentiality agreements. We informed staff that, in order to protect privileges, we would continue to withhold production.

6. On June 7, 2017, staff asked us to confirm receipt of the letter, which we did. The letter stated: "If you have any questions or concerns about complying with this request and deadline, please contact Committee staff in advance of the deadline."

7. On June 12, 2017, we asked for a week's extension of time because counsel for Fusion GPS was out of town that week, on another matter.

8. On June 19, 2017, we spoke with staff on the phone and renewed our request to respond to the June 7 letter by June 23, 2017. Minority counsel also participated on the call. Majority staff approved the request, on the call.

B. The First Amendment

The information and material sought in your March 24 letter are protected by the First Amendment privileges of Fusion GPS and its clients. In the face of a request for the voluntary production of information and material, we have discharged our obligations to protect those privileges. By the same token, we want to be sure to address the points in your letter. That said, in an environment in which you already have raised questions about waiver, we must be careful not to state anything here that would result in a waiver of any privilege, including the First Amendment privileges of Fusion GPS or its clients.

Fusion GPS worked with and for its clients in furtherance of its clients' First Amendment rights to engage in political activity and political speech, to speak anonymously, to associate freely with others and to petition their government. Fusion GPS continued to work, in the absence of a client, on matters related to information and documents being sought, in furtherance of its First Amendment rights to engage in political activity and political speech, to associate freely with others, to exercise freedom of the press and to petition the government. The information and documents sought are all protected by those First Amendment privileges.

These freedoms are ones we all value and lie at the very foundation of our constitutional democracy. "[S]peech on public issues occupies the highest run of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (internal quotation marks omitted). On a similar pedestal is the freedom of association: "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." *Knox v. Serv. Employees Int'l Union, Local 100*, 567 U.S. 298, 309 (2012). Likewise: "the right to petition [the government is] one of the most precious of the liberties safeguarded by the Bill of Rights" because "the right is implied by the very idea of a government, republican in form." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (internal quotation marks and alteration omitted).

The Supreme Court has limited the right of Congress to demand information and materials from Americans when doing so would violate their First Amendment rights. "[T]he constitutional rights of witnesses will be respected by the Congress as they are in a court of justice…. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged." *Watkins v. United States*, 354 U.S. 178, 188 (1957). For that reason, the Supreme Court ruled that the State of Alabama could not compel the NAACP to disclose the names of its members because such compulsion would result in a "substantial restraint" of their freedom of association under the First Amendment. *NAACP v. Alabama,* 357 U.S. 449, 462-63 (1958). When the court in *Perry v. Schwarzenegger* analyzed a claimant's assertion of a First Amendment privilege in the face of a subpoena, the court found: "The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of

the information will have a deterrent effect on the exercise of protected activities." 591 F.3d 1147, 1162 (9th Cir. 2010).

In your June 7 letter, the only question raised about the claim of First Amendment privilege, on behalf of Fusion GPS and its clients, is the fact that a D.C. Superior Court judge, in 2014, ruled against Mr. Simpson's (not Fusion GPS') First Amendment claim.[2] But that decision remains on appeal from the *Superior Court*, whose caselaw does not govern the authority of Congress to investigate, and does not apply here. Among other things, this matter involves a completely different set of circumstances and facts from those before the Superior Court. For example, unlike the matter here, the Superior Court found that the subpoena neither involved political speech nor sought lists of members or clients, or information about them.[3] Also, the Superior Court did not evaluate *Fusion GPS'* First Amendment privilege, including but not limited to Fusion GPS' right to free association. That Mr. Simpson was involved in that Superior Court matter is of no moment, without more. Here, Fusion GPS has asserted additional grounds for First Amendment protection in response to your request, supported by different facts, and in conjunction with the claims of its clients, which of course were not present before the Superior Court in 2014.

You have requested that Fusion GPS reveal the names of any clients that had retained the company for the purpose of performing opposition research on a major political party candidate for president. You likewise have requested that Fusion GPS disclose all of its internal communications regarding any such opposition research. Such requests (and any disclosures made pursuant to them) have a chilling effect both on a company like Fusion GPS and on its clients, both Republican and Democrat. For that reason, courts have elected not to enforce subpoenas that infringe on the subject's First Amendment rights (*e.g.*, free association, political speech), particularly when the information being sought can be gleaned elsewhere (here, the FBI) or is not "highly relevant" to the Committee's legitimate inquiry (*i.e.*, whether the FBI complied with its policy on working with informants).[4]

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[2] *See Vandersloot v. The Found. for Nat'l Progress*, No. 2014 CA 003684, at 15 (D.C. Sup. Ct. Oct. 27, 2014), *appeal pending.*

[3] *See id.*

[4] *Perry,* 591 F.3d at 1161 ("Importantly, the party seeking the discovery must show that the information sought is highly relevant ... a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable.") *See also Wyoming v. U.S. Dep't of Agric.*, 208 F.R.D. 449, 455 (D.D.C. 2002) (invalidating government's subpoena because enforcement would chill free exercise of speech and association, where the documents sought were not highly relevant and the government had not reasonably attempted to obtain the information elsewhere); *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002) (blocking government's discovery requests that would chill First Amendment associational rights); *United States v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987) (denying enforcement of government subpoena that would chill First Amendment associational rights).

Since these First Amendment claims cover the information and material sought in your request for the voluntary production of documents and information, it would be overly burdensome, at this stage of the process, to produce a privilege log or to otherwise risk waiver through the production of other documents (*e.g.*, confidentiality agreements).

C. The Attorney Work Product Doctrine

While the First Amendment privilege covers the entirety of your request, the attorney work product doctrine covers only *some* of the work produced on behalf of one of Fusion GPS' clients. That limited work was conducted at the direction of counsel, in anticipation of litigation – in particular, in anticipation of government investigations into ties between the Russian government and Donald Trump's presidential campaign (based on news stories),[5] as well as defamation suits.[6] Should Fusion GPS or its subcontractors have identified facts about Donald Trump's illegal or improper conduct, it was reasonably foreseeable at the beginning of Fusion GPS' work for its client that Mr. Trump would have filed a lawsuit. At that point in time, he had filed 1,900 lawsuits, including defamation suits.[7]

D. No Waiver

Waiver has not occurred. Neither Fusion GPS nor its clients have authorized anyone to waive their privileges, and Fusion GPS has taken reasonable steps to prevent others within the privilege chain from waiving privilege. *See* Federal Rule of Evidence 502. Indeed, no one has made any inadvertent disclosures, let alone in a federal or state proceeding, or to a federal office or agency. *See id.*

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[5] *See In re Sealed Case*, 146 F.3d 881, 885-86 (D.C. Cir. 1998) (upholding assertion of the attorney work product doctrine by Republican National Committee ("RNC") lawyers because of their subjective view that the FEC might investigate a non-profit associated with the RNC, based on news reports); *see also EEOC v. Lutheran Soc. Servs.*, 186 F.3d 959, 960, 968 (D.C. Cir. 1999) (upholding claim of the attorney work product doctrine by the Lutheran Social Services for an internal investigation report prepared because of the board's concern that the EEOC might investigate the organization's compliance with Title VII).

[6] *United States v. Roxworthy*, 457 F.3d 590, 600 (6th Cir. 2006) (upholding assertion of work product privilege where the "opposing party[]" had a "general inclination to pursue this sort of litigation" and thus litigation was reasonably anticipated by the party asserting the privilege).

[7] *See* Nick Penzenstadler and Susan Page, *Exclusive: Trump's 3,500 Lawsuits Unprecedented for a Presidential Nominee*, USA TODAY, June 1, 2016, *available at* https://www.usatoday.com/story/news/politics/elections/2016/06/01/donald-trump-lawsuits-legal-battles/84995854/. *See also* Olivia Nuzzi, *Donald Trump Sued Everyone But His Hairdresser*, THE DAILY BEAST, July 6, 2015, *available at* http://www.thedailybeast.com/donald-trump-sued-everyone-but-his-hairdresser.

In the June 7 letter, citing an article from *The New York Times*, you questioned whether waiver occurred "based on Fusion's efforts to share the dossier with journalists and members of Congress." (Letter from Chairman Grassley to G. Simpson, June 7, 2017, at 3.) Without confirming or denying that story, releasing a report to a third party (including, but not limited to the government) would not cause a waiver of privilege.[8]

E. The Senate Committee Can Seek the Same Information Elsewhere.

In the meantime, Fusion GPS is not the only custodian for the information sought, as questions about the FBI's compliance with internal policy should be directed to the Bureau and the Department of Justice (not Fusion GPS or its clients). As the Judiciary Committee exercises its right, pursuant to its oversight function, to seek information regarding the FBI's compliance with its own policy and regarding any contacts the FBI and the Department of Justice may have had with third parties, the Committee should direct those requests for information and material to the government. Compelling Fusion GPS to come between the Committee and Fusion GPS' clients' exercise of their First Amendment rights, when the same information can be obtained from the FBI, is overly burdensome. The heart of the Chair's inquiry seems to be whether the FBI acted appropriately. The last 8 of the Chair's 13 questions to Fusion GPS *all* relate to the FBI. To obtain that information, the Chair can follow up with the Department and/or the Bureau for that information rather than burden Fusion GPS and its clients, weaken the First Amendment and chill Fusion GPS and its clients (both Republican and Democrat) from exercising their rights under the First Amendment. To the extent that the Chair's questions do not relate to the FBI, the information sought is not pertinent to the Committee's oversight inquiry into the conduct of the FBI, and Fusion GPS has a heightened obligation to protect the privilege with regard to such information and documentation.

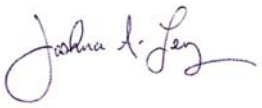
Conclusion

Given the strength and importance of the privileges being asserted by Fusion GPS and its clients – in particular, their First Amendment privileges – we hope that you and the other members of the Committee will be respectful of them. As you have noted on the Senate floor, in a speech dedicated to the defense of the First Amendment: "Anyone can stand up for speech with which they agree. The test for

[8] *See United States v. Deloitte LLP*, 610 F.3d 129, 140 (D.C. Cir. 2010) (upholding the attorney work product privilege claim and finding that "voluntary disclosure … does not necessarily waive work-product protection"); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (holding that disclosure to the government did not waive the work product privilege and explaining that such a disclosure "should not suffice in itself for waiver of the work product privilege").

government officials and free speech is whether they will allow speech with which they disagree."[9] Under these circumstances, requiring Fusion GPS to produce the requested information and materials would chill the exercise of Fusion GPS' and its clients' First Amendment rights; thus, compulsory process is not warranted here for the information and material now being requested.

Sincerely,



Joshua A. Levy
Robert F. Muse

cc: The Honorable Diane Feinstein
Ranking Member
U.S. Senate Committee
on the Judiciary

[9] Senator Charles E. Grassley, Floor Statement: Attacks on the First Amendment Freedom of Speech (July 26, 2012), *available at* https://www.grassley.senate.gov/news/news-releases/grassley-floor-statement-attacks-first-amendment-freedom-speech.