IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Randy L. Miller, *et al.*,	:	
Plaintiffs	:	Civil Action 2:14-cv-00101
v.	:	Judge Frost
Randall Meyer, *et al.*,	:	Magistrate Judge Abel
Defendants	:	

ORDER

This matter is before the Magistrate Judge on defendant Brown County Prosecutor Jessica Little's November 26, 2014 motion to quash the subpoena duces tecum issued to the Brown County Clerk of Courts (doc. 51) and defendant Brown County Clerk of Courts L. Clark Gray's December 2, 2014 motion to quash the subpoena duces tecum issued to the Brown County Clerk of Courts (doc 52).

Plaintiffs seek production of "all grand jury documents, papers, and transcripts" resulting in the indictments of plaintiffs from the Brown County Clerk of Courts.

Background. The amended complaint makes the following allegations. In September 2009, a confidential informant contacted the Ohio Inspector General ("OIG") to allege that Brown County Division of Wildlife ("DOW") officer Allan Wright had engaged in misconduct that was not properly investigated by the Ohio Department of Natural Resources ("ODNR"), DOW officials. According to the informant, Wright

helped a non-resident, South Carolina wildlife officer obtain a 2006 Ohio resident hunting license by allowing him to list Wright's home address as his own address. This allowed Wright's friend to pay a resident fee of $19 for the resident hunting license instead of the non-resident license fee of $125. From December 22, 2009 until February 1, 2010, defendant Ronald E. Nichols, a Deputy Inspector in the Office of the OIG, interviewed plaintiffs Randy L. Miller, James E. Lehman, Jr., Michele E. Ward-Tackett, David M. Graham and Todd E. Haines with the intent of obtaining incriminating statements from them. Am. Compl., ¶ 23. They told Nichols that before 2006, it was an ODNR practice to permit wildlife officials from other states to obtain Ohio hunting licenses for an in-state fee to encourage interstate networking and cooperation. Plaintiffs had investigated the 2006 incident, determined that Wright's supervisor had given him permission to allow his friend to purchase a resident hunting license, and given Wright a verbal reprimand for "failure of good behavior". *Id.*, ¶ 27. Nonetheless, the OIG reported to the Governor that plaintiffs had improperly failed to report Wright's "criminal" conduct to the ODNR director or chief counsel. *Id.*, ¶ 32.

On March 17, 2010, defendants Logan and Celebrezze acknowledged that they had been aware of the earlier investigation of Wright and that plaintiff Graham talked with them before disciplining Wright. *Id.*, ¶ 33. Nonetheless, defendants Thomas Charles and/or the OIG forwarded the OIG report to the Franklin County Prosecutor, who refused to prosecute. *Id.*, 34. They then sent the report to the Brown County Prosecutor. *Id.*, 35. The amended complaint further alleges:

> Upon information and belief Defendant Thomas Charles, Defendant Ron Nichols and Defendant Jessica Little met. During the meetings they continued to investigate the Plaintiffs activities. Upon information and belief, Defendant Jessica Little and Defendant Charles and Defendant Nichols manufactured evidence and/or testimony (of Nichols specifically) regarding the actions of Plaintiffs. Following this, Defendant Little made the decision to indict the Plaintiffs. During the grand jury indictment and knowing the testimony and evidence to be false, manufactured, misleading and inaccurate, Little and Nichols provided the same to the grand jury. To be sure the information regarding Plaintiffs report to the ODNR and the Governor's office following their investigation of Wright was not provided to the Grand Jury. In fact, testimony indicating that no such report was made was manufactured by Little and Nichols prior to the decision to indict. Other misleading or inaccurate information was provided to the Grand Jury.

Id., 36. Plaintiffs were indicted for one count of obstructing justice and one count of complicity to obstruct justice, both felonies. The trial judge suppressed their statements. *Id*., ¶ 41. After the Supreme Court of Ohio affirmed that decision, the charges were dismissed. *Id*., ¶¶ 51 and 52.

Arguments of the Parties. Defendant Brown County Prosecutor Jessica Little filed a motion to quash the subpoena duces tecum issue to the Brown County Clerk of Courts. Defendant Little argues that the materials sought by plaintiffs are part of secret grand jury proceedings and are not subject to disclosure pursuant to Federal Criminal Rule 6, Ohio Criminal Rule 6 and Ohio Revised Code §§ 2939.06 and 2939.11. Defendant Little maintains that the subpoena should be quashed in accordance with Rule 45(d)(3)(A)(iii) of the Federal Rules of Civil Procedure because it seeks disclosure of privileged or other protected matter and no exception of waiver applies.

Defendant Little argues that grand jury proceedings are secret and not subject to disclosure unless the party seeking the materials first establishes a particularized need for disclosure that outweighs the need for secrecy. Little maintains that in the context of a malicious prosecution claim, allegations that people lied to the grand jury are insufficient to establish a particularized need for grand jury materials that outweighs the need to keep the proceedings secret. According to Little, even a criminal defendant's claim that disclosure of a grand jury transcript would reveal exculpatory evidence is insufficient to overcome the policy of secrecy of grand jury proceedings.

Defendant Clark Gray also filed a motion to quash the subpoena and argues that plaintiffs failed to even attempt to meet their burden of showing that the need for disclosure outweighs the need for secrecy.

In responding to defendant Little's motion to quash, plaintiffs maintain that in a December 10, 2009 letter, former Ohio Department of Natural Resources Director Sean Logan forward to Tom Charles, then Inspector General for the state of Ohio, evidence that plaintiffs Miller, Kehman, Ward-Tackett, Haines and Graham had investigated Allan Wright's activities and reported his activities to their supervisors, filed an investigation report and disciplined Allan Wright. According to plaintiffs, despite actual knowledge that plaintiffs had reported the entirety of the matter to their supervisors, defendants Charles, Nichols and Little conspired to prosecute plaintiffs for crimes that they could not have committed based on the contents of the letter. Plaintiffs argue that in order for the grand jury to indict them, Little, Nichols and Charles would

have had to manufacture evidence, provide false evidence, or provide false testimony to the grand jury.

Plaintiffs also argue that Little has no standing to quash the subpoena directed to the Brown County Clerk of Courts. Plaintiffs maintain that a party generally lacks standing to seek to quash a subpoena issued to a nonparty. Limited exceptions exist only if the party claims some personal right or privilege with regard to the documents sought, and plaintiffs contend that Little has not claimed a personal right or privilege with regard to the documents.

Plaintiffs further argue that they have shown a particularized need for disclosure of the grand jury documents. Although mere speculation or suggestion of perjury is not sufficient to show a particularized need for disclosure, grand jury transcripts are discoverable in civil rights actions against counties and their employees when review of the transcripts could show that the grand jury proceedings were aimed at depriving plaintiffs of their civil rights rather than legitimate investigations of criminal acts. A strict protective order can limit any damage from the disclosure.

Plaintiffs maintain that they have more than mere speculation suggesting perjury or other irregularity in the grand jury proceedings. Plaintiffs point to the December 10, 2009 letter evidencing that plaintiffs investigated Wright's activities and reported his activities to their supervisors. In order for the grand jury to indict plaintiffs, defendants would have had to manufacture evidence, provide false evidence, or provide false testimony to the grand jury.

Plaintiffs further argue that it is only by review of the transcripts and evidence that they requested that plaintiffs will be able to show that false and manufactured evidence was provided to the grand jury and that the grand jury proceedings were aimed at depriving plaintiffs of their civil rights rather than a legitimate investigation of a criminal act. Plaintiffs note that they are not the only parties in need of the transcripts and evidence. Defendants Nichols and Charles have also requested materials from the grand jury.

Plaintiffs argue without access to the transcript and evidence, plaintiffs will be unable to impeach defendants' testimony or ascertain if defendants lied about the December 10, 2009 letter. Granting the motion to quash the subpoena would be tantamount to dismissing plaintiff's case. Courts have found that impeaching a witness, refreshing a witness's recollection, and testing witness credibility is sufficient to establish a particularized need for disclosure. The December 10, 2009 letter is evidence that plaintiffs investigated Wright's activities, reported it to their supervisors, filed an investigation report, and disciplined Wright.

Discussion. The grand jury system depends upon its secrecy:

> [S]everal distinct interests are served by safeguarding the confidentiality 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 would also be the risk that those about to be indicted would flee, or would try to influence grand jurors to vote against indictment. Finally, by preserving the secrecy

> of proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Company v. Petrol Stops Northwest, 441 U.S. 211, 218–19 (1979). "Grand jury secrecy, however, is not absolute." *Horizon of Hope Ministry v. Clark County, Ohio*, 115 F.R.D. 1, 3 (S.D.Ohio,1986). The Supreme Court outlined when grand jury materials may be disclosed:

> The party seeking grand jury transcripts under Rule 6(e) must show 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 continued secrecy, and that their request is structured to cover only material so needed. . . . [D]isclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and . . . the burden of demonstrating this balance rests upon the private party seeking disclosure. . . . [A]s the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification.

441 U.S. at 222–23. In the federal courts, Rule 6(e) requires that requests for grand jury materials be submitted to the court that supervised the grand jury first in the interests of comity. *Brunson v. City of Dayton*, 163 F. Supp. 2d 919, 922 (S.D. Ohio, 2001). Neither Little or Gray have asked that the Brown County Court of Common Pleas be given the opportunity to initially decide whether to release the grand jury materials. *Id.* at 923. *Horizon of Hope Ministry v. Clark County, Ohio*, 115 F.R.D. 1, 4 at n.1 (S.D. Ohio 1986).

Judge Frost's October 23, 2014 Opinion and Order held:

> Necessarily accepting Plaintiffs' allegations as true and drawing all inferences in their favor, the Court must infer that Defendant Little met with OIG Defendants Charles and Nichols to discuss the investigation into Plaintiffs' activities. During that time—before (according to the Amended Complaint) the decision to prosecute was made—Defendants Little,

> Charles, and Nichols allegedly manufactured evidence (namely, the OIG investigative report containing false information) and came up with false testimony that Defendant Little could use to prosecute Plaintiffs. Although the Court acknowledges that the Amended Complaint is light on facts describing the manufactured evidence, it concludes that Plaintiffs' allegations are sufficient to survive Defendant Little's absolute immunity defense at this stage of the litigation.

Doc. 42, PageID 273-74.

The need for secrecy with regard to these grand jury transcripts is not great. The criminal investigation has ended. The identity of the witnesses is already known to plaintiffs, and there is no indication that plaintiffs would seek retribution against the witnesses. Nonetheless, plaintiffs have not met their burden of showing a sufficient particularized need to overcome the need to maintain the secrecy of grand jury proceedings. Judge Frost's decision makes clear that defendants' presentation of evidence to the grand jury, even if false, is not actionable. Only the pre-grand jury manufacture of false evidence and conspiracy to manufacture false evidence is actionable. The crux of plaintiffs' allegations appears to be that Nichols and Charles[1] gave the OIG report to prosecutor Little and failed to inform the grand jury of a December 10, 2009 letter that shows they investigated Wright's activities and reported them to their supervisors. Based on that failure, plaintiffs argue that defendants manufactured evidence that was intended to mislead the grand jury into believing that they failed to investigate and discipline Wright.

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[1]Charles has executed a declaration t asserting that he did not testify before the grand jury. Doc. 57-3, PageID 659.

Plaintiffs have failed to demonstrate that their need for the grand jury transcript outweighs the public's interest in secrecy. First, they have had the opportunity in discovery to ask the witnesses what evidence Charles and Nichols communicated to Little and what communications she made to them. If those witnesses say that Charles and/or Nichols told Little about the December 10, 2009 letter and accurately reported plaintiffs' investigation, findings, and actions regarding Wright's misconduct, then plaintiffs have demonstrated that their interest in asking Charles and Nichols whether they provided the grand jurors with the OIG report and/or testified about that report outweighs the public's interest in grand jury secrecy. Similarly, they would have demonstrated that they could question the witnesses about whether Charles and Nichols provided the grand jury with or testified about the December 10 letter.

Plaintiffs have failed to provide the court with the December 10 letter or any information about what the witnesses have testified. Without that information, the magistrate judge cannot determine whether they can demonstrate that their need for the grand jury transcript outweighs the public's interest in grand jury privacy.

Conclusion. Defendant Brown County Prosecutor Jessica Little's November 26, 2014 motion to quash the subpoena duces tecum issued to the Brown County Clerk of Courts (doc. 51) and defendant Brown County Clerk of Courts L. Clark Gray's December 2, 2014 motion to quash the subpoena duces tecum issued to the Brown county Clerk of Courts (doc 52) are GRANTED.

Under the provisions of 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P., and Eastern Division Order No. 91-3, pt. F, 5, either party may, within fourteen (14) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by the District Judge. The motion must specifically designate the Order, or part thereof, in question and the basis for any objection thereto. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

s/Mark R. Abel
United States Magistrate Judge