

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

CHAKA FATTAH, SR., et al.

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CRIMINAL NO. 2:15-cr-346

**DEFENDANT CHAKA FATTAH SR.’S MOTION FOR A SHOW CAUSE HEARING
PURSUANT TO RULE 6(e) AND DISCLOSURE OF GRAND JURY
COMMUNICATIONS**

Defendant Chaka Fattah, Sr., by and through the undersigned counsel, hereby moves this Court to enter an Order directing the Government to show cause why an order of contempt should not be entered against FBI Special Agent Richard Haag for revealing matters before the grand jury. Additionally, because it is essential to determine if any additional matters have been revealed, Defendant Fattah seeks an Order directing the Government to produce all communications occurring between prosecutors and grand jurors in each grand jury convened in connection with this criminal matter.

WHEREFORE, for the reasons stated herein and in the accompanying Memorandum of Law, Defendant Fattah respectfully asks that his Motion be granted.

Respectfully Submitted,

ROSS LEGAL PRACTICE, LLC

BY: /s/ Riley H. Ross III
Riley H. Ross III, Esq.
Two Penn Center
1500 JFK Blvd., Suite 1525
Philadelphia, PA 19102
(215) 587-7177 (office)
(215) 703-8480 (cell)
(215) 587-0628 (fax)
rileyross@rosslegalpractice.com

Date: January 15, 2016

MINCEY & FITZPATRICK, LLC

BY: /s/ Kevin V. Mincey, Esq.
Kevin V. Mincey, Esq.
Thomas O. Fitzpatrick, Esq.
Shabrei M. Parker, Esq.
Two Penn Center
1500 JFK Blvd., Suite 1525
Philadelphia, PA 19102
(215) 587-0006 (office)
(215) 587-0628 (fax)
kevin@minceyandfitz.com

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**DEFENDANT CHAKA FATTAH SR.’S MEMORANDUM OF LAW IN SUPPORT OF
HIS MOTION FOR A SHOW CAUSE HEARING PURSUANT TO RULE 6(e) AND
DISCLOSURE OF GRAND JURY COMMUNICATIONS**

Defendant Chaka Fattah, Sr., by and through the undersigned counsel, hereby files the instant Memorandum of Law in support of his Motion for a Show Cause Hearing Pursuant to Rule 6(e) and Disclosure of Grand Jury Communications.

I. FACTUAL BACKGROUND

On September 28, 2015, during the criminal trial of *United States v. Chaka Fattah, Jr.*, Crim. No. 2:14-CR-00409 (E.D. Pa), Agent Richard Haag admitted on the stand that he had tipped off Philadelphia Inquirer Reporter Martha Woodall that agents would be executing a search warrant at the residence of the Chaka Fattah, Jr. Because Agent Haag revealed significant grand jury information in violation of Rule 6(e) of the Federal Rules of Criminal Procedure, and because the information revealed included grand jury information about Defendant Fattah, Defendant Fattah now seeks a show cause hearing to remedy the grand jury secrecy violation. Defendant Fattah also seeks the disclosure of grand jury communications to determine if any other violations have occurred.

II. ARGUMENT

A. Defendant Fattah Is Entitled To A Show Cause Hearing

Rule 6(e) of the Federal Rules of Criminal Procedure sets forth the general rule of grand jury secrecy by prohibiting grand jurors, interpreters, court reporters, government attorneys and others from disclosing “a matter occurring before the grand jury.” When a party alleges a violation of Rule 6(e), the court must determine if the moving party has set forth a *prima facie* case of such a violation. *See, e.g. In re Sealed Case, No. 98-3077*, 151 F.3d 1059, 1067-69 (D.C. Cir. 1998); *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 214-20 (5th Cir. 1980). To determine if a *prima facie* showing has been made, courts consider a number of factors, including, (1) whether it appears the disclosure was made by someone subject to Rule 6(e)(2); (2) whether relief will interfere with the grand jury proceeding; (3) whether the government has sufficiently rebutted any showing; and (4) whether the disclosure involved matters occurring before the grand jury. *See Lance*, 610 F.2d at 216.

If a *prima facie* showing of a Rule 6(e) violation is made, “the burden shifts to the government to ‘attempt to explain its actions’ in a show cause hearing.” *In re Sealed Case No. 98-3077*, 151 F.3d at 1068 (quoting *Barry v. United States*, 865 F.2d 1317, 1325 (D.C. Cir. 1989)). If the Government fails to explain its actions, the Court may punish the Rule 6(e) violation as a contempt of court. Fed. R. Crim. P. 6(e)(7). Because Defendant Fattah can establish a *prima facie* showing of a Rule 6(e) violation, a show cause hearing should be set to determine if a violation has occurred.

Regarding the factors to be weighed when determining whether a *prima facie* showing has been made, it is clear that Agent Haag is subject to Rule 6(e)(2) via Rule 6(e)(2)(B)(vii). As one of the government agents on this case, Agent Haag is “government personnel” that the

prosecutors in this matter consider necessary to assist in performing their duty. *See* Rule 6(e)(3)(A)(ii). Indeed, in the *U.S. v Chaka Fattah, Jr.* matter, this Court held that “a government agent such as Agent Haag ‘must not disclose a matter occurring before the grand jury’ without the court’s authorization pursuant to the circumstances listed in the Rule.” *Bartle Mem. Op.* (Doc. No. 228) at 4-5 (citing Fed. R. Crim. P. 6(e)).

Second, the relief requested (a show cause hearing on why an order of contempt should not be entered) will not interfere with the grand jury proceedings as those proceedings have ended. However, even if grand jury proceedings were active at this time, the relief requested would not threaten the proceedings:

A prima facie case to secure a hearing on whether to impose contempt sanctions . . . does not require as strong a showing. Such a hearing carries little threat of conflict with the grand jury proceedings. Punishment for contempt of court is the sanction specifically authorized by Rule 6(e)(1) for violations of its provisions, and a contempt citation will generally provide an adequate remedy for such violation.

Lance, 610 F.2d at 219.

Next, the Government has not had an occasion to rebut the assertions made against Agent Haag in this matter. Additionally, the Court docket in the *U.S. v. Fattah, Jr.* matter reveals that the Government did not offer a rebuttal to defendant Chaka Fattah, Jr.’s Motion for a Hearing before the Court issued its Memorandum Opinion.

The only factor that would seem to garner a dispute from the Government is whether Agent Haag leaked information that constitutes “matters occurring before the grand jury” or if he simply revealed information relating to his own investigation. However, a detailed review of relevant case law and of the information leaked reveals that Agent Haag did in fact reveal matters occurring before the grand jury.

1) Case Law Establishing Investigations as Matters Before the Grand Jury

The secrecy requirement of Rule 6(e) stretches beyond the disclosure of information drawn from the testimony of witnesses who appear before the grand jury and extends to “anything which may tend to reveal what transpired before the grand jury.” *Lance*, 610 F.2d at 216 (quotations and citations omitted). *See also In re Grand Jury Matter (Catania)*, 682 F.2d 61, 63 (3rd Cir. 1982) (“Both the direct and indirect disclosure of information are proscribed.”). The secrecy provisions also extend to the disclosure of events which will occur in the future. *See Lance*, 610 F.2d at 217 n.4 (noting that news articles “disclose information about the grand jury inquiry by foretelling its future course of conduct.”).

“Matters occurring before the grand jury” also include investigations conducted by government agents like Agent Haag. For example, “information obtained by a government official who, in pursuing an investigation that is not truly independent of the grand jury’s inquiry, has become an agent of the grand jury.” *U.S. v. Flemmi*, 233 F. Supp.2d 113, 115 (D. Mass. 2000) (citing *In re Grand Jury Subpoena*, 920 F.2d 235, 241-43 (4th Cir. 1990) and *In re Grand Jury Subpoena; John Doe No. 4*, 103 F.3d 234, 238-39 (2d Cir. 1996).

The Third Circuit has held that an investigation must be parallel and truly independent of grand jury proceedings to prevent the information produced by the investigation from being designated as “matters occurring before the grand jury.” In *In re Grand Jury Matter (Catania)*, 682 F.2d 61 (3rd Cir. 1982), the United States Attorney’s Office for the Eastern District of Pennsylvania and the Federal Bureau of Investigation (“FBI”) conducted an investigation into possible voter fraud. The inquiry produced no federal prosecutions and the Delaware County District Attorney’s Office sought to obtain matters placed before the grand jury for its own

investigation. Before ruling on the request, the District Court was made aware that materials developed during the Government's investigation had already been disclosed to the District Attorney. The District Court held that those specific materials were not matters occurring before the grand jury and the Third Circuit affirmed this ruling. In doing so, the Court noted that the information at issue consisted of materials obtained during the course of a prior FBI investigation that yielded documents obtained without a grand jury subpoena. The Court agreed with the District Court's finding that "these materials were the product of an FBI investigation, were not generated by the grand jury, and were not requested or subpoenaed by the grand jury." *Id.* at 64.

2) Agent Haag's Communications with Inquirer Reporter Martha Woodall

On October 28 and 29, 2015, Agent Haag testified in the *U.S. v. Chaka Fattah, Jr.* matter about his communications with Reporter Martha Woodall. During his time on the stand, Agent Haag admitted the following:

- Agent Haag first contacted Woodall in the summer or fall of 2011. *See* Trial Transcript dated October 28, 2015 ("10/28/15 Tr.") attached hereto as Exhibit A at 58:21-24.
- Agent Haag contacted Woodall after listening to surreptitiously recorded conversations between Chaka Fattah, Jr. and Matthew Amato. *Id.* at 56:4-16.
- Agent Haag was investigating whether Fattah, Jr., with the help of his father, Defendant Fattah, could assert influence over individuals employed by or associated with the Philadelphia School District. *Id.* at 56:4 – 57:5.
- Agent Haag told Woodall specific details about the investigation, including the fact that he possessed tape-recorded conversations of Chaka Fattah, Jr., *id.* at 60:6-8, and that he was in the process of drafting a search warrant. *Id.* at 61:8-19.

- Woodall was aware that the investigation was secret and not privy to the public. *Id.* at 61:8-12 (“And she asked me at some point, you know, is any of this going to become public, is any of this investigation going to become public, and I said, yes.”).
- Woodall revealed to Agent Haag one of her sources of information. *Id.* at 64:2–25.
- Agent Haag revealed information about the investigation and search warrant to Woodall, including (at least) the fact that the search warrant affidavit that he would be drafting involved white-collar criminal offenses and the date and location of the search of Chaka Fattah Jr.’s residence. *Id.* at 55: 17-19; 61:13-18.
- Agent Haag told Woodall what subject matters he would be investigating. *Id.* at 60:16-17 (“So, I mean, I had to let her know that I was going to be looking at these subject matters . . .”).
- Agent Haag had a “significant number” of contacts with Woodall (maybe up to 50) in the time from late summer or fall of 2011 through the date that the search warrant was executed at the residence of Chaka Fattah, Jr. on February 29, 2012. *Id.* at 60:2-5; Trial Transcript dated October 29, 2015 (“10/29/15 Tr.”) attached hereto as Exhibit B at 8:22 – 9:9.
- Months before the search warrant was executed at Chaka Fattah, Jr.’s residence, Agent Haag made Woodall aware that he would be seeking such a warrant. 10/29/15 Tr. at 6:12 – 7:9.

- Approximately two weeks before executing the February 29, 2012 search warrant, Agent Haag told Woodall that the warrant would be executed on February 29, 2012. *Id.* at 9:11-25.
- In submitting the search warrant affidavit, Agent Haag asked a Magistrate Judge to keep the search warrant under seal because the premature disclosure of the information would jeopardize an ongoing investigation. *Id.* at 11:16 – 14:9.
- Agent Haag provided the detailed information to Woodall to establish a quid pro quo relationship with her based on his belief that Woodall, as a reporter, needed to have a reason to provide him with information. 10/28/15 Tr. at 60:10-19 (“Well, I wanted her to have – to feel as though she had a vested interest, that we had information that could eventually lead to a potential story for her. I mean, she has to have a reason to provide me with information.”)

Reviewing Agent Haag’s communications with Woodall makes it clear that he disclosed matters occurring before the grand jury. Agent Haag’s work with the prosecutors in this matter made him an agent of the grand jury as outlined in *U.S. v. Flemmi*, 233 F. Supp.2d at 115, and *Catania*, 682 F.2d at 63-64, as his investigation was not truly independent of the grand jury investigation and the materials he received in the course of the investigation were obtained through grand jury subpoenas. Further, Agent Haag revealed information to Woodall that informed the reporter of what had and/or would transpire before the grand jury. *See Catania*, 682 F.2d at 63; *Lance*, 610 F.2d at 216. For example, months before the search warrant was executed, Agent Haag disclosed to Woodall that such a warrant would be forthcoming.

Additionally, Agent Haag would inform Woodall of each subject matter he was investigating, thus moving her through the investigation as it unfolded before the grand jury.

Given that a search warrant was executed at Chaka Fattah, Jr.'s residence and that he was later indicted, a reasonable person would conclude that the information about each subject matter that Agent Haag related to Woodall was also placed before the grand jury. The Third Circuit has used this very same analysis in finding that certain materials constituted matters occurring before the grand jury. *See In re Grand Jury Matter (Garden Court Nursing Home, Inc.)*, 697 F.2d 511, 513 (3d Cir. 1982) (“In our view, given the nature of the crimes for which [defendant] was indicted, a reasonable person would conclude that the audits or their results were presented to the grand jury. Thus disclosure of the auditors’ analyses is governed by Rule 6(e)(2).”).

Lastly, both Agent Haag and Woodall recognized the secretive nature of the information being disclosed. Woodall even asked Agent Haag if the information would ever become public. Agent Haag went as far as to represent to a Magistrate Judge that his search warrant needed to be protected from disclosure while at the same time freely sharing the same information with Woodall. Because Agent Haag disclosed matters occurring before the grand jury, Defendant Fattah should be granted a show cause hearing and the Government should be ordered to show cause as to why an order of contempt should not be entered against Agent Haag.

B. Disclosure of Grand Jury Communications is Necessary

In light of Agent Haag’s above-stated leak to the press, Defendant Fattah seeks the disclosure of certain grand jury proceedings, including all discussions between prosecutors and grand jurors concerning the grand jury’s investigation, in order to determine if additional leaks of grand jury information have been made in this matter. The Supreme Court has established that grand jury proceedings must normally remain secret absent a compelling necessity. *United States v. Procter & Gamble*, 356 U.S. 677, 682 (1957). However, the Third Circuit has recognized that “[a] court may authorize disclosure of grand jury testimony . . . if the defendant shows that ‘a ground may exist to dismiss the indictment because of a matter that occurred

before the grand jury.” *United States v. Minerd*, 299 Fed. Appx. 110, 111 (3d Cir. 2008) (quoting Fed. R. Crim. P. 6(e)(3)(E)(ii)). In order to obtain such testimony, the moving party bears the burden of establishing “a particularized need for that information which outweighs the public interest in secrecy.” *United States v. McDowell*, 888 F.2d 285, 289 (3d Cir. 1989). Here, Defendant Fattah maintains that if examining the communications between the prosecutors and grand jurors reveals additional leaks of “matters occurring before the grand jury,” a ground will exist to dismiss the indictment. As such, the communications should be disclosed.

The Supreme Court has noted several distinct public interests that are served by preserving the secrecy of grand jury proceedings.

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. Moreover, 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. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979). It seems clear that the reasons for grand jury secrecy are most pronounced during the pre-indictment stage when there is a possibility that those about to be indicted would flee; when the grand jury has yet to conduct its deliberations; and when the grand jury is subject to intimidation. On the other hand, these reasons are largely inapplicable post-indictment as it “is . . . clear that as considerations justifying secrecy become less relevant,” the party seeking disclosures will have “a lesser burden in showing justification.” *Id.* at 223. As such, the standard for releasing grand jury information is arguably relaxed here given the stage of these proceedings.

Defendant Fattah asserts that communications between prosecutors and grand jurors regarding the grand jury's investigations constitute "matters occurring before the grand jury." This is because such communications "could reveal whom the grand jury is investigating and what witnesses have been called, how likely is an indictment and what is the direction of the investigation." *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1176-77 (10th Cir. 2006) (citing *Douglas Oil*, 441 U.S. at 219 n.10). The Tenth Circuit has labeled such communications as "administrative matters." *Id.* at 1176. Categorizing communications involving the grand jury's investigation as matters occurring before the grand jury worthy of protection makes sense as revealing such communications threaten the very function of the grand jury process. As the D.C. Circuit explained:

[T]he touchstone is whether disclosure would tend to reveal some secret aspect of the grand jury's investigation[;] such matters as the identities of witnesses or jurors, the substance of testimony, *the strategy or direction of the investigation, the deliberations or questions of jurors*, and the like."

Senate of Puerto Rico ex rel. Judiciary Comm. v. United States, 823 F.2d 574, 582 (D.C. Cir. 1987) (emphasis added; internal quotation marks omitted).

Moreover, the Third Circuit has held that disclosure is only permissible if a three-prong test is satisfied. In *In re Grand Jury Matter (Garden Court Nursing Home, Inc.)*, 697 F.2d 511, 513 (3d Cir. 1982), the Court held that the moving party has the burden of showing "that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for secrecy, and that their request is structured to cover only the material so needed." *Id.* (quoting *Douglas Oil*, 441 U.S. at 222).

Here, Defendant Fattah can demonstrate a particularized need for the grand jury proceedings. In order to determine if additional grand jury information has been leaked, it is

necessary to determine what information was presented to the grand jury through the prosecutors' communications. Indeed, a review of the communications is needed to avoid a possible injustice in this matter, which is separate from the grand jury proceedings, because leaks of the investigative and other administrative matters discussed with the grand jurors will prejudice Defendant Fattah in this matter. For example, if a government agent reveals grand jury information, then Defendant Fattah has the right to seek remedies ranging from contempt charges against the agent to a dismissal of the indictment. Defendant Fattah will be severely prejudiced if he is prevented from seeking such remedies and from challenging a potential witness against him in this manner.

Additionally, given the likely prejudice to Defendant Fattah if the communications are not disclosed, it is clear that need for disclosure outweighs the need for secrecy. Defendant Fattah is seeking to determine if certain information was leaked to the press, therefore the information has already lost its secrecy by the virtue of being leaked. Lastly, Defendant Fattah is only seeking the information necessary to determine if additional leaks have been made to the public and/or press. For these reasons, Defendant Fattah has satisfied his burden and the communications should be disclosed.

III. CONCLUSION

Based on the foregoing, counsel respectfully requests that this Honorable Court grant the Motion for a Show Cause Hearing Pursuant to Rule 6(e) and Disclosure of Grand Jury Communications.

Respectfully Submitted,

ROSS LEGAL PRACTICE, LLC

BY: /s/ Riley H. Ross III
Riley H. Ross III, Esq.
Two Penn Center
1500 JFK Blvd., Suite 1525
Philadelphia, PA 19102
(215) 587-7177 (office)
(215) 703-8480 (cell)
(215) 587-0628 (fax)
rileyross@rosslegalpractice.com

Date: January 15, 2016

MINCEY & FITZPATRICK, LLC

BY: /s/ Kevin V. Mincey, Esq.
Kevin V. Mincey, Esq.
Thomas O. Fitzpatrick, Esq.
Shabrei M. Parker, Esq.
Two Penn Center
1500 JFK Blvd., Suite 1525
Philadelphia, PA 19102
(215) 587-0006 (office)
(215) 587-0628 (fax)
kevin@minceyandfitz.com

Date: January 15, 2016

CERTIFICATE OF SERVICE

I, Riley H. Ross III, certify that on this date I caused a true and correct copy of the above Motion to be filed via the Court's electronic filing system and that the document is available for viewing and downloading.

/s/ Riley H. Ross III

Riley H. Ross III

Date: January 15, 2016