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

December 12, 2006

TO BE FILED UNDER SEAL

BY FACSIMILE

Honorable Jed S. Rakoff
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

In Re: Motion To Quash A Grand Jury Subpoena

Dear Judge Rakoff:

The Government respectfully submits this letter in connection with the above-referenced matter in response to the Court's request for briefing concerning whether the ACLU's moving papers should remain sealed. For the reasons set forth below, the ACLU's papers should remain under seal because they relate to a grand jury subpoena issued in connection with an ongoing grand jury investigation, under seal.

There can be little question that, for good reason, grand jury proceedings traditionally have been kept secret. Indeed, "'the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'" United States v. Haller, 837 F.2d 84, 87-88 (2d Cir. 1988) (quoting Douglas Oil Co. v. Petrol Stops N.W., 441 U.S. 211, 218 (1979)).[1]

[1] The Second Circuit "ha[s] repeatedly explicated the rationale for this policy":

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may appear before the grand

Rule 6(e) of the Federal Rules of Criminal Procedure "implements this policy of secrecy." Doe No. 4 v. Doe No. 1 (In re Grand Jury Subpoena), 103 F.3d 234, 237 (2d Cir. 1996). "The plain language of the Rule shows that Congress intended for its confidentiality provisions to cover matters beyond those actually occurring before the grand jury." Doe No. 4, 103 F.3d at 237.

Rule 6(e)(5) states: "Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of matters occurring before a grand jury." Fed. R. Crim. P. 6(e)(5). Similarly, Rule 6(e)(6) states: "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." Fed. R. Crim. P. 6(e)(6).

"The law of this circuit is clear that, once a proceeding falls under Rule 6(e), it receives a presumption of secrecy and closure." Doe No. 4, 103 F.3d at 239; accord, e.g., In re Sealed Case, 199 F.3d 522, 526 (D.C. Cir. 2000) ("Unlike typical judicial proceedings, grand jury proceedings and related matters operate under a strong presumption of secrecy."); In re Subpoena to Testify before Grand Jury Directed to Custodian of Records, 864 F.2d 1559, 1563 (11th Cir. 1989) ("[C]riminal proceedings . . . . are presumptively open . . . . In the case of grand jury proceedings, however, the reverse is true."). The presumption of secrecy for grand jury matters may be rebutted if

---

> jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial when there was no probability of guilt.

Doe No. 4 v. Doe No. 1 (In re Grand Jury Subpoena), 103 F.3d 234, 237 (2d Cir. 1996) (quoting United States v. Moten, 582 F.2d 654, 662 (2d Cir. 1978) (quoting United States v. Amazon Indus. & Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931))).

"'the party seeking disclosure . . . show[s] a "particularized need" that outweighs the need for secrecy.'" Doe No. 4, 103 F.3d at 239 (quoting United States v. Moten, 582 F.2d at 662 (citing Dennis v. United States, 384 U.S. 855, 868 (1966))); accord In re Subpoena, 864 F.2d at 1562.

Here, there can be no question that the grand jury subpoena at issue, and the ACLU's motion to quash it, fall squarely within the protections of Rule 6(e). The law is clear that a motion to quash a subpoena is "implicitly regarded" as relating to or affecting the grand jury. See Doe No. 4, 103 F.3d at 238 (citing Advisory Notes to Rule 6(e)(5).[2] Despite movant's attempts to portray the subpoena as pretextual - arguments to which the Government will respond fully in a separate filing, as ordered by the Court - there is nothing improper about the subpoena, and nothing imaginary about the grand jury investigation to which it relates.[3]

Nor can there be any serious question that the subpoena itself must remain sealed, pursuant to Rule 6(e)(6). Moreover, it is equally clear that, as this motion proceeds, the hearings and documents attendant to those hearings will need to be sealed pursuant to Rule 6(e)(5), to protect the grand jury's investigation from exposure, as will be discussed in the Government's brief to be submitted on Friday. Thus, the question becomes whether, as the ACLU advocates, the Court can somehow treat piecemeal the filings the parties make in this matter, all of which indisputably relate to the grand jury subpoena and investigation at issue. The Government submits that the Court should not.

First, all of the filings that have been and will be made in this matter relate to the same issue: whether a grand

---

[2] Prior to its amendment in 2002, the language of Rule 6(e)(5) required that the hearing to be presumptively closed involve a matter "affecting a grand jury proceeding." Now, of course, any hearing "must" be closed to the extent necessary to prevent disclosure of a grand jury matter.

[3] If in order to determine the present motion the Court wishes further information concerning the grand jury investigation at issue than has been disclosed thus far, the Government will submit more detailed information to the Court on an ex parte basis.

jury subpoena issued by the Government to the ACLU was properly issued and should be enforced, or whether that subpoena should be quashed. The Government has found no authority for the proposition, which makes no extrinsic sense, to treat certain of the filings in this matter differently based on the identity of the filer. Without question, the Government cannot under Rule 6(e) disclose the nature or progress of the grand jury's investigation into this matter. Nor, then, should the ACLU be permitted to publicly file its papers on these same matters. This is not merely a matter of fairness to both litigants; permitting only half (or even one) of the filings to be publicly released inevitably will provide the public with a skewed view of the facts of this motion and the proceedings relating to it.[4]

Second, there is simply no authority for permitting the ACLU to file its papers publicly, and ample authority for requiring those papers to remain under seal. Rule 6(e)(6) unequivocally requires grand jury subpoenas to remain sealed, and yet the ACLU's motion not only includes a copy of the subpoena as Exhibit 1 to its Order to Show Cause, but describes the subpoena at great length, including, among other things, mention of the crimes under investigation and a discussion of the nature of the investigation.

The ACLU may argue that Rule 6(e)(2) does not impose on

---

[4] As merely one example, the Declaration of Terrence Dougherty states that in a conversation with Assistant United States Attorney Jennifer Rodgers on November 20, 2006, Ms. Rodgers claimed that the authority under which the Government was insisting the ACLU return the classified document in its possession was 18 U.S.C. §§ 793 and 798. In its supporting brief, however, the ACLU described Ms. Rodgers's statement as being that those statute sections supported the assertion that the ACLU's possession was illegal, not that they supported the Government's demand for the documents' return. While neither version is entirely accurate (the Government does not intend to submit evidence on this clearly collateral point at this time unless the Court requests it do so), the fact that there are internal inconsistencies in the ACLU's motion papers along with other inaccuracies (notably concerning the also collateral conversation between AUSA Rodgers and Mr. Dratel that was discussed at yesterday's proceeding) highlights the fact that the public would be misled by seeing only the ACLU's submissions and not the Government's response.

it any duty of grand jury secrecy, and that is true as a reading of Rule 6(e)(2) in isolation. The fact that Rule 6(e)(2) does not impose a specific duty on the ACLU to keep grand jury matters secret, however, does not mean that the converse is true: that the ACLU may disclose using its chosen vehicle the details of a grand jury investigation as exposed by proceedings concerning its motion to quash. If that were the case, Rule 6(e)(5) and Rule 6(e)(6) would be effectively superseded and voided by Rule 6(e)(2). The Government has found no authority for this novel proposition, and, indeed, the significant body of caselaw upholding the strict requirements of Rule 6(e)(5) and (6) demonstrate beyond doubt that its requirements are enforceable on the ACLU.

The ACLU presumably will argue that the content of its papers does not implicate secret matters pending before the grand jury, but that position both under-represents the scope of the ACLU's papers and misses the point. Their papers include a copy of the subpoena, describe and quote from the subpoena, and challenge the executive branch's classification of the document sought by the subpoena. Clearly, then, the release of this brief will provide information concerning the grand jury's investigation - namely that it is an investigation into the leaking, to at least the ACLU, of a document classified by the Government, that the Government has made attempts to retrieve the document (attempts the ACLU clearly means to portray as heavy-handed), and that the document concerns a matter the ACLU believes to be of interest to it and to the public. Release of this information concerning the grand jury investigation would be a result directly at odds with the traditional secrecy rules governing grand jury materials and the Federal Rules of Criminal Procedure.

Nor is this a case where there has already been public information about the grand jury's investigation released, and thus there can be no argument that the information is already in the public domain. See In re North, 16 F.3d 1234, 1245 (D.C.Cir. 1994) ("Rule 6(e) does not create a type of secrecy which is waived once public disclosure occurs," but "when information is sufficiently widely known . . . it has lost its character as Rule 6(e) material"). Indeed, at this stage, there is nothing in the public domain concerning this investigation; a claim that will not be viable if the Court releases the ACLU's motion papers.

Moreover, there are no exigencies in this case that would dictate unsealing the ACLU's motion papers now, before

litigation of this motion to quash is completed within the next two weeks. First, there can be no claim that it is imperative that the motion papers be unsealed immediately. The Government's subpoena was issued more than three weeks ago. The ACLU first asked for a one week extension, and then waited the full additional week before responding with its motion on the return date. Accordingly, any claim that a sense of urgency should attach to the release of the ACLU's motion should be met with significant skepticism.

More importantly, however, there is no identifiable harm to the ACLU if its papers remain under seal. Unlike the vast majority of proceedings concerning the release of papers or transcripts of proceedings affecting a grand jury investigation, where the movant is either an interested individual citizen or a press organization and does not have access to the materials it seeks, the ACLU would be deprived of nothing if the motion to quash remains under seal. And, to the extent that the ACLU has an interest in disclosing the facts that it received a grand jury subpoena and is in the process of litigating a motion to quash that subpoena, it already has the right, as the Court noted yesterday, to do that. As a result, the ACLU loses nothing if its papers remain under seal. Conversely, the harm that may be suffered if the subpoena and the motion to quash papers are released, in the form of the potential effect on the ongoing grand jury investigation into the leak of classified materials, could be significant.

These proceedings "must" be kept secret pursuant to Rule 6(e)(5) and (6). The ACLU's motion to quash is the basis for these proceedings. Thus, the ACLU's motion should not be disclosed. Accordingly, the Government respectfully requests that the Court maintain the ACLU's motion under seal.

Respectfully submitted,

MICHAEL J. GARCIA
United States Attorney

By: _____
Jennifer G. Rodgers
Assistant U.S. Attorney
(212) 637-2513

cc: Charles Sims, Esq.
Joshua Dratel, Esq.