



U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

July 22, 2020

TO BE FILED UNDER SEAL

VIA EMAIL

The Honorable Sarah Netburn
United States District Court
Southern District of New York
United States Courthouse
New York, New York 10007

Re: *In re Application to Unseal Civil Discovery Materials*, 19 Misc. 179 (SN)

Dear Judge Netburn:

The Government respectfully submits this letter in response to the Court's July 15, 2020 Order, directing the Government to state its position as to whether any or all previous filings in the above-captioned case (the "Miscellaneous Case") should remain under seal. For the reasons set forth below, the Government respectfully requests that all filings in the Miscellaneous Case remain sealed.

This Miscellaneous Case arises from the Government's application, dated February 5, 2019 (the "Application"), in connection with a then-pending, and still pending, grand jury investigation. Although the investigation has resulted in two unsealed indictments, the full scope and details of that investigation are not publicly known. That investigation is actively ongoing, and various relevant particulars of the investigation—including, but not limited to, certain subjects of the investigation, certain of the offenses being investigated, and the identities and experiences of certain witnesses and victims—similarly remain not publicly known.

Pursuant to Federal Rule of Criminal Procedure 6(e)(6): "Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Because the entirety of the materials in the Miscellaneous Case relate to, and fall under, the ongoing grand jury investigation, and because the unsealing of any such materials would reveal the Government's efforts to obtain certain evidence and types of evidence, and have the potential to result in the destruction of or tampering with evidence, or otherwise seriously jeopardize an investigation, the materials should not be unsealed. *See, e.g., Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 n.9 (1979) ("Since the 17th century, grand jury proceedings have been closed to the public; and records of such proceedings have been kept from the public eye. The rule of grand jury secrecy . . . is an integral part of our criminal justice system."). As described above, the grand jury investigation repeatedly referenced in all materials associated with the Miscellaneous Case is

active and ongoing, and indeed resulted in new charges being brought just this month. *See United States v. Maxwell*, 20 Cr. 330 (AJN). The existence of the Government's application related to its efforts to permit compliance with a grand jury subpoena, and the specific recipient and subject areas in that subpoena, are non-public and implicate the heart of the secret grand jury process.

The First Amendment presumptive right of access applies to civil and criminal proceedings and "protects the public against the government's arbitrary interference with access to important information." *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.* ("NYCTA"), 684 F.3d 286, 298 (2d Cir. 2012) (internal quotation marks omitted). The Circuit has applied two different approaches when deciding whether the First Amendment right applies to particular material. The "experience-and-logic" approach asks "both whether the documents have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (internal quotation marks omitted). The second approach—employed when analyzing judicial documents related to judicial proceedings covered by the First Amendment right—asks whether the documents at issue "are derived from or are a necessary corollary of the capacity to attend the relevant proceedings." *Id.* (internal quotation marks and alteration omitted). Even when it applies, however, the First Amendment right creates only a presumptive right of access. "What offends the First Amendment is the attempt to [exclude the public] without sufficient justification," *NYCTA*, 684 F.3d at 296, not the simple act of exclusion itself.

Even assuming for purposes of this submission that the materials filed in the Miscellaneous Case could be considered judicial documents, however, continued sealing is nonetheless appropriate. The balancing of interests strongly favors sealing in order to protect the integrity of law enforcement proceedings. The filings and order are inextricably intertwined with an ongoing criminal grand jury investigation, which, despite significant coverage in the media in connection with charges brought against Jeffrey Epstein and Ghislaine Maxwell, nevertheless continues to include matters not publicly known or confirmed through public filings or Government statements.

The Government notes that it intends to provide defendant Maxwell with relevant materials from both the Miscellaneous Case and from 19 Misc. 149 (CM), to which the Government referred in its letter to this Court dated April 9, 2019, in order to comply with the Government's discovery obligations. The Government intends to seek a protective order from the presiding district judge, in order to provide relevant materials to the defendant while maintaining grand jury secrecy and confidentiality.

Accordingly, the Government respectfully requests that the Miscellaneous Case and its filings remain under seal until further order of the Court. The Government also respectfully proposes that the Court set a date approximately 180 days from now, or as soon thereafter as the

Court believes would be appropriate, for the Government to update the Court on its position regarding sealing in connection with the Miscellaneous Case.

Respectfully submitted,

AUDREY STRAUSS
Acting United States Attorney

By:

[REDACTED]
[REDACTED] / [REDACTED] / [REDACTED]
Assistant United States Attorneys

Tel.: [REDACTED]