

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 08-80736-Civ-Marra/Johnson

JANE DOE #1 and JANE DOE #2

v.

UNITED STATES
_____ /

**JANE DOE #1 AND JANE DOE #2'S REASSERTION OF OBJECTIONS TO
GOVERNMENT'S ASSERTIONS OF PRIVILEGES**

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as “the victims”), by and through undersigned counsel, to re-assert objections to the Government’s assertions of privilege. See DE 257 at 3 (“to the extent [the victims] raise objections to the government’s assertions of privileges, [the victims] may re-assert these objections”).

The victims have sought numerous important documents in this case. While producing some pages of largely unimportant materials, the Government has asserted privilege with regard to 14,825 pages of materials. All of the Government’s assertions of privilege are not well founded, for the reasons described in this pleading. Accordingly, the Court should provide all of the documents to the victims.¹ The factual support for the arguments found in this memorandum is contained, inter alia, in the attached affidavit of Bradley J. Edwards, Esq. The victims have also concurrently filed itemized, document-by-document objections to the Government’s privilege log.

I. General Responses to All Assertions of Privilege.

Many of the Government’s assertions of privilege suffer from overarching defects. This section elaborates on these overarching problems, which apply to more than one category of privilege assertions.

Inadequate Privilege Log – The great bulk of the Government’s privilege assertions do not comply with the Court’s directive that the privilege log must “clearly identify[] each document[] by author(s), addressee(s), recipient(s), date, and general subject matter” DE

¹ Should the Court allow the Government to assert privilege with regard to any of the materials, the victims would then be free to argue that, as a remedy for the Government’s assertion of privilege, the Court should preclude the Government from denying the claims by the victims that would have been supported by the withheld information. See, e.g., *Attorney General of the U.S. v. Irish People, Inc.*, 684 F.2d 928, 951 (D.C. Cir. 1982).

190 at 2. As a result of the Government's failures, it is impossible to even begin to determine which of the Government's assertions of privilege are valid.

It is, of course, true that victims' counsel possess background information about this case and that privilege logs "should be evaluated not in a vacuum, but in light of information that the parties can be presumed to possess." *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 898 F.Supp.2d 584, 590 (S.D.N.Y. 2012). The following represent plainly defective, overly broad privilege log listings regarding highly relevant materials:

- File folder entitled "Rsrch re Crime Victims Rights" containing attorney research, handwritten notes, draft victim notification letter, and draft correspondence to Jay Lefkowitz [115 pages total, P-010526 through P-010641];²
- Filed folder entitled "6/12/09 Victim Notif. Log" containing chart with victim contact information and attorney notes regarding dates and type of contacts [11 pages total, P-011778 through P-011788]; and,
- File folder entitled "Key Documents" containing correspondence between AUSA and case agent regarding indictment prep questions, victim identification information, corrections to draft indictment, indictment preparation timeline, key grand jury material [89 pages total, P-012362 through P-012451].

Regardless of any other commentary pertaining to these listings, they are plainly overbroad and not in compliance with the Court's order. Moreover, numerous other similar examples of defective listings exist.

Failure to Prove Factual Underpinnings of Privilege Claim – The Government has asserted four types of privileges that rest on factual underpinnings; specifically, the deliberative process privilege, attorney-client privilege, investigative privilege, and work product privilege. However, the Government has attempted to establish the factual underpinning for only one of

² The Government agreed to turn over six pages of the 115 pages.

those privileges—the deliberative process privilege³—while not providing any factual support for the remaining three privileges.

The party invoking a “privilege has the burden of proving that a[] [privileged] relationship existed and that the particular communications were confidential.” *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003). To prove confidentiality, the “privilege holder must prove the communication was (1) intended to remain confidential and (2) under the circumstances was reasonably expected and understood to be confidential.” *Id.* Of course, these are factual propositions that must be established through evidence—not mere assertion. *See, e.g., Brown v. City of Margate*, 842 F.Supp. 515, 520 (S.D. Fla. 1993) (holding that the city failed to carry its burden to prove attorney-client relationship), *aff’d*, 56 F.3d 1390 (11th Cir. 1995). Here, other than the deliberative process privilege, the Government has made no effort to establish the factual predicates for its privilege assertions. Accordingly, the assertions of privilege fail.

Waiver of Confidentiality – Some of the Government’s assertions of privilege fail because it is clear that any confidentiality was waived by the presence of persons outside the confidential relationship. For example, some of the assertions of attorney-client privilege involve documents and correspondence sent to persons outside of any attorney-client relationship.

An illustration of waiver is present on page one of the supplemental privilege log (DE 216-1), with regard to supplemental box No. 3 (P-013282 to 83). The entry here reads: “7/08/08

³ The Government has filed two affidavits regarding the deliberative process privilege, from Wilfredo Ferrer (DE 238-1) and Robin Ashton (DE 243-1). The Government also filed an affidavit from Special Agent Kuyrkendall. DE 229-1. But this brief and vague affidavit does not address the specific privilege issues under discussion here.

email from A. Marie Villafaña to A. Acosta, J. Sloman, Ki. Atkinson, and FBI re proposed response to Goldberger's letter re victim notification." The log then indicates that the Government is asserting attorney-client privilege regarding these emails. Nevertheless, the emails were not internal to the U.S. Attorney's Office, but were also sent to the "FBI." (This is yet another illustration of the inadequacies of the privilege log because the FBI recipients are not disclosed). Importantly, the FBI is a law enforcement investigative agency, not an agency that provides legal advice. Accordingly, any attorney-client privilege would be waived by dissemination of this e-mail outside of the U.S. Attorney's Office.

In its earlier pleadings on this matter, the Government claimed that the FBI was somehow the "client" that received legal advice. See DE 229 at 5-6 (the victims "do not appear to understand that the U.S. Attorney's Office is rendering legal advice to a client agency, the FBI, who investigated Epstein and brought the case to the U.S. Attorney's Office for potential prosecution."). Conversely, if the FBI is the client, then many of the documents in question are not in furtherance of providing legal advice to the FBI and thus are not privileged. See, e.g., P-013272 through P-013278 (communications between the U.S. Attorney's Office and Executive Office for U.S. Attorney's regarding recusal). More fundamentally, the Government is incorrect in asserting that a prosecutor in a criminal case has an attorney-client privilege with regard to communications with his investigating agents. Interpreting attorney-client privilege broadly in such settings could have "pernicious potential in a government top-heavy with lawyers." *Jupiter Painting Contracting Co. v. United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980). "In criminal prosecutions, . . . the prosecutor does not act on behalf of the government in the sense that legal advice is being rendered to the government. Consequently, when government employees (like

investigators) speak with the prosecutor, it has been held that the communications are not protected by the attorney-client privilege.” See PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES (2012) (citing *Sampson v. Schenck*, 2009 WL 484224, at *8 (D. Neb. 2009) (stating that the prosecutor’s office “does not render legal services to the investigators in the context of pursuing criminal charges against a third-party”)).

Communications Facilitating Crime-Fraud-Misconduct Not Covered – Any attorney-client privilege (and presumably other privileges as well) would be subject to a crime-fraud-misconduct exception. See *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (applying exception to attorney-client privilege); *Cox v. Administrator U.S. Steel & Carnie*, 17 F.3d 1386, 1422 (11th Cir. 1994) (applying exception to work product claim). In its earlier pleading on this argument, the Government asserted that the documents are not relevant to specifically prove either a crime or a fraud. The government failed to acknowledge that the exception is not limited to just crimes and frauds, but rather is properly denoted the “crime-fraud-misconduct” exception. It extends beyond crimes and fraud to other “misconduct.” See, e.g., *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (describing exception as applicable to “crime, fraud, or other misconduct”); accord *United States v. Myers*, 593 F.3d 338, 347 n.14 (4th Cir. 2010) (exception applies to “crime, fraud, or other misconduct” (emphasis added)); see also *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 354 (1985) (citing authorities holding that the privilege “does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary torts”). The rationale for the exception is that the privilege “takes flight if the [attorney-client] relation is abused.” *Clark v. Untied States*, 289 U.S. 1, 15 (1933). The underlying goal of the privilege is to “encourage full and frank

communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. However, the privilege is itself based in policy, rather than in the Constitution, and therefore it alone cannot stand in the face of countervailing law or strong public policy.” *United States v. Stewart*, 2002 WL 1300059 at *5 (S.D.N.Y. 2002).

Here, it would be an abuse of the attorney-client relationship for government prosecutors to work together (or with defense attorneys) to deprive crime victims of their statutorily-protected rights under the CVRA and then claim “privilege” to block inquiry into their plans. The Government has admitted that its internal affairs component—the Office of Professional Responsibility—has collected information about possible improper behavior during the investigation of the Epstein matter. Gov’t Answers to RFA ¶ 22 (government admits that “[t]he Justice Department’s Office of Professional Responsibility and/or other Government entities have collected information about . . . other government attorney’s [apart from Bruce Reinhart’s] possible improper behavior in the Epstein matter”). The fact that the Government’s own investigative agencies have collected such information demonstrates that there is a prima facie case of improper behavior, which is enough to trigger the crime-fraud-misconduct exception to various privileges. Other examples are provided in the attached Edwards affidavit, at ¶¶ 83-95.

Factual Materials Not Covered – Any privilege would only cover materials reflecting the confidential relationship, not non-confidential factual materials. *See, e.g., EPA v. Mink*, 410 U.S. 73, 87–88 (1973) (“memoranda consisting only of compiled factual material . . . and severable from its context would generally be available for discovery by private parties in litigation with the Government.”). Many of the materials at issue are factual materials, thus not

covered by any protection. *See, e.g., Jupiter Painting Contracting Co. v. United States*, 87 F.R.D. 593, 598 (E.D. Pa. 1980) (“the shield of confidentiality does not extend to reports or comments on information coming from persons outside the institutional client”). For example, the Government has asserted attorney-client privilege over a memorandum “summarizing [the] Jeffrey Epstein investigation,” P-013263 through P-013271, and over “victim identification information,” P-012362 through P-012451. Such factual information is not subject to the attorney-client privilege.

Documents Not Prepared in Anticipation of CVRA Litigation – The work product doctrine (as well as the investigative privilege) only applies to documents prepared by an attorney in anticipation of litigation, not to documents prepared in the ordinary course of business, pursuant to regulatory requirement, or for other non-litigation purposes. *See, e.g., Solis v. Food Employers Labor Relations Ass’n*, 644 F.3d 221, 231 (4th Cir. 2011). Many of the documents at issue here were not prepared in anticipation of litigation, and certainly not in anticipation of litigation about the Crime Victims’ Rights Act. *See, e.g., Southern Union Co. v. Southwest Gas Corp.*, 205 F.R.D. 542, 549 (D. Ariz. 2002) (holding that the documents were not protected by work product because they were not prepared in connection with case at hand).

“The executive branch of our government employs an uncountable and ever-growing number of attorneys, and the [law] can hardly be understood as protecting everything they put on paper. In the federal courts the privilege may be invoked only for materials ‘prepared in anticipation of litigation or for trial.’ Fed.R.Civ.P. 26(b)(3).” *Kent Corp. v. N.L.R.B.*, 530 F.2d 612, 623–24 (5th Cir. 1976). Many of the materials in question fall well outside this protection.

For example, purely factual material and communications about crime victim notifications do not qualify for such protection.

II. Specific Responses to Specific Assertions of Privilege.

A. Attorney-Client Privilege.

Ordinary Governmental Communications Not Covered – A general attorney-client privilege does not exist for ordinary governmental communications. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 916–21 (8th Cir. 1997). Given the Government’s lack of specificity, it hard to tell precisely which communications may or may not be ordinary governmental communications. All such ordinary communications are unprotected.

Only communications concerning legal services covered – Any attorney-client privilege would be limited to communications made for purposes of facilitating the rendition of legal services to the Government client. *See, e.g., Diamond v. City of Mobile*, 86 F.R.D. 324 (D. Ala. 1978) (holding that attorney-client privilege did not bar disclosure of statements made to the city attorney while conducting the internal investigation where the purpose of the investigation was not to provide legal advice or assistance to the police officers, but rather to provide the city with information relating to alleged indiscretion within the department). The Government has failed to show which of the documents involve government prosecutors rendering legal services.

Attorney-Client Relationship Not Established. Any attorney-client privilege has not been properly invoked because the Government has not provided factual material identifying who is the attorney, who is the client, and how the communications were confidential. *See Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003). The Government has failed to provide any supporting affidavits or other proof that any kind of an attorney-client relationship existed. This

is not a technical quibble, but a requirement that the Government establish the basic pre-requisite for carrying *its* burden of proof. Moreover, the Government will need to identify precisely who the “client” is in this case.

B. Deliberative Process Privilege

Final Decision Exempted from Privilege – Any deliberative process privilege would only cover the processes by which a decision was made, not the final decision itself. *See, e.g., NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151-52 (1975). This point becomes important because the Government seems to be invoking a deliberative process privilege that never ends. If the Government is going to rely on this privilege, then the Government should be able to clearly demonstrate where the deliberative process ended and a final decision was made. Because the Government cannot do so, the Court should reject any blanket assertion of this privilege.

Qualified Privilege Overridden By the Victims’ Need for the Documents – Any deliberative process privilege would be a qualified privilege, which would be overridden by the victims’ compelling need to obtain the materials. *See, e.g., Newport Pac., Inc. v. County of San Diego*, 200 F.R.D. 628, 638-41 (S.D. Cal. 2001) (in action charging county Board of Supervisors with violating Federal Fair Housing Act, the interest in free expression by policy makers during the deliberative process leading up to those actions was outweighed by the litigant’s interest in obtaining information concerning said deliberations). In making a determination of whether the victims’ need overrides, the Court should consider all relevant factors, including:

(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the ‘seriousness’ of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future

timidity by government employees who will be forced to recognize that their secrets are voidable.

Elkem Metals Co. v. United States, 126 F.Supp.2d 567, 580 (Ct. Int'l Trade 2000).

In this case, the victims' need for the information clearly outweighs the need for secrecy. As explained at greater length in the accompanying Edwards Affidavit (*see* ¶¶ 26-60, discussing victims' discovery requests item-by-item), the victims have a compelling need for all of the information that they are seeking.

Moreover, the victims have no other way of proving their case—particularly that the Government deliberately violated their rights under the CVRA. Of course, proving a deliberate violation requires proof of what government actors were thinking at the time that they made certain decisions about victim notifications and related matters. The only way the victims can make that showing is through access to internal government documents.

With regard to the “seriousness” of this litigation, as the Court is aware this case involves a dispute that has spanned more than six years about apparently deliberate violations of the CVRA in a case that resulted in the non-prosecution of a serial sex offender.

The Government's role in the litigation is central. The case presents claims directly against the Government about its handling of its statutory obligations to confer with crime victims and related subjects.

Finally, with respect to possible future timidity by government employees, neither of the declarations previously submitted by the Government (by Mr. Ferrer and Ms. Ashton) made any such claim. To the contrary, the declarations simply described the documents as being part of a deliberative process. Perhaps the reason that the Government is not claiming any future effect on the deliberative process is that this case is truly one-of-a-kind. The Government has admitted

that “[i]t is not standard practice for the U.S. Attorney’s Office to negotiate with defense attorneys about the extent of notifications provided to crime victims.” Gov’t Resp. to Request for Admission 2(b). Because such deliberations are not likely to occur in the future, ordering disclosure of the materials here will not raise concerns in the future.

C. Investigative Privilege

Not Within the Scope of the Investigative Privilege – It is not immediately clear that the Eleventh Circuit has recognized an “investigative privilege.” Assuming—but not conceding—the existence of such a privilege, other circuits have narrowly confined materials such “as information pertaining to law enforcement techniques and procedures, information that would undermine the confidentiality of sources, information that would endanger witness and law enforcement personnel [or] the privacy of individuals involved in an investigation, and information that would otherwise ... interfere[] with an investigation.” *In re The City of New York*, 607 F.3d 923, 944 (2d Cir. 2010). The Government has not attempted to make any such showing with regard to specific materials over which it has asserted investigative privilege. The burden is on the Government to make such a showing and, unless it can do so, its assertion of privilege must be rejected.

An example of material not covered by the investigative privilege is found at P-012624 through P-012653, which is described as “[f]older entitled ‘(Victims) Additional 302’s’ containing reports of interviews conducted in June 2007, October 2007, and March 2008.” How release of these materials (with the victims’ names redacted) could endanger a Government investigation is not immediately clear.

Qualified Privilege Overridden By the Victims' Need for the Documents – Any investigative privilege would be a qualified privilege, in which the public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information. *Tuite v. Henry*, 98 F.3d 1411, 1418 (D.C. Cir. 1996). The balancing is ordinarily made by considering the ten factors identified in *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973).

Those ten factors decisively tip in favor of the victims receiving access to the information. As explained at greater length in the accompanying Edwards Affidavit, the victims have a great need for the materials in question. See Edwards Affidavit at ¶¶ 106-16. On the other side of the equation, the Government has no significant reason for blocking use of the materials.

One example of why the victims have established a compelling need for the materials is the fact that the Court has indicated that it will be considering an “estoppel” argument raised by the Government as a defense in this case. DE 189 at 12 n.6. The Court has noted that this argument “implicates a fact-sensitive equitable defense which must be considered in the historical factual context of *the entire interface between Epstein, the relevant prosecutorial authorities and the federal offense victims*—including an assessment of the allegation of a deliberate conspiracy between Epstein and federal prosecutors to keep the victims in the dark on the pendency of negotiations between Epstein and federal authorities until well after the fact and presentation of the non-prosecution agreement to them as *a fait accompli*.” DE 189 at 12 n.6 (emphasis added). In weighing competing concerns for the investigative privilege (and all other

privileges), the Court must be aware of the victims need to defeat the Government's alleged estoppel defense and, accordingly, grant the victims broad access to the evidence that they need.

D. Work Product Doctrine.

No Work Product Doctrine in the Context of a Claim Against Public Prosecutors –

The work product doctrine does not apply to claims advanced by crime victims that federal prosecutors have violated their public responsibilities under the Crime Victims' Rights Act. In such circumstances, the work product doctrine must yield to the higher goal of protecting congressionally-created rights.

A good illustration of these principles comes from *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 919-21 (8th Cir. 1997), in which Government attorneys attempted to raise not merely a work-product claim, but an attorney-client privilege to defeat a grand jury subpoena. The Eighth Circuit rejected the effort, explaining that "the general duty of public service calls upon government employees and agencies to favor disclosure over concealment." *Id.* at 920. The Eighth Circuit also relied upon *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984), which refused to extend work product privilege to public accountants, because they have "a public responsibility transcending any employment relationship with the client." Here, where the issue is whether the Government fulfilled its obligations to protect crime victims' rights, it should not be able to throw a shroud of secrecy over the conduct of its prosecutors.

Indeed, the U.S. Attorney's Office is obliged to produce favorable information to the victims because of the CVRA's requirement that prosecutor use their "best efforts" to protect crime victims' rights. The CVRA directs that "[o]fficers and employees of the Department of

Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall *make their best efforts* to see that crime victims are notified of, and accorded, the rights described in [the CVRA].” 18 U.S.C. § 3771(c)(1) (emphasis added). It is hard to understand how the Government can argue that it is using its “best efforts” to protect victims’ rights while simultaneously withholding readily-identifiable documents from the victims that might allow them to protect those very rights. If a best efforts obligation means anything, it must mean that the U.S. Attorney’s Office cannot suppress favorable information; the work product must yield to this specific statutory command.

Qualified Privilege Overridden By the Victims’ Need for the Documents – The work product doctrine is a qualified privilege that can be overcome where a litigant shows it has a substantial need for the materials and that it has exhausted other means of obtaining the relevant information it seeks. *See, e.g., In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 185-86 (2d Cir. 2007). The victims here can make this showing, as explained in detail in the accompanying Edwards affidavit (¶¶ 117-20).

Accordingly, the victims have a compelling need for the materials that OPR collected as part of its investigation. Because Justice Department attorneys are generally required to talk to OPR investigators, OPR was apparently able to investigate the claims of misconduct related to the Epstein case by getting statements from the attorney’s involved. These interviews appear to be recorded in materials found at page fourteen of the supplemental privilege log (DE 216-1), with regard to Suppl. Box #3 P-013956 to P-013846 [sic – apparently should be P-013970, a total of 14 pages]. Judging from the entry, these notes would be factual statements from Justice Department prosecutors about how the Epstein case was handled and whether any misconduct

occurred during the handling of the case. Those are central issues in this case. There is no other way for the victims to obtain information about these subjects because the Justice Department has declined to provide information on this subject.

Work Production Privilege Does Not Apply When the Attorney's Conduct is at Issue – If the attorney's conduct is a central issue in the case, the work-production protection does not apply. *See, e.g., In re John Doe*, 662 F.2d 1073, 1080 (4th Cir. 1981); *Charlotte Motor Speedway, Inc. v. International Ins. Co.*, 125 F.R.D. 127, 130 (M.D.N.C. 1989). The work product rule is designed to protect against disclosure of an attorney's mental impressions so that an attorney can fairly defend a case. However, the rule "cannot be viewed as a means by which attorneys, based solely upon that status, are to be elevated to a preferred position when involved as parties in the litigation process." *SEC v. Nat'l Student Mktg. Corp.*, 18 Fed. R. Serv. 2d 1302 at * 3 (D.D.C. 1974).

An illustration of these principles comes from bad-faith actions against insurers, which

[C]an only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did. The claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information is not only substantial, but overwhelming. The 'substantial equivalent' of this material cannot be obtained through other means of discovery.

Brown v. Superior Court in and for Maricopa County, 670 P.2d 725, 734 (Ariz. 1983). Here, of course, the victims have alleged essentially bad faith handling of their crime victims' rights. Because the prosecutors' conduct is directly at issue, work product doctrine does not apply to conceal their conduct.

E. Rule 6(e) – Grand Jury Secrecy

Court-Authorized Disclosure Not Covered Under Rule 6(e)(3)(E) – The Court can authorize disclosure of grand jury materials pursuant to Fed. R. Crim. P. 6(e)(3)(E)(i), which allows release “in connection with a judicial proceeding.” It has already authorized disclosure of relevant materials in this case—DE 190—and the Government has no independent “privilege” to interpose against court-ordered disclosure of grand jury materials.

The Court Has Inherent Power to Release Grand Jury Materials – The Court has “inherent power beyond the literal wording of Rule 6(e)(3) to disclose grand jury material” and has properly exercised that power here. *United States v. Aisenberg*, 358 F.3d 1327, 1347 (11th Cir. 2004).

Victims Have Properly Petitioned for the Release of Grand Jury Materials – A litigant can petition for release of grand jury materials. Fed. R. Crim. P. 6(e)(3)(F). The Court has now granted the victims petition for release of the materials, reserving the issue of “whether the materials in question are protected from disclosure by the Federal Rule of Criminal Procedure 6(e).” DE 257 at 3. Because there is no protection against disclosure as identified by the Government, the materials should be released.⁴

The CVRA Gives the Court Authority to Release Grand Jury Materials – The Court is obligated to enforce crime victims’ rights. 18 U.S.C. § 3771(b)(1) (the court “shall ensure” that crime victims receive their rights). This obligation carries with it authority to release necessary materials to protect victims’ rights, including grand jury materials. The CVRA’s

⁴ Epstein has recently filed a motion to preclude release of grand jury materials. DE 263. To the extent that this motion raises separate arguments for release of the materials, the victims intend to file a response in due course.

specific statutory language trumps anything in mere court-created rules, like the Federal Rules of Criminal Procedure.

Grand Jury Materials Can Be Severed from Other Materials – For many of its grand jury objections, the Government has simply referred to some tangential connection to grand jury proceedings. However, the Government can redact grand jury information from the requested materials, and produce the remainder. *See, e.g., In re Grand Jury Investigation*, 445 F.3d 266, 280 (3rd Cir. 2006).

An illustration of this problem comes from page twelve of the first privilege log (DE 212-1), with regard to Box #2 P-008616 to P-008686. The entry reads: “File folder entitled ‘FBI Summary Charts’ containing chart prepared at direction of AUSA, containing victims names, identifying information, summary of activity, and other information relevant to indictment.” This does not appear to be a document that was ever presented to the grand jury or that directly discloses grand jury proceedings. Moreover, to the extent that it involves some kind of limited disclosure of grand jury proceedings, the materials making that limited disclosure can be redacted and the other information provided to the victims.

F. The Privacy Rights of Other Victims

Government Redaction Can Resolve Privacy Concerns – The Government has asserted privacy rights of victims at various points; however, it cannot legitimately withhold materials in this case by a blanket assertion of the privacy rights of other victims when it has the simple option of redacting the names and identifying information of these other victims before producing the materials. The Government has already followed this procedure elsewhere. *See,*

e.g., Bates 000966-67 (materials about victim “B.B.”). The Court should require the Government to do so here as well.

No Assertion of Privacy Rights by Other Victims – Several of the victims cited by the Government are represented by undersigned counsel and do not wish to interpose privacy rights here. Nor has the Government established that they can assert the privacy rights of other victims.

G. The Privacy Act

The Privacy Act Does Not Apply in the Context of Court-Compelled Disclosures for Discovery – A final objection raised by the Government is the Privacy Act, yet the Act very specifically allows a court to order release of materials when good cause has been shown. *See* 5 U.S.C. § 552a(b)(11). As the Eleventh Circuit has explained, “[r]elease is allowed when a court of competent jurisdiction so orders.” *Id.* at 1447.

In its earlier pleading, the Government suggested that the Court must engage in some sort of balancing of interests to release information. The government fails to acknowledge that the Court has already undertaken the balancing. Moreover, the Government has not shown any legitimate interest in privacy that cannot be met through the simple device of redacting the names of the crime victims at issue. Of course, government prosecutors do not enjoy any sort of “privacy” right that they can interpose when their conduct is at issue before the court.

CONCLUSION

Because the Government’s assertions of privilege are not well-founded, the Court should provide all of the documents the Government submitted for in camera inspection to the victims.

DATED: October 20, 2014

Respectfully Submitted,

/s/ Bradley J. Edwards

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served on October 20, 2014, on the following
using the Court's CM/ECF system:

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