UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY NOS. 16-3, 18-1 AND 19-1.	Grand Jury Action No. 21-26 (BAH) Chief Judge Beryl A. Howell

PARTIAL UNSEALING ORDER

On August 6, 2021, a sealed Memorandum Opinion and Order was filed in the instant sealed matter resolving the government's motion for permission to disclose certain grand jury materials pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(i). The order associated with that opinion directed the government to submit "any proposed redactions to portions of this Memorandum Opinion and Order that must remain sealed so that the remainder may be unsealed and made publicly accessible." Mem. Op. & Order at 15, ECF No. 2. In an August 16, 2021 minute order, the Court reiterated its request and ordered a response by August 19, 2021.

On August 19, 2021, the government submitted a response identifying one sentence of the Memorandum Opinion and Order for redaction. Gov't's Resp. Ct.'s Mem. Op. & Order Dated Aug. 6, 2021 & Ct.'s Min. Order Dated Aug. 16, 2021 at 2, ECF No. 3.

Upon consideration of the government's response, it is hereby

ORDERED that this Order and the attached Redacted Memorandum Opinion & Order, which has been redacted only to the extent requested by the government, be unsealed and posted on the Court's website.

SO ORDERED.

Date: August 19, 2021

BERYL A. HOWELL
Chief Judge

ATTACHMENT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY NOS. 16-3, 18-1 AND 19-1.	Grand Jury Action No. 21-26 (BAH) Chief Judge Beryl A. Howell **UNDER SEAL**

MEMORANDUM OPINION AND ORDER

In an *ex parte* motion, filed on July 23, 2021, the government seeks authorization, pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(i), to disclose documents produced in response to over fifty grand jury subpoenas issued over a two-year period by three grand juries in the District of Columbia, during a criminal investigation that is now closed and yielded no charges. Gov't's Ex Parte Motion Pursuant to F.R.Cr.[P.] 6(e) to Allow Law Enforcement Agents to Use Grand Jury Material for a Civil Purpose ("Gov't's Mot."), ECF No. 1. The intended disclosure of this grand jury material, plus any derivative information gained from the result of witness interviews that referenced the subpoenaed records, is to certain personnel of one or more federal agencies, along with "consultants, expert witnesses and fact witnesses," Gov't's Proposed Order at 2, ECF No. 1-1, for use in furtherance of potential civil or administrative enforcement actions.[1]

[1] The government indicates that the Criminal Division of the Department of Justice and the State Department's Office of Inspector General pursued a joint criminal investigation into suspect vouchers seeking reimbursement of educational expenses contrary to applicable State Department regulations. Gov't's Mot. at 1. [redacted] *Id.* Over the course of two years, three now-expired federal grand juries empaneled by this Court, numbered 16-3, 18-1, and 19-1, issued 53 subpoenas *duces tecum* for documents that are now the subject of the instant pending motion. *Id.* Fourteen grand jury subpoenas for witness testimony were also issued but no testimony was presented to the grand juries since the witnesses, instead, opted to provide voluntary statements. *Id.* at 1–2. Based on the evidence collected, the government declined to pursue any criminal charges. *Id.* at 2. "However, it left open the possibility of civil actions taken either by the Department of Justice's Civil Division or any civil actions and penalties that could be levied by the Department of State under its own authority." *Id.* The State Department's

The government argues that the requested disclosure is appropriate on two grounds. First, the government suggests that documents produced in response to the grand jury subpoenas are not necessarily "matter[s] occurring before [a] grand jury," FED. R. CRIM. P. 6(e)(2)(B) (instructing that, "[u]nless these rules provide otherwise," "an attorney for the government" "must not disclose a matter occurring before the grand jury"), such that no grand jury secrecy requirement applies, *see* Gov't's Mot. at 3 (citing *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980); *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988)). Second, alternatively, the government points to the rule exception authorizing a court order for disclosure of grand jury material "preliminarily to or in connection with a judicial proceeding," FED. R. CRIM. P. 6(e)(3)(E)(i), noting that the Court is "infused with substantial discretion" in deciding whether to grant disclosure of grand jury materials, Gov't's Mot. at 3 (quoting *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 223 (1979)), and should exercise that discretion here, particularly since "the grand juries are no longer sitting, the need for secrecy has abated and because no testimony was taken there are no grand jury transcripts at issue," *id.*

The first basis proffered by the government does not withstand scrutiny under binding precedent in this Circuit and the government has not sustained its burden for disclosure of the grand jury materials at issue under the secrecy exception invoked. *See Douglas Oil Co.*, 441 U.S. at 223 (noting that burden rests on the party seeking disclosure of grand jury material);

Office of Inspector General and Office of General Counsel now wish to investigate, and potentially assess civil penalties for, possible violations of the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801 *et seq.* Gov't's Mot. at 2. In furtherance of that investigation, the government seeks permission to use "all documents returned pursuant to grand jury subpoenas and any derivative information gained from the result of witness interviews that referenced any subpoenaed record." *Id.* The government concedes that the same materials could be obtained using administrative subpoenas, although doing so would cause it to incur duplicative expenses. *Id.*

United States v. Sells Eng'g, Inc., 463 U.S. 418, 432–34 (1983) (confirming that the *Douglas Oil* standard applies to a government requestor); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) (denying requested disclosure since requesting party failed to carry burden "to show that 'a particularized need' exists . . . which outweighs the policy of secrecy"). Therefore, the government's motion for disclosure of the grand jury materials is denied for reasons explained more fully below.

I. DISCUSSION

Contrary to the government's suggestion, the secrecy mandated by Rule 6(e) for grand jury material applies to the government's requested disclosure and, as such, judicial authorization is required before these materials may be disclosed for use in potential civil or administrative enforcement proceedings. The government has not, however, addressed whether the possible proceedings for which disclosure is sought qualify as "judicial proceedings" under the Rule 6(e) exception invoked, nor adequately demonstrated the requisite particularized need for the disclosure. This motion must therefore be denied.

This denial is without prejudice should the government be able to supplement its application to satisfy the prerequisite for the requested disclosure as "preliminarily to or in connection with a judicial proceeding," FED. R. CRIM. P. 6(e)(3)(E)(i), and to demonstrate the requisite particularized need for the disclosure.

A. Applicability of Rule 6(e) to Materials Sought to Be Disclosed

As noted, absent an exception, an attorney for the government "must not disclose a matter occurring before the grand jury." FED. R. CRIM. P. 6(e)(2)(B)(vi).[2] Although the materials the

[2] To be precise, *disclosure* of grand jury material by a government attorney can be distinguished from *reuse* of such material for a new purpose by that same attorney. The Supreme Court addressed this distinction in *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987), a case neither discussed nor cited by the government in the pending application. Relying on the plain meaning of the word "disclose," the *John Doe* Court held that Rule 6(e) did not

government seeks to disclose are documents produced in response to grand jury subpoenas, the government nevertheless contends that the materials may not be "matter[s]" to which the secrecy rule attaches. Gov't's Mot. at 3. As support, the government cites two D.C. Circuit decisions for the proposition that documents are not cloaked with grand jury secrecy merely "because they were subpoenaed by a grand jury," *id.*, but neither of these decisions leads to the conclusion urged by the government on the facts presented here.[3]

At a high level, the government is correct that Rule 6(e) does not draw "a veil of secrecy . . . over all matters occurring in the world that happen to be investigated by a grand jury." *Labow v. U.S. Dep't of Justice*, 831 F.3d 523, 529 (D.C. Cir. 2016) (quoting *Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice ("SCPR")*, 823 F.2d 574, 582 (D.C. Cir. 1987)). Indeed, "[t]here is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers." *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice ("CREW")*, 746 F.3d 1082, 1100 (D.C. Cir. 2014) (quoting *Lopez v. Dep't of Justice*, 393 F.3d 1345, 1349 (D.C. Cir. 2005)); *accord Stolt-Nielsen Transp. Grp. v. United States*, 534 F.3d 728, 732 (D.C. Cir. 2008); *SCPR*, 823 F.2d at 582. Instead, the key question is whether disclosure of the information requested "would 'tend to reveal some secret aspect of the grand

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bar, nor require a court order authorizing, individual Justice Department attorneys who had been involved in a grand jury antitrust investigation (and therefore privy to the grand jury materials) from later privately reviewing the grand jury materials in furtherance of possible civil actions. *Id.* at 104–10. The government's motion is vague regarding precisely which attorneys are involved in the closed criminal matter and the prospective civil or administrative matters, but even if some overlap exists, *John Doe* provides no basis on which to grant the motion because the identified set of intended recipients is far broader to encompass non-attorneys. *See* Gov't's Proposed Order at 2.

[3] The government highlights the fact that "[t]hese grand juries have since expired and are no longer empaneled," Gov't's Mot. at 2, as a reason for permitting the requested disclosure, *id.* at 3, but this is singularly unpersuasive. The Supreme Court has instructed that "in considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries," *Douglas Oil Co.*, 441 U.S. at 222, and "[t]hus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities," *id.*

jury's investigation,' including 'the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation,' or 'the deliberations or questions of jurors.'" *CREW*, 746 F.3d at 1100 (quoting *Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir. 2013)). With respect to subpoenaed *documents* in particular, the D.C. Circuit has described this test using a simple dichotomy: "documents that 'would reveal to the requester that they had been subpoenaed' by a grand jury [are] protected, but documents that 'would not necessarily reveal a connection to a grand jury' [are] not." *Bartko v. U.S. Dep't of Justice*, 898 F.3d 51, 73 (D.C. Cir. 2018) (quoting *Labow*, 831 F.3d at 529).

To satisfy the *Labow* test that the requested disclosures are not covered by Rule 6(e), the government must demonstrate that the subpoenaed documents "would not necessarily reveal a connection to the grand jury." On its face, the requested disclosure does not meet this test. The government expressly states that the government personnel to whom disclosure is intended—the intended *recipients*—have expressly "requested authority to use *all documents returned pursuant to grand jury subpoenas* and any derivative information gained from the result of witness interviews that referenced any subpoenaed record." Gov't's Mot. at 2 (emphasis supplied). Thus, the recipient personnel would be amply aware that the tranche of material newly available to them was obtained through grand jury subpoenas. This result falls on the grand jury secrecy side of the line drawn by *Labow*.

To be sure, ample D.C. Circuit case law provides examples of disclosures that have *not* been categorically deemed to be "matter[s] occurring before the grand jury" and therefore not necessarily governed by Rule 6(e). *See, e.g.*, *Bartko*, 898 F.3d at 73 ("copies of specific records provided to a federal grand jury in response to [a grand jury] subpoena" (citation omitted))[4];

[4] In *Bartko*, the D.C. Circuit considered whether the FBI could invoke a Freedom of Information Act ("FOIA") exemption to withhold disclosure of the contents of "a thumb drive that was provided as a result of a

Labow, 831 F.3d at 529–30 (specific documents that had been subpoenaed by a grand jury, without disclosing that fact); *SCPR*, 823 F.2d at 583 ("all evidence" regarding an incident, a substantial subset of which was grand jury material but not identifiable as such). Critically, none of these cases concerns a disclosure that, like the government's instant request, is coextensive with and plainly identified as the set of documents subpoenaed by a grand jury in a criminal investigative matter. The government's two marquee cited cases, as discussed next, are especially unhelpful to its argument and instead show this distinction in sharp relief.

In *SEC v. Dresser Industries, Inc.*, a company, which had complied with a grand jury subpoena for documents, sought to quash a roughly contemporaneous SEC subpoena for some of the same documents, arguing, in part, that enforcing the SEC subpoena would undermine grand jury secrecy. 628 F.3d at 1370, 1373, 1382. The D.C. Circuit rejected this argument, noting that the "existence of a grand jury proceeding neither adds to nor detracts from [a subject's] rights before the SEC." *Id.* at 1383. While *Dresser* made clear that merely because records were subpoenaed by the grand jury does not shield those records from review in another parallel or subsequent government proceeding, the government's instant disclosure request is far different in nature in at least two critical respects. First, *Dresser* concerned the enforcement of a *separate* subpoena which overlapped in content with the grand jury subpoena. Here, the government seeks to reuse the fruits of grand jury subpoenas, which are identified as such fruits, for civil or

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Grand Jury Subpoena to a third party individual and contained specific documents sought by the Grand Jury." 898 F.3d at 72–73 (internal quotation marks and citation omitted). The information on the drive included identities of grand jury subpoena recipients, identification of what records were subpoenaed, and "copies of specific records provided to a federal grand jury in response to such a subpoena." *Id.* at 73 (citation omitted). The Circuit concluded that the first two categories were clearly protected but the third, "copies of specific records," would need to be evaluated under the *Labow* dichotomy of whether a given document would or would not reveal that it had been obtained by grand jury subpoena. *Id.* On remand, the district court indicated that the FBI should proceed to process the documents (or file a renewed motion for summary judgment, which the FBI did not). *See Bartko v. U.S. Dep't of Justice*, No. 13-cv-1135 (JEB), 2019 WL 3532734, at *3 (D.D.C. Aug. 2, 2019).

administrative purposes. Indeed, as already pointed out, the government makes clear that the government personnel to whom disclosure is intended have expressly "requested authority to use *all documents returned pursuant to grand jury subpoenas*." Gov't's Mot. at 2 (emphasis supplied).

Second, the SEC subpoena in *Dresser* "covered substantially the same documents and materials subpoenaed by the grand jury, and more." *Dresser*, 628 F.3d at 1373. As a result, production of the materials requested by the SEC did not inherently compromise the secrecy of the precise contours and foci of the grand jury investigation. By contrast, here, the government proposes to share precisely what was returned in response to the grand jury subpoenas. Gov't's Mot. at 2. By so doing, the disclosure plainly reveals the contours of the grand jury's work. *See In re Sealed Case*, 801 F.2d 1379, 1381 (D.C. Cir. 1986) ("Disclosure of which documents the grand jury considered reveals, at the very least, the direction of the grand jury's investigation and the names of persons involved, and thus falls within Rule 6(e)(2).").

The government's citation to *Washington Post Co. v. U.S. Department of Justice*, 863 F.2d 96 (D.C. Cir. 1988), is similarly unavailing. In *Washington Post*, the plaintiff sought access, under the Freedom of Information Act ("FOIA"), to a report that had been voluntarily submitted to the Justice Department by a pharmaceutical company and later produced by the company in response to a subpoena by a grand jury, which also heard testimony relating to the report. *Id.* at 98–100. The government's effort to resist disclosure of the report in reliance on Rule (6)(e) and the FOIA exemption, which exempts from FOIA disclosure matters "specifically exempted from disclosure by [another] statute" and includes Rule 6(e), *id.* at 99–100, was rejected by the D.C. Circuit since the requested report was obtained by the government before empanelment of the grand jury and, thus, the report, standing alone, would reveal nothing about

the grand jury proceedings, *id.* at 100. Furthermore, as the D.C. Circuit noted, the only reason a recipient would know of any use of the report by the grand jury was because the government announced that fact in the litigation. *Id.* Unlike the FOIA request to the Justice Department at issue in *Washington Post* for a single document obtained by the government before a grand jury was even empaneled, here the government seeks to disclose the precise set of documents subject to grand jury subpoenas, thereby making apparent not only the way in which the documents were obtained by the government but also the substance of the matters under investigation by the grand jury.

Accordingly, the Court finds that the requested disclosure is for materials that would reveal a "matter occurring before the grand jury" and are protected by grand jury secrecy.

B. Applicability of Rule 6(e)(3)(E)(i) Exception Is Not Demonstrated

In the alternative, the government invokes Rule 6(e)(3)(E)(i), which authorizes court ordered disclosures of grand jury materials "preliminarily to or in connection with a judicial proceeding," as grounds for the requested disclosure. Gov't's Mot. at 3 (quoting long-outdated language for this Rule 6(e) exception).[5] Disclosure of grand jury material under this Rule 6(e) exception calls for a two-part analysis. First, the government must show that the requested disclosure is in fact sufficiently connected to a contemplated or pending judicial proceeding. Second, the government must make an adequate showing of particularized need for the disclosure. In this case, the government has not sufficiently explained how either Rule 6(e)(3)(E)(i) requirement is met.

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[5] The government's reliance on outdated language in this Rule 6(e) exception does not affect the analysis as "[t]he current text of Rule 6(e) differs in form but not in substance." *In re Cisneros*, 426 F.3d 409, 412 & n.2 (D.C. Cir. 2005).

1. "Preliminarily to or in Connection with a Judicial Proceeding"

The government relies on the Rule 6(e)(3)(E)(i) exception to support its requested disclosure, but without articulating any connection between the intended use of the documents and any eventual or pending "judicial proceeding." The motion seeks disclosure "for use in evaluating violations" of a specified statute that "provides for civil penalties" in certain instances. Gov't's Mot. at 2. Without more, the Court is left to guess what this may entail.

As an initial matter, the government does not identify precisely any specific "judicial proceeding" for which the grand jury materials may be relevant, but instead refers to the possibility of "an administrative action involving [statutory] violations" or "any subsequent litigation" if a violation is discovered, Gov't's Proposed Order at 1–2, also without expressing any limitation on the persons against whom the grand jury materials may be used—for example, the original targets or subjects of the grand jury investigation. In other words, the grand jury material appears intended to be used as fodder for perhaps multiple civil or administrative enforcement actions against an unknown number of persons.

This raises dual concerns. First, the requested disclosure "threatens to expand the scope of (E)(i)'s exception to grand jury secrecy beyond the narrow, discrete instances of disclosure anticipated in the text," which permits disclosure "in connection with a *single* other judicial proceeding." *In re Capitol Breach Grand Jury Investigations Within the District of Columbia*, No. 21-gj-20 (BAH), 2021 WL 3021465, at *20 (D.D.C. July 16, 2021). Second, permitting the requested use of grand jury material runs afoul of the significant policy reasons articulated by the Supreme Court in *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 432–34 (1983), for disallowing wholesale use of grand jury material by civil attorneys. The Supreme Court explained that if use of grand jury materials by civil attorneys were generally allowed, an

incentive would exist to "manipulate the grand jury's powerful investigative tools" for civil purposes. *Id.* at 432–33. This type of reuse may undermine limits on the government's civil or administrative investigatory powers imposed by statute or regulation, given that grand jury discovery would not be so limited, *id.* at 433–34, resulting in systematically disadvantaging private litigants relative to the government, *see id.* at 434.

Furthermore, whether the "preliminarily to" test is satisfied for *administrative* investigations or enforcement actions (whether singular or plural) involving the statute at issue appears to be a question of first impression but one the government fails to address. On the one hand, D.C. Circuit case law casts some doubt on whether a civil administrative investigation, even one involving an "adjudicatory hearing," can be deemed sufficiently linked to a "judicial proceeding" so as to allow this exception to be used. *See, e.g.*, *United States v. Bates*, 627 F.2d 349 (D.C. Cir. 1980) (per curiam) (affirming the district court's denial of permission for the Federal Maritime Commission to use grand jury materials for "an adjudicatory hearing" to assess whether indicted offenses constituted violations of the Shipping Act); *Dresser*, 628 F.2d at 1384 n.44 (noting in *dicta* that "administrative investigative proceedings may not be considered preliminary to or in connection with a judicial proceeding for purposes of the Rule"). On the other hand, the statute relevant to the government's request does provide for hearings where the presiding officer may be an administrative law judge or similar, and does contemplate enforcing civil penalties by filing civil actions.[6] The government has not described the contemplated civil or administrative proceedings nor any special statutory or regulatory discovery rules or

[6] *See* 31 U.S.C. § 3803(d)(2) (allowing the accused party to request a hearing before a "presiding officer"); *id.* § 3801(a)(7) (defining "presiding officer" as either an administrative law judge or an officer or employee selected and supervised under similar conditions); *id.* § 3806(b) (allowing the Attorney General to bring civil actions to enforce civil penalties).

safeguards that may apply but would be circumvented by allowing the requested disclosure of grand jury material.

In the end, the government has not carried its burden of satisfactorily showing that the requested disclosure meets the threshold prerequisite for application of the Rule 6(e)(3)(E)(i) exception that the grand jury material is to be used in connection with a "judicial proceeding," or "preliminarily to" such a qualified proceeding.

2. Particularized Need

Although Rule 6(e)(3)(E)(i) does not directly advise courts on how to evaluate disclosure requests, the Supreme Court has made clear that this exception "require[s] a strong showing of particularized need for grand jury materials before any disclosure will be permitted." *Sells Eng'g*, 463 U.S. at 442–43; *see also United States v. Baggot*, 463 U.S. 476, 479–80 (1983) (explaining that the "preliminarily to or in connection with a judicial proceeding" and the "particularized need" requirements "are independent prerequisites to [(E)(i)] disclosure"). As the government notes, judicial determinations in this regard are "infused with substantial discretion." Gov't's Mot. at 3 (quoting *Douglas Oil Co.*, 441 U.S. at 223). That "discretion," however, is not unbounded. Rather, in assessing the need for the disclosure, the relevant factors are whether the disclosure "is needed to avoid a possible injustice in another judicial proceeding," whether "the need for disclosure is greater than the need for continued secrecy," and whether the request is narrowly tailored to cover only necessary material. *Douglas Oil Co.*, 441 U.S. at 222; *see also Sells Eng'g*, 463 U.S. at 443 (invoking the *Douglas Oil* standard in a case involving subpoenaed documents). Necessity is the unifying theme of these factors.

Sells is an instructive benchmark for what qualifies as "need"—and a deeply problematic one for the government's instant grand jury disclosure request. In *Sells*, the Supreme Court

considered a request similar to the one pending here. There, the government sought to allow government attorneys within the Civil Division of the Department of Justice to use grand jury materials relating to dismissed indictments for fraud and tax evasion for the new purpose of pursuing civil litigation under the False Claims Act. *Sells Eng'g*, 463 U.S. at 421–22. The Court concluded that, without more, a bare assertion that "the grand jury materials sought are rationally related to the civil . . . suit" is insufficient for a showing of particularized need required to invoke the Rule 6(e)(3)(E)(i) exception (formerly Rule 6(e)(3)(C)(i)). *Id.* at 445–46.

Although the application of the "particularized need" standard was left for the district court to address on remand, the Court expressed serious concern about freely repurposing grand jury material for use by government attorneys working on civil matters, describing this type of practice as both "unjustified" and "threaten[ing] to do affirmative mischief." *Id.* at 431. The Court reached this topic in the context of discussing the separate but related question in the case: whether Rule 6(e)(3)(A)(i) allows *carte blanche* disclosure of grand jury materials to government *attorneys* other than criminal prosecutors. *See id.* at 427–31. After noting that prosecutors working with the grand jury have a practical need to know what takes place before the grand jury, the Court saw no corresponding "need" for civil attorneys. *Id.* at 431. On this point, the Court observed that "[t]he civil lawyer's need [for access] is ordinarily nothing more than a matter of saving time and expense," and cautioned that the Court had "consistently rejected the argument that such savings can justify a breach of grand jury secrecy." *Id.* While the savings of cost and time fall short of the "particularized need" requirement for a disclosure under Rule 6(e)(3)(E)(i), the Court acknowledged possible situations where disclosure could be genuinely necessary, such as when "ordinary discovery is insufficient for some reason," in which case "the Government may request disclosure under a[n (E)(i)] court order." *Id.*

In addition to rejecting the purported "need" for disclosures made strictly to help civil attorneys save time and money, the Court identified various policy concerns that further militate against permitting this type of disclosure, including, as discussed *supra* in Part I.B.1, concerns about "manipulat[ion]" of the grand jury for civil purposes and circumventing civil or administrative investigatory powers imposed by statute or regulation. 463 U.S. at 432–34.[7]

The government effectively concedes that its request is a time and cost saving measure, and nothing more. Indeed, the government "acknowledges that it could obtain the records and information in question by using administrative subpoenas," impeded only by the "duplication of efforts and the needless expenditure of time and money." Gov't's Mot. at 2. Disclosure may well be in the public interest for that reason, but the government's request nevertheless runs headlong into the Supreme Court's observations in *Sells*. Perhaps *Sells* can be distinguished for reasons not articulated in the government's motion—for example, if "ordinary discovery is insufficient" for certain materials due to loss or destruction—but, on the present record, no daylight between *Sells* and the instant request for disclosure of grand jury material has been presented.

Accordingly, the government may not rely on the exception in Rule 6(e)(3)(E)(i) for the requested disclosure of grand jury materials.

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The conclusion reached here may be viewed as counterintuitive and as producing inefficient and detrimental results for civil and administrative enforcement of federal law by federal agency personnel. As the government points out, absent the requested disclosure of the

[7] The Court also noted that the possible use of grand jury testimony in subsequent civil or administrative matters may dissuade some witnesses from testifying "fully and candidly." *Sells Eng'g*, 463 U.S. at 432. This concern does not apply here given that no testimony was presented to the grand jury. Gov't's Mot. at 1-2.

grand jury materials, the agency personnel seeking to pursue civil and administrative enforcement of federal law will likely need to issue administrative subpoenas for the same materials already in the possession of the Department of Justice Criminal Division attorneys, resulting in "a duplication of efforts and the needless expenditure of time and money." Gov't's Mot. at 2. This result burdens not only the government but also the private parties required to assemble, again, potentially voluminous document production in response to later administrative subpoenas. Barring access to the requested grand jury materials may thus impede the government's ability to pursue civil and administrative remedies, which could otherwise yield penalties benefitting the public fisc. *See* Gov't's Mot. at 4.

Nevertheless, under binding precedent, this Court has no latitude to stretch the list of enumerated Rule 6(e)(3) exceptions to allow other types of disclosures, no matter how useful they may be. In *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), the D.C. Circuit held that the Rule 6(e)(3) list is specific and exhaustive. *Id.* at 845. Allowing the district court to fashion additional, policy-based exceptions, the Court reasoned, "would render the detailed list of exceptions merely precatory and impermissibly enable the court to 'circumvent' or 'disregard' a Federal Rule of Criminal Procedure." *Id.* (citation omitted). As this Court has previously observed with respect to judicial discretion to grant or to prevent grand jury-related disclosures, *McKeever* has stripped the government of "operational flexibility." *In re Application of USA for an Order Pursuant to 28 U.S.C. § 1651(a) Precluding Notice of a Grand Jury Subpoena*, No. 19-wr-10 (BAH), 2019 WL 4619698, at *5 (D.D.C. Aug. 6, 2019) (holding that the logic of *McKeever* bars use of All Writs Act as authority to order recipient of grand jury subpoena not to disclose grand jury matter since such recipients are not enumerated in Rule 6(e)(2)(B)).

II. ORDER

For the foregoing reasons, it is hereby

ORDERED that the government's Motion to Allow Law Enforcement Agents to Use Grand Jury Material for a Civil Purpose, ECF No. 1, is **DENIED**, without prejudice; and it is further

ORDERED that the government shall submit, by August 12, 2021, any proposed redactions to portions of this Memorandum Opinion and Order that must remain sealed so that the remainder may be unsealed and made publicly accessible.

SO ORDERED.

Date: August 6, 2021

This is a final and appealable order.

Beryl A. Howell

BERYL A. HOWELL
Chief Judge