

**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 RESPONSE TO EPSTEIN'S MOTION TO
PROTECT FROM DISCLOSURE GRAND JURY MATERIALS**

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to respond to Epstein's motion to protect from disclosure certain grand jury materials (DE 263). Epstein's objections are meritless for three reasons.

First, Epstein misstates the legal standard regarding release of grand jury materials. The Court clearly has discretion to release the materials and should do so if an appropriate reason is shown for release. Any alleged "reputational harm" to Epstein can be resolved by simply keeping the materials under seal.

Second, Epstein misunderstands the compelling need that the victims have for those materials. The materials all relate directly to important and disputed issues in this case.

Third, at a minimum, Epstein's motion should not be granted at this time, because the Government has failed to provide a specific privilege log about the grand jury materials at issue. Until the Government has properly itemizes the materials at issue, it is impossible for the victims to properly respond to Epstein's (and the Government's) objections to release of the materials.

I. THE COURT HAS DISCRETION TO RELEASE THE GRAND JURY MATERIALS.

Epstein begins his pleading by recounting tropes regarding grand jury secrecy. To be sure, grand jury proceedings are ordinarily secret, particularly while they are investigating criminal activity. But the Federal Rules of Criminal Procedure specifically carve out exceptions to that secrecy. Rule 6(e) provides that a court may release grand jury materials “preliminarily to or in connection with a judicial proceeding.” Fed. R. Crim. P. 6(E)(i). This is the rule that the victims rely upon, and yet Epstein does not cite it anywhere. This rule plainly authorizes release of the materials here, and the only question is whether good cause exists for release of the materials.

As Epstein appears to concede, “a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion.” *Douglas Oil Co. of Calif. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979). To obtain release of materials under this rule, a litigant “must show ‘particularized need’ to justify infringement of the secrecy surrounding a grand jury.” *United States v. Cole*, 755 F.2d 748, 758 (11th Cir. 1985) (citing *United States v. Tucker*, 526 F.2d 279, 282 (5th Cir.1976)).

Epstein begins his pleading with generic, overarching references to alleged “reputational harm” that might come from publicly releasing the materials (Epstein Mot. at 3-4). But that is not a special factor allowing the Court to prevent release of materials. And, indeed, it is not clear exactly what sort of reputational harm Epstein can legitimately seek to protect, given his guilty plea to a felony sex offense and his related agreement to pay damages to dozens of young girls who were his sexual assault victims.

In any event, to the extent that the Court feels it necessary, any alleged “reputational harm” can be fully avoided by the Court simply releasing the grand jury materials to the victims under seal. Rule 6(E) specifically authorizes the Court to release materials “in a manner, and subject to any other conditions that it directs” To the extent that there is any legitimate reputational interest that must be protected, then the Court should release the materials to the victims’ counsel under seal.

Epstein never makes any argument that he has a legitimate reputational interest that needs to be protected *from the victims*. Of course, the victims already believe he is a serial sex offender who sexually assaulted them. Epstein suffers no incremental harm if victims’ legal counsel receives the grand jury materials for use in preparing legal pleadings in this case.

The Court has already established a procedure for correspondence between prosecutors and defense counsel to be kept under seal in this case. *See* DE 255 at 5 (directing the parties to negotiate to develop a mutually-agreeable protective order covering correspondence in this case). The Court could simply follow the same approach here, entirely eliminating the need to consider any reputation harm to Epstein.

II. THE VICTIMS EASILY MEET THE THREE-PART TEST FOR DISCLOSURE.

The Supreme Court has explained that a party has justified release of grand jury materials when he shows “[1] that the material [he] 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 [his] request is structured to cover only material so needed.” *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979). The victims easily satisfy these three requirements.

First, if the materials are not released to the victims, an injustice may occur in these proceedings. One illustration comes from the fact that the Court 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). While the Government has yet to precisely itemize the grand jury materials, it appears that many of the documents will be highly relevant to demonstrating what the “entire interface” was between the Government and the victims.

The grand jury materials relate directly to what the Government knew at the time that it was failing to communicate with the victims. These materials would demonstrate that the Government had an extremely strong case against Epstein, giving both Epstein and the Government a motive for needing to keep the victims in the dark about the plea deal. Against the backdrop of a strong case, the Government would not have been able to answer the simplest of questions from the victims about why they were dropping all federal charges against Epstein, the strength of the case against Epstein, the range of possible charges and sentences against Epstein, nor any other common question typically asked of prosecutors by victims. Nor would the Government have been able to explain to the victims why it was not pursuing additional investigative leads against Epstein. Proof that the Government had a strong case against Epstein is a critical starting point for the victims’ case.

Epstein pretends that this point can be easily established in other ways. But the Government has refused to admit basic facts surrounding the strength of its case. The victims' first request for admission to the Government asked for an admission that the U.S. Attorney's Office's and the FBI's "investigation into Jeffrey Epstein developed a case for a federal prosecution against Epstein for many federal sex offenses." Victims' Req. for Admission #1. Rather than simply admit this point, the Government responded cagily: "The government admits that the FBI and the U.S. Attorney's Office . . . conducted an investigation in Jeffrey Epstein and developed evidence and information in contemplation of a potential federal prosecution against Epstein for many federal sex offenses. *Except as otherwise admitted above, the government denies Request No. 1.*" Gov't Resp. to Pet.'s First Request for Admissions, #1 (emphasis added). The Court also directed the Government to work with the victims to reach stipulations about basic facts in this case; the Government, however, while initially agreeing to do so, later backed out of even the most basic stipulations. See Edwards Aff., DE 265-1 at ¶¶ 3-25 (recounting extensive maneuvers by the Government thwarting efforts reach a stipulated set of facts). Against that backdrop of Government's obstructionism, the victims are plainly entitled to have the Court produce grand jury documents concerning the investigation to avoid the injustice of preventing the victims from the obtaining the necessary evidence to maximize the strength of their claims or having the Court dismiss the case for lack of evidence.

The victims "need for disclosure is greater than the need for continued secrecy." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979). The victims are seeing to protect congressionally-mandated rights, which promise them important procedural protections in the criminal justice system. See 18 U.S.C. § 3771. The victims have articulated specific reasons for needing the materials, as each of the documents is requested under 26 specific

requests for production – as discussed in the following paragraphs. On the other side of the scales, Epstein has not established any continuing need for secrecy. The only point that he raises – and the only point that he would have standing to raise – is harm to his own reputation. But as shown in Part I, *supra*, any need to protect (convicted felon and registered sex offender) Epstein’s reputation can be handled by simply sealing the materials in question.

Finally, the victims request for production “is structured to cover only material . . . needed.” *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979). As the Court will recall, the grand jury issue has arisen in this case because the Government raised grand jury secrecy as a basis for blocking the release of documents specifically requested by the victims. The victims had filed 26 very specific requests for production of various items. See *Edwards Aff.*, DE 265-1 at ¶¶ 26-60 (explaining in detail why documents are needed under each specific request for production). The *Edwards* affidavit begins by explaining the general relevance of the documents in question:

The documents that the victims requested that the Government produce to them on October 3, 2011, are all highly relevant to their CVRA enforcement action. We would not have requested them otherwise. The victims also have no other means of obtaining the requested material. . . . As the Court will note from reviewing the requests for production, most of the requests specifically recount the allegations that the requested documents would support, in an effort to eliminate any dispute from the Government that the documents were not relevant to the case. Many of the requests for production link directly to specific paragraphs in the victims’ previously-filed summary judgment motion. Accordingly, the victims have a very specific need for these documents to support the allegations in the summary judgment motion found at DE 48 at 3-23.

Ed Edwards Aff., DE 265-1 at ¶ 26.

An illustration of how the victims specifically structured their requests for production to link to their anticipated summary judgment motion comes from RFP No. 9, which sought materials related to how the FBI came to represent to the victims in January 2008 that their

sexual assault cases were “still under investigation” when, in fact, the non-prosecution agreement had been signed with Epstein months earlier. RFP No. 9 requested documents as follows:

On January 10, 2008, Jane Doe #1 and Jane Doe #2 received letters from the FBI advising them that “this case is currently under investigation.” Please provide all documents, correspondence, and other information relating to those representations being made by the FBI to Jane Doe #1 and Jane Doe #2, including all information about whether the FBI was aware of the non-prosecution agreement at that time and about whether Epstein was aware of the notifications being made to the victims.

Victims’ Request for Production No. 9 (Oct. 3, 2011), attached as an exhibit to DE 265-1.

The Edwards affidavit then goes on to specifically explain why these particular documents are vital to the victims’ case:

These documents are needed to show that these letters [from the FBI to the victims] were inaccurate or, at the very least, highly misleading, because they conveyed the impression that no plea arrangement (for example, a non-prosecution agreement) had been negotiated between Epstein and the Government. *See, e.g.*, DE 48 at 16. These documents are also needed to respond to the Government’s “estoppel” defense, as noted in the Court’s order DE 189 at 12 n.6.

DE 265-1 at ¶ 36.

Request for Production No.9 is only one of the 26 requests made by the victims. The victims highlight this request because it illustrates the remaining 25 requests. Moreover, this request may be important because it appears that the Government is refusing to produce certain grand jury materials responsive to this request. The victims can only say that it “appears” the Government is withholding documents because the Government has failed to provide a specific privilege log, explaining which items it is withholding are responsive to which request, as discussed below in Part III.

With regard to the other 25 requests apart from Request for Production No. 9, the Edwards affidavit reviews each one of them, item-by-item, and explains specifically why each

request links directly to particular issues to be addressed in the victims' anticipated summary judgment motion. The victims request to produce limited grand jury materials is thus plainly "structured to cover only material . . . needed." *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979).

III. AT A MINIMUM, THE GOVERNMENT SHOULD BE REQUIRED TO FILE A MORE DETAILED PRIVILEGE LOG REGARDING THE EVIDENCE IN QUESTION BEFORE THE COURT RULES ON WHETHER TO RELEASE THE EVIDENCE.

Epstein admits in his motion that he "is without access to the protected documents and thus cannot further particularize objections at this time" Epstein Resp. at 4. The victims, of course, are in the same boat: they cannot particularize objections to the Government's – and Epstein's – assertions of grand jury privilege since, for many of the documents, the Government has provided no description. Compounding this problem, the Government has interposed generic objections without identifying the documents to which the privilege assertions apply. At the very least, before the Court rules on Epstein's motion, it should require the Government to provide specific information about the grand jury information in question.

As the Court knows, the Government has now produced more than 10,000 pages of documents to the Court for in camera inspection. Along with that production, the Government provided the Court and the victims with an inadequate privilege log,¹ generally describing many of the documents but not complying with the Court's order that the privilege log must "clearly identify[] each document[] by author(s), addressee(s), recipient(s), date, and general subject matter" See DE 190 at 2. Equally important for purposes of this response, the Government

¹ Earlier this week, the victims filed their re-assertion of objections to the Government's privilege claims. See DE 265. Attached as an exhibit to that pleading is the victims document-by-document response to the Government's privilege log, specifically listing the many privilege log entries that the victims believe are inadequate.

did not coherently organize its production. The Government's production did not identify which documents responded to which of the victims' requests. Consequently, the Government's "grand jury" objections are raised generally, without explaining which of the 26 requests for production particular documents pertain to.

Of course, Epstein, whose interest remains aligned with the Government's, simply piggy-backed his motion on top of the Government's vague privilege assertions. The result of all this is that the victims cannot identify which documents would be blocked from release if the Court were to grant Epstein's motion (or the related Government motion) – and thus it is impossible for the victims to effectively respond. Consider, as just one example, this general entry in the Government's privilege log (DE 212-1 at 20) covering 90 pages of documents (Bates P-012362 through P-012451). The only description the victims have is: "File folder entitled 'Key Documents' containing correspondence between AUSA and case agent regarding indictment prep questions, victim identification information, correction to draft indictment, indictment preparation timeline, key grand jury material." The Court will notice that there are no dates, addressees, or recipients listed for these dozens and dozens of pages. Moreover, while the Government is apparently claiming that some of these pages involve grand jury materials, it is not clear which pages are such materials or, indeed, even what these pages generally involve. It is obviously impossible for the victims to even begin to respond to a claim of a need for grand jury secrecy in these documents without further information. At the very least, before considering granting any part of Epstein's motion, the Court should direct the Government to file a more specific privilege log to provide the victims a fair opportunity to contest the Government's – and Epstein's – assertions.

CONCLUSION

For all these reasons, the Court should deny Epstein's request that the Court deny release of relevant grand jury materials to the victims and should instead release the materials (under seal) to victims' counsel. The victims have, of course, also responded to the Government's similar arguments. *See* De 265. The victims also rely on those responses here.

DATED: October 24, 2013

Respectfully Submitted,

/s/ Bradley J. Edwards

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CERTIFICATE OF SERVICE

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