

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FGJ 07-103(WPB)
U.S. District Judge Donald M. Middlebrooks

IN RE:

GRAND JURY PROCEEDINGS

**SEALED APPLICATION FOR PERMISSION TO DISCLOSE GRAND JURY
MATERIAL AND FOR ENTRY OF A PROTECTIVE ORDER**

I, AUSA A. [REDACTED], an attorney for the government as defined by Rule 1(b)(1)(B) of the Federal Rules of Criminal Procedure hereby applies to the Court for an order authorizing:

(1) the disclosure of matters occurring before the grand jury to attorney Jonathan Biran of the firm Baker Donelson to allow him to fulfill his obligations in representing the undersigned in connection with an investigation conducted by the Justice Department's Office of Professional Responsibility;

(2) the entry of a Protective Order; and

(3) the sealing of this Application, and the accompanying Orders.

BACKGROUND

1. From 2006 to 2008, I was the lead prosecutor on the investigation of Jeffrey Epstein, known as Operation Leap Year.

2. That matter involved the issuance of subpoenas on behalf of and the presentation of testimony to Federal Grand Jury No. 07-103 (WPB), which was empaneled by U.S. District Judge

Donald M. Middlebrooks on January 19, 2007.¹

3. In 2007, **over my objection**, the U.S. Attorney's Office (USAO) elected to enter into a Non-Prosecution Agreement (NPA) with Jeffrey Epstein, which allowed him to avoid federal prosecution by: (a) pleading guilty to two state charges, (b) registering as a sex offender, and (c) paying civil damages as a substitute for restitution to the victims identified during the federal investigation. Also, **over my objection**, the USAO decided to enter into this NPA without first conferring with those victims.

4. After signing the NPA, Epstein delayed performing its terms, and began raising arguments to various officials within the Justice Department that: (a) the NPA was unlawful; (b) there was no basis for federal prosecution of Epstein (and, hence, no basis for the NPA); (c) members of the USAO (including me) had engaged in prosecutorial misconduct; and (d) the FBI had engaged in investigative misconduct. In addition to responding to Epstein arguments, the USAO offered to allow Epstein to rescind the Agreement so that the parties could proceed to trial.

5. During the period of delay (from September 2007 to June 2008), the grand jury's investigation continued, including through the issuance of subpoenas and the presentation of testimony.

6. After Epstein unsuccessfully pursued his claims as high as the Deputy Attorney General, **over my objection**, the USAO still allowed Epstein the benefits of the NPA. On June 30, 2008, he entered a guilty plea to violations of Florida state law in Palm Beach County. **Over my objection**, the USAO did not provide written notification of the state court plea proceeding in advance of the change of plea. After that, the active federal investigation ceased, except for several

¹ Early subpoenas were issued on behalf of Federal Grand Jury No. 05-02 (WPB). That grand jury expired before the investigation was completed, so the matter was transferred to FGJ 07-103.

occasions when I attempted to present an indictment to the grand jury following Epstein's various breaches of the NPA.

7. After Epstein's state guilty plea, two of Epstein's victims filed suit against the United States alleging violations of the Crime Victim's Rights Act (CVRA). *Jane Doe 1 and Jane Doe 2 v. United States*, S.D. Fla. Case No. 08-80736-CV-KAM. The CVRA requires members of the Justice Department to use their "best efforts" to confer with victims regarding the course of proceedings, to treat them with respect, to protect their privacy, and to notify them of court proceedings. After many years of litigation, news articles, and Congressional calls for investigation, on February 21, 2019, Judge Marra issued an order granting partial summary judgment in favor of petitioners (DE 435). In his Order, Judge Marra referenced a letter sent by the FBI's victim-witness specialist to Jane Does 1 and 2 on January 10, 2008 that read "[t]his case is currently under investigation. This can be a lengthy process and we request your continued patience while we conduct a thorough investigation" (DE 435 at 16). The FBI sent the same letter to another victim in May 2008 (*id.* at 17). The Court later referred to these FBI letters when concluding:

Particularly problematic was the Government's decision to conceal the existence of the NPA and mislead the victims to believe that the federal prosecution was still a possibility.[] When the Government gives information to victims, it cannot be misleading. While the Government spent untold hours negotiating the terms and implications of the NPA with Epstein's attorneys, scant information was shared with victims. Instead, the victims were told to be "patient" while the investigation proceeded (*id.* at 28).

8. In his Order, Judge Marra made several references to communications between me and Epstein's counsel. The USAO asserted executive privilege, deliberative process, attorney-client privilege, work product, and 6(e), which kept the petitioners and the Court from seeing internal communications establishing how I used my best efforts to meet my obligations under the CVRA.

9. A group of U.S. Senators asked the Justice Department’s Inspector General to investigate the handling of the Epstein case. The Inspector General determined that he did not have jurisdiction to investigate the U.S. Attorney’s discretionary decision not to prosecute Epstein federally.

10. The matter was then referred to the Justice Department’s Office of Professional Responsibility (OPR). According to the Justice Department’s Policies and Procedures, “OPR has jurisdiction to investigate allegations of professional misconduct against Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice . . .” (U.S. Dep’t of Justice, Off. of Prof. Resp., Policies and Procedures at 1 (5/21/2015)). All of the individuals who made decisions regarding the Epstein case no longer work for the Justice Department. The Policies and Procedures state that “[e]ven if the subject attorney resigns or retires from the Department during the course of an investigation, OPR ordinarily completes the investigation in order to better assess the litigation impact of the alleged misconduct and to permit the Attorney General² and Deputy Attorney General to assess the need for changes in Department policies or practices” (*id.* at 3).

11. The Policies and Procedures further instruct that “[a]ll Department employees have an obligation to cooperate with OPR investigations and must respond to questions posed during the course of an investigation upon being informed that their statements will not be used to incriminate them in a criminal proceeding. Employees who refuse to cooperate with OPR investigations may be subject to formal discipline, including removal” (*id.* at 4). At the completion of the investigation, “OPR prepares a report of investigation in which it makes findings of fact and

² Attorney General Barr is recused from this matter because his former law firm represented Mr. Epstein during the course of the investigation and negotiated the NPA.

reaches conclusions as to whether the subject attorney committed professional misconduct” (*id.*). Depending on the conclusion, a range of discipline can be recommended, including a referral to state bar authorities; and disclosures are authorized to other government agencies for law enforcement purposes, to a court, to a grand jury, to other federal agencies in connection with the hiring/retention of an employee, the employee’s security clearance, or the investigation of the employee (*id.* at 5-6).

12. Despite the significance of these repercussions, the Justice Department Policies and Procedures state: “[t]he majority of OPR investigations are administrative in nature, and employees are not entitled to counsel as a matter of law. However, counsel may be permitted if counsel does not interfere with or delay the interview. Counsel must be actually retained by the employee as a legal representative, not as an observer. Counsel is not permitted access to certain confidential criminal investigative information and may not be permitted access to grand jury information” (*id.* at 4). The Policies and Procedures do not describe that portion of OPR investigations that are not administrative.

13. To assist in responding to the OPR investigation, I secured the services of Jonathan Biran, a partner at Baker Donelson in Washington, DC, as my counsel. Mr. Biran graduated from Stanford Law School in 1993 and clerked with me for the Hon. David F. Levi at the U.S. District Court for the Eastern District of California. Following his clerkship, Mr. Biran worked with the Public Integrity Section at the Justice Department; the Office of Special Counsel for the investigation of U.S. Secretary of Commerce Ronald Brown; the U.S. Attorney’s Office for the Eastern District of Virginia; and the U.S. Attorney’s Office of the District of Maryland, where he served as the Chief of the Appellate Division. After leaving federal service, Mr. Biran served as the named partner in his own firm, Biran Kelly, before joining Baker Donelson as a partner.

14. On April 2, 2019, Mr. Biran received a five-page letter from Jeffrey R. Ragsdale, Principal Deputy Director of OPR, describing the scope of OPR's investigation and its view of my role:

[OPR] has initiated an investigation into certain aspects of the U.S. Attorney's Office for the Southern District of Florida's (USAO) criminal investigation of Jeffrey Epstein, which began in 2006. Specifically, OPR is investigating the circumstances under which the USAO entered into a non-prosecution agreement with Mr. Epstein in 2007, the terms of the agreement, and the government's efforts to ensure compliance with the agreement. OPR is also investigating allegations stemming from the February 21, 2019 order issued by U.S. District Judge Kenneth A. Marra, in *Jane Doe 1 and Jane Doe 2 v. United States*, 9:08-80736-CIV-MARRA (S.D. Fla.), in which Judge Marra concluded that the USAO violated the Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA) by failing to notify the victims of Mr. Epstein's alleged criminal conduct that the government intended to enter into the non-prosecution agreement. Your client, Assistant U.S. Attorney (AUSA) Ann ██████████, was the lead prosecutor in the Epstein case, and she participated in the negotiation of the non-prosecution agreement, efforts to ensure compliance with it, and decisions concerning victim notifications (4/2/2019 Ragsdale ltr to Biran at 1).

15. I was then instructed, through counsel, to answer a total of 17 questions, with an additional six subparts, on a number of topics (*id.*). Some of the questions clearly called for information regarding the grand jury, for example, "[e]xplain why the USAO decided to initiate a federal grand jury investigation" (*id.* at 2).

16. I prepared a 58-page response to Mr. Ragsdale's letter ("Response"), along with a 51-page timeline ("Timeline"), a 14-page chart summarizing victim notifications ("Chart"), a 10-page exhibit list ("Exhibit List"), and 234 exhibits ("Exhibits"). These were all provided to OPR on May 10, 2019. Mr. Biran was provided a copy of the Response and a redacted version of the Chart.³ He was not provided the other items, that is, the Timeline, the Exhibit List, or the Exhibits.

³ All victim identifying information was redacted. There is no assertion that the Chart contained any 6(e) information.

17. After I provided the materials to OPR, Mr. Biran and I received communications from an attorney at OPR stating that she believed that I had improperly disclosed material covered by Fed. R. Crim. P. 6(e) to Mr. Biran. This was due, in part, from her mistaken belief that I had provided to Mr. Biran the Timeline, the Exhibit List, and the Exhibits.⁴ While I believe there is a disagreement regarding whether any matters “occurring before the grand jury” were disclosed in my Response,⁵ during my OPR interview, I must be able to explain the origins of the grand jury investigation, how it progressed, and how it continued even after the NPA was signed. I must be able to explain that all of the members of the supervisory chain – up to and including the U.S. Attorney – were aware of the existence of the continuing grand jury investigation and the planned

⁴ The Exhibits included 6(e) materials, including grand jury transcripts.

⁵ For example, in response to the question “Describe in detail your role, and the role of each other person in the USAO, the Federal Bureau of Investigation (FBI), and elsewhere . . . who was involved in the assessment of the viability and strength of the viability and strength of the federal case against Mr. Epstein . . .” (██████████ Resp. at 7), I described one case agent as “presented the case to the USAO, handled the bulk of the interviews, served subpoenas, and testified before the grand jury” (*id.* at 11). Her testimony is not quoted or summarized anywhere in the Response. General categories of types of subpoenas are described. Some specific subpoenaed parties are named, but those individuals never testified before the grand jury and the materials were never returned to the grand jury (because they were the subject of a never-decided motion to quash). *See, e.g., United States v. Phillips*, 843 F.2d 438, 441 (11th Cir. 1988) (“The term ‘matters occurring before the grand jury’ has been defined to include anything that will reveal what transpired during the grand jury proceedings. Therefore, only documents that reveal some secret aspect of the grand jury investigation should be subject to the restrictions of rule 6(e). In this case, the subpoenaed documents were never seen by the grand jury. . . . The documents in question were not ‘matters occurring before the grand jury’ and are not subject to the secrecy provisions of rule 6(e).”); *Anaya v. United States*, 815 F.2d 1373, 1379-80 (10th Cir. 1987) (“When documents or other material will not reveal what actually has transpired before a grand jury, their disclosure is not an invasion of the protective secrecy of its proceedings Indeed, the test of whether disclosure of information will violate Rule 6(e) depends upon whether revelation in the particular context would in fact reveal what was before the grand jury. As we perceive the proper inquiry, a reviewing court must find that disclosure is certain to destroy the protection of Rule 6(e) before it finds a violation of the rule. In contrast, revelation of information that has not been submitted to the grand jury does not vitiate those protections for the simple reason that the information was not part of what transpired in the grand jury room.”) (internal quotation omitted). A copy of the Response is available for the Court’s review upon request. It has not been attached because OPR proceedings are considered confidential.

indictment of Mr. Epstein. Given the significance of the potential penalties, I need to be able to share these materials with my counsel during preparation sessions. Also, if OPR uses them during the interview, I do not want OPR to be able to exclude Mr. Biran from the interview on the basis of grand jury.

18. Accordingly, I hereby apply for permission to disclose grand jury matter to my counsel *nunc pro tunc* subject to the protective order attached hereto.

LEGAL BASIS FOR DISCLOSURE

19. Under Fed. R. Crim. P. 6(e)(2)(B)(vi), an attorney for the government “must not disclose a matter occurring before the grand jury.” An exception exists in Fed. R. Crim. P. 6(e)(3)(E), wherein the “court may authorize disclosure – at a time, in a manner, and subject to any other conditions that it directs – of a grand jury matter: (i) preliminarily to or in connection with a judicial proceeding[.]” As noted above, OPR is investigating the conduct of members of the USAO underlying Judge Marra’s Order in the matter of *Jane Doe 1 and Jane Doe 2 v. United States*. The Supreme Court has interpreted Rule 6(e)(3)(E)(i) broadly, that is, for uses that are “related fairly directly to some identifiable litigation, pending or anticipated.” *United States v. Baggot*, 463 U.S. 476, 480 (1983). OPR’s investigation of the facts underlying Judge Marra’s Order is “related fairly directly to some identifiable litigation,” that is *Jane Doe 1 and Jane Doe 2 v. United States*.

20. The Supreme Court has held that in order to obtain disclosure and use of grand jury materials covered by the secrecy provisions of Rule 6(e), the petitioner must show a “particularized need.” *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979). The *Douglas Oil* Court explained that in order to pierce the veil of Rule 6(e) secrecy,

[p]arties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial

proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.

Id. at 222.

21. As set forth above, the “particularized need” is for my counsel to adequately prepare to represent me in connection with the OPR proceeding. In considering whether that “particularized need” is sufficient, the Court may consider a somewhat analogous case where the disclosure is made to attorneys in the Justice Department’s Civil Division. In *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 444 (1983), the Supreme Court “emphasize[d] that a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion,” *Douglas Oil*, 441 U.S. at 223, and may view disclosures to the Civil Division in a less stringent light. Indeed, the Supreme Court has “made it clear that the concerns that underlie the policy of grand jury secrecy are implicated to a much lesser extent when the disclosure merely involves Government attorneys.” *United States v. John Doe, Inc. I*, 481 U.S. 102, 112 (1987).

Nothing in *Douglas Oil*, however, requires a district court to pretend that there are no differences between governmental bodies and private parties. The *Douglas Oil* standard is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others. Hence, although *Abbott* and the legislative history foreclose any special dispensation from the *Douglas Oil* standard for government agencies, the standard itself accommodates any relevant considerations, peculiar to government movants, that weigh for or against disclosure in a given case. For example, a district court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage or improper use than would disclosure to private parties or the general public.

Sells Engineering, 463 U.S. at 445.

22. In the context of the OPR matter, the disclosure to Mr. Biran will be within our attorney-client relationship, and the proposed Protective Order requires that Mr. Biran receive no copies of grand jury transcripts; that he make no copies of any materials; and that he destroy all materials at

the end of the representation. Mr. Biran is undertaking this representation *pro bono*. As in *John Doe I*, “the threat to grand jury secrecy was minimal in this context.” *John Doe I*, 481 U.S. at 116. The Court should consider whether, given the administrative and confidential nature of OPR proceedings – confined as they are within the Justice Department, the proposed disclosure “poses less risk of further leakage or improper use than would disclosure to private parties or the general public.” *Sells Engineering*, 463 U.S. at 445; see *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1 (Hastings)*, 833 F.2d 1438, 1441 (11th Cir. 1987) (“the interests that underlie the policy of grand jury secrecy affected implicated to a lesser degree when disclosure to a government body is requested.”).

CONCLUSION

WHEREFORE, the United States respectfully requests that the Court enter:

1. an Order authorizing the disclosure *nunc pro tunc* of matters occurring before the grand jury to attorney Jonathan Biran of the firm Baker Donelson to allow him to fulfill his obligations in representing the undersigned in connection with an investigation conducted by the Justice Department’s Office of Professional Responsibility;
2. a Protective Order; and
3. an Order sealing this Application and the accompanying Orders.

Respectfully submitted,

ARIANA FAJARDO ORSHAN
UNITED STATES ATTORNEY

By: _____

A. [REDACTED]
ASSISTANT UNITED STATES ATTORNEY
Florida Bar No. [REDACTED]
500 S. Australian Avenue, Suite 400
West Palm Beach, FL 33401-6235

[Redacted]
Tel: [Redacted] / Fax: [Redacted]