



In relevant part, the indictment alleges that Nicholas and certain of her codefendants conspired to execute a scheme to repay an illegal \$1,000,000 loan made by an individual identified as "Person D" to Fattah's 2007 campaign to become Mayor of the City of Philadelphia. As part of this scheme, Nicholas allegedly misappropriated the proceeds of a grant made by NASA to Educational Advancement Alliance ("EAA"), a nonprofit entity founded by Fattah of which Nicholas was Chief Executive Officer. According to the indictment, Nicholas and certain codefendants used these funds to repay Person D in part for the campaign loan.

In the motion now before us, Nicholas seeks suppression of "testimony or other evidence pertaining to a NASA OIG subpoena issued on May 1, 2009." She explains that in 2008, the Department of Justice ("DOJ") OIG began an audit into a DOJ grant to a nonprofit called College Opportunity Resources for Education Philly ("CORE Philly"). EAA had been the financial administrator for the grant. In November 2008, according to Nicholas, a grand jury investigation into the matter of the CORE Philly grant was opened. The grand jury and DOJ OIG both issued subpoenas as part of their respective investigations. In January 2009, the grand jury subpoenaed and received EAA's bank

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§ 1957. See Memorandum and Order dated March 29, 2016 (Docs. ## 223 & 224).

statements, which revealed that EAA had received grants from NASA. Nicholas recounts that in February 2009, Special Agent Kenneth Diffenbach ("Diffenbach"), the DOJ OIG Agent assigned to the matter, contacted NASA OIG and communicated certain information about the investigation, including its focus, the investigative plan, and the allegations involved. Thereafter, the May 1, 2009 subpoena was issued to EAA by NASA OIG. On May 27, 2009, the Government filed a notice of disclosure informing the court that information about the grand jury investigation had been communicated to NASA OIG.

Nicholas contends that the NASA OIG subpoena was obtained in violation of Rule 6(e)(3)(B) of the Federal Rules of Criminal Procedure. Rule 6(e) imposes broad secrecy requirements on grand jury proceedings, among them the requirement that law enforcement personnel "must not disclose a matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(2)(B). Rule 6(e)(3), however, contains certain limited exceptions to those requirements. In particular, Rule 6(e)(3)(A)(ii) provides that "[d]isclosure of a grand-jury matter . . . may be made to . . . any government personnel . . . that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law." Rule 6(e)(3)(B), the provision cited by Nicholas, adds that

[a] person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

Nicholas maintains that Diffenbach disclosed grand jury information to NASA OIG and that the Government failed to "promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made [or] certify that [an attorney for the Government] has advised those persons of their obligation of secrecy." See Fed. R. Crim. P. 6(e)(3)(B). The essence of her argument appears to be that the Government did not make any such report to the court for approximately three and a half months after the purported disclosure. This delay, Nicholas urges, justifies suppression of all evidence related to the NASA OIG subpoena.

In response, the Government sets forth a timeline that differs in some respects from the one described by Nicholas. For example, the Government states that Diffenbach advised NASA OIG of the subject matter of the DOJ OIG investigation in September 2008, several months before the grand jury initiated its investigation and began issuing subpoenas. According to the

Government, this means that Diffenbach could not have disclosed to NASA OIG a "matter occurring before the grand jury," because the grand jury had not yet begun its investigation when the purported disclosure was made. The Government also contends that the subject matter conveyed by Diffenbach to NASA OIG was not a "matter occurring before the grand jury" but rather the details of a parallel DOJ OIG investigation.

Even if Diffenbach disclosed grand jury information and the Government did not "promptly" notify the court as required by Rule 6(e)(3)(B), suppression of evidence, the remedy sought by Nicholas, is overkill. Nicholas cites just one case in support of this request: United States v. Coughlan, 842 F.2d 737 (4th Cir. 1988). In Coughlan, a case almost thirty years old from another circuit, a district judge had ordered the disclosure of a defendant's grand jury testimony for use in a civil forfeiture proceeding without first determining whether there was a "particularized need" for such disclosure. Id. at 739, 740. The Fourth Circuit remanded the matter for further consideration. It directed the district court "first [to] consider whether a particularized need justifies disclosure of the grand jury testimony." Id. at 740. Only absent such a particularized need, the Court held, should the testimony be suppressed. Id. Here, in contrast, Nicholas does not argue any lack of particularized need. Contrary to the argument of

Nicholas, Coughlan does not stand for the proposition that suppression is the proper remedy under the present circumstances.

Consequently, the motion of Nicholas for suppression of all evidence pertaining to the May 1, 2009 NASA OIG subpoena will be denied.

