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6 United States of America

7 UNITED STATES DISTRICT COURT
8 FOR THE CENTRAL DISTRICT OF CALIFORNIA
9 SOUTHERN DIVISION

10 UNITED STATES OF AMERICA,) SA CR No. 05-293(B)-CJC
11 Plaintiff,)
12 v.) APPLICATION TO SEAL
DECLARATION OF JAY I.
13 CHI MAK, et al.,) BRATT PURSUANT TO LOCAL
14 Defendants.) RULE 79-5.1

15 Authorities: Rule 6(e),
16 Fed. R. Crim. P.;
Deliberative Process
Privilege

17 The United States of America, through its
18 undersigned counsel, applies for an order pursuant to
19 Local Rule 79-5.1 that would maintain the *Ex Parte* and
20 *In Camera* Declaration of Jay I. Bratt ("Bratt
21 Declaration") under seal. Good legal cause exists to
22 preserve the status quo and keep the declaration under
23 seal and *in camera*. In particular, the declaration
24 contains grand jury information that is not subject to
25 public disclosure pursuant to Rule 6(e), Fed. R. Crim.
26 P. In addition, because the declaration discusses both
27 predecisional recommendations to the Attorney General
28 and internal Department of Justice ("DOJ")

1 deliberations about how to proceed in this matter, the
2 deliberative process privilege protects it from public
3 dissemination. Mr. Gertz has demonstrated no need for
4 the document such that he can overcome either Rule 6(e)
5 or the government's privilege. Last, as alternative,
6 the Court should defer ruling on whether to unseal the
7 declaration until after the July 24th hearing.

8 In support of this application, the government
9 states as follows:

10 **Background**

11 On July 10, 2008, the government filed a motion to
12 continue the hearing date previously scheduled for July
13 24, 2008, and to extend the time (1) for the government
14 to file its response to William Gertz's motion to quash
15 the subpoena the Court issued to him, and (2) for Mr.
16 Gertz to file any reply. In support of its July 10th
17 motion, the government filed the Bratt Declaration *in*
18 *camera* and *ex parte*. In paragraph 2 of the declaration,
19 the government gave its reasons for filing the document
20 under seal. It did not, however, formally seek to seal
21 the declaration pursuant to the requirements of Local
22 Rule 79-5.1.¹ Mr. Gertz objected to the government's
23

24 ¹ The government notes that Local Rule 79-5.1
25 appears to contemplate that the application and
26 proposed order that accompany the document that the
27 party seeks to file under seal will themselves be filed
28 under seal and *in camera*. The government is not filing
this application under seal or *in camera* because,
unlike the Bratt Declaration, which did not address any
of Mr. Gertz's arguments in support of his motion to

1 failure to follow the local rule.

2 By minute order dated July 14, 2008, the Court
3 denied the government's motion for a continuance. In
4 the same order, the Court stated that it would make the
5 Bratt Declaration public by the close of business on
6 Wednesday, July 16, "unless the Government can show good
7 legal cause for maintaining the declaration under seal."
8 See Minute Order, Docket Entry 754, at 2.

9 **Argument**

10 **I. The Bratt Declaration Contains Rule 6(e)**
11 **Information**

12 In its Order, the Court stated that the
13 "declaration does not reveal any . . . matter occurring
14 before the grand jury." *Id.* The government
15 respectfully submits that the Court was mistaken.

16 In *In re Grand Jury Investigation (Lance)*, 610 F.2d
17 202 (5th Cir. 1980), a leading case setting forth the
18 criteria for determining when a matter is something that
19 occurs before the grand jury, the Fifth Circuit held
20 that the secrecy provisions of Rule 6(e) apply not only
21 to past events that have occurred before the grand jury,
22 but also to "disclosure of matters which will occur,
23 such as statements which reveal the identity of persons
24 who will be called to testify or which report when the

25 quash, this pleading does discuss authorities and
26 principles that are germane to issues that Mr. Gertz
27 has raised in his motion to quash. This application,
28 however, describes certain information in only general
terms in order to preserve its status as confidential
and privileged.

1 grand jury will return an indictment." *Id.* at 216-17;
2 accord *In re Dow Jones & Co.*, 142 F.3d 496, 499-500
3 (D.C. Cir. 1998); *SEC v. Dresser Indus., Inc.*, 628 F.2d
4 1368, 1382 (D.C. Cir. 1980) (en banc). As this circuit
5 has explained, the scope of Rule 6(e) "extends to
6 anything which may reveal what occurred before the grand
7 jury, or information which would reveal the identities
8 of witnesses or jurors, the substance of testimony, the
9 strategy or direction of the investigation, the
10 deliberations or questions of the jurors, and the like."
11 *Standley v. Dep't of Justice*, 835 F.2d 216, 218 (9th Cir.
12 1987) (emphasis added).

13 The information here is almost identical to that
14 considered by the Fifth Circuit in *Lance*, where the
15 court specifically found that an article in the *Atlanta*
16 *Journal and Constitution* "clearly discuss[ed] matters
17 occurring before the grand jury" because, *inter alia*, it
18 "name[d] a specific witness who is expected to be
19 called" before the grand jury. 610 F.2d at 218 n.12.
20 Here, the Bratt Declaration reveals that government
21 attorneys have formally sought the Attorney General's
22 approval to subpoena a specific witness to the grand
23 jury and it names that witness. Rule 6(e) prohibits the
24 disclosure of that sort of information.

25 **II. The Bratt Declaration Reveals Matters that Are**
26 **Protected by the Deliberative Process Privilege**

27 As this circuit explained in *FTC v. Warner Comms.*
28 *Inc.*, the deliberative process privilege—

1 permits the government to withhold documents that
2 reflect advisory opinions, recommendations and
3 deliberations comprising part of a process by which
4 government decisions and policies are formulated.
5 *NLRB v. Sears, Roebuck & Co*, 421 U.S. 132, 150
6 (1975). It was developed to promote frank and
7 independent discussion among those responsible for
8 making governmental decisions, *Environmental*
9 *Protection Agency v. Mink*, 410 U.S. 73, 87 (1973),
10 and also to protect against premature disclosure of
11 proposed agency policies or decisions. *Coastal*
12 *States Gas Corp. v. Department of Energy*, 617 F.2d
13 854, 866 (D.C.Cir. 1980). The ultimate purpose of
14 the privilege is to protect the quality of agency
15 decisions. *Sears*, 421 U.S. at 151.

16
17 A document must meet two requirements for the
18 deliberative process privilege to apply. First,
19 the document must be predecisional—it must have
20 been generated before the adoption of an agency's
21 policy or decision. . . . Second, the document
22 must be deliberative in nature, containing
23 opinions, recommendations, or advice about agency
24 policies. *Coastal States*, 617 F.2d at 866. . . .

25
26 The deliberative process privilege is a qualified
27 one. A litigant may obtain deliberative materials
28

1 if his or her need for the materials and the need
2 for accurate fact-finding override the government's
3 interest in non-disclosure. . . . Among the
4 factors to be considered in making this
5 determination are: 1) the relevance of the
6 evidence; 2) the availability of other evidence; 3)
7 the government's role in the litigation; and 4) the
8 extent to which disclosure would hinder frank and
9 independent discussion regarding contemplated
10 policies and decisions.

11 742 F.2d 1156, 1161 (9th Cir. 1984)²; see also *Maricopa*
12 *Audubon Soc'y v. United States Forest Serv.*, 108 F.3d
13 1089, 1093-95 (9th Cir. 1997) (addressing the deliberative
14 process privilege in the context of Exemption 5 of the
15 Freedom of Information Act); *Nat'l Wildlife Fed'n v.*
16 *United States Forest Serv.*, 816 F.2d 1114, 1117 (9th Cir.
17 1988) (same).

18 The discussions and documents described in the
19

20 ² To assert the deliberative process privilege in a
21 court proceeding, the "head of the department" having
22 control over the requested information must make a
23 formal claim, based on his personal consideration of
24 the matter, specifying the information for which the
25 government is asserting the privilege. *Landry v. FDIC*,
26 204 F.3d 1125, 1135 (D.C. Cir. 2000). To support the
27 claim of privilege here, the government is submitting
28 the accompanying declaration of J. Patrick Rowan, the
Acting Assistant Attorney General for the National
Security Division at DOJ. Mr. Rowan is the senior DOJ
official with oversight of the government's
investigation in this matter. He is personally
familiar with the information in the Bratt Declaration
and has attested both to its deliberative nature and to
the harm to DOJ if the information is publicly
disseminated.

1 Bratt Declaration are both predecisional and
2 deliberative. The declaration describes discussions
3 that have occurred within DOJ regarding the position the
4 government should take in response to the court's
5 subpoena of Mr. Gertz and explains that no decision on
6 that issue has yet been made. The declaration also
7 indicates who within DOJ will be making that decision.
8 The Bratt Declaration further discusses internal
9 recommendations made by Department of Justice officials,
10 as well as formal written requests, and therefore
11 discusses matters protected by the deliberative process
12 privilege. In particular, it discusses the
13 recommendations of attorneys within DOJ as to whether
14 the Attorney General should authorize the issuance of
15 particular grand jury subpoenas. See 816 F.2d at 1118-
16 19 (explaining approvingly that the deliberative process
17 privilege has been held to cover all "recommendations,
18 draft documents, proposals, suggestions and other
19 subjective documents which reflect the personal opinions
20 of the writer rather than the policy of the agency," as
21 well as documents which would "inaccurately reflect or
22 prematurely disclose the views of the agency") (quoting
23 *Coastal States*, 617 F.2d at 866); see also *United States*
24 *v. Furrow*, 100 F. Supp. 2d 1170, 1174-75 (C.D. Cal.
25 2000) (death penalty evaluation form and prosecution
26 memorandum submitted to the Attorney General's committee
27 considering whether to authorize pursuit of that penalty
28

1 were protected by the deliberative process privilege).

2 The government has a strong interest in protecting
3 the predecisional and deliberative information contained
4 in the Bratt Declaration. As set forth in the
5 Declaration of J. Patrick Rowan ("Rowan Decl."),
6 dissemination of the declaration could have a chilling
7 effect on internal discussions within DOJ. See Rowan
8 Decl. at ¶¶ 4-5. Among other things, the individuals
9 who raised issues about the government's continued
10 participation in the proceeding the Court initiated –
11 issues that are separate from any of the arguments that
12 Mr. Gertz has raised in his motion to quash – might very
13 well refrain from raising similar concerns in the
14 future. *Id.*

15 For his part, Mr. Gertz has not demonstrated a need
16 for the information in the Bratt Declaration sufficient
17 to overcome the government's privilege. The internal
18 discussions within DOJ about how to participate in the
19 Court's proceedings and the recommendations of DOJ
20 attorneys about how to further the government's own
21 investigation of the leaks are not relevant to the
22 issues that Mr. Gertz has raised in his motion. He
23 argues that to the extent that "the Bratt Declaration
24 contains information within the scope of Rule 6(e), then
25 Mr. Gertz has a particularized need for access to that
26 information in connection with these proceedings . . .
27 ." William Gertz's Response to Motion to Continue

28

1 ("Gertz Response") at ¶ 4. That might be true if the
2 information in the Bratt Declaration related to the
3 grand jury proceedings that gave rise to the leaks in
4 his May 16, 2006, article. However, he has no such
5 particularized need for the information when it pertains
6 to future grand jury activity in the separate
7 investigation of the leaks.³

8 Mr. Gertz also contends that the information in the
9 Bratt Declaration may "bear upon what the government has
10 represented, or may later represent, to the Court
11 regarding the character of the information reported in
12 the May 16, 2006, Gertz article, the need for Mr.
13 Gertz's testimony, or other matters that may affect the
14 outcome of these proceedings." *Id.* at ¶ 5. As the
15 Court is aware, the declaration speaks solely to why the
16 government was not in a position to file a response to
17 the motion to quash by the July 10, 2008, due date and
18 was requesting additional time. It avoided the merits
19 of the dispute. Nor did the Bratt Declaration "contain
20 information regarding Mr. Gertz or his employer, not
21 directly related to the issues implicated by the Motion
22 to Quash, of which Mr. Gertz should be aware." *Id.* Mr.
23 Gertz has no need for the privileged information (or the
24

25 ³ Insofar as Mr. Gertz might fear that the
26 government may use future activities in the grand jury
27 to respond to the exhaustion argument he raises in his
28 motion to quash, the government represents that it has
no intention of doing so. Nor did the Bratt
Declaration discuss such a scenario.

1 grand jury information subject to Rule 6(e))⁴ in order
2 to effectively participate in this litigation.


3 **III. Alternatively, the Court Should Refrain from**
4 **Ruling Whether to Unseal the Bratt Declaration**
5 **until after the July 24, 2008, Hearing**

6 At the July 24, 2008, hearing, the Court may decide
7 to grant Mr. Gertz's motion to quash. Such a ruling
8 would render the issue of whether the Bratt Declaration
9 should be unsealed moot. Accordingly, given the
10 government's initial showing of the privileged and
11 confidential nature of the information in the Bratt
12 Declaration, the Court should defer ruling on whether to
13 unseal it until after the hearing.

13 **Conclusion**

14 For the foregoing reasons, the Court should grant
15 the government's application to seal the Bratt
16 Declaration pursuant to Local Rule 79-5.1.

17 Respectfully submitted,

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19 _____
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25 ⁴ Even if Mr. Gertz could establish a
26 particularized need for the information in the
27 declaration, that would only mean that he would have
28 access to that information pursuant to a protective
order; Rule 6(e) would still require the information
to remain non-public.