

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	
)	No. 20 CR 812
v.)	Hon. Rebecca R. Pallmeyer
)	<i>Chief Judge</i>
)	
MICHAEL McCLAIN,)	
ANNE PRAMAGGIORE,)	
JOHN HOOKER, and)	
JAY DOHERTY)	

**GOVERNMENT’S RESPONSE TO DEFENDANTS’ JOINT MOTION
FOR ACCESS TO GRAND JURY SELECTION MATERIALS**

The UNITED STATES OF AMERICA, by its attorney, JOHN R. LAUSCH, JR., United States Attorney for the Northern District of Illinois, submits this response to the defendants’ joint motion for access to grand jury selection materials (the “Motion”). For the reasons described below, the Motion should be granted in part and denied in part.

BACKGROUND

The Special January 2019 Grand Jury was impaneled in January 2019, as its name suggests. At the time this grand jury was impaneled, all jurors, including alternate jurors, were selected. No additional jurors have been selected to serve on this grand jury since the time it was impaneled.

On November 18, 2020, the Special January 2019 Grand Jury returned an indictment charging the defendants with one count of conspiring to commit an offense against the United States, in violation of 18 U.S.C. § 371; four counts of corruptly offering to give a thing of value to influence and reward a public official, in violation of 18 U.S.C.

§ 666(a)(2) and 2, and four counts of falsification of books and records, in violation of 15 U.S.C. §§ 78m(b)(5), 78ff(a), and 18 U.S.C. § 2. R. 1.¹ The indictment alleges that the defendants—all associated with Commonwealth Edison Company (“ComEd”)—participated in a conspiracy to corruptly give things of value to Public Official A and Public Official A’s associates, namely, jobs, vendor subcontracts, and monetary payments associated with those jobs and subcontracts, with intent to influence and reward Public Official A, in connection with legislation affecting Commonwealth Edison Company (“ComEd”) and its business. *Id.*²

On December 11, 2020, defendants filed their Motion, seeking the disclosure of records pursuant to a provision of the Jury Selection and Service Act of 1968 (the “JSSA”). *See* 28 U.S.C. § 1867(f). R. 34.³ Specifically, the defendants speculate that additional jurors were added to the Special January 2019 Grand Jury as a result of the COVID-19 pandemic, and that any jurors added to the panel may not have been representative of the community. For this reason, defendants seek access to a host of records in order to prepare a motion challenging the manner in which such additional

¹ References to the record appear as “R. ___.”

² ComEd has entered into a deferred prosecution agreement with the government in which ComEd, among other things: stipulated to a statement of facts concerning the misconduct of its employees and agents; agreed to cooperate with the government in connection with its ongoing criminal investigation; agreed to undertake remedial measures to prevent future violations of law; and agreed to pay a \$200 million fine to the United States Treasury. *United States v. Commonwealth Edison Co.*, No. 20 CR 368 (N.D. Ill.) (Kness, J.) [ECF#3].

³ The Motion is before the Chief Judge for resolution because the Motion concerns records relating to a grand jury, and such records may only be released upon order of the Chief Judge of this district. Local Criminal Rule 6.2.

jurors were selected. Motion at 2. For the reasons that follow, the Motion should be granted in part and denied in part.

ARGUMENT

The Motion Should Be Granted in Part and Denied in Part.

A. Applicable Law

The Constitution guarantees a defendant the right to a jury pool comprised of a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). For this reason, “jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community.” *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979) (citations omitted).⁴ However, a defendant “does not have a right to a jury of ‘any particular composition’ and the jury actually chosen does not have to ‘mirror the community.’” *Green*, 435 F.3d at 1270-71 (quoting *Taylor*, 419 U.S. at 538). The JSSA codifies the policy of ensuring that grand jurors are “selected at random from a fair cross section of the community in the district . . . wherein the court convenes.” 28 U.S.C. § 1861.

Under the JSSA, defendants do not have an unfettered right to examine records relating to the selection of grand jurors. Specifically, records relating to the jury selection process “shall not be disclosed” except as “necessary” to prepare, among other

⁴ In challenging whether a grand jury meets the JSSA’s fair cross-section requirement with a motion to dismiss or motion to stay proceedings under §1867(a), the motion must establish a prima facie violation by showing: (1) that the allegedly excluded group is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Duren*, 439 U.S. at 364.

things, a motion to dismiss an indictment or stay proceedings on the ground there was a “*substantial failure* to comply with the provisions” of the JSSA concerning the selection of grand jurors.” 28 U.S.C. § 1867(a), (f) (emphasis added). In this context, the Seventh Circuit has required a defendant to make a showing of necessity and a substantial failure to comply with the JSSA before authorizing the release of records. *United States v. Davenport*, 824 F.2d 1511, 1515 (7th Cir. 1987) (defendant must show that the requested records are “necessary” for the preparation of a motion under § 1867(a) and set forth a substantial failure to comply with the JSSA). *Accord United States v. Joost*, 94 F.3d 640, 1996 WL 480215 at *5-6 (1st Cir. Aug. 7, 1996) (affirming denial of access to records under § 1867 due to defendant’s failure to show “likely substantial noncompliance” with the JSSA); *United States v. Shader*, No. 20-CR-202, 2020 WL 4158059, at *3 (E.D.N.Y. July 17, 2020) (explaining that “access to materials under the JSSA is not unfettered” and that “JSSA is not a license for litigants to rummage at will through all jury-related records maintained by the Clerk of Court”) (citation omitted); *United States v. Gotti*, No. S8 02CR743(RCC), 2004 WL 2274712, *6 (S.D.N.Y. Oct. 7, 2004) (defendant making § 1867(f) request “is not entitled to unencumbered access to juror information”).⁵

The interest in maintaining the secrecy of grand jury proceedings must also be considered in assessing a defendant’s request for discovery. The Supreme Court has

⁵ Defendants, citing *Test v. United States*, 420 U.S. 28 (1975), maintain they have an unqualified right to review records relating to the selection of grand jurors. *Test* does not stand for this broad proposition. *Davenport*, 824 F.2d at 1514 (“No documents were involved in *Test* other than jury lists. *Test* does not hold that completed juror questionnaires must be made available to defendants in addition to jury lists.”).

consistently “recognized that the proper functioning of our grand jury system depends on the secrecy of grand jury proceedings” and in “the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of secrecy has been authorized.” *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 424 (1983) (citations omitted). *See also* Fed. R. Crim. P. 6(e) (mandating grand jury secrecy and prohibiting disclosure of matters before a grand jury except in very limited circumstances).

B. Application

The Motion is based on mistaken conjecture. Defendants speculate that, as a result of the COVID-19 pandemic, additional jurors were selected to serve on the Special January 2019 Grand Jury during the course of the pandemic, and that the manner in which they were selected runs afoul of the dictates of the JSSA. This is incorrect: As noted earlier, the Special 2019 Grand Jury (including all alternates) were selected *at the time the grand jury was impaneled* in January 2019, approximately one year before the pandemic struck the United States. The pandemic could not have compromised the selection of jurors as defendants theorize, and therefore, defendants cannot make a showing of a likely “substantial failure” in the selection process of grand jurors brought on by the COVID-19 pandemic to justify their discovery requests.⁶ *Davenport*, 824 F.2d at 1515. *See also United States v. Braxton*, No. 20-CR-237 (LDH) (E.D.N.Y. Oct. 15,

⁶ Even if the grand jury was impaneled during the pandemic, the government does not agree that defendants are entitled to the information they seek. In most cases, access to records under § 1867 should be limited to information regarding the creation of the Master Jury Wheel for each division. Because this grand jury was selected before the pandemic, however, the Court need not reach this issue.

2020) [ECF #13 at 7] (“because the grand jury here was empaneled months before the start of the COVID-19 pandemic, any changes made to address the effect of the pandemic on the current grand jury selection process [are] irrelevant to any potential motion by Defendant”); *Shader*, 2020 WL 4158059, at *3-6 (denying COVID-19 related document requests because jurors were selected before pandemic).

Cleared of these factual misconceptions, it is apparent that defendants have not shown a likely substantial failure to comply with the JSSA, and therefore, most of the document requests are improper and should be denied. Specifically:

- Request 2 seeks questionnaires issued to potential grand jurors during the COVID-19 pandemic. As no grand jurors from the Special January 2019 Grand Jury were selected during the pandemic, this request is irrelevant and improper, because it does not concern the selection of jurors for the Special January 2019 Grand Jury. 28 U.S.C. § 1867(f).
- Request 4 seeks any policies or practices established by the Clerk of the Court’s office for excusing grand jurors during the pandemic. However, record requests are limited under § 1867(f) to the *selection* of grand jurors, and in this case, all grand jurors on the Special January 2019 Grand Jury, including alternates, were selected prior to the pandemic.
- Request 5 seeks information including the racial, gender and ethnic information for grand jurors “added after a grand jury was originally empaneled.” Here, no jurors were added after the Special January 2019 Grand Jury was impaneled.
- Request 6 seeks information concerning the racial, religious, gender, and ethnic composition of jurors on the master jury wheel in this district. Insofar as this information is sought to compare it to the composition of jurors added to the Special January 2019 Grand Jury since the pandemic, it is irrelevant, since all jurors were selected before the pandemic.
- Request 7 seeks information concerning the racial, religious, gender, and ethnic composition of jurors summoned since the Special January 2019 Grand Jury was impaneled. Since no additional grand jurors have been selected to serve on the Special 2019 Grand Jury since it was impaneled, this information is irrelevant.

- Request 8 seeks information for all excuses received and accepted for jurors during the pandemic. As noted above, all jurors of the Special January 2019 Grand Jury were selected before the pandemic, so this request does not concern the selection of grand jurors and therefore is not contemplated by the JSSA. 28 U.S.C. § 1867(f).
- Request 9 seeks racial, gender and ethnic information for prospective jurors whose jury service was deferred as a result of the pandemic. Because the jurors for the Special January 2019 Grand Jury were selected before the pandemic, this request is also irrelevant.

This leaves Request 1 (which asks for the Jury Plan for the district, which is available on the Court's website) and Request 3 (a general form used to summon jurors). Given the fact that these materials are either publicly available or a simple form, the government does not object to defendants receiving this information from the Clerk.

Subsequent to the filing of the Motion, the government advised defense counsel of the timing of the selection of grand jurors for the Special January 2019 Grand Jury. In response, counsel for the defendants have advised the government that they will revise their requests to seek the following information:

- Revised Request 1: Records from the Court that will confirm the government's representation that the grand jurors, including alternates, for the Special January 2019 Grand Jury were selected in January 2019, prior to the pandemic.
- Revised Request 2: Records for the Special January 2019 Grand Jury since the beginning of the pandemic, identifying which grand jurors attended on specific dates (and presumably the race, sex, and ethnic origin of those grand jurors in attendance).
- Revised Request 3: Records reflecting whether any grand jurors were excused from service during the pandemic, as well as whether any alternate jurors were called in to replace them, together with the dates when these events occurred, as well as identifying information for any grand jurors excused from and called in for service (and presumably the race, sex, and ethnic origin of those grand jurors).

The government has no objection to Revised Request 1. However, the government continues to object to Revised Request 2 and Revised Request 3. As noted above, the JSSA contains provisions that concern the selection of jurors; § 1867 is a provision to obtain documents concerning compliance with those selection procedures, it is not a mechanism to obtain documents concerning the week-to-week *attendance* of grand jurors once they have been selected, nor is it a means to question the decision to excuse or seat alternates on the jury who were chosen in accordance with the JSSA. Defendants cannot demonstrate, as they must in this Circuit, that attendance and excusal records would be likely to show a substantial failure to comply with the selection requirements of the JSSA. *Davenport*, 824 F.2d at 1515. Moreover, providing records concerning the identity of grand jurors and the dates of their attendance would be an unwarranted intrusion upon the secrecy of grand jury proceedings which is not recognized by statute. *Sells Eng'g, Inc.*, 463 U.S. at 424. These requests should be denied.

WHEREFORE, the government respectfully requests that the Court enter an order (i) granting the Motion in part and denying it in part; and (ii) granting the government such other and further relief as is just and proper.

Respectfully submitted.

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