

Per C. Olson, OSB #933863
HOEVET OLSON HOWES, PC
1000 SW Broadway, Suite 1500
Portland, Oregon 97205
Telephone: (503) 228-0497
Facsimile: (503) 228-7112
Email: per@hoevetlaw.com

Of Attorneys for Defendant Fry

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID LEE FRY,

Defendant.

Case No. 3:16-CR-00051-13-BR

DEFENDANT'S RESPONSE TO
GOVERNMENT'S RENEWED
MOTION FOR ORDER (DOCUMENT
755)

Defendant, David Fry, through his attorney Per Olson, and on behalf of all other defendants who have not changed their plea, hereby responds to the Government's Renewed Motion for Order Permitting the Government to File Under Seal and *Ex Parte* the Declaration of AUSA Pamala R. Holsinger in Support of the Government's Motion to Compel Production of the Investigation of the FBI Use of Force and Cover-Up in the Finicum Shooting. (Document 755).

Defendant objects to the government submitting Ms. Holsinger's affidavit *ex parte*. The government asserts that the declaration "concerns matters occurring before the grand jury protected from disclosure" by F.R.Cr.P. 6(e). However, subsection (e)(3)(E) of Rule 6 permits the court to authorize disclosure " -- at a time, in a manner,

and subject to any other conditions that it directs – of a grand jury matter: (i) preliminarily to or in connection with a judicial proceeding.” Defendant asks the court to authorize the disclosure of Ms. Holsinger’s declaration pursuant to that provision, and to order the government to file the declaration under seal, pursuant to a protective order, but not *ex parte*.

In *In re Barker*, 741 F.2d 250, 254 (9th Cir. 1984), the Court held that when the disclosure of grand jury matter is sought under Rule 6(e)(3)(E), “the proper inquiry is whether the primary purpose of the disclosure is to assist in the preparation or conduct of judicial proceedings.” The Court relied on *United States v. Baggot*, 463 U.S. 476 (1983), in which the Supreme Court addressed the requirement that an authorized disclosure be “preliminary to or in connection with a judicial proceeding.” The Court in *Baggot* held that the rule contemplates “only uses related fairly directly to some identifiable litigation, pending or anticipated.” *Baggot*, 463 U.S. at 480.

Here, defendant seeks the disclosure of Ms. Holsinger’s declaration “in connection with a judicial proceeding,” *i.e.*, the present case of *United States v. Bundy et al.* For a disclosure to occur, there is no requirement that the “judicial proceeding” be the same that is contemplated by the “grand jury matter.” See *In re Barker*, 741 F.2d at 254 (grand jury material could be disclosed to investigators in contemplation of a quasi-judicial proceeding before the Oregon State Bar). Furthermore, the disclosure defendant seeks “relate[s] fairly directly” to the present criminal case, as the subject matter of Ms. Holsinger’s declaration is precisely what is sought in defendant’s motion to compel information relating to the FBI shooting and cover-up.

Before authorizing the disclosure of a grand jury matter, the court also must consider whether there is a “particularized need” for the disclosure. The factors are (1) whether “absent disclosure, injustice will occur in the contemplated proceeding,” (2) “the need for disclosure is greater the need for continued secrecy,” and (3) the “request is

structured to cover only material so needed.” *In re Barker*, 741 F.2d at 254, quoting *In re Sells*, 719 F.2d 985, 991 (9th Cir. 1983).

In its assessment of these factors, the court is asked to consider that, although defendant presently seeks the disclosure of a declaration that refers to a grand jury matter, the defendant did not start off by seeking the disclosure of grand jury material. Rather, the motion to compel before the court seeks the production of investigation reports prepared by the Tri-County Major Incident Team and by the Department of Justice, Office of Inspector General, into FBI agents who shot at Finicum and then covered up their involvement. Publically available information reveals that those two agencies started their investigations some time ago; and it is fair to infer that the grand jury proceeding commenced sometime later. Thus, although information developed in those investigations might now be before a grand jury, the investigation reports sought in defendant’s motion to compel exist independently of the grand jury proceeding. The government should not be permitted to cast a shroud of secrecy over those agency investigation reports by referring to a grand jury proceeding that covers the same subject matter.

Regarding the first “particularized need” factor, defendant will suffer an injustice if he is not permitted to see Ms. Holsinger’s affidavit, because he will not be in fair position to rebut the government’s factual assertions and arguments as to why defendant’s underlying motion to compel should be denied. An *ex parte* presentation to a court deciding a disputed and substantive matter runs afoul of fundamental due process for the obvious reason that defendant has no way of knowing and challenging what the government has said.

With respect to the need for “secrecy,” the court can address grand jury secrecy through a protective order that would prevent further disclosure to the public at large. Also, the government already has disclosed the bare existence of a grand jury matter in

a publically filed pleading. It is apparent from its motion that the government was trying to be circumspect, but today's Oregonian includes an article about a grand jury proceeding into the FBI's conduct in the Finicum shooting. (Mr. Fry's attorney represents that he had nothing to do with that). So the existence of the grand jury matter is no longer a secret.

Finally, with respect to the last factor, defendant's request for Ms. Holsinger's declaration is fully coextensive with the material needed for this proceeding because, again, defendant needs to know what the government is saying in direct response to defendant's motion to compel.

For further argument as to defendant's need for Ms. Holsinger's declaration, defendant would rely on the underlying motion to compel. (Docket No. 700).

To conclude, the court is asked to deny the government's motion to file Ms. Holsinger's declaration *ex parte*.

DATED this 24th day of June, 2016.

HOEVET OLSON HOWES, PC

/s Per C. Olson
Per C. Olson, OSB 933863
Attorney for Defendant David Fry