

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

JANE DOE #1 and JANE DOE #2,
petitioners,

vs.

UNITED STATES OF AMERICA,
respondent.

/

**ORDER GRANTING PETITIONERS' MOTION TO REQUIRE GOVERNMENT TO
FILE REDACTED PLEADINGS IN THE PUBLIC COURT FILE [DE 150]**

&

**ORDER DIRECTING CLERK TO UNSEAL THE GOVERNMENT'S
RESPONSE IN OPPOSITION TO THE MOTION [DE 156]**

THIS CAUSE is before the court on the petitioners' motion for entry of order requiring the government to file redacted pleadings in the open court file [DE 150], together with the government's sealed response in opposition [DE 156]. For reasons discussed below, the court has determined to grant the motion and order the parties to place all written submissions in this proceeding in the open court file, with limited exception for identifying victim information and evidentiary grand jury materials.

There is a presumptive right of public access to pretrial motions of a non-discovery nature, whether preliminary or dispositive, and the material filed in connection with such motions. *Romero v. Drummond Co.*, 480 F.3d 1234 (11th Cir. 2007), citing *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157 (3d Cir. 1993); *United States v Amodeo*, 71 F.3d 1044 (2d Cir. 1995). The common law right of access to judicial proceedings, including the right to inspect and copy public records and documents, is not absolute, however. It does not apply to discovery, and even when it does apply, may be overcome by a showing of good cause, which requires "balanc[ing]

the asserted right of access against the other party's interest in keeping the information confidential." *Romero* at 1246, citing *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001). In balancing the competing interests, the court appropriately considers "whether allowing access would impair court functions or harm legitimate privacy interests, the degree of and likelihood of injury if made public, the reliability of the information, whether there will be an opportunity to respond to the information, whether the information concerns public officials or public concerns, and the availability of a less onerous alternative to sealing the documents. *Id.*

In this case, the government identifies the secrecy of grand jury proceedings, protected against disclosure under Fed. R. Crim. P. 6(e)(6) as good cause for the filing of its submissions under seal.¹ Specifically, the government contends that the submission under seal of its (i) original memorandum in support of motion to dismiss; (ii) reply memorandum in support of motion to dismiss for lack of subject matter jurisdiction and (iii) motion to stay discovery pending resolution of motion to dismiss was appropriately made in conformity with a November 8, 2011 (sealed) order permitting limited disclosure of grand jury matters in this proceeding issued by United States District Judge Donald Middlebrooks, the district judge before whom the original grand jury matter was filed. In addition, the government relies on Fed. R. Crim P. 6(e)(2)(B), prohibiting certain

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Rule 6(e)(6) provides that "[r]ecords, orders and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Information is protected from disclosure under Rule 6(e) if disclosure would tend to reveal some secret aspect of the grand jury's investigation, such matters as identities or addresses of witnesses or jurors, the subject of grand jury testimony, the strategy or direction of the investigation, the deliberations or questions of jurors and the like. *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D. C. Cir.), cert. denied, 525 U.S. 820 (1998).

individuals (including prosecutors) from disclosing “a matter occurring before the grand jury” as authority for its submission of the above documents under seal.

The November 8, 2011 order refers to certain collateral evidence gathered in Federal Grand Jury Proceeding 05-02 and Federal Grand Jury Proceeding 07-103 (WPB) [DE 121-1, page 15], matters having little, if any, relevance to the issues framed in this proceeding under the Crime Victims Rights Act. The government’s insertion of passing references to this material in its pleadings before this court does not justify the government’s wholesale submission of these filings under seal. In the first instance, it is unlikely that release of the information referenced in the November 8 order would compromise the strategy of ongoing federal grand jury proceeding at this juncture.²

However, the court need not address whether grand jury secrecy interests still attach because the petitioners agree to the filing of redacted documents as a method of protecting any possible grand jury secrecy interests while otherwise making public the government’s filings in this proceeding. The court agrees that this is a less onerous alternative to sealing which is appropriately employed in this case. *See e.g. In re Grand Jury Proceedings*, 417 F.3d 18 (1st Cir. 2005); *In re Grand Jury Proceedings*, 616 F.3d 1172 (10th Cir. 2010).

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“Grand jury secrecy is not unyielding” when there is no secrecy left to protect. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006). Rule 6(e)(6) requires that records, 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. Thus, when once-secret grand jury material becomes “sufficiently widely known,” it may “los[e] its character as Rule 6(e) material.” *In re North*, 16 F.3d 1234 (D. C. Cir. 1994).

It is accordingly **ORDERED AND ADJUDGED**:

1. The petitioners' motion to require the government to file all pleadings and other submissions in the open court file, with redactions limited only to references to the above-described grand jury evidence and identifying information pertaining to victims [DE 150] is **GRANTED**.
2. Within **TEN (10) DAYS** from the date of entry of this order, the government shall redact out any references to the grand jury material in question from its various pleadings and other submissions in this proceeding, signifying the placement of any redactions with highlighted double brackets, e.g. "[[]]]," or black-out marker, and shall then re-file the same in the public portion of the court file. Similarly, the government shall redact out any reference to the identity of the crime victims, by name or initial, before placement of the substituted pleadings in the open court file.
3. The Clerk of Court is further directed to unseal and place in the public portion of the court file the government's "Opposition to Petitioners' Motion Requesting an Order Directing the Government to File Redacted Pleadings in the Public Court File" [DE 156], which submission contains no descriptive references to the grand jury material in question.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 18th day of June, 2013.



Kenneth A. Marra
United States District Judge

cc. All counsel