

# Court Finds That Cooperating Company's Disclosure of Privileged Documents to Government Does Not Waive Privilege, but Fairness Nevertheless Requires Disclosure to Defendants

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The U.S. District Court for the Central District of California recently ordered the government to produce to defendants privileged documents it obtained from the defendants' former employer as part of that employer's cooperation with the government's investigation into violations of the Foreign Corrupt Practices Act (the "FCPA"). In a series of decisions (available [here](#) and [here](#)), the court in *United States v. Carson*, No. SA CR 09-77-JVS (C.D. Cal.), found that, even though the employer disclosed the documents to the government subject to a Confidentiality and Non-Waiver Agreement—which the court held preserved the attorney-client and work-product protections—the defendants had a due process right to the protected documents because the government showed them to numerous potential witnesses in the case.

The defendants were former employees of CCI, which voluntarily disclosed potential FCPA violations following an internal investigation led by outside counsel. CCI later pled guilty to FCPA violations. As part of its on-going cooperation, CCI entered into a Confidentiality and Non-Waiver Agreement with the government, in which CCI agreed to provide certain documents prepared by outside counsel and subject to the attorney-client privilege and attorney work-product protection. CCI agreed that the government could disclose such confidential and protected documents only "to the extent that DOJ determines in its sole discretion that disclosure is otherwise required by law." CCI provided the government with several charts prepared by its outside counsel, purporting to summarize hundreds of alleged FCPA violations by individual CCI employees, including the defendants. According to CCI itself, these charts provided a "roadmap" for the government's prosecution of the defendants. The defendants later learned that the government had, without the explicit authorization of CCI, routinely disclosed the contents of the charts to dozens of potential witnesses in the case and their counsel.

Defendants sought to compel disclosure of the charts, arguing that any attorney-client or work-product protections were waived when CCI provided the documents to the government, or when the government disclosed the documents to its various witnesses. The court ruled that because the Confidentiality and Non-Waiver Agreement limited the government's ability to disclose the privileged materials to those situations where "disclosure is otherwise required by law," CCI maintained an expectation of privacy in the documents despite their production to the government. The court specifically distinguished similar disclosure agreements that allowed broad disclosure by the government—namely, agreements permitting disclosure as the government "deems appropriate" or in furtherance of the "discharge of its duties and responsibilities."

Nevertheless, the court held that fairness required disclosure of some of the charts to the defendants. The court found that the government had "taken the benefit of disclosing portions of the . . . charts in the preparation of its case," and that disclosure to the defendants was necessary "to enable the defendants to conduct effective cross examination" of the witnesses who had seen the charts. Thus, the court ordered the government to produce to the defendants all pages of the charts specifically disclosed to third parties or their counsel. But the court went further and ordered the government to also produce all pages of the charts with any relevance to the transactions at issue in the case, "whether or not shown to a third party."

Although the court upheld a cooperating entity's ability to disclose information to the government and still maintain attorney-client privilege and work-product protections, this case shows that there are no blanket rules. The conduct of the parties—even unilateral conduct by the government—can alter the calculus over whether a defendant is nevertheless entitled to access the protected materials.

There are several lessons to be learned from this case:

Parties seeking to disclose protected information to the government as part of their cooperation efforts, and who wish to maintain the protected status of those documents, should get the government to agree not to disclose the protected materials to any third party without prior authorization, unless required by law.

Defendants may be able to argue that a third party's disclosure of supposedly privileged documents to the government waives any such protections—despite a confidentiality and non-waiver agreement—if the agreement

investigation.

Defendants seeking access to materials produced to the government by a third party should be aggressive in determining whether the government has disclosed the privileged material to other third parties or potential witnesses. In CCI's case, it took numerous requests by defense counsel before the government finally conceded that it had, in fact, shown the documents to others. The court reprimanded government counsel for his negligence in not earlier informing the court about the disclosures, and for being obtuse in his responses when defense counsel suspected there had been disclosures. Defendants should carefully parse government counsel's responses and consider making explicit requests to determine whether there have been such disclosures.

For additional information on this or any related topic, please contact:

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