

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF
THE SEARCH OF UDF
1301 MUNICIPAL WAY
GRAPEVINE, TEXAS 76051

Case No. 3:21-mc-284-B-BT

**UNITED DEVELOPMENT FUNDING’S SUPPLEMENT TO
MOTION FOR RETURN OF PROPERTY PURSUANT TO
RULE 41(g) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE**

At the Court’s invitation, United Development Funding (“UDF”) files this supplement to its motion for return of property pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure.

I. The government’s search of UDF violates Section 9-13.420 of the Department of Justice (“DOJ”) manual for obtaining evidence.

As mentioned during UDF’s argument before the Court, the government’s search of UDF irredeemably violated UDF’s “legitimate attorney-client relationships” and “legitimate claim[s] of privilege.” *See* Exhibit A, Excerpts of the Department of Justice’s manual for obtaining evidence.

Section 9-13.420 instructs DOJ personnel as follows:

A. Alternatives to Search Warrants. In order to avoid impinging on valid attorney-client relationships, **prosecutors are expected to take the least intrusive approach** consistent with vigorous and effective law enforcement when evidence is sought from an attorney actively engaged in the practice of law. Consideration should be given to obtaining information from other sources or through the use of a subpoena, unless such efforts would compromise the criminal investigation or prosecution, or could result in the obstruction or destruction of evidence, or would otherwise be ineffective.

Id. (emphasis added).

In this case, the government took the opposite, most intrusive approach and obtained a search warrant for every document and piece of equipment at UDF’s premises, knowing UDF was (a) represented by counsel, (b) cooperating with the government, (c) had previously produced

thousands of documents in response to government subpoenas, and (d) had several individuals within the walls of UDF who were attorneys actively engaged in an attorney-client relationship with UDF.

II. The government's conduct as recent as June 23, 2021 undermines the government's waiver argument.

At the hearing, the government, for the first time contended that UDF waived its privacy rights protected by the attorney-client privilege as early as 2017. The fundamental veracity of that position, however, is directly undermined by the actions of the government on June 23, 2021. On that date, more than five years after the government seized UDF's materials, the government requested that UDF counsel review roughly 60,000 files seized from Melissa Youngblood's office for privilege review of attorney client material on July 23, 2021. *See* Exhibit 20 to the Declaration of Paul Pelletier attached to UDF's Motion for Return of Property Pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure. Common sense dictates that if the government truly believed that UDF had waived its privacy interest in attorney-client privileged materials, the government would not have sent copies of documents for UDF to review for exactly the purpose that the government now claims it believed UDF had waived. For this reason, the government's conduct here actually betrays the positions previously articulated to the Court.

III. Conclusion

For the reasons stated above, in UDF's prior pleadings, and during UDF's argument before the Court, UDF respectfully requests that this Court, sitting in equity, require the government and USAO-NDTX to return all originals and copies of all materials seized from UDF's headquarters on February 18, 2016.

Dated: October 28, 2021

Respectfully submitted,

/s/ Paul E. Pelletier

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**ATTORNEYS FOR UNITED
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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2021, I filed this document with the Clerk's Office. I further provided an electronic copy of this document on counsel, as listed below, *via* electronic mail:

United States Attorney's Office	Assistant U.S. Attorney Doug Brasher	doug.brasher@usdoj.gov
United States Attorney's Office	Assistant U.S. Attorney Steve Fahey, Criminal Chief	steve.p.fahey@usdoj.gov

/s/ Paul E. Pelletier

Paul E. Pelletier

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 substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

- G. Questions.** Questions regarding the applicability of the authorization requirement or any of its exceptions should be directed to the Policy and Statutory Enforcement Unit, Office of Enforcement Operations at 202-305-4023 or pseu@usdoj.gov.

[updated March 2016] [cited in JM 9-11.255; JM 9-13.420]

9-13.420 - Searches of Premises of Subject Attorneys

NOTE: For purposes of this policy only, "subject" includes an attorney who is a "suspect, subject or target," or an attorney who is related by blood or marriage to a suspect, or who is believed to be in possession of contraband or the fruits or instrumentalities of a crime. This policy also applies to searches of business organizations where such searches involve materials in the possession of individuals serving in the capacity of legal advisor to the organization. Search warrants for "documentary materials" held by an attorney who is a "disinterested third party" (that is, any attorney who is not a subject) are governed by 28 C.F.R. 59.4 and JM 9-19.221 et seq. See also 42 U.S.C. Section 2000aa-11(a)(3).

There are occasions when effective law enforcement may require the issuance of a search warrant for the premises of an attorney who is a subject of an investigation, and who also is or may be engaged in the practice of law on behalf of clients. Because of the potential effects of this type of search on legitimate attorney-client relationships and because of the possibility that, during such a search, the government may encounter material protected by a legitimate claim of privilege, it is important that close control be exercised over this type of search. Therefore, the following guidelines should be followed with respect to such searches:

- A. Alternatives to Search Warrants.** In order to avoid impinging on valid attorney-client relationships, prosecutors are expected to take the least intrusive approach consistent with vigorous and effective law enforcement when evidence is sought from an attorney actively engaged in the practice of law. Consideration should be given to obtaining information from other sources or through the use of a subpoena, unless such efforts could compromise the criminal investigation or prosecution, or could result in the obstruction or destruction of evidence, or would otherwise be ineffective.

NOTE: Prior approval must be obtained from the Assistant Attorney General for the Criminal Division to issue a subpoena to an attorney relating to the representation of a client. See JM 9-13.410.

- B. Authorization by United States Attorney or Assistant Attorney General.** No application for such a search warrant may be made to a court without the express approval of the United States Attorney or pertinent Assistant Attorney General. Ordinarily, authorization of an application for such a search warrant is appropriate when there is a strong need for the information or material and less intrusive means have been considered and rejected.
- C. Prior Consultation.** In addition to obtaining approval from the United States Attorney or the pertinent Assistant Attorney General, and before seeking judicial authorization for the search warrant, the federal prosecutor must consult with the Criminal Division.

NOTE: Attorneys are encouraged to consult with the Criminal Division as early as possible regarding a possible search of an attorney's office. Telephone No. (202) 305-4023; Fax No. (202) 305-0562.



To facilitate the consultation, the prosecutor should submit a form available to Department attorneys containing relevant information about the proposed search along with a draft copy of the proposed search warrant, affidavit in support thereof, and any special instructions to the searching agents regarding search procedures and procedures to be followed to ensure that the prosecution team is not "tainted" by any privileged material inadvertently seized during the search. This information should be submitted to the Criminal Division through the Office of Enforcement Operations. This procedure does not preclude any United States Attorney or Assistant

Attorney General from discussing the matter personally with the Assistant Attorney General of the Criminal Division.

If exigent circumstances prevent such prior consultation, the Criminal Division should be notified of the search as promptly as possible. In all cases, the Criminal Division should be provided as promptly as possible with a copy of the judicially authorized search warrant, search warrant affidavit, and any special instructions to the searching agents.

The Criminal Division is committed to ensuring that consultation regarding attorney search warrant requests will not delay investigations. Timely processing will be assisted if the Criminal Division is provided as much information about the search as early as possible. The Criminal Division should also be informed of any deadlines.

- D. Safeguarding Procedures and Contents of the Affidavit.** Procedures should be designed to ensure that privileged materials are not improperly viewed, seized or retained during the course of the search. While the procedures to be followed should be tailored to the facts of each case and the requirements and judicial preferences and precedents of each district, in all cases a prosecutor must employ adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized.
- E. Conducting the Search.** The search warrant should be drawn as specifically as possible, consistent with the requirements of the investigation, to minimize the need to search and review privileged material to which no exception applies.

While every effort should be made to avoid viewing privileged material, the search may require limited review of arguably privileged material to ascertain whether the material is covered by the warrant. Therefore, to protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a "privilege team" should be designated, consisting of agents and lawyers not involved in the underlying investigation.

Instructions should be given and thoroughly discussed with the privilege team prior to the search. The instructions should set forth procedures designed to minimize the intrusion into privileged material, and should ensure that the privilege team does not disclose any information to the investigation/prosecution team unless and until so instructed by the attorney in charge of the privilege team. Privilege team lawyers should be available either on or off-site, to advise the agents during the course of the search, but should not participate in the search itself.

The affidavit in support of the search warrant may attach any written instructions or, at a minimum, should generally state the government's intention to employ procedures designed to ensure that attorney-client privileges are not violated.

If it is anticipated that computers will be searched or seized, prosecutors are expected to follow the procedures set forth in the current edition of *Searching and Seizing Computers*, published by CCIPS.

- F. Review Procedures.** The following review procedures should be discussed prior to approval of any warrant, consistent with the practice in your district, the circumstances of the investigation and the volume of materials seized.
- o Who will conduct the review, i.e., a privilege team, a judicial officer, or a special master.
 - o Whether all documents will be submitted to a judicial officer or special master or only those which a privilege team has determined to be arguably privileged or arguably subject to an exception to the privilege.
 - o Whether copies of all seized materials will be provided to the subject attorney (or a legal representative) in order that: a) disruption of the law firm's operation is minimized; and b) the subject is afforded an opportunity to participate in the process of submitting disputed documents to the court by raising specific claims of privilege. To the extent possible, providing copies of seized records is encouraged, where such disclosure will not impede or obstruct the investigation.
 - o Whether appropriate arrangements have been made for storage and handling of electronic evidence and procedures developed for searching computer data (i.e., procedures which recognize the universal nature

of computer seizure and are designed to avoid review of materials implicating the privilege of innocent clients).

These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

[updated January 2020]

9-13.500 - International Legal Assistance

Some countries reserve official acts to local officials and provide significant criminal penalties for persons who engage in such acts in their territory without authorization. Before attempting to do any unilateral investigative act outside the United States relating to a criminal investigation or prosecution, including contacting a witness by telephone or mail, prior approval must be obtained from the Criminal Division's Office of International Affairs (OIA) (202-514-0000).

In addition, OIA must be consulted before contacting any foreign or State Department official in matters relating to extradition of a fugitive or the obtaining of evidence through compulsory process from a foreign authority in a criminal investigation, prosecution, or ancillary criminal matter.

Any proposed contact with foreign officials, other than United States investigative agents, in a foreign country for the purpose of obtaining the extradition of a fugitive or evidence through compulsory process should first be discussed with OIA.

None of the above is intended to prevent prosecutors from:

1. having preliminary discussions with U.S. law enforcement representatives posted abroad concerning the obtaining of assistance,
2. communications with agents of State Department's Diplomatic Security Service concerning an investigation under their jurisdiction, or
3. participating in standing international committees such as the U.S.-Canada Cross Border Committee.

[cited in JM 9-11.140] [updated April 2018]

9-13.510 - Obtaining Evidence Abroad—General Considerations

Every nation enacts laws to protect its sovereignty and can react adversely to American law enforcement efforts to gather evidence within its borders without authorization. Such efforts can constitute a violation of that nation's sovereignty or criminal law. You should contact the Office of International Affairs, Criminal Division, as soon as you become aware that you may need evidence located in another country to determine methods for securing assistance from abroad and to select an appropriate one.

[updated June 2018]

9-13.512 - Intended Use of the Evidence

When a country provides evidence pursuant to a request for legal assistance, such as an MLAT, letter rogatory, or letter of request, contact OIA before using or disclosing it for a purpose other than that specified in the legal assistance request. (Examples of such use or disclosure include Freedom of Information Act requests, or requests to use the evidence in a parallel civil or administrative proceeding.) OIA will work with the USAO to determine whether the evidence can be used for a different purpose without the express permission of the country that provided it and, if not, for guidance in securing such permission.

[updated April 2018]