

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: :
GRAND JURY MATTER :
: GRAND JURY NO. 98-225

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 12, 2002

The United States moves under Fed. R. Crim. Pro. 6(e)(3)(i)(I) to release to attorneys of the civil division of a Cabinet Department (the "Department") "pre-existing business and financial records" obtained by grand jury subpoena. The court initially denied the Government's request because it failed to make a showing of particularized need; the Government renewed its motion with a supporting affidavit. For the reasons given below, the motion will be denied without prejudice.

I. BACKGROUND

The Department previously instigated a criminal investigation of a now-defunct Pennsylvania Company ("the Company") for an allegedly fraudulent transfer of money. The investigation, conducted by a grand jury, initially focused on an employee of the Company (the "Employee"). The Employee died during the pendency of the grand jury investigation. The grand jury term expired without the return of an indictment.

The Company's owner (now the "Target") was the alleged beneficiary of the Employee's malfeasance. However, evidence did not establish guilt beyond a reasonable doubt, and the Department has decided not to pursue a criminal investigation.

The Department would like to conduct a civil investigation and recover some of the lost funds through a civil action against the Target and the Employee's estate. To do so, it allegedly requires documents subpoenaed from the Employee by the grand jury.

II. DISCUSSION

It is natural for the Government, attempting to remedy civilly what it could not punish criminally, to wish to avoid duplicating its investigatory efforts. Such was the position of the Government in United States v. Sells Engineering, Inc., 463 U.S. 418, 440 (1983). There, the United States pursued certain individuals for fraud and tax evasion both criminally and civilly. When civil discovery proved contentious, the Government used a grand jury subpoena to recover documents from the defendants. After the defendants pled guilty to criminal charges, the Government moved to have the materials obtained by grand jury subpoena released to the civil division. The Supreme Court held that automatic disclosure would subvert interests of grand jury secrecy, and violate Fed. R. Crim. Pro. 6(e).

Civil use of grand jury materials is not illegal per se; the civil division may petition the court to release the materials on a showing of "particularized need." Such need must be distinct from the omnipresent desire to "save time and expense." Sells Engineering, 463 U.S. at 431. Particularized need exists if:

Parties seeking [disclosure under] Rule 6(e) ... 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
[D]isclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure ..."
Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222-223 (1979).

"In determining whether the party has met the burden, the court may consider alternative discovery tools available." In re: Grand Jury Matter, Gr. Jur. No. 98-194, at 4 (E.D. Pa. August 18, 1994) (Shapiro, J.),¹ citing Sells Engineering, 463 U.S. at 445). Because "[a]utomatic disclosure would subvert the limitations on the discovery process in civil actions," id., the court must analyze each of the Government's proposed justifications with care.

The Government does not press its argument that the materials in question are not covered by Rule 6(e). Cf. In re:

¹This opinion was not published, but was provided to Government when the court denied the Government's initial motion here.

Grand Jury Matter, Gr. Jur. No. 98-194, at 7 ("The type of documents subpoenaed may reveal the nature and extent of the grand jury investigation"). Rather, it argues that it has a particularized need for disclosure. On examination, the Government's asserted grounds do not establish particularized need.

1. Source of Department Knowledge

The Government argues that absent disclosure, the Department would have "no knowledge of the alleged civil violations." Since it would be unable to identify an independent source of information to justify a civil investigation, it would be "theoretically improper" to initiate a civil investigation absent the grand jury records.

This theoretical argument is without any basis in law or fact. "The veil of secrecy covers the grand jury proceedings themselves, not the subject matter of the investigation or statements made by persons before grand jury testimony is given." United States v. Lebovitz, 586 F. Supp. 265, 279 (W.D. Pa. 1984). The Department may initiate an inquiry with knowledge that a grand jury was empaneled, without knowing any of the particulars of its deliberations or possessing subpoenaed documents. The Government points to no relevant law requiring the Department have probable cause before initiating a civil investigation.

2. Critical Documents in the Target's Possession

The Target allegedly possesses the only other copies of certain documents subpoenaed by the grand jury. If the Department were forced to gather documents independently, it would look to the Target as the "first, and possibly the sole"² source for many records. Because the Target is subject to potential liability under the applicable statute, he or she would have "every incentive to destroy the ... records ..." The order would "ensure [the Department's] access to those records."

This justification fails because it is no different from the problems faced by every litigant in civil discovery. There is always a possibility that a civil litigant will destroy necessary documents. However, that mere possibility does not create particularized need. If the Target does destroy the documents in question, the Government could then make a real showing of need: the only copies of the documents would be those subpoenaed and retained by the grand jury. Until that event occurs, the court will not assume that a citizen will not comply with court ordered discovery.

3. Consideration for Third-Party Custodians of Records

The Government argues that third-party record holders would

²This reference in the Government's brief is confusing. If the Target would be the sole source of the documents, they are not held by the grand jury and cannot be the subject of this motion. If the Government meant to assert that the Target would be the only non-privileged source of the documents, it might have found a more clear way of saying so.

be unnecessarily burdened by the need to produce records already produced to the grand jury. The Government is concerned that non-compliance with discovery would be a "distinct possibility." Particularized need does not exist when it is merely possible that a future bad act will create a real need. The Government's concern for third-party record custodians, while laudable, is a generalized concern present in all such petitions. It does not outweigh the harm done to the Target and grand jury secrecy, and the possible subversion of limitations on civil discovery. See Sells Engineering, 463 U.S. at 433 (automatic disclosure would "subvert the limitations applied outside the grand jury context on the Government's powers of discovery and investigation.").

4. Impairment of Disclosure to Potential Litigants

Finally, the Government argues that absent disclosure, the Department will be unable to disclose wrongdoing to citizens who might be able to bring a private cause of action. But the Government points to no part of the applicable statute that would prevent the Department, on conducting a civil investigation, to provide anything learned in that investigation, including documents collected through normal discovery, to potentially affected citizens. Documents before grand juries are not secret by their nature: they are secret because releasing them, in the context of their collection by the grand jury, would violate Fed.

R. Crim. Pro. 6(e). If they are collected elsewhere, the same concerns are not implicated. The Government does not provide any reason for disclosure now, before the Department has even attempted discovery.

There is no present particularized need, only desire - a desire to take the easy route without regard for Fed. R. Crim. Pro. 6(e).

III. CONCLUSION

Although disclosure of information collected by the grand jury would save the Government, and possibly third parties, "time and expense," Sells Engineering, 463 U.S. at 431, it would also subvert the normal rules of discovery and potentially expose the inner workings of a grand jury investigation. The Government has failed to show a particularized need for disclosure because the relevant documents can be recovered from sources other than the grand jury, and the Department retains broad authority under the applicable statute to conduct a civil investigation. The motion to release criminal investigative materials will be denied without prejudice to renew if civil discovery fails and there is then a particularized need.

The clerk of court would normally file this opinion under seal, and no one but the attorney representing the Government would see it. However, because the issues addressed herein arise

somewhat frequently, but there is little recent, relevant, published authority, an exception will be made for this opinion. The court has removed from the discussion information that would identify the Target, Employee, or the nature of the grand jury's deliberations.

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ORDER

AND NOW, this 12th day of July, 2002, for the reasons given in the foregoing memorandum, it is **ORDERED** that:

1. The Government's Renewed Motion for Release of Limited Criminal Investigative Materials (#4) is **DENIED WITHOUT PREJUDICE** to renew on a showing of particularized need.

2. In the interests of justice, the clerk of court is authorized to make this opinion available to the public.

Norma L. Shapiro, S.J.