UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE APPLICATION OF USA FOR ORDER PURSUANT TO FED. R. CRIM. P. 6(e)(3)(E)(i) FOR LIMITED DISCLOSURE OF MATTER OCCURRING BEFORE A GRAND JURY	**NO. 22-GJ-37** **FILED UNDER SEAL**

SECOND APPLICATION FOR ORDER PURSUANT TO FED. R. CRIM. P. 6(e)(3)(E)(i) FOR DISCLOSURE OF MATTER OCCURRING BEFORE A GRAND JURY

This Court previously approved the disclosure of certain aspects of a grand jury investigation occurring in this district in connection with a judicial proceeding occurring in the Southern District of Florida, *Trump v. United States of America*, No. 9:22-cv-81294-AMC (the "SDFL Matter"). *See* Order, Dkt. No. 2 (Aug. 29, 2022) ("[T]he government is permitted to discuss, in its filings and at any hearing in [the SDFL Matter], the grand jury subpoena seeking documents bearing classification markings described in its application here, as well as any correspondence or communications directly flowing from that subpoena, including the attachments to the government's application, as well as the existence of the subpoena for video surveillance footage, both subpoenas having been disclosed publicly by the petitioner in the [SDFL Matter]."). This second application seeks the Court's authorization for the government to disclose these same facts—already publicly disclosed—in another pending judicial matter concerning the government's unsealing of portions of a sealed search warrant affidavit.

BACKGROUND

As the government explained in its first Application for Order Pursuant to Fed. R. Crim. P. 6(e)(3)(E)(i) (Dkt. No. 1) (the "First Application"), on August 5, 2022, a magistrate judge in the Southern District of Florida authorized a search and seizure warrant for classified and other

government documents at the Mar-a-Lago club in Palm Beach, Florida, a residence of the former President of the United States ("FPOTUS"). The search was executed on August 8, 2022. As detailed in the First Application, the affidavit establishing probable cause for the August 8 search relied, in part, on the grand jury material from an investigation opened by a federal grand jury sitting in this district. *See id.* at 5-6.

After the execution of the August 8 search was publicly disclosed by FPOTUS, *see* First Application at 6, the search received extensive public interest and attention. In consideration of the extraordinary public interest in the matter, and mindful of the qualified right of access of the press and public to criminal and judicial proceedings, *see, e.g., Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1245 (11th Cir. 2007), the government initially moved to unseal the search warrant itself (but not the affidavit establishing probable cause), as well as Attachments A and B to the search warrant and the property receipt provided to FPOTUS's representative at the time of the search, with minimal redactions for personal identifying information. *See In re Sealed Search Warrant*, No. 9:22-mj-08332-BER (S.D. Fla.) (the "Search Warrant Matter"), Dkt. No. 18.

Various media organizations, however, sought even broader access to various records related to the search warrant, including the affidavit establishing probable cause, and moved to intervene before the magistrate judge who issued the warrant in order to advocate for access to the entire sealed record. *See, e.g.,* Search Warrant Matter, Dkt. No. 22 at 2 (Motion of the Washington Post, CNN, NBC News, and Scripps to Intervene, for Access to All Search Warrant Records, and In Support of the United States' Partial Motion to Unseal). The government took the position that the affidavit should remain sealed in order to protect the integrity of its ongoing law enforcement investigation, and objected that any redactions necessary to mitigate harm to the investigation would be so extensive as to render the resulting redacted affidavit "devoid of meaningful content."

Search Warrant Matter, Dkt. No. 59 at 1 n.1 (Government's Omnibus Opposition to Motions to Unseal).

The court thereafter held a hearing on the then-pending motions to unseal, *see* Search Warrant Matter, Dkt. No. 73 (Minute Entry for Proceedings, August 18, 2022), and ultimately ordered the government to propose redactions to the search warrant affidavit so that some version of it could be released publicly, *see* Search Warrant Matter, Dkt. No. 74. As the court in that matter explained, the government could justifiably keep under seal "highly sensitive information about witnesses," "specific investigative techniques," and "information required to be kept under seal pursuant to Federal Rule of Criminal Procedure 6(e)," but concluded that the record did not justify keeping the entire affidavit sealed. Search Warrant Matter, Dkt. No. 80 at 9-10. The government thereafter proposed redactions to the affidavit and filed a legal memorandum justifying its proposal. *See* Search Warrant Matter, Dkt. No. 89 (later partially unsealed at Dkt. No 98). The court approved the government's proposed redactions, *see* Search Warrant Matter, Dkt. No. 94, and a redacted version of the probable cause affidavit was released on the public docket, *see* Search Warrant Matter, Dkt. No. 102-1.

Among the facts redacted from the public version of the affidavit in the Search Warrant Matter were matters occurring before a grand jury in this district, protected from disclosure by Federal Rule of Criminal Procedure 6(e). As the Court is aware from the government's First Application, however, FPOTUS voluntarily disclosed the existence of two subpoenas in the SDFL Matter in which he sought to, among other things, secure the appointment of a special master concerning privilege issues in relation to the materials seized during the August 8, 2022 execution of the search warrant at the Mar-a-Lago club. *See generally* SDFL Matter, Dkt. Nos. 1 & 28. In its Order granting the First Application, this Court authorized the government to disclose the grand

jury matters occurring in this district that FPOTUS had already disclosed, as well as "correspondence and communications" flowing directly therefrom. Dkt. No. 2 at 2. Consistent with that order, the government thereafter disclosed certain facts related to the grand jury investigation in this district in its response and at the court hearing in the SDFL Matter. *See* SDFL Matter, Dkt. No. 48 (United States' Response to Motion for Judicial Oversight and Additional Relief).

ARGUMENT

In order to maintain large parts of the search warrant affidavit under seal in the Search Warrant Matter, the government was required to establish, among other things, a "sufficiently important interest in secrecy that outweighs the public's right of access." Search Warrant Matter, Dkt. No. 80 at 5. And as the magistrate judge explained in that matter, the "courts' concern for grand jury secrecy and for the grand jury's law enforcement function is generally greatest during the investigative phase of grand jury proceedings." *Id.* at 8 (citing *Blalock v. United States*, 844 F.2d 1546, 1550 n.5 (11th Cir. 1988)) (internal quotation marks and citation omitted).

At the time of those proceedings—and also when the search warrant affidavit was presented to the magistrate judge—the subpoenas discussed in the First Application here were not matters of public knowledge and the government believed that keeping them from being revealed would help maintain the integrity of its ongoing investigation. On that basis, the government sought to keep portions of the affidavit that referenced those subpoenas sealed, through redactions that the court in the Search Warrant Matter ultimately accepted. *See* Search Warrant Matter, Dkt. No. 94 at 1-2 (finding that the government's proposed redactions were "narrowly tailored to serve the Government's legitimate interest in the integrity of the ongoing investigation").

Now, however, as the government explained in the First Application before this Court, FPOTUS has disclosed the existence of a subpoena served on his post-presidential office for documents bearing classification markings, and a subpoena served on his business entity, the Trump Organization, for video surveillance footage from the Mar-a-Lago club. *See* First Application at 7-8. And, pursuant to this Court's authorization, the government acknowledged the existence of those subpoenas and disclosed certain additional details in its response in the SDFL Matter. *See* SDFL Matter, Dkt. No. 48 at 7-10.

Because the existence of those subpoenas and related facts—such as a document custodian's declaration, and the visit of FBI and DOJ personnel to the Mar-a-Lago club to pick up responsive documents—have now been disclosed, the government does not believe that it can any longer establish a "sufficiently important interest in secrecy" vis-à-vis the limited and discrete aspects of the grand jury investigation that have been publicly revealed. Thus, the government asks this court to extend its order on the First Application to cover not only the SDFL Matter, but also the Search Warrant Matter, which will allow the government to seek partial unsealing of aspects of the search warrant affidavit that it had left redacted.

As this Court has explained, disclosure under the Rule 6(e)(3)(E)(i) exception is proper when three requirements are satisfied: the party seeking disclosure must identify a relevant "judicial proceeding;" the party must establish that the requested disclosure is "in connection with" that proceeding; and the requesting party must show a "particularized need" for the grand jury material. *See In re Capitol Breach Grand Jury Investigations*, 339 F.R.D. 1, 23 (D.D.C. 2021) (internal citations omitted). As set forth above, the Search Warrant Matter is the "judicial proceeding" in which the government intends to further disclose the grand jury materials at issue,

and the government will do so by identifying redacted portions of the search warrant affidavit for which secrecy is no longer justified.

Next, to establish "particularized need," a party must show that "(1) the requested materials are 'needed to avoid a possible injustice in another judicial proceeding;' (2) the need for disclosure is greater than the need for continued secrecy; and (3) the request is structured to cover only material so needed." *Id*. at 24 (quoting *In re Sealed Case*, 801 F.2d 1379, 1381 (D.C. Cir. 1986)). Determinations of "particularized need" are committed to the discretion of the district court. *See Douglas Oil v. Petrol Stops Nw.*, 441 U.S. 211, 228 (1979). As the Supreme Court has explained, moreover, a district court exercising its discretion in deciding whether to authorize disclosure under Rule 6(e)(3)(E)(i) should engage in a balancing exercise, bearing in mind that "as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury [material] will have a lesser burden." *Id.* at 223.[1]

Here, there is no remaining secrecy consideration whatsoever, given that the material has already been disclosed in the SDFL Matter. And because the government asks the Court to extend its prior order to cover the Search Warrant Matter as well as the SDFL Matter, the scope of what this Court will be allowing to be disclosed will be no broader than has already occurred. The second and third "particularized need" factors are therefore met. As for the need to avoid a possible injustice, this Court has previously explained that a "paradigmatic" showing of "particularized need" occurs where disclosure of grand jury information is necessary to avoid misleading a trier of fact. *See In re App. of Comm. on Judiciary, U.S. House of Representatives, for an Order*

[1] The D.C. Circuit and the Supreme Court have explained that the interests motivating grand jury secrecy consist of "(1) preserving the willingness and candor of witnesses called before the grand jury; (2) not alerting the target of an investigation who might otherwise flee or interfere with the grand jury; and (3) preserving the rights of a suspect who might later be exonerated." *McKeever v. Barr*, 920 F.3d 842, 844 (D.C. Cir. 2019) (citing *Douglas Oil*, 441 U.S. at 219).

Authorizing the Release of Certain Grand Jury Materials, 414 F. Supp. 3d 129, 177-78 (D.D.C. 2019) (vacated as moot by *Department of Justice v. House Comm. on the Judiciary*, 142 S.Ct. 46 (2021)). In the Search Warrant Matter, the magistrate judge made a number of findings of fact in his order permitting the government to keep grand jury information sealed, ultimately concluding that the secrecy of the government's investigation warranted continued sealing of various aspects of grand jury material. *See* Search Warrant Matter, Dkt. No. 80 at 6. But because that secrecy no longer exists with respect to the limited and discrete aspects of the grand jury investigation permitted to be disclosed in the Court's order on the First Application, to permit the government to disclose the same grand jury material to the magistrate judge in the Search Warrant Matter will ensure that the magistrate judge is not misled as to what facts do and do not merit continued secrecy.

In short, the government relied on the then-secret facts of both the May 11, 2022 subpoena to the Office of Donald J. Trump for documents bearing classification markings and the June 24, 2022 subpoena to the Trump Organization for certain surveillance video footage in advocating for the continued sealing of the affidavit in the Search Warrant Matter. Because the existence of those subpoenas was disclosed in the SDFL Matter, and because this Court permitted the government to discuss them in its own filings in the SDFL Matter, that secrecy no longer exists. And because that secrecy no longer exists, the government seeks this Court's approval to further disclose the subpoenas in the Search Warrant Matter, so that the affidavit supporting the search warrant can be further unsealed.[2] *Accord In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154 (D.C. Cir.

[2] To be clear, the government will only seek further unsealing—*i.e.* un-redaction—to the extent set forth in this Court's Order on the First Application. Various other aspects of the government's grand jury investigation have not become public and should remain subject to the secrecy provisions of Rule 6(e).

2007) ("Rule 6(e)(6) requires that '[r]ecords, orders, and subpoenas relating to grand-jury proceedings' remain sealed only 'to the extent and as long as necessary to prevent the unauthorized disclosure' of such matters.") (quoting *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006)).

Because the government seeks disclosure of a grand jury matter, it requests that this matter be kept under seal pursuant to Fed. R. Crim. P. 6(e)(6) unless and until the Court grants the government's motion for disclosure. Should the Court grant the motion for disclosure, the government does not object to the unsealing of this memorandum.

CONCLUSION

For the foregoing reasons, the Court should grant the government's application for disclosure of a matter occurring before a grand jury by permitting the government to disclose, in the Search Warrant Matter, the existence of the May 11, 2022 subpoena, the response thereto, and the course of correspondence and in-person consultation stemming from it, as well as the existence of the June 24, 2022 subpoena for video surveillance footage and the response thereto.

September 6, 2022

Respectfully submitted,

MATTHEW G. OLSEN
ASSISTANT ATTORNEY GENERAL
NATIONAL SECURITY DIVISION

/s/_____
Jay I. Bratt
Julie A. Edelstein
Brett C. Reynolds
Counterintelligence and Export Control Section
National Security Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(202) 233-0986

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[PROPOSED] ORDER

Before the Court is the second application of the United States of America seeking the Court's authorization to disclose certain grand jury material "in connection with a judicial proceeding" pursuant to Fed. R. Crim. P. 6(e)(3)(E)(i). Specifically, the government seeks to disclose the existence of grand jury subpoenas out of this district issued to (1) the Custodian of Records for the Office of Donald J. Trump on May 11, 2022, and (2) the Trump Organization on June 24, 2022, in connection with *In re Sealed Search Warrant,* No. 9:22-cv-08332-BER, in the Southern District of Florida. The Court finds as follows:

(1) As contemplated by Fed. R. Crim. P. 6(e)(3)(F), because the government is the petitioner, this Court may proceed *ex parte*;

(2) Pursuant to Fed. R. Crim. P. 6(e)(3)(G), because this Court is able to reasonably determine whether disclosure is proper, it does not need to transfer the government's application to the Southern District of Florida, where the relevant "judicial proceeding" is pending;

(3) The government has established that a "judicial proceeding" is pending, that it seeks disclosure of a matter occurring before a grand jury "in connection with" that proceeding, and that it has a "particularized need" for the grand jury material, *see In re Capitol Breach Grand Jury Investigations*, 339 F.R.D. 1, 23 (D.D.C. 2021), insofar as it previously represented to the court in *In re Sealed Search Warrant* that grand jury secrecy concerns—some of which no longer obtain because the recipient of one of the grand jury subpoenas has already disclosed their existence and this Court previously authorized them to be disclosed in *Trump v. United States*, No. 9:22-cv-81294-AMC (S.D. Fla.)—justified the continued sealing of an affidavit in support of a search warrant, and now seeks to provide that court with updated accurate information about the secrecy of the grand jury materials at issue;

In light of those findings, and having reviewed the government's applications and the attachments thereto, the Court hereby ORDERS that the government is authorized pursuant to Fed. R. Crim. P. 6(e)(3)(E)(i) to make the limited disclosure of a grand jury material set forth in its application. In particular, the government is permitted to disclose, in its filings and in any further unsealings to previously-sealed or previously-redacted filings in *In re Sealed Search Warrant,* No. 9:22-cv-08332-BER (S.D. Fla.), the grand jury subpoenas seeking (1) documents bearing classification markings and (2) video surveillance footage, both described in its second application here, as well as any correspondence or communications directly flowing from them, both having been disclosed publicly by the petitioner in *Trump v. United States* and having been previously authorized by this Court to be disclosed in the government's pleadings and at any argument in that matter. *See* Dkt. No. 2 (Aug. 29, 2022).

It is further ORDERED that the government's second application is hereby unsealed.

DONE AND ORDERED in Washington, D.C., this __ day of September, 2022.

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HON. BERYL A. HOWELL
CHIEF UNITED STATES DISTRICT JUDGE