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March 20, 2023

By Email
Hon. Arthur F. Engoron
New York Supreme Court
New York County
60 Centre Street, Room 566
New York, NY 10007

Re: *People v. Donald J. Trump* – Index No. 452564/2022
Third-Party Subpoenas Requesting Communications With The New York
County District Attorney’s Office

Dear Justice Engoron:

It has come to our attention that defendants in the above captioned case have issued several third-party *Subpoena Duces Tecum* that inappropriately demand production of materials relating to this Office (referred to by defendants as the “Manhattan DA” or “MDA”). Among other things, the subpoenas demand all communications with the MDA; all subpoenas or document requests received from the MDA; and all documents, communications and information provided to the MDA. To the extent a subpoena recipient has materials responsive to these requests, those materials are confidential — protected by either grand jury secrecy or the public interest privilege. Allowing a private litigant to compel disclosure of such confidential materials will have a dangerous effect on our criminal justice system.

It is a foundation of the grand jury system that “[g]rand jury proceedings are secret.” CPL § 190.25(4)(a). This rule exists, in large part, to provide “assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely.” *People v. DiNapoli*, 27 N.Y.2d 229, 235 (1970); *Melendez v. City of New York*, 109 A.D.2d 13, 17 (1st Dept. 1985). Likewise, “statements made by a witness to the District Attorney’s Office are protected by the public interest privilege,” and “should be treated in the same manner as Grand Jury testimony for the purposes of disclosure.” *Sanchez v. City of New York*, 201 A.D.2d 325, 326 (1st Dept. 1994).

One significant and well-known barrier to witnesses “testifying freely” is that being identified as a witness may lead to intimidation or retribution. It is because of this

Honorable Arthur F. Engoron

March 20, 2023

Page 2 of 3

that the Penal Law contains multiple provisions punishing the acts of intimidating or tampering with witnesses. *See, e.g.*, PL §§ 215.10, 215.11, 215.12, 215.13, 215.15, 215.16, 215.17; *cf. People v. Buari*, 11 Misc. 3d 1077(A) (2008) (“Defendant appeared to have considerable influence over those surrounding the witnesses and the witnesses clearly had a real and founded fear of Defendant; the witnesses were surely aware of the murder of the eyewitness who testified in the Grand Jury; one of the witnesses had to deal with the peril attending one labeled a ‘rat.’”).

Thus “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.” *Ruggerio v. Fabey*, 103 A.D.2d 65, 71 (2d Dept. 1984) (*citing Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979)). This is true even if the grand jury material sought to be released is from an investigation that is no longer active. *Douglas Oil Co. of California*, 441 U.S. at 222. Allowing grand jury information to be released by compulsion of a civil subpoena could inhibit future cooperation by targets and witnesses with grand jury investigations, upset the long-standing policy goals behind grand jury secrecy, and create needless risk to witnesses who have performed their duty of providing evidence.

Under the CPL, absent a court order or other exceptions, disclosure of “the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding” is prohibited. CPL § 190.25(4)(a). This secrecy extends not just to the minutes of grand jury proceedings, but to grand jury material or information of any kind, including the type of information and records sought by the instant subpoenas. *Adelhardt Construction Corp v. Citicorp North America, Inc., et al.*, 200 A.D.3d 588, 589 (1st Dept. 2021) (grand jury secrecy applied to all “grand jury materials”); *Matter of Aiani v. Donovan*, 98 A.D.3d 972, 973 (2d Dept. 2021) (bank records obtained pursuant to a grand jury investigation without a subpoena and not entered into evidence); *Matter of James v. Donovan*, 130 A.D.3d 1032, 1039 (2d Dept. 2015) (grand jury secrecy applies to instructions given to the grand jury and records that were not entered into evidence); *New York News v. Office of the Special State Prosecutor of State of N.Y.*, 153 A.D.2d 512 (1st Dept. 1989) (investigative material not disclosable because it would reveal information provided to the grand jury).

Indeed, so strong are the principles of grand jury secrecy and the policies underlying it that unauthorized disclosure of grand jury evidence is a felony in New York. *See* Penal Law § 215.70; *Matter of James*, 130 A.D.3d at 1032.

To be sure, both CPL § 190.25(4)(a) and Penal Law § 215.70 allow an exception to grand jury secrecy, in that “[n]othing contained” in those statutes “shall prohibit a witness from disclosing his own testimony.” When interpreted by the Courts, however,

Honorable Arthur F. Engoron

March 20, 2023

Page 3 of 3

this language is always held to be purely permissive. *See, e.g., Dunlap v. Dist. Atty of Ontario County*, 296 A.D.2d 856 (4th Dept. 2002) (CPL § 190.25[4][a] “permits” a witness to disclose their own testimony); *Grossman v. Monroe County Dist. Atty*, 231 A.D.2d 968 (4th Dept. 1996) (CPL § 190.25[4][a] “merely allows” a witness to disclose their own testimony); *Application of Police Com’r of City of New York*, 131 Misc.2d 695 (NY County Sup. Ct., 1986) (A witness before the grand jury “may” disclose his own testimony).

In other words, while a witness in a grand jury proceeding may voluntarily disclose the substance of their own testimony, they may not be compelled to do so. *See, e.g., Melendez v. City of New York*, 109 A.D.2d 13, 22-23 (1st Dept. 1985) (grand jury testimony may not be disclosed where witness indicated he “had no intention of making any voluntary disclosure”); *S.E.C. v. Oakford Corp.*, 141 F. Supp.2d 435, 437 (2001) (“a witness may not be compelled to testify whether or not he has appeared and testified before a grand jury as to a particular matter, absent a court order to do so”). Absent witnesses’ voluntary disclosure of their own testimony—which cannot be obtained pursuant to compulsory process—the only way for any party to obtain the release of grand jury materials or information is to make a showing of a “compelling and particularized need” before a judge with jurisdiction over the grand jury. *Matter of District Attorney of Suffolk County*, 58 N.Y.2d 436, 444 (1983); *People v. Fetcho*, 91 N.Y.2d 765, 765-66 (1998); *Matter of Lungen v. Kane*, 217 A.D.2d 849, 850 (3d Dept. 1995); *People v. Astacio*, 173 A.D.2d 834, 835 (2d Dept. 1991), *see also Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 225 (1979).

Prospective witnesses must be assured that at no time in the future will they be forced to divulge whether or not they participated with a grand jury investigation, or the substance of such participation, unless they choose to do so of their own volition, or where other specific criteria mandating disclosure are met. Allowing that veil of secrecy to be pierced through discovery proceedings in civil lawsuits would necessarily upend that clear policy goal, place witnesses in danger, and should not be permitted. To the extent that the Court does not grant the Attorney General’s application to limit the scope of certain subpoenas and deposition questioning, this Office requests an opportunity to move for a protective order asserting the interests identified above on the basis that this Office is a person about whom discovery is sought.

Respectfully submitted,



Leslie Dubeck
General Counsel

CC: Counsel of Record, by email