UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY SUBPOENA NO. 7409	Grand Jury Action No. 18-41 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM OPINION AND ORDER

On July 11, 2018, in connection with the Special Counsel's Office's investigation into foreign interference with the 2016 presidential election, a federal grand jury sitting in the District of Columbia issued a subpoena to a Corporation from Country A. *See* Mem. Op. (Sept. 19, 2018) at 11, ECF No. 42.[1] After a month of negotiations between the Corporation's counsel and the Special Counsel's Office, *id.* at 2–5, the Corporation moved to quash that subpoena, Corp.'s Mot. Quash, ECF No. 3.[2] That motion initiated this matter.

The Corporation's motion to quash has travelled through all three levels of the federal judiciary. First, on September 19, 2018, this Court denied the motion and ordered the Corporation to produce the subpoenaed records by October 1, 2018. *See generally* Mem. Op. (Sept. 19, 2018). That production did not happen. Consequently, on October 4, 2018, the government moved to hold the Corporation in contempt. *See* Gov't's Mot. Contempt, ECF No. 27. After an October 5, 2018 hearing, the government's motion to hold the Corporation in contempt was granted and, to coerce the Corporation's compliance with the Court's order, the

[1] On February 28, 2019, the September 19, 2018 Memorandum Opinion, and five other Orders or Memorandum Opinions, were partially unsealed and posted to this Court's website. Those Orders and Memorandum Opinions are available at https://www.dcd.uscourts.gov/sites/dcd/files/FINAL_18gj41_In_re_GJ_Subp_Notice_of_Opinions.pdf.

[2] On January 31, 2019, a redacted version of the docket sheet in this matter was posted to this Court's website. That docket sheet is available at https://www.dcd.uscourts.gov/sites/dcd/files/FINAL_18gj41_PublicDocket_20190131.pdf.

Corporation was assessed a daily $50,000 fine until the Corporation fully complied. *See* Order (Oct. 5, 2018), ECF No. 30. Next, on December 18, 2018, the D.C. Circuit, in a brief opinion, affirmed this Court's decision, *see In re Grand Jury Subpoena*, 749 F. App'x 1 (D.C. Cir. 2018), with a second opinion following, on January 8, 2019, that explained more fully the basis of that Court's decision, *see In re Grand Jury Subpoena*, 912 F.3d 623 (D.C. Cir. 2019). Between the D.C. Circuit's two opinions, the Supreme Court stayed the Corporation's accrual of contempt sanctions, *see* Order, *In re Grand Jury Subpoena*, No. 18A669 (U.S. Dec. 23, 2018), but that stay eventually was lifted, and the Corporation's contempt fines resumed, *see* Order, *In re Grand Jury Subpoena*, No. 18A669 (U.S. Jan. 8, 2019). Separately, the Corporation asked the Supreme Court to review the D.C. Circuit's decision to affirm this Court's order holding the Corporation in contempt. *See* Petition for a Writ of Certiorari, *In re Grand Jury*, No. 18-948 (U.S. Jan. 7, 2019). The Supreme Court, however, declined. *See* Denial of Petition for a Writ of Certiorari, *In re Grand Jury*, No. 18-948 (U.S. Mar. 25, 2019). Consequently, the Corporation has no argument left to make against its duty to comply with the grand jury subpoena.

Given that this case is about a grand jury subpoena, these proceedings have largely been conducted under seal. Nevertheless, through the release of redacted opinions from this Court and the D.C. Circuit, and public versions of briefs filed in conjunction with the Corporation's petition for a writ of certiorari, some of the relevant facts and legal issues have filtered into the public domain. To bring what remains under seal to light, the Reporters Committee for Freedom of the Press ("Reporters Committee") moved, on February 26, 2019, to unseal, at least in redacted form, several types of records and information in this matter, including briefs, transcripts, orders, and the Corporation's identity. *See* Mov.'s Mot. Unseal ("Mov.'s Mot."), ECF No. 94. On

March 27, 2019, the Court held a public hearing on the Reporters Committee's motion. For the following reasons, that motion is granted in part and denied in part.

I. APPLICABLE LEGAL STANDARDS

"Unlike an ordinary judicial inquiry, where publicity is the rule, grand jury proceedings are secret." *Levine v. United States*, 362 U.S. 610, 617 (1960); *see also* LCrR 6.1 ("A motion or application filed in connection with a grand jury subpoena or other matter occurring before a grand jury, all other papers filed in support of or in opposition to such a motion or application, and all orders entered by the Court in connection therewith, shall be filed under seal."). Secrecy is an indispensable element of a properly functioning grand jury for several reasons. *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979). "First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony." *Id.* at 219. Second, "witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements." *Id.* Third, publicity introduces "the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment." *Id.* Finally, secrecy "assure[s] that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Id.*

Federal Rule of Criminal Procedure 6(e) embodies the expectation of grand jury secrecy. *See In re Motions of Dow Jones & Co.* ("*Dow Jones*"), 142 F.3d 496, 499–500 (D.C. Cir. 1998). Under that rule, nearly all participants with knowledge of "a matter occurring before the grand jury" are prohibited from disclosing that knowledge. FED. R. CRIM. P. 6(e)(2)(B) (imposing duty of nondisclosure on, *inter alia*, grand jurors, interpreters, court reporters, and government attorneys). Additionally, judicial proceedings ancillary to a grand jury proceeding, which may

include a motion "to quash a subpoena, or to compel testimony, or to immunize a witness," *Dow Jones*, 142 F.3d at 502, as well as the attendant records, shall be shielded from the public to the extent necessary to prevent disclosure of matters occurring before a grand jury, FED. R. CRIM. P. 6(e)(5), (6); *see also* LCrR 6.1.

The default cloak of secrecy that applies to grand jury matters may be lifted by the Court, either *sua sponte* or on the motion of any person, to make public "[p]apers, orders and transcripts of hearings" related to a grand jury subpoena "upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." LCrR 6.1; *see also In re Sealed Case*, 199 F.3d 522, 523 (D.C. Cir. 2000) ("Reasonably construed, Rule 6.1 says that, with respect to grand jury ancillary proceedings, when a party makes a request for a redacted docket in a specific case, the District Court will duly consider the request and will, if it denies the request, offer some explanation."). This Court's Local Criminal Rule 6.1 rule may be implemented by releasing redacted documents. *Dow Jones*, 142 F.3d at 500–01.

II. DISCUSSION

Consistent with Local Criminal Rule 6.1, the Reporters Committee has asked for the release of "redacted versions of the briefs, record, transcripts and orders in this action," as well as the identity of the Corporation. *See* Mov.'s Mot. at 1. Only parts of the Reporters Committee's motion to unseal are contested. In fact, the request to unseal orders is moot. On January 31, 2019, several weeks before the filing of the Reporters Committee's motion, the Court *sua sponte* released to the public a redacted version of the docket in this matter and also directed the parties to confer about proposed redactions for public release of the six Orders and Memorandum Opinions issued in this matter. *See supra*, n.2; Min. Order (Jan. 31, 2019). Then, on February 28, 2019, the Court *sua sponte* released redacted versions of the six Orders and

Memorandum Opinions issued in this matter. *See supra*, n.1.[3] Thus, the only issues remaining are whether to release redacted versions of the briefs and transcripts in this matter and, if so, whether public versions of those documents should identify the Corporation.

A. Releasing Briefs and Transcripts

Although the government initially opposed the Reporters Committee's motion in full, *see generally* Gov't's Opp'n Mot. Unseal ("Gov't's Opp'n"), ECF No. 104, the government clarified at the March 27, 2019 hearing that the government "understand[s] the mandate of Rule 6.1" and "the mandate of *Dow Jones*" and is "perfectly willing to work within the confines of both those constructs" to prepare redacted versions of the briefs and transcripts for public release, Mar. 27, 2019 Tr. at 18:16–21, ECF No. 113. The Corporation, for its part, does not object to the release of properly redacted versions of records in this matter. *See* Corp.'s Response to Mot. Unseal, ECF No. 103; Mar. 27, 2019 Tr. at 6:9–10 (agreeing to participate in redacting any briefs and transcripts that the Court orders to be released).

Thus, under Rule 6.1, versions of the briefs and transcripts in this matter shall be made public. The grand jury investigation to which the underlying subpoena relates, however, is ongoing, *see* Mar. 27, 2019 Tr. at 17:8–9 (responding to Court's query, the government attorney stated that the grand jury investigation is "continuing robustly"). Redactions must thus be applied to maintain the secrecy of all matters occurring before a grand jury. *See Dow Jones*, 142 F.3d at 499–501. Ultimately, then, redacted versions of the requested briefs and transcripts

[3] In brief, those Orders and Memorandum Opinions are: (1) the September 19, 2018 Memorandum Opinion denying the Corporation's motion to quash, ECF No. 42; (2) the October 5, 2019 Memorandum and Order holding the Corporation in contempt, ECF No. 30; (3) the January 10, 2019 Memorandum and Order denying the Corporation's motion to stay accrual of contempt fines, ECF No. 48; (4) the January 15, 2019 Memorandum and Order denying the Corporation's counsel's request to make a limited public statement, setting a briefing schedule, clarifying the date for accrual of contempt fines, and denying the Corporation's second request for a stay of contempt fines, ECF No. 57; (5) the January 24, 2019 Memorandum Opinion denying the Corporation's motion to declare the October 5, 2018 contempt Order unenforceable, ECF No. 65; and (6) the January 30, 2019 Memorandum and Order resolving disputes about the unsealing of Orders in this matter, ECF No. 72.

might produce little material for public consumption because, in contrast to appellate review of grand jury matters, "[i]n the district court, ancillary proceedings generally proceed at a more rapid pace, the proceedings typically are not as structured, issues are not always as highly refined, witnesses may be present, and written presentations may be abbreviated." *Id.* at 502. Consequently, matters occurring before the grand jury often are "woven tightly into the ancillary proceeding[s]" such that selected redactions might not be possible. *Id.* at 505. The parties shall do their best to identify material that may be released without compromising matters occurring before the grand jury. Maintaining grand jury, however, secrecy is paramount.

While the government now agrees that Local Criminal Rule 6.1 calls for the release of redacted briefs and transcripts in this matter, before the government conceded as much, the Reporters Committee had argued, in the alternative, that the First Amendment and common law create "a right of public access [that] applies to the contempt proceedings at issue in this case." Mov.'s Mem. P. & A. Supp. Mov.'s Mot. Unseal ("Mov.'s Mem.") at 9, ECF No. 94-1.[4] That First Amendment right, the Reporters Committee continued, creates a presumption of access to contempt records, subject to the government's showing that "closure 'is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.'" *Id.* at 14 (quoting *Press-Enter. Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 510 (1984)). In the Reporters Committee's view, no compelling government interest could justify wholesale sealing of the contempt records given that both this Court and the D.C. Circuit have released public opinions related to this matter, and the Supreme Court made public versions of the briefs related to the Corporation's petition for a writ of certiorari. *Id.* at 15.

[4] The public's right of access to records of proceedings ancillary to a grand jury should not be confused with the Court's inherent authority to release such records. Whether the Court has such inherent authority is an issue currently pending before the D.C. Circuit. *See McKeever v. Barr*, No. 17-5149 (D.C. Cir. Filed June 26, 2017).

The Reporters Committee conceded during the March 27, 2019 hearing that the release of records consistent with Local Criminal Rule 6.1 obviates the need to consider what right of access the First Amendment provides to the same records. Mar. 27, 2019 Tr. at 7:6–13. Still, aspects of the Reporters Committee's assertion about the First Amendment and common law right of access to contempt proceedings merit brief discussion.

Whether the public holds a First Amendment right of access to criminal proceedings depends on "two complementary considerations": experience and logic. *Press-Enter. Co. v. Superior Court of Cal. for Riverside Cty.* ("*Press-Enter. II*"), 478 U.S. 1, 8–9 (1986). The Supreme Court instructed that, as to the experience consideration, the First Amendment is more likely to preserve access to "place[s] and process[es that] have historically been open to the press and general public," and the logic consideration may be satisfied when "public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8. "If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches." *Id.* at 9.

Binding D.C. Circuit law already makes clear that no First Amendment or common law right of access attaches to grand jury ancillary proceedings. *In re Sealed Case*, 199 F.3d at 523; *Dow Jones*, 142 F.3d at 502–04. Nevertheless, contempt proceedings, the Reporters Committee urges, should be treated differently. According to the Reporters Committee, "[t]here is . . . a long history of requiring that contempt proceedings be public to check a court's power, which the Supreme Court has recognized can potentially be 'arbitrary in its nature and liable to abuse.'" *Id.* at 10 (quoting *Levine* 362 U.S. at 615). Thus, the Reporters Committee argues, experience dictates a right of access. Yet, to the extent that contempt proceedings historically have been public, the purpose of that publicity is not to preserve the public's First Amendment rights.

Rather, the Supreme Court has explained the necessity of opening contempt proceedings as preservative of contemnors' due process rights. *Levine*, 362 U.S. at 616. "Contempt power . . . uniquely is 'liable to abuse'" because "civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994) (quoting *Bloom v. Illinois*, 391 U.S. 192, 202 (1968)). Due process, which instantiates, among other principles, that "justice must satisfy the appearance of justice," is the counterweight to the possibility of abuse and ensures that justice is done for the contemnor by "demand[ing] appropriate regard for the requirements of a public proceeding." *Levine*, 362 U.S. at 616. Given that the openness of contempt proceedings protects the contemnor's rights and not the public's, the Supreme Court has held that closed contempt proceedings do not visit any constitutional harm upon a contemnor who, like the Corporation here, never requests an open hearing, nor does the due process right apply to any portion of a contempt proceeding that reveals matters occurring before the grand jury, such as the questions the grand jury may pose to the contemnor. *Id.* at 617–18. Sure enough, the Ninth Circuit, in an opinion relied upon by the Reporters Committee, concluded when considering precedent for the public's right of access to transcripts of closed contempt proceedings, that "there is no hard-and-fast tradition that contempt hearings held ancillary to a grand jury investigation must be public." *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1089 (9th Cir. 2014).

With respect to the logic of opening grand jury contempt proceedings, many contempt proceedings "will likely involve some disclosure of information traditionally cloaked by Rule 6(e)." *Id.* at 1090; *see also Dow Jones*, 142 F.3d at 502, 505. For that reason, consistent with the D.C. Circuit's ruling in *Dow Jones*, the Ninth Circuit has held, "there is no First Amendment

public right of access to those portions of the transcript of [a] contempt hearing that contain[s] grand jury testimony or information regarding the grand jury investigation, *i.e.*, the closed portion of the hearing." *Index Newspapers*, 766 F.3d at 1090. The rationale for grand jury secrecy also answers why neither the First Amendment nor the common law provides the public with a "right of access to a motion to hold a grand jury witness in contempt while the grand jury investigation is ongoing." *Id.* at 1093. Conversely, orders holding a witness in contempt, "at least when the grand jury witness does not object and the court determines that the grand jury investigation will not be compromised," may be subject to a First Amendment right of access because "[p]ublic access to this part of the record provides a check on the process by ensuring that the public may discover when a witness has been held in contempt and held in custody." *Id.* Here, that order already has been released. *See supra*, n.2.

Nor do the federal or local procedural rules suggest any independent right of access to contempt proceedings. Under the Federal Rules of Criminal Procedure, contempt proceedings are closed "[s]ubject to any right to an open hearing," FED. R. CRIM. P. 6(e)(5), thereby accommodating whatever First Amendment, Fifth Amendment, or Sixth Amendment rights are "deemed applicable in that context because of the proceedings' similarities to a criminal trial," *see* FED. R. CRIM. P 6(e)(5) advisory committee's note to 1983 amendment. Accordingly, rules-based access is coterminous with rights-based access, the latter of which, in this context, does not exist. As for the local rules of this Court, the contemnor may request a public hearing. LCrR 6.1. That rule is consistent with the Supreme Court's recognition of a contemnor's right to a public hearing, at least for the contemnor's "act of contempt, that is, his definitive refusal to comply with the court's direction" and for "the consequent adjudication and sentence." *Levine*,

362 U.S. at 618. Here, the Corporation made no request for a public hearing when held in contempt. *See* Mar. 27, 2019 Tr. at 5:10–17.

Importantly, the government clarified at the March 27, 2019 hearing that the underlying grand jury investigation is ongoing. Mar. 27, 2019 Tr. at 17:6–9. As the Reporters Committee conceded, the need for secrecy is heightened during an ongoing investigation and warrants redactions to preserve grand jury secrecy. *Id.* at 11:22–12:9, 15:11–23.

At bottom, Local Criminal Rule 6.1 provides the Reporters Committee with access to the briefs and transcripts, with any matters occurring before the grand jury redacted. The First Amendment and common law do not.

B. Redacting the Corporation's Identity

Moving to what redactions will, or will not, be applied to the records released consistent with Local Criminal Rule 6.1, the Reporters Committee specifically asks "that the Court direct that the public versions of filings identify the contemnor in this proceeding." Mov.'s Mot at 1. According to the Reporters Committee, that request finds support in "Local Criminal Rule 6.1, the First Amendment, and common law." Mov.'s Mem. at 16. That is incorrect.

The D.C. Circuit already has closed the door on the Reporters Committee's claim of entitlement to the Corporation's identity. Indeed, "[t]he press is not entitled, by the Constitution or by rule, to information about 'matters occurring before the grand jury'" even if such matters arise in the course of ancillary judicial proceedings. *Dow Jones*, 142 F.3d at 500. Nor does the common law provide a right of access to records of judicial proceedings ancillary to a grand jury subpoena because, for the public's right of access, "the common law has been supplanted by Rule 6(e)(5) and Rule 6(e)(6) of the Federal Rules of Criminal Procedure." *Id.* at 504. Critically, matters occurring before the grand jury encompass the identities of grand jury

witnesses. *Id.* at 499–500. Thus, the Reporters Committee has no Constitutional, common law, or rules-based claim of entitlement to the Corporation's identity, and certainly not while the grand jury investigation persists.

Of course, as the Reporters Committee underscores, "Rule 6(e) contemplates that a witness itself is not prohibited from revealing its own participation in a grand jury proceeding." Mov.'s Mem. at 16. The Corporation, however, has not chosen to identify itself publicly and "prefer[s] not to have its identity disclosed to the public." Tr. Mar. 27, 2019 at 5:23–25.

At this time, the Court will not direct that the public records identify the contemnor.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that the Reporters Committee's Motion to Unseal, ECF No. 94, is GRANTED in part and DENIED in part; and it is further

ORDERED that the government and the Corporation file, by May 1, 2019, a joint status report, under seal, advising the Court which of the following records may be unsealed with redactions, and proposing redactions to be made prior to any unsealing:

1) Briefs and transcripts regarding the Corporation's motion to quash, docketed at ECF numbers 3, 4, 5, 8, 9, 12, and 16;
2) Briefs and transcripts regarding the government's motion to hold the Corporation in contempt, docketed at ECF numbers 27, 28, 29, and 38;
3) Briefs and transcripts about the accrual, and enforceability, of contempt fines, docketed at ECF numbers 45, 51, 52, 53, 55, 56, 58, 59, 78, 79, 80, 81, 82, 84, 87, 92, 102, 106, 109; and

4) Briefs about the public release of Orders and Memorandum Opinions, docketed at ECF numbers 66, 67, 68, 69, 70, 71, 73, 74, 94, 103, 104, 108.

SO ORDERED.

DATE: April 1, 2019

Beryl A. Howell
Chief Judge