UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA/JOHNSON

JANE DOE 1 and JANE DOE 2,
Plaintiffs,
v.
UNITED STATES OF AMERICA,
Defendant.

INTERVENOR'S MOTION FOR THE COURT TO PROTECT FROM DISCLOSURE GRAND JURY MATERIALS IDENTIFIED IN GOVERNMENT'S PRIVILEGE LOGS AT D.E. 212-1 AND D.E. 216-1

Intervenor Jeffrey Epstein moves that this Honorable Court, pursuant to Federal Rule of Criminal Procedure 6(e), prevent the disclosure of matters that occurred before the two grand juries that investigated Mr. Epstein in 2005-2007. Mr. Epstein joins the Government in its assertion of Rule 6(e) objections to the various requests by plaintiffs for broad discovery, discovery that is either irrelevant or at most marginally relevant to the issues regarding the application and allegations of possible violation of the Crime Victims' Rights Act, and, if allowed, would be adverse to the privacy and reputational interests of the Intervenor. Although Mr. Epstein was convicted of state offenses and was sentenced to jail, he nevertheless has a right to the safeguards and requirements of Rule 6(e). Those protections include Rule 6(e)'s imperative that absent particularized need, the secrecy of grand jury proceedings must remain intact not only to protect the confidentiality of past proceedings, including the identity of witnesses, subjects, targets, and the nature of considered charges, but also to protect all citizens who are not charged from the disclosure of 6(e) information, documents, and testimony.

This Court granted plaintiffs limited discovery, finding that "some factual development is necessary to resolve the remaining issues in this case[.]" Order on Plaintiffs' Motion for Finding

of Violations of the Crime Victims' Rights Act [D.E. 99]. Thereafter, plaintiffs sought discovery of matters occurring before the grand jury and the government, in response, produced an initial privilege log [D.E. 212-1] and later a supplemental privilege log [D.E. 216-1] asserting, among several other privileges, Rule 6(e) grand jury secrecy, to many of the documents in its possession.

After the government produced its privilege log and Mr. Epstein moved to intervene [D.E. 215] to protect his rights under Rule 6(e), plaintiffs filed their Protective Petition for Disclosure of Grand Jury Materials [D.E. 227] and a Motion to Compel Production of Documents [D.E. 225] in which they make the conclusory assertions that they have "established particularized needs and compelling reasons" for the release of information that occurred before the grand jury and that the Court has the inherent power to release grand jury materials. The Court granted plaintiffs' Protective Petition for Disclosure of Grand Jury Materials subject to rulings as to whether the materials in question are protected from disclosure by Federal Rule of Criminal Procedure 6(e). [D.E. 257 at 3 ¶ 3]. The Court also allowed plaintiffs an additional opportunity to file a motion "re-asserting the objections to the government's assertions of privilege." *Id*. at 3 ¶ 4. Plaintiffs, in their prior submissions, (see D.E. 225 at 6-7, D.E. 225-1 at 23-24), have failed to establish that grand jury materials are relevant to their claim under the CVRA and much less shown a particularized need for these grand jury materials particularly given the Government's Response to Plaintiffs' Request for Admission 1, (D.E. 225-1 at 49). Further, Mr. Epstein's interest in the secrecy of matters which occurred before the federal grand juries of which he was the target should weigh, along with other essential 6(e) purposes, in the Court's future consideration of whether the requested materials should or should not be disclosed.

I.
GRAND JURY PROCEEDINGS MUST REMAIN SECRET TO PROTECT PRIVATE CITIZENS FROM REPUTATIONAL HARM

Mr. Epstein has enforceable private interests in the continued secrecy of matters that occurred before the two grand juries that investigated whether he committed indictable federal offenses. Rule 6(e) prohibits disclosure of matters occurring before the grand jury "to protect the secrecy which is critical to the grand jury process," including "protect[ion of] the reputation of a person under investigation who is not indicted." *United States v. Eisenberg*, 711 F.2d 959, 961 (11th Cir. 1983). *See, e.g.*, *Lucas v. Turner*, 725 F. 2d 1095, 1100 (7th Cir. 1984) ("One of the principal reasons for preserving the secrecy of grand jury proceedings is to protect the reputations of both witnesses and those under investigation"); *In re Grand Jury Proceedings*, 610 F.2d at 213 ("The rule of secrecy avoids injury to the reputation of those persons accused of crimes whom the grand jury does not indict."). The private interests at stake in grand jury secrecy are so important that private parties may bring civil actions for injunctive relief to prevent violations of Rule 6(e) by government actors subject to the Rule 6(e) disclosure prohibition. *See, e.g.*, *United States v. Barry*, 865 F.2d 1317, 1323 (D.C. Cir. 1989) (explaining that "a trial court may enjoin Government counsel from further disclosures and hold counsel in contempt for breaches of . . . Rule [6(e)]."); *United States v. Blalock*, 844 F.2d 1546, 1551 (11th Cir. 1988) (recognizing that a target of a grand jury investigation "may bring suit for injunctive relief against the individuals subject to Rule 6(e)(2) and may invoke the district court's contempt power to coerce compliance with any injunctive order the court grants.").

The former Fifth Circuit recognized the problem inherent in stigmatizing private citizens by the release of information concerning possible criminal conduct when that private citizen does

not have a forum in which to vindicate his rights. In *In re Smith*, 656 F.2d 1101, 1103-04 (5th Cir. 1980),[1] the name of an unindicted grand jury witness, Edward Smith, was disclosed by the government in factual summaries during two plea hearings and identified as someone who had accepted bribes from the defendants who were changing their pleas. Mr. Smith filed a motion to strike his name from the factual summaries and the record of that case or to seal the record. *Id.* at 1104. The lower court denied Mr. Smith's motion. *Id.* at 1105. The Fifth Circuit overruled the lower court, relying on an earlier panel's decision in *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975), and explained that "no legitimate governmental interest is served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights." *Id*. at 1106. In the instant case, the Government has filed a privilege log which, in part, relies on Rule 6(e). The Intervenor is without access to the protected documents and thus cannot further particularize objections at this time beyond what is evident – that the disclosure of draft indictments, subpoenaed documents, the identities of witnesses, subjects and targets, and other materials protected by grand jury secrecy would impact on the Intervenor's privacy rights as well as on the other interests protected by the rules requiring Grand Jury secrecy.

II.
THE GRAND JURY MATERIALS ARE IRRELEVANT TO PLAINTIFFS' CLAIM UNDER THE CVRA

Plaintiffs do not need grand jury materials to establish their claim under the CVRA that the government did not confer with them.[2] Indeed, this Court found, in its Order Denying

[1] *In re Smith* is binding precedent in the Eleventh Circuit under *Bonner v. City of Prichard, Ala.*, 661 F. 2d 1206, 1209 (11th Cir. 1981) (*en banc*).

[2] The Government has also taken the position that "all documents sought regarding the underlying criminal investigation, the FBI investigative file, prosecution memorandum, [and] draft indictment . . . are irrelevant." *See* Respondent's Relevance Objections to Petitioners' First Request for Production to the Government [D.E. 260 at 2-3]. The Government correctly points

Government's Motion to Dismiss for Lack of Subject Matter Jurisdiction & Order Lifting Stay of Discovery, that "[t]he victims' CVRA injury is *not* the government's failure to prosecute Epstein federally – an end within the sole control of the government. Rather, it is the government's failure to confer with the victims before disposing of contemplated federal charges." [D.E. 189 at 10] (emphasis in original).

Therefore, plaintiffs cannot make any showing, much less a strong showing, that they are entitled to traditionally privileged grand jury materials that clearly pertain to the *substantive* criminal investigation of Mr. Epstein and have no relation to the CVRA failure-to-confer claim. Whether the government had probable cause in its investigation against Mr. Epstein, and whatever a search warrant or target letter or draft indictment or overt acts show, none of it appears, facially, to be relevant to the claim advanced in this case that the government should have conferred with plaintiffs before resolving the investigation of Mr. Epstein.[3] The Court should uphold the government's claim of privilege under Rule 6(e) pertaining to grand jury materials.

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out that "[t]he documents being requested are irrelevant because the issue before this Court is whether the government violated the CVRA, not how it exercised its prosecutorial discretion in the Epstein case." *Id.* at 3.

[3] In contrast to the contested issue of when consultation rights are triggered by statute, the CVRA expressly states that "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). The Act codifies the long-standing principle that "[t]he Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). This is due in large part to the separation of powers doctrine. *Id.*; U.S. CONST. art. II, § 3. Whether to investigate possible criminal conduct, grant immunity, negotiate a plea, or dismiss charges, are all central to the prosecutor's executive function. *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000).

III.
PLAINTIFFS HAVE NOT ESTABLISHED A PARTICULARIZED NEED FOR GRAND JURY MATERIALS

Not only are the grand jury materials irrelevant to plaintiffs' CVRA claims, plaintiffs also cannot make a "strong showing" of particularized need for these grand jury materials. "[T]he Supreme Court has consistently held that a strong showing of particularized need is required before any grand jury materials are disclosed." *Lucas v. Turner*, 725 F.2d 1095, 1101 (7th Cir. 1984). To make "a strong showing of particularized need" for disclosure of grand jury materials, the Supreme Court has established the following three-prong test: A party "must show [1] that the material [he or she] seek[s] is needed to avoid a possible injustice in another judicial proceeding, [2] that the need for disclosure is greater than the need for continued secrecy, and [3] that [the] request is structured to cover only material so needed." *Id.* (citing *Douglas Oil*, 441 U.S. at 222). "In determining whether disclosure of grand jury matters is appropriate in any given case, a court must exercise substantial discretion, weighing the need for secrecy against the need for disclosure of specified documents and testimony occurring before the grand jury." *Id.* (citing *Matter of Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d 1079, 1088 (7th Cir. 1982)). Even "[i]n a case where a particularized need is established 'the secrecy of the proceedings is lifted discretely and limitedly.'" *Id.* (citing *United States v. Procter & Gamble*, 356 U.S. 677, 683, (1958)).

Even though the two federal grand juries that were investigating Mr. Epstein have ended their investigation, the Court must still consider the chilling effect that disclosure of grand jury materials in this case might have on future grand juries. "In considering the effects of disclosure on grand jury proceedings, the court must consider not only the immediate effects upon a

particular grand jury, but also the possible effect upon the functioning of future grand juries." *Id.* (citing *Douglas Oil*, 441 U.S. at 223). The court in *Lucas* acknowledged that disclosure of grand jury materials would cause witnesses in future grand jury proceedings to consider the possibility that their testimony might later be disclosed to people outside the grand jury. *Id.* The court, citing *Douglas Oil Co.*, recognized that fear of retribution or social stigma could act as strong disincentives to prospective witnesses. "Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities." *Id.* (citing *Douglas Oil. Co.*, 441 U.S. at 223).

Plaintiffs cannot establish a particularized need for the grand jury materials listed in the government's privilege log because they cannot satisfy any of the three prongs established in *Douglas Oil*. First, plaintiffs cannot show that the grand jury materials they seek, such as a draft indictment, a list of overt acts, a search warrant or search warrants that include 6(e) material, or target letters, for example, are needed to avoid a possible injustice in this CVRA case involving a claim that the government failed to confer with plaintiffs before resolving this investigation.

Second, plaintiffs cannot establish that the need for disclosure is greater than the need for continued secrecy. As is more fully explained above, plaintiffs cannot even establish that the grand jury materials are relevant to their action under the CVRA, much less show that their need for the grand jury materials outweighs all the reasons for maintaining the secrecy of the grand jury materials. Lastly, plaintiffs' Protective Petition for Disclosure of Grand Jury Materials [D.E. 227], and its corollary requests contained in their Motion to Compel [D.E. 225], in effect seeks wholesale production of the grand jury materials. Accordingly, plaintiffs have failed to establish a particularized need for the production of grand jury materials.

IV.
CONCLUSION

Mr. Epstein's interest in protecting the secrecy of matters that occurred before the two federal grand juries of which he was the target, along with the interests of various witnesses, subjects, and the Government's overall interest in grand jury secrecy, override any interest that plaintiffs may have in the grand jury materials listed in the government's privilege log absent a showing of the most compelling particularized need. Moreover, plaintiffs have not and cannot make "a strong showing" that the materials are even relevant to their claim under the CVRA, much less that they have a particularized need for these materials. The Court should therefore find that the documents identified by the government as grand jury materials are protected from disclosure under Rule 6(e). Accordingly, the Court should decline to order the disclosure of the grand jury materials listed in the government's privilege log.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We certify that on October 9, 2014, the foregoing document was filed electronically with the Clerk of the Court using CM/ECF.

By: /s/ Roy Black
ROY BLACK, ESQ.