

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 DE 212-1 AND DE 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 bestmost -marginally relevant to the issues regarding the application and possible violation of the Crime Victims’ Rights Act, and, if allowed, would be adverse to be deeply injurious to the privacy and reputational interests of the intervenor. Although Mr. Epstein was convicted of state offenses and was , -sentenced to jail , and has otherwise suffered reputational injury from his past offenses, he nevertheless has a right to the safeguards and requirements of Rule 6(e) including its imperative that absent particularized need, the secrecy of grand jury proceedings remains intact both to protect the confidentiality of past proceedings including the identity of witnesses, subjects, and targets and the nature of considered charges, but also to protect the rights of all citizen who was not are not charged to from the disclosure of 6(e) information, documents, and testimony. not have his reputation newly injured here over 7 years after the resolution of the federal investigation.

This Court granted plaintiffs limited discovery, finding that “some factual development is necessary to resolve the remaining issues in this case[.]” *See* 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]. Plaintiffs 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. 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 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 (11<sup>th</sup> Cir. 1983). *See, e.g., Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 611 (2d Cir. 1988) (“Not the least important consideration is to protect the good name and reputation of those investigated, but not indicted, by the grand jury”); *Lucas v. Turner*, 725 F. 2d 1095, 1100 (7<sup>th</sup> 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 (11<sup>th</sup> Cir. 1988) (holding 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.<sup>1</sup> In *In re Smith*, 656 F.2d 1101, 1103-04 (5<sup>th</sup> Cir. 1980), the name of an unindicted grand jury witness, Edward Smith, was disclosed by the government during factual resumes at 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 resumes and 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 (5<sup>th</sup> 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. ~~Although here, the government is not the party seeking disclosure of matters that occurred before the grand jury, the principle that a person has a recognizable interest in his reputation and that this interest is most vulnerable when the person does not have a forum in which to defend himself still stands.~~ 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 particularize objections at this time beyond what is evident – that the disclosure of draft indictments, subpoenaed documents, the identities of witnesses and 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.

~~Although Mr. Epstein has already suffered reputational harm from the acceptance of his plea and conviction in state court for a charge related to the federal grand juries' investigation,~~

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

~~Mr. Epstein could suffer greater reputational harm if the matters that occurred before the two federal grand juries are disclosed. He should be allowed to attempt to move past the reputational harm he has already suffered.~~

The following types of documents, if produced today (seven years after Mr. Epstein accepted a plea offer in state court and five years since Mr. Epstein served his sentence), would prejudice Mr. Epstein:<sup>2</sup>

<b>Document</b>	<b>Bates Range</b>
Sealed search warrant application and warrant to the extent they include 6(e) material as noted in Government's privilege log [REDACTED]-212-1]	P-000550 to P-000621 P-000622 to P-000693
Target letters	P-000983 to P-001007 P-013609 to P-013615
Draft indictments	P-008383 to P-008516 P-008550 to P-008615 P-010758 to P-010793 P-011663 to P-011698 P-012189 to P-012361 P-011699 to P-011777 P-012362 to P-012451 P-012453 to P-012623
File folder entitled "Lists of Identified Phone Numbers" containing charts of information culled from grand jury materials, including information for the issuance of follow-up grand jury subpoenas	P-006803 to P-006860
File folder entitled "FBI G.J. Log" containing copy of FBI grand jury subpoena log	P-012179 to P-012188
Indictment Preparation binder containing Grand Jury subpoena log and other matters protected by 6(e)	P-002266 to P-002386 P-002387 to P-002769

<sup>2</sup> The chart below is not exhaustive and provides only a selective summary of the types of documents identified in the government's privilege log as Rule 6(e) grand jury materials that would prejudice Mr. Epstein if disclosed. The intervenor does not have access to these materials and is relying on the descriptions of the Government. By highlighting these selections he is not waiving his right to contest other 6(e) materials to the extent they are identified by the Government as being 6(e) materials

Indictment Preparation binder containing evidentiary summaries that include grand jury materials-	P-002770 to P-003211 P-012865 to P-013226
File folder entitled "Summary of Sexual Activity" containing chart to the extent it includes 6(e) material as noted in Government's privilege log-	P-003647 to P-003651
Prosecutor's notes regarding research, documents, witnesses, investigation and case strategy to the extent they include 6(e) material as noted in Government's privilege log	P-003630 to P-003633 P-005060 to P-005081 P-005388 to P-005442 P-006861 to P-007785 P-008543 to P-008549 P-011238 to P-011319 P-011967 to P-012016 P-012362 to P-012451 P-012865 to P-013226
File folder entitled "Research re Travel for Prostitution" containing handwritten notes regarding potential charges-	P-003694 to P-003711
Subpoenas and correspondence that identifies names of witnesses	P-003713 to P-003746 P-003747 to P-003751
File folder bearing name of victim/witness containing grand jury materials relevant to possible charges	P-004296 to P-004350
File folder entitled "FBI Summary Charts" prepared at the prosecutor's direction that identifies victims and contains other information relevant to the indictment	P-008616 to P-008686
Research regarding grand jury instructions	P-011238 to P-011319
Handwritten notes cross-checking all overt acts alleged in draft indictment by victim	P-011880 to P-011922
File folder entitled "Overt Act Lists" containing handwritten notes cross-checking all overt acts alleged in draft indictment by victim and typed overt act summary charts for indictment preparation	P-011880 to P-011922

File folders containing meta-analysis of all phone, travel, and grand jury data for all victim/witnesses for indictment preparation	P-005607 to P-005914 P-006223 to P-006522
File folders bearing name of victim/witness containing meta-analysis of all phone, travel, and grand jury data related to that victim/witness for indictment preparation	P-005915 to P-005977 P-005978 to P-006050 P-006051 to P-006065 P-006066 to P-006220 P-006221 to P-006222 P-008687 to P-008776 P-008777 to P-008808 P-008809 to P-008847 P-008848 to P-008862 P-008863 to P-008890 P-009126 to P-009134 P-009135 to P-009141 P-009141A to P-009141C P-009142 to P-009152 P-009153 to P-009156 P-009157 to P-009208 P-009209 to P-009213 P-009214 to P-009271

~~No legitimate interest is served in this case by vitiating the secrecy historically afforded to grand jury materials. Mr. Epstein has a strong interest in preserving the confidentiality of these materials and not being subject to the damage that disclosure of these materials would cause.~~

**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.<sup>3</sup> Indeed, this Court found, in its Order Denying

<sup>3</sup> 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 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.

Government’s Motion to Dismiss for Lack of Subject Matter Jurisdiction & Order Lifting Stay of Discovery [D.E. 189], 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.” (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 the search warrants or target letters 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.<sup>4</sup> The Court should uphold the government’s claim of privilege under Rule 6(e) pertaining to grand jury materials.

**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 establish a particularized need for these grand jury materials. “[T]he Supreme Court has

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<sup>4</sup> 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).

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 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. 1982)).

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.* 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, target letters, or a sexual activity chart, 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 ~~in the following section 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, ~~including Mr. Epstein's personal interest in preventing further harm to his reputation.~~

Lastly, plaintiff's Protective Petition for Disclosure of Grand Jury Materials [D.E. 227] does not specifically identify the materials they are requesting and therefore, in effect, they are requesting 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 overrides 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 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.

We certify that on October 6, 2014, the foregoing document was filed electronically with the Clerk of the Court using CM/ECF.

Respectfully submitted,

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