

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

IN RE:

THE FORTIETH STATEWIDE
INVESTIGATING GRAND JURY

Notice Number 1
Report Number 1

Petitioners' Objections to the Office of
Attorney General's Redacted Brief

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* Supreme Court of Pennsylvania Nos.
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* 75 WM 2018, 77 WM 2018, 78 WM 2018,
* 79 WM 2018, 80 WM 2018, 81 WM 2018,
* 82 WM 2018, 84 WM 2018, 85 WM 2018,
* 86 WM 2018, 87 WM 2018, 88 WM 2018,
* 89 WM 2018, 104 WM 2018
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OPINION AND ORDER

Krumenacker, J: Currently before the Court are the Petitioners' Objections to the Office of Attorney General's Redacted Brief (Objections) asserting that the redacted brief filed by the Office of Attorney General (OAG) relative to these appeals contains materials protected by grand jury secrecy and that further redaction is required. The Petitioners argue that the OAG has violated grand jury secrecy by including in their redacted brief the specific factual findings about them made by the Fortieth Statewide Investigating Grand Jury (Grand Jury) and contained in Report Number 1 (Report) issued by the Grand Jury for public release. Further, Petitioners' contend that release of the information contained in the redacted brief: 1) violates extant Supreme Court orders; and 2) would impermissibly lift the cloak of anonymity they have been afforded by the Supreme Court.

In response the OAG argues: 1) the information is no longer protected by grand jury secrecy; 2) if the information is protected by grand jury secrecy the OAG is authorized to release it under 42 Pa. C.S. 4549(b); 3) the inclusion of the information in the redacted report is necessary to respond to Petitioners' unredacted allegations that the Report is flawed, contains inaccuracies, and is otherwise erroneous, which has tarnished the Report and tainted the public

perception of it before its release; 4) there is a general rule of openness in the courts as part of our transparent legal system that gives the public the right to be aware of proceedings occurring in the courts and to understand the legal process; and 5) the OAG has complied with the Supreme Court's grant of anonymity to the Petitioners by redacting all personally identifying information.

It is well settled that

"Pennsylvania's grand jury process is 'strictly regulated,' and the supervising judge has the singular role in maintaining the confidentiality of grand jury proceedings." Camilo v. State Farm Fire and Casualty Co., 334 F.3d 345, 356 (3rd Cir. 2003) (citation omitted). "The supervising judge has the continuing responsibility to oversee grand jury proceedings, a responsibility which includes insuring the solemn oath of secrecy is observed by all participants." In re June 1979 Allegheny County Investigating Grand Jury, 490 Pa. 143, 415 A.2d 73, 78 (1980).

In re Dauphin Cty. Fourth Investigating Grand Jury, 610 Pa. 296, 318, 19 A.3d 491, 504 (2011).

Thus this Court maintains jurisdiction over matters concerning grand jury secrecy during the pendency of the grand jury and after its work is concluded to ensure secrecy of the proceedings. Id. See also, 42 Pa. C.S. § 4549. The Supreme Court confirmed this jurisdiction in its July 6, 2018, Order directing that any disputes relating to grand jury secrecy be directed to this Court for expedited resolution. The Court has reviewed the OAG's redacted brief, reviewed the Petitioners' Objections, reviewed the Petitioner's Proposed Redacted OAG Brief, N.T. 7/19/18 Ptrs.' Ex. B, considered the arguments presented at the July 19th hearing on the Objections, and, for the reasons contained herein, concludes that the redacted brief does not violate grand jury secrecy.

It is beyond question that matters occurring before a grand jury are secret and remain so even after the conclusion of the grand jury unless their release is authorized by either a specific provision of the Investigative Grand Jury Act (Act), 42 Pa. C.S. §§ 4541-4553, or by order of

court. See, 42 Pa. C.S. § 4549; In re November, 1975 Special Investigating Grand Jury, 299 Pa. Super. 539, 544, 445 A.2d 1260, 1263 (1982). Our Supreme Court has long held that the secrecy of grand jury proceedings is “indispensable to the effective functioning of a grand jury.” In re Investigating Grand Jury of Philadelphia Co. (Appeal of Philadelphia Rust Proof Company), 496 Pa. 452, 437 A.2d 1128, 1130 (1981). See also, United States v. Procter & Gamble, 356 U.S. 677, 681, 78 S.Ct. 983, 986 (1958); In re Dauphin County, 610 Pa. at 316, 19 A.3d at 502-03; Petition of McNair, 324 Pa. 48, 187 A. 498 (1936). This traditional rule of secrecy has been adopted by our Legislature in the passage of the Act which specifically states the limited exceptions to the general rule of secrecy.

The United States Supreme Court summarized the history and purpose of the grand jury in the United States in Costello v. United States, 350 U.S. 359, 76 S.Ct. 406 (1956), explaining that

The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.

Id. 350 U.S. at 362, 76 S.Ct. at 408. In Pennsylvania the historical function of the grand jury to investigate criminal activity and issue indictments has been expanded to authorize a grand jury to

issue investigative reports. 42 Pa. C.S. 4552. A grand jury is no longer the only means of filing charges in the Commonwealth, Pa. Const. art. I, § 10, and, in fact, is no longer the method used in most counties but this change has not altered its role as an investigative body. In re Investigation of January 1974 Philadelphia Cty. Grand Jury, 458 Pa. 586, 328 A.2d 485 (1974) (the fact that procedure by indictment was replaced by procedure by information in criminal cases in no way affected institution of grand jury as an investigative body).

When functioning in either capacity secrecy remains a vital part of grand jury proceedings. Our Supreme Court discussed the rationale for such secrecy in In re Investigating Grand Jury of Philadelphia County, Appeal of Philadelphia Rust Proof Co., Inc., 496 Pa. 452, 437 A.2d 1128 (1981), explaining that

Grand jury proceedings have traditionally been conducted in secrecy. This secrecy, which is indispensable to the effective functioning of a grand jury's investigation, is designed

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Id. at 457-58, 437 A.2d at 1130-31 (internal quotations and citations omitted).

In discussing the need for grand jury secrecy the United States Supreme Court has observed that there exists

‘a long-established policy’ of [grand jury] secrecy, United States v. Procter & Gamble, [356 U.S. 677, 681, 78 S.Ct. 983, 986 (1958)], older than our Nation itself. The reasons therefor are manifold, id., 356 U.S. at page 682, 78 S.Ct. at page 986, and are compelling when viewed in the light of the history and *modus operandi* of the grand jury. Its establishment in the Constitution ‘as the sole method for preferring charges in serious criminal cases’ indeed ‘shows the high

place it (holds) as an instrument of justice.’ Costello v. United States, 1956, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397. Ever since this action by the Fathers, the American grand jury, like that of England, ‘has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.’ Id. Indeed, indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves. Id. 350 U.S. at pages 362, 363, 76 S.Ct. at pages 408, 409. To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused.

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399–400, 79 S.Ct. 1237, 1241, 3 L.Ed.2d 1323 (1959). Exceptions to this secrecy exist but are rare, 42 Pa. C.S. § 4549, and typically the protections of secrecy are removed only where a presentment or report has been issued by a grand jury.

Such is the case here where the Grand Jury authored the Report which, pursuant to section 4552 of the Act, was accepted by the Court. The Court then ordered the Report to be made public¹ by Order dated April 27, 2018 as amended by Amended Order entered May 22, 2018. The public release of the Report was stayed for thirty days to permit notice to named nonindicted persons and to provide such persons an opportunity to respond as required by due process and section 4552(e) of the Act. Absent the due process requirement that nonindicted persons be afforded the opportunity to respond the Report would have been immediately released to the public. Release of the Report would have occurred shortly thereafter once all responses were indexed and prepared for publication as an appendix to the Report. The issuance of the Report by the Grand Jury has removed the material contained therein from the protections of grand jury secrecy.

¹ Other than the contents of the Report all other materials related to Notice 1 would remain under seal.

For these reasons the Court concludes, consistent with its authority under section 4549 of the Act and the July 6th Order, that the information contained in the Report is no longer protected by grand jury secrecy as the Grand Jury intended it to be released to the public in an expeditious manner, this Court accepted that determination and authorized the public release of the Report subject only to a brief delay to allow the filing of responses. The period necessary to allow the filing of responses and to index and compile them into an appendix to the Report has now passed and the Report should now be public. At this time the release of the Report is only prevented by our Supreme Court's order of June 20, 2018, enjoining the Court and the OAG from releasing the Report.

Accordingly, as there is no violation of grand jury secrecy, the redacted brief may be filed and made public in its current form at the discretion of the Supreme Court. The issues raised by Petitioners' of whether the inclusion of the factual information in the redacted brief violates any extant Supreme Court order or breaches the anonymity afforded the Petitioners by that Court is not within this Court's purview. Due to the determination that grand jury secrecy is not violated by the redacted brief, the Court need not address the OAG's second, third, and fourth arguments and its fifth argument, related to anonymity, is not within this Court's jurisdiction.

For the foregoing reasons the following Order is entered:

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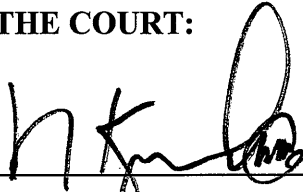
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ORDER

AND NOW, this 20 day of July 2018, upon consideration of the Petitioners' Objections to the Office of Attorney General's Redacted Brief and for the reasons discussed in the foregoing Opinion, it is hereby **ORDERED, DIRECTED, AND DECREED** that the Objections are **OVERRULED**. The Court finds that there is no material protected by grand jury secrecy contained in the Office of Attorney General's Redacted Brief. The brief may be filed as a public record at the discretion of the Pennsylvania Supreme Court.

This Opinion and Order are not sealed.

BY THE COURT:



Norman A. Krumenacker, III
Supervising Judge
40th Statewide Investigating Grand Jury