STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 18, 2017)

In Re: 38 Studios Grand Jury	:	**C.A. No. PM-17-0701**

DECISION

GIBNEY, P.J. Governor Gina M. Raimondo (the Petitioner), in her capacity as Governor of the State of Rhode Island, brings this petition for the release of grand jury documents relating to the 38 Studios investigation. The Petitioner requests that the Court order public disclosure of all grand jury materials and/or documents regarding 38 Studios which were presented over the course of eighteen months beginning in 2013 and ending in 2015. Noting the immense public interest in the 38 Studios investigation, the Petitioner urges the release of documents and maintains that the reasons for disclosure outweigh the need for secrecy. In an amicus curiae brief, the American Civil Liberties Union of Rhode Island (ACLU) supports the Petitioner's request to disclose grand jury records. The Rhode Island Office of the Attorney General (Attorney General) objects to the Petitioner's request, contending that disclosure is not permitted under Rhode Island's Rules of Criminal Procedure and that the Petitioner has not demonstrated a particularized need for the materials. This Court exercises jurisdiction pursuant to Super. R. Crim. P. 6(e)(3)(C).

I

Facts and Travel

In June of 2010, the Rhode Island General Assembly authorized the issuance of up to $125 million in bonds to provide for the financing of companies seeking to grow their

employment in Rhode Island. In November of 2010, the Rhode Island Economic Development Corporation (the EDC) issued $75 million in bonds to 38 Studios to encourage the company's move to Rhode Island and to finance its expansion in the state. In 2012, 38 Studios filed for bankruptcy and did not repay the bonds. The bankruptcy of 38 Studios left Rhode Island taxpayers with an estimated $88 million loss in principal and interest.

A statewide grand jury convened in December of 2013 in order to investigate the 38 Studios deal for any possible criminal wrongdoing. That grand jury sat for a total of eighteen months, concluding in July of 2015. There were approximately 146 individuals, including members of the 2010 General Assembly, interviewed in connection with the grand jury's investigation. At the conclusion of that investigation, the Attorney General and the Rhode Island State Police determined that there were "no provable criminal violations of the Rhode Island General laws in connection with the funding of 38 Studios, the disbursement of funds to 38 Studios, [or] by 38 Studios vendors." Results of the Criminal Investigation of 38 Studios, LLC (Investigation Results) at 8. On February 3, 2017, the Attorney General confirmed that the 38 Studios grand jury investigation was closed.

Following the bankruptcy of 38 Studios and the failure to repay the bonds, the State brought a separate civil action against entities involved in the business deal. This civil action resulted in settlements in excess of $61 million and provided for the release of hundreds of thousands of pages of documents, e-mails, pleadings, and deposition transcripts that were produced in relation to the civil action. On February 10, 2017, this Court, Silverstein J., approved the final settlement of the last remaining defendant in the State's civil action, thus bringing the civil matter to a close. Following that final settlement, on February 13, 2017, the Petitioner brought her petition to release materials related to the grand jury's investigation.

II

Parties' Arguments

In moving for the disclosure of grand jury materials, the Petitioner contends that there has been prolonged and profound public interest in the 38 Studios deal and the resulting investigation. The Petitioner notes that Super. R. Crim. P. 6(e)(2) (Rule 6(e)(2)) sets forth a general rule of grand jury secrecy that prohibits the disclosure of information that would tend to reveal some secret aspect of the grand jury's investigation. Notwithstanding Rule 6(e)(2), the Petitioner contends that the Superior Court has discretion to order the release of grand jury material in exceptional circumstances.

Moreover, the Petitioner argues that the Superior Court—in evaluating the disclosure of grand jury materials—should consider the effect such disclosure would have on policies underlying grand jury secrecy and should evaluate the need for the material sought. The Petitioner avers that the burden of demonstrating such a particularized need is not a heavy one and that as the conditions justifying secrecy become less relevant, a party requesting disclosure will have a lesser burden in showing justification.

Further, the Petitioner notes, the general secrecy of the grand jury can be pierced if a disclosure request complies with an enumerated exception under Super. R. Crim. P. 6(e)(3) (Rule 6(e)(3)), which provides for the release of documents in limited circumstances. However, the Petitioner contends that the exceptions providing for disclosure under Rule 6(e) are not an exclusive or exhaustive list. The Petitioner argues that some federal courts have granted disclosure of materials when a request did not fit the list of exceptions provided in the Federal Rules of Criminal Procedure. Those federal courts, the Petitioner explains, allow for disclosure

in "exceptional circumstances" and will consider a release of material if there is significant public interest and if disclosure would further the goal of government transparency.

Finally, the Petitioner contends that the immense historical significance and profound public interest constitute exceptional circumstances, as recognized by federal courts, warranting the disclosure of grand jury materials. Such exceptional circumstances, the Petitioner argues, justify disclosure in the instant matter and outweigh the need for grand jury secrecy. The Petitioner maintains that—although the grand jury investigation did not result in the indictment of any individual—revealing grand jury materials would not unjustly expose innocent individuals because many parties have already been under the public microscope for their involvement with 38 Studios, and the public is generally aware of their involvement.

In its amicus curiae brief, the ACLU, in support of the Petitioner's request, cites similar arguments in favor of disclosure. The ACLU contends that grand jury records should be released in light of the extraordinary circumstances of the 38 Studios grand jury investigation. Namely, the ACLU contends that the public has a right to know the inner workings of the investigation since it dealt with the Rhode Island Legislature and the allocation of taxpayer funds. The ACLU maintains that the Court is not constrained by the Rhode Island Rules of Criminal Procedure and it may release records beyond those circumstances which allow for disclosure according to Rule 6(e)(3). Finally, the ACLU argues that the historical relevance of this investigation favors disclosure and that heightened public interest outweighs any need for secrecy.

Alternatively, the Attorney General contends that the Petitioner's request should be denied because disclosure of the 38 Studios grand jury materials is not permitted under Rhode Island's Rules of Criminal Procedure. The Attorney General maintains that the request for disclosure does not meet any of the enumerated exceptions to Rule 6(e) as required to warrant

disclosure. The Attorney General notes that the Petitioner's request is not brought preliminarily to, or in conjunction with, a judicial proceeding, since the State's civil suit for damages has already concluded.

Further, the Attorney General maintains that the Petitioner has not demonstrated a particularized need for the materials, instead focusing her request on a need for governmental transparency and public interest. The Attorney General contends that such a basis is insufficient to permit disclosure under the Rules of Criminal Procedure and Rhode Island case law. Even if the Court were to consider disclosure outside the permitted exceptions to Rule 6(e), the Attorney General contends that the Petitioner's request does not merit disclosure according to policy considerations promulgated by the federal courts. The Attorney General notes that the identity of witnesses who testified before the grand jury have never been released, no witness has authorized disclosure, and the investigation closed relatively recently in 2015. It further argues that the statute of limitations for potential charges has not yet run and that the Petitioner's request is not properly limited in scope. Accordingly, the Attorney General maintains that disclosure is not appropriate under federal policy considerations.

Finally, the Attorney General contends that the Petitioner's claim of public interest does not outweigh an interest in maintaining grand jury secrecy. The Attorney General argues that release of the materials without a demonstration of a particularized need could have a chilling effect on future grand juries and their role in the criminal justice system; such a disclosure could affect witnesses' willingness to testify or cooperate in fear that their testimony could be released without proper legal foundation. For all of the above reasons, the Attorney General contends that the Petitioner's request must be denied.

III

History of the Grand Jury

The Rhode Island Supreme Court has stated that the purpose of the grand jury is to serve the '"dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions."' Ims v. Town of Portsmouth, 32 A.3d 914, 922-23 (R.I. 2011) (quoting U.S. v. Sells Eng'g, Inc., 463 U.S. 418, 423 (1983)). Our Supreme Court has also noted that a grand jury proceeding is not a trial; rather, the grand jury was developed primarily as an inquisitorial institution, as opposed to one of an adversarial nature. Id. at 923. A grand jury's role is to determine through inquiry whether or not a criminal prosecution is warranted based on the evidence presented. See id.; see also Sara Sun Beale, William C. Bryson, James E. Felman, and Michael J. Elston, Grand Jury Law and Practice, § 1:7 (2d ed. 2016). In carrying out its mission, the grand jury serves two primary roles, often referred to as the "sword" and "shield" functions. See U.S. v. Navarro-Vargas, 408 F.3d 1184, 1190-96 (9th Cir. 2005).

Concern for the importance of the grand jury's dual function underlies the '"long-established policy that maintains the secrecy of the grand jury proceedings."' In re Doe, 717 A.2d 1129, 1134 (R.I. 1998) (quoting Sells Eng'g, 463 U.S. at 424). Due to the weighty nature of its responsibilities, the grand jury conducts its investigation behind closed doors where it is free from scrutiny by the public, the press, the court, and even the defendant and defense counsel. See 1 Charles A. Ian Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice & Procedure Criminal § 106 (4th ed. 2008).

The Rhode Island Rules of Criminal Procedure address the critical role of the grand jury and its need for secrecy. Rule 6(e)(2)[1] states that

> "[a] grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the State, or any person to whom disclosure is made . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. A knowing violation of Rule 6 may be punished as a contempt of court."

In contemplating the disclosure of grand jury materials, the Court must be mindful of the "fundamental policy of grand jury secrecy." See In re Doe, 717 A.2d at 1134 (internal quotation omitted). Accordingly, whenever a reviewing court is asked to determine whether a specific disclosure impermissibly pierces this veil of secrecy, the reviewing court must examine "not only the need for and the character of the material sought but also the effect such disclosure would have on policies underlying grand jury secrecy." Id.

Accordingly, Rule 6(e)(3) contains a list of exceptions whereby disclosure of grand jury matters, otherwise prohibited by the Rules of Criminal Procedure, may be made. See Rules 6(e)(3)(A) and 6(e)(3)(C). Specifically, Rule 6(e)(3)(C) states that:

> "(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
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> > "(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;
> >
> > "(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;
> >
> > "(iii) when the disclosure is made by an attorney for the State to another grand jury; or

[1] Rhode Island Rule of Criminal Procedure 6(e)(2) is analogous to its federal rule counterpart. See Fed. R. Crim. P. 6(e)(2).

> "(iv) when permitted by a court at the request of an attorney for the State, upon a showing that such matters may disclose a violation of federal criminal law, to an appropriate official of the federal government for the purpose of enforcing such law."

Furthermore, the Rhode Island Supreme Court instructs that a reviewing Court should evaluate policy considerations with an eye to the particular facts of each request before piercing the grand jury's veil of secrecy. See State v. Carillo, 112 R.I. 6, 11 n.4, 307 A.2d 773, 776 n.4 (1973); see also In re Grand Jury Investigation No. 78-184, 642 F.2d 1184, 1191 (9th Cir. 1981). These policy considerations include:

> (1) Preventing the escape of those whose indictment may be contemplated;
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> (2) Ensuring the grand jurors the utmost freedom in their deliberations and preventing a defendant or target of an investigation from importuning them;
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> (3) Preventing the subornation of perjury and other witness tampering;
>
> (4) Encouraging the free and untrammeled disclosure of relevant information; and
>
> (5) Protecting the innocent defendant or target exonerated by the investigation from public disclosure of the fact that he or she was under investigation. See Carillo, 112 R.I. at 11 n.4, 307 A.2d at 776 n.4.

With these policy considerations in mind, various courts have nonetheless cautioned that the secrecy extended to grand jury proceedings is not absolute as there is "no per se rule against disclosure of any and all information which has reached the grand jury chambers." In re Young, 755 A.2d 842, 846 (R.I. 2000) (internal quotation omitted).

IV

Analysis

The Petitioner acknowledges that—although requests for grand jury material typically coincide with one of the exceptions in Rule 6(e)(3)(C)—her request does not, in fact, fall under any of the enumerated exceptions which would permit disclosure despite the secret nature of the grand jury. Rather, the Petitioner argues that the Rhode Island Rules of Criminal Procedure are analogous to the Federal Rules of Criminal Procedure, pursuant to which some federal courts have held that the list of enumerated exceptions under Rule 6(e) is not an exclusive list. The Petitioner contends that the release of grand jury materials is appropriate in "exceptional circumstances" that are not explicitly provided for in the rules of criminal procedure.

The Attorney General counters that Rhode Island's enumerated list of exceptions to Rule 6(e) is, in fact, an exclusive list and that petitioners seeking disclosure must first meet an enumerated exception before their request can be granted. The Attorney General contends that a petitioner's request must meet a two-pronged test before disclosure is permitted; first, the Court must determine that the request meets a recognized exception under Rule 6(e)(3), and second, the petitioner must then demonstrate a particularized need for disclosure. To support its analysis, the Attorney General notes that previous Rhode Island cases carefully evaluated whether an exception to Rule 6(e) was met before granting disclosure and that Rhode Island courts have denied requests that failed to comport with an enumerated exception.[2]

[2] The Attorney General points to this Court's decisions in the following—In re: Ryan O'Loughlin Grand Jury, (R.I. Super. Oct. 15, 2012) (Gibney, P.J.); U.S. v. Baggot, 463 U.S. 476, 480 (1983); and In re: Station Fire Grand Jury, No. PM-2006-5611 (R.I. Super. Dec. 21, 2006) (Rodgers, P.J.)—to suggest that a petitioner's request must first meet an exception to the general rule of secrecy before a request for disclosure can be evaluated.

While Rhode Island courts have not yet granted a motion to disclose that falls outside the exceptions, the Court of Appeals for the Second Circuit has interpreted Federal Rule 6(e) as a nonexclusive list, holding that the disclosure of grand jury materials may be warranted in special circumstances beyond those listed in Fed. R. Crim. P. 6(e). See In re Petition of Craig, 131 F.3d 99, 103 (2nd Cir. 1997). However, that same federal court denied the petitioner's motion, finding that—although the list of enumerated exceptions under Federal Rule 6(e) is not an exhaustive list and motions to disclose may be brought under other circumstances not listed—the petitioner's request still must comport with certain factors as outlined by the court, which the petitioner failed to show. See id. at 106-107. The Court of Appeals noted that a reviewing court "might want to consider" factors such as:

> "(i) the identity of the party seeking disclosure;
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> "(ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure;
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> "(iii) why disclosure is being sought in the particular case;
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> "(iv) what specific information is being sought for disclosure;
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> "(v) how long ago the grand jury proceedings took place;
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> "(vi) the current status of the principals of the grand jury proceedings and that of their families;
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> "(vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public;
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> "(viii) whether the witnesses to the grand jury proceedings who might be affected by the disclosure are still alive; and
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> "(ix) the additional need for maintaining secrecy in the particular case in question." See id. at 106.

At the same time, the Court of Appeals in In re Petition of Craig rejected the petitioner's argument "that any time a public interest is asserted, a trial judge should simply balance the

interest in question with the need for secrecy of the particular grand jury." See id. at 104 (emphasis in original). Explained the Second Circuit: '"if courts granted disclosure whenever the public had an interest in grand jury proceedings, Rule 6(e) would be eviscerated."' Id. (emphasis in original) (quoting In re Petition of Craig, 942 F. Supp. 881, 883 (S.D.N.Y, 1996). Indeed, permitting an exception based on mere public interest alone would allow the exception to entirely swallow the rule, and the purpose of Rule 6(e) regarding the general secrecy of the grand jury would be rendered obsolete. See id. at 105. Ultimately, the Second Circuit court in In re Petition of Craig denied the petitioner's motion after applying the facts of the case to the above-listed factors. See id. at 104.

The Second Circuit is only one of three federal appellate courts that have held that grand jury testimony and records may be disclosed despite a request's failure to comport with a specified exception to Rule 6(e). See 154 A.L.R. Fed. 657 Ch. II § 3; see also Carlson v. U.S., 837 F.3d 753 (7th Cir. 2016); In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261 (11th Cir. 1984). In In re Petition to Inspect and Copy, the Eleventh Circuit held that requests for disclosure may be considered when the circumstances fall outside the limited exceptions contained in the rule; however, that court granted the petitioner's request only because the materials were being sought for use in connection with an investigation into a district court judge's alleged violation of the Code of Judicial Conduct. See In re Petition to Inspect and Copy, 735 F.2d at 1267-68. The Eleventh Circuit Appellate Court noted that a judicial investigation constituted "special circumstances," since the request for materials was "at least

closely analogous to the situation for which the explicit Rule 6(e)(3)(C)(i) exception was created."[3] Id. at 1268.

A

Rhode Island's Rule 6(e)

This Court is mindful that the Second and Eleventh Circuits' interpretations of Federal Rule 6(e) are not binding upon this Court, which interprets Rhode Island's Rule 6(e) pursuant to Rhode Island law. See Plante v. Stack, 109 A.3d 846, 856 n.8 (R.I. 2015). This Court looks to the Rhode Island Supreme Court's analysis of Rhode Island's Rule 6(e) of Criminal Procedure in In re Young, 755 A.2d at 846-48.[4] In that decision, the Supreme Court stressed the well-founded history of the grand jury and the importance of secrecy essential to its core functions. See id. at 846. The Court noted that "whenever a reviewing court is asked to determine whether a specific disclosure impermissibly pierces this veil of secrecy, that court must examine not only the need for and the character of the material sought but also the effect such disclosure would have on policies underlying grand jury secrecy." Id.

The Rhode Island Supreme Court has not yet ruled on a motion to disclose grand jury materials which falls outside the enumerated exceptions listed in Rule 6(e)(3)(C). See id. Similarly, this Court has never before granted such a motion to disclose when a request fell outside the enumerated exceptions provided for in Rule 6(e)(3)(C). See In re Grand Jury, No. 10-6179, 2010 WL 5042899, at *3 (R.I. Super. Dec. 3, 2010) (denying motion despite

[3] This Court notes that Federal Rule 6(e)(3)(C)(i) provides for the release of grand jury materials when sought "preliminarily to or in connection with a judicial proceeding" and is the exception most often cited for grand jury requests, both at the federal and state level. See Fed. R. Crim. P. 6(e)(3)(C)(i); In re Petition to Inspect and Copy, 735 F.2d at 1268.

[4] Our Supreme Court in In re Young, in affirming the finding of the Presiding Justice, found the decision to be "very persuasive," attached the decision to the order, and made it a "part hereof." 755 A.2d at 843.

petitioner's request for use in trial preparation since no particularized need shown); In re Mark Jackson Grand Jury, No. 09-6902, 2010 WL 677721, at *4 (R.I. Super. Feb. 23, 2010) (denying petitioner's motion, despite meeting an enumerated exception, because no particularized need was shown and request was unlimited in scope).

This Court denied a request for grand jury disclosure in 2012 when the request failed to first meet an enumerated exception to Rule 6(e). See In Re: Ryan O'Loughlin at 6. This Court stated that "a court will not release grand jury transcripts unless the party seeking disclosure fulfills both the requirements of Rule 6(e)(3)(C)(i) and the three prongs of the 'particularized need' test."[5] See id. (emphasis in original). This Court clarified the relationship between the Rules of Criminal Procedure and the particularized need test promulgated by the courts, stating that exceptions to Rule 6(e) first impose a threshold requirement that a specific type of need be shown, while the particularized need test merely evaluates the degree of the need presented. See id. (citing to U.S. v. Baggot, 463 U.S. at 480).

Rhode Island's Rule 6(e)(2) of Criminal Procedure generally bars the disclosure of grand jury materials, and Rule 6(e)(3)(C) states that grand jury materials may be disclosed under the four enumerated circumstances as provided for in the rule. See Super. R. Crim. P. 6(e) (emphasis added). Under a plain reading of Rule 6(e)(3)(C), grand jury disclosure may not be had unless such a request falls within the enumerated exceptions to Rhode Island's Rules of Criminal Procedure. See also FIA Card Servs., N.A. v. Pichette, 116 A.3d 770, 779 (R.I. 2015) (interpreting a rule of civil procedure according to the "plain language" and "clear intent" of said

[5] The particularized need test—first outlined in Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 222 (1979) and later adopted by the Rhode Island Supreme Court—evaluates whether the material sought is needed to avoid a possible injustice in another judicial proceeding, whether the need for disclosure is greater than the need for continued secrecy, and whether the request is structured to cover only material so needed.

rule); Letendre v. R.I. Hosp. Trust. Co., 74 R.I. 276, 281, 60 A.2d 471, 474 (1948) (holding that rules of procedure are given same force and effect as statutes if promulgated under proper exercise of judicial power). In denying the petitioner's request for disclosure of grand jury materials, our Supreme Court specifically noted that, as the "instant disclosure request would pierce the veil of secrecy shielding the matters which occurred before the grand jury, the motion must be denied unless an exception can be shown." [6] See In re Young, 755 A.2d at 847 (emphasis added).

In the present matter, the Petitioner admittedly does not request the 38 Studios grand jury materials under any of the enumerated exceptions providing for such disclosure. She is not requesting the documents for use "preliminarily to or in connection with a judicial proceeding" under Rule 6(e)(3)(C)(i), since the State's civil suit concluded with a final settlement approved on February 10, 2017. See id. at 846 (limiting "preliminary to or in connection with a judicial proceeding" to uses related "fairly directly to some identifiable litigation, pending or anticipated[]"). Neither is the Petitioner requesting the release of grand jury documents under any alternative exceptions as provided in Rule 6(e)(3). See Rule 6(e)(3). Therefore, this Court must deny the Petitioner's request pursuant to a plain reading of the Rhode Island Rules of Criminal Procedure. See Rule 6(e)(3); see also FIA Card Servs., 116 A.3d at 779; In re Young, 755 A.2d at 847.

[6] Additionally, in dicta from In Re Young, the Rhode Island Supreme Court approved a limited disclosure of materials because the request conformed with a Rule 6(e) exception and the materials were "restricted to discovery and trial purposes" related to the civil claim of the petitioner. See 755 A.2d at 843.

B

Particularized Need

Even assuming, arguendo, that this Court were not limited by the confines of Rule 6(e)(3)(C), the Petitioner must show a "particularized need" for the grand jury materials in order to succeed with her request. See In re Young, 755 A.2d at 847; see also Carillo, 112 R.I. at 11, 307 A.2d at 776 (employing a particularized need standard in the criminal context as well, when defense counsel requests materials to aid a subsequent trial). Our Supreme Court set out the elements of the particularized need test when it held that

> "[t]he standard for determining when the traditional secrecy of the grand jury may be broken, warranting the disclosure pursuant to Rule 6(e), is that the parties must make a particularized showing 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.'" In re Young, 755 A.2d at 847 (citing Douglas Oil Co., 441 U.S. at 222).

The first prong of the particularized need test requires that the petitioner be preliminarily or actually engaged in "another judicial proceeding" distinct from the motion brought to disclose grand jury documents. See Douglas Oil, 441 U.S. at 211. The second prong places the burden of demonstrating that the need for disclosure outweighs the need for secrecy upon the party requesting disclosure.[7] See id. at 223. Finally, the third prong of the particularized need test favors requests that are limited in scope to a disclosure of materials specifically needed to prevent an injustice in another judicial proceeding. See Lucas v. Turner, 725 F.2d 1095, 1100 (7th Cir. 1984); see also In re Young, 755 A.2d at 847 (granting the release of documents where request was properly limited in scope to only materials so needed).

[7] However, that same Court recognized that such a burden is lessened when the particular facts of a case meet certain policy considerations as outlined by the federal courts. See Douglas Oil, 441 U.S. at 223.

In the present matter, the Petitioner has not sought release of materials for use in any other judicial proceeding, preliminarily or otherwise. The Petitioner notes that the independent civil action concluded in February of 2017 through settlement. The Petitioner requests disclosure based on a need for governmental transparency and public interest, but does not argue any recognized need for the documents, such as the prevention of an injustice in another proceeding. See Sells Eng'g, 463 U.S. at 443; U.S. v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (finding no particularized need when defense in civil suit would not be greatly prejudiced or an injustice would not be done). Therefore, the Petitioner has not met her burden to demonstrate that the need for disclosure outweighs the need for secrecy. See Douglas Oil, 441 U.S. at 223.

Finally, the Petitioner has not limited her request in any way to materials specifically needed; rather, in the memorandum accompanying her petition, she seeks all materials or documents presented to the grand jury, including transcripts, recordings, exhibits, and all other documents. The Petitioner requests all materials in furtherance of her desire for governmental transparency. Both federal courts and the Rhode Island Supreme Court have reviewed unlimited requests for materials unfavorably, since such requests suggest a lack of a particularized or specific need. See In re Young, 755 A.2d at 843 (reviewing a petition for limited disclosure, stating that "the Presiding Justice of the Superior Court, in a carefully crafted and comprehensive order, imposed stringent conditions on the release of the grand jury tapes[]"); see also Procter & Gamble, 356 U.S. at 683 (stating that in a case where a particularized need is established, "the secrecy of the proceedings is lifted discretely and limitedly[]").

Indeed, an unlimited request does not satisfactorily evidence a particularized need for the materials. No limit was placed on the materials requested in this case; rather, the Petitioner seeks

all records, including grand jury minutes and witness testimony for the purpose of governmental transparency. "Transparency" is not a relevant or persuasive factor under any court's analysis. See Lucas, 725 F.2d at 1108. In Lucas, the United States Court of Appeals for the Seventh Circuit denied a request for disclosure where there was no limit to the material sought since the request was not directed at the materials only so needed. See id. That Court explained:

> "Plaintiffs made *no* attempt to limit their request as they merely sought wholesale disclosure of *all* grand jury materials and then attempted to justify their needs. The indispensable secrecy of grand jury proceedings . . . must not be broken except where there is a compelling necessity . . . When compelling necessity warrants breaking this secrecy, the showing of need for [grand jury] transcripts [must] be made with particularity so that the secrecy of the proceedings may be lifted discretely and limitedly." See id. (internal citations omitted).

Likewise, the Petitioner in the instant case has not demonstrated a particularized need for the materials, and her unlimited request is not directed at materials only so needed. See In re Young, 755 A.2d at 847; see also Procter & Gamble, 356 U.S. at 683; Lucas, 725 F.2d at 1108.

Pursuant to the three-pronged test employed by Rhode Island and federal courts, this Court finds that the Petitioner has not demonstrated a "particularized need" for the 38 Studios grand jury materials. See Douglas Oil, 441 U.S. at 222. She has failed to demonstrate that the materials are needed to avoid a possible injustice in another proceeding, that the need for disclosure is greater than the need for continued secrecy, and that her request is structured to cover only materials so needed. See In re Young, 755 A.2d at 847; see also U.S. v. Sobotka, 623 F.2d 764, 768 (2nd Cir. 1980) (finding no showing of particularized need and denying request despite heightened public interest in the matter); Douglas Oil, 441 U.S. at 222.

C

Policy Considerations

1

Rhode Island Policy Factors

Assuming, arguendo, that the Petitioner had brought a motion to disclose under an exception enumerated in Rule 6(e)(3) and that she had demonstrated a particularized need, the Court would then engage in an analysis of policy considerations, first outlined in Carillo, 112 R.I. at 11 n.4, 307 A.2d at 776 n.4 and discussed supra. Despite the Petitioner's failure to meet threshold requirements, for purposes of discussion, this Court will analyze the Petitioner's request according to policy factors provided by the Rhode Island Supreme Court. See Carillo, 112 R.I. at 11 n.4, 307 A.2d at 776 n.4.

In the instant request, the first three policy considerations promulgated by the Rhode Island Supreme Court in Carillo and In re Doe would carry less weight since the grand jury that presided over the 38 Studios investigation has now disbanded.[8] See In re Doe, 717 A.2d at 1134; Carillo, 112 R.I. at 11 n.4, 307 A.2d at 776 n.4. Disclosure of the 38 Studios grand jury materials would not prevent the escape of any "whose indictment may be contemplated" since no indictment was issued and the investigation was closed. See In re Young, 755 A.2d at 846. Additionally, disclosure would not deprive the "grand jurors the utmost freedom in their deliberations," since this particular group has now disbanded; although, disclosure might affect the broader policy consideration of shielding jurors from public scrutiny. See id. Finally, disclosure in this case would not jeopardize the prevention of perjury or witness tampering since

[8] This Court has previously held that the first three policy considerations are eliminated after the grand jury in question has been disbanded and pointed to the holding in In re Doe, 717 A.2d at 1134, which reached this same conclusion. In re Mark Jackson Grand Jury, 2010 WL 677721, at *2.

all witness testimony before the grand jury has concluded; however, it is entirely possible for more witnesses to come forward in the future since, as the Attorney General notes, the statute of limitations for potential charges has not yet run. See id.

Nonetheless, disclosure of 38 Studios grand jury materials would negatively impact the "free and untrammeled disclosure of relevant information" before the grand jury, see id.—especially if a request for materials is granted without demonstration of a particularized need—since persons who have "information with respect to the commission of crimes" might be less likely to come forward with such information. See Lucas, 725 F.2d at 1100. Additionally, disclosure of 38 Studios materials would prejudice innocent defendants or targets "exonerated by the investigation" and would confirm to the public that the individual was under investigation, despite the fact that no indictment was returned and the investigation produced no evidence of criminal wrongdoing.[9] See In re Young, 755 A.2d at 846 (noting that the concern regarding protection of targets exonerated by a grand jury investigation had dissolved after the targets waived any objection to disclosure).

2

Federal Policy Factors

Assuming, arguendo, that the Court were to entertain a request for disclosure that fell outside the enumerated exceptions provided for in Rule 6(e)(3)(C),[10] the Court might also consider the policy factors employed by the Second Circuit. See In re Petition of Craig, 131 F.3d

[9] See also In re Grand Jury, 2010 WL 5042899, at *2, wherein the Court noted that the need for secrecy was not entirely lost since defendant had not sanctioned release of the materials. In that case, unlike the within matter, the defendant had been indicted.

[10] This Court denied a request for disclosure in 2012, wherein the request failed to first meet an enumerated exception to Rule 6(e). See In re: Ryan O'Loughlin Grand Jury, at *6. This Court stated that, "a court will not release grand jury transcripts unless the party seeking disclosure fulfills both the requirements of Rule 6(e)(3)(C)(i) and the three prongs of the 'particularized need' test." See id.

at 103. The Second Circuit's first policy factor considers the identity of the party seeking disclosure. See id. In the present case, the party seeking disclosure—the Petitioner on behalf of the State—does not contend that she was a party, witness, or target of the underlying action. The second policy factor considers whether a defendant to the grand jury proceeding or the government opposes disclosure. See id. No defendant has objected to disclosure in this matter, since the grand jury returned no indictment; however, the Attorney General has objected to Petitioner's request, stating that it represents the public interest in preserving the integrity of the judicial system and the grand jury process.

Pursuant to the Second Circuit's third policy consideration, the Court should evaluate "why disclosure is being sought in the particular case." See id. at 106. The Petitioner states that disclosure is sought due to the "immense and prolonged public interest" generated by the 38 Studios investigation. The Petitioner contends that a release of documents would promote "transparency" in order to boost the "public's confidence in State government," allowing the State to "finally move past this unfortunate episode in our history." Pet'r's Mem. 1, 11. Here, the Petitioner has not argued any particularized need for the disclosure—since she is not requesting the documents for use in a subsequent civil proceeding—and she cites to public interest to support her desire for release of the materials. See In re Young, 755 A.2d at 847 (citing Douglas Oil, 441 U.S. at 222 (stressing that a particularized need for disclosure must be shown)).

The Second Circuit's fourth policy consideration addresses the scope of the request for disclosure and encourages consideration of "what specific information is being sought for disclosure." See In re Petition of Craig, 131 F.3d at 106. In the present case, the Petitioner has not limited the scope of her request in any way, instead requesting the complete disclosure of all

materials presented to the grand jury. The Petitioner argues that the release of the materials from the independent civil suit has lessened the need for secrecy, and therefore, all materials or documents should be disclosed. However, the Attorney General notes that no grand jury documents have previously been made public through any means, despite the release of materials related to the independent civil suit.

Although this Court will consider the "extent to which the desired material . . . has been previously made public" under the seventh policy factor, see id., the Rhode Island Supreme Court in In re Young favorably addressed the petitioner's limited request for documents that was reserved only to materials specifically needed. See In re Young, 755 A.2d at 843. That Court evaluated "the petition for limited disclosure of grand jury minutes" when it stated:

> "[T]he Presiding Justice of the Superior Court, in a carefully crafted and comprehensive order, imposed stringent conditions on the release of the grand jury tapes. Specifically, the use of the materials so released is restricted to discovery and trial purposes related to the claim of the estate and may not otherwise be disseminated, published, or released under penalty of contempt." Id. at 842, 843.

In the present instance, the Petitioner has not limited her request in any way, since she seeks all grand jury materials—including transcripts, recordings, exhibits, and all other documents—to promote governmental transparency.

The Second Circuit's fifth policy consideration looks at "how long ago the grand jury proceedings took place[,]" while the sixth factor considers the "current status of the principals of the grand jury proceedings and that of their families[.]" See In re Petition of Craig, 131 F.3d at 106. Further, the eighth policy factor considers "whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive[.]" See id. This Court notes that the grand jury investigation into 38 Studios concluded fairly recently in 2015, making it highly likely that

the principals of the grand jury proceedings, along with witnesses, would still be alive and that they might be affected by disclosure. See id.

3

Historical Significance

The Second Circuit has noted that historical significance might also affect a court's decision to disclose. See id. at 105. In In re Petition of Craig, the Second Circuit determined that historical interest alone could justify the release of grand jury information, but then provided the "John Wilkes Booth or Aaron Burr conspiracies" as examples of such historical cases. See id. The present request for the disclosure of 38 Studio documents cannot rest on the basis of historical significance alone—considering the investigation was so recent—and since disclosure would affect persons still living who were the target of the investigation or who provided information to the grand jury. See id.

The Petitioner cites a Rhode Island case, In re: Station Fire Grand Jury, to support her argument that—similar to the Second Circuit's consideration of historical significance—the Rhode Island Superior Court has previously allowed disclosure in cases of historical significance. See No. PM-2006-5611, at 13 (R.I. Super. Dec. 21, 2006) (Rodgers, P.J.). However, in distinction, the Court in In re: Station Fire Grand Jury granted petitioner's request for disclosure since the materials were needed to aid a pending federal civil suit—a point that the Petitioner acknowledges. The Court did not grant disclosure based on the historical significance of the Station Nightclub Fire itself, but rather granted disclosure because the petitioner's request met an enumerated exception to the Rules of Criminal Procedure. See id. at 6.

That same Court addressed the historical significance of the Station Nightclub Fire only when discussing the rare nature of granting such an unlimited request for disclosure. See id. at

12. The Court noted that "having already determined that this large group of plaintiffs . . . have demonstrated a particularized need for access to the Grand Jury transcripts that outweighs the need for continued secrecy, [the Court] must determine what limits and restrictions, if any, to place on disclosure." See id. The Court elaborated that "[s]uch broad disclosure without restriction gives the Court pause and requires careful consideration"; the Court then cited the historical significance of the case and the staggering number of plaintiffs as the reasons for granting a request so unlimited in scope. See id. Thus, while the Second Circuit might entertain a request based on historical significance alone, Rhode Island Courts have not previously done so; instead, Rhode Island courts have required a preliminary showing that the request first meets a Rule 6(e)(3) exception, and subsequently, that there is a particularized need for the materials. See In re Petition of Craig, 131 F.3d at 105; In re: Station Fire Grand Jury, at 13.

V

Conclusion

Notwithstanding the fact that the Petitioner's request does not fall under any of the enumerated exceptions that provide for disclosure under Rhode Island's Rule 6(e)(3)—and that the Petitioner has failed to demonstrate a particularized need—policy considerations promulgated by the Rhode Island Supreme Court and by the federal courts further call for the denial of Petitioner's request. See In re Young, 755 A.2d at 846; see also In re Petition of Craig, 131 F.3d at 106; Rule 6(e)(3)(C). The Petitioner was not a party to the original investigation, the civil suit has concluded, the Petitioner does not need the materials for any particularized reason, the targets of the investigation were exonerated, and disclosure of the material would hinder the free and untrammeled flow of information and compromise the long-standing history of grand jury secrecy. See In re Young, 755 A.2d at 847; see also In re Petition of Craig, 131 F.3d at 106.

Accordingly, this Court must deny the Petitioner's request for disclosure of 38 Studios grand jury documents. This Court finds that the Petitioner has not met her burden of demonstrating that the need for disclosure outweighs the need for secrecy. See Douglas Oil, 441 U.S. at 223 (placing the burden on the party requesting disclosure). Allowing public clamor alone to justify disclosure would cause the exception to swallow the rule; namely, releasing documents based on mere public interest in grand jury proceedings would entirely defeat the purpose, and role, of the grand jury. See In re Disclosure of Evidence Taken Before Special Grand Jury Convened on May 8, 1978, 650 F.2d 599, 602 (5th Cir. 1981) ("Allegations of public interest alone do not always constitute need per se."); Sobotka, 623 F.2d at 768 ("While there is an admitted public interest and concern . . . that interest per se does not justify [] disclosure . . . ."); see also In re Petition of Craig, 131 F.3d at 105 (a "blanket assertion" that public has an interest in the information contained in grand jury transcripts cannot constitute "special circumstances" warranting disclosure). Without meeting a recognized exception to the grand jury's secrecy—and without showing a "particularized need"—disclosure cannot be permitted.[11] Therefore, the Petitioner's petition for the release of 38 Studios grand jury materials must be, and is, denied. Counsel shall submit the appropriate order for entry.

[11] The court in In re Disclosure of Evidence Taken Before Special Grand Jury Convened on May 8, 1978 denied disclosure and held that "[i]f a preliminary showing of particularized need is not forthcoming," the court need not proceed to an evaluation of the policy factors. 650 F.2d at 602.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**In Re: 38 Studios Grand Jury**
CASE NO:	**PM-17-0701**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 18, 2017**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**

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