

Ninth Circuit Rejects FOIA Request, Upholds Grand Jury Secrecy in White Collar Case

by Greg Brower and Zachary Meyer

The U.S. Court of Appeals for the Ninth Circuit recently ruled that Exemption 3 of the Freedom of Information Act (“FOIA”) bars disclosure of documents that the federal government possesses because of a grand jury subpoena. While the case involved a FOIA request to the U.S. Department of Justice (“DOJ”), the decision is significant for any organization that produces documents in response to a federal grand jury subpoena. It confirms that a range of requesters, including state regulators and plaintiffs’ attorneys, cannot necessarily obtain such documents from DOJ via the FOIA process.

The subject case, *Kalbers v. United States Department of Justice*,¹ arose from a law professor’s effort to obtain information about the settlement of a criminal case DOJ brought against German automobile manufacturer Volkswagen AG (“VW”) as a result of the “Dieselgate” scandal. The parties resolved the case through a plea agreement, an agreement the professor believed to be a “sweetheart deal.” The professor attempted to use the FOIA process to obtain every document produced by VW during DOJ’s investigation. When DOJ denied the professor’s FOIA request, he sued.

While FOIA generally requires the federal government to produce information in its possession upon a proper request, the law contains exceptions known as FOIA Exemptions 1 through 13 and Exclusions 1 through 3. The exception at issue in this case was Exemption 3, which applies to information prohibited from disclosure by another federal law. The federal law at issue here, Federal Rule of Criminal Procedure 6(e), generally makes information related to a federal grand jury investigation secret. The professor’s lawsuit led DOJ to submit a “Vaughn index”² of documents it contended that Exemption 3 and Exemption 7 (which pertains to certain types of information compiled for law enforcement purposes), protected from disclosure under FOIA. DOJ then moved for summary judgment. The District Court rejected DOJ’s position and both DOJ and VW, which had intervened in the case, appealed.

The Ninth Circuit framed the question on appeal as “whether the DOJ can withhold the documents under Rule 6(e) because they are a matter occurring before the grand jury.” Answering this question in the affirmative, the panel reversed in a unanimous decision. First, the panel found that FOIA excepts from disclosure a grand jury’s subpoena file where the file consists of the only

¹ *Kalbers v. Volkswagen AG*, Nos. 24-1048 & 24-1477 (9th Cir. Jan. 30, 2026).

² A Vaughn index is like a privilege log and takes the form of a government affidavit identifying the documents withheld, the FOIA exemption(s) claimed, and an explanation of why each document falls within the claimed exception. See *Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973).

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version of the documents in the government's possession and the documents themselves show that they were subject to a grand jury subpoena. The court explained that the grand jury's broad power requires that matters brought before the grand jury be shielded from public view. In support of that conclusion, the court cited the U.S. Supreme Court's line of decisions recognizing that the proper functioning of the grand jury system depends on the secrecy of grand jury proceedings. Moreover, the court opined that Rule 6(e) protects both the details of the grand jury's subpoena and the content of the response.

The court also addressed specific arguments raised by the professor, including: (1) that Rule 6(e) does not apply because he was seeking the documents for their "own sake rather than to learn what took place before the grand jury" and (2) that disclosure would not "compromise the integrity of the grand jury process." The court rejected both arguments, finding that the government may defeat a FOIA request that seeks documents subpoenaed by a grand jury by showing any of the following:

1. the documents are in the government's possession because of a grand jury subpoena and not by way of an independent source;
2. the documents are being sought for a reason related to the underlying grand jury investigation; or
3. disclosure would compromise the integrity of the grand jury process.

Because the subject documents were "indisputably in the government's possession only through a grand jury subpoena and not through any other source," the court held the documents protected from production under FOIA. The court further clarified two other points. First, it explained that whether the documents reveal the grand jury's deliberative process is not the question, and Rule 6(e) bars revelation of any "matter" before the grand jury, including the fact of the investigation itself. Second, the government may disclose documents in its possession independent of a grand jury investigation, even if those same documents also appear in a grand jury file.

This decision resolves historical ambiguity concerning the scope of Rule 6(e) in favor of secrecy over disclosure in the FOIA context. In so deciding, the Ninth Circuit seems to be following the Sixth Circuit, which has broadly construed the definition of "matter occurring before the grand jury."³ By contrast, the Second Circuit has opined that "documents are not cloaked with secrecy merely because they are presented to a grand jury."⁴ Meanwhile, the D.C. Circuit has held that a case-by-case inquiry is required to determine whether disclosure would undermine grand jury secrecy.⁵ On balance, the Ninth Circuit's decision in *Kalbers* is a positive one for grand jury secrecy in the context of both FOIA requests to the government and civil litigation when attorneys seek grand jury materials or information.

³ See *In re Grand Jury Proceeding*, 851 F.2d 860, 863 (6th Cir. 1988).

⁴ See *Grynberg v. U.S. Dep't of Justice*, 758 F. App'x 162, 164 (2d. Cir. 2019).

⁵ See *Lopez v. Dep't of Justice*, 393 F.3d 1345, 1349 (D.C. Cir. 2005).