9th Circ. Ruling Clarifies Doc Protection Limits In Gov't Probes

By **Andrew Goldstein and Ephraim McDowell** (March 31, 2026)

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The U.S. Court of Appeals for the Ninth Circuit's Jan. 30 decision in Kalbers v. U.S. Department of Justice holds that documents produced to the government solely in response to a grand jury subpoena are protected from disclosure under the Freedom of Information Act, or FOIA.

The ruling provides meaningful assurance to companies navigating responses to federal grand jury subpoenas — but it also invites a broader look at what companies must do to preserve confidentiality in the full range of their interactions with the government.

Understanding Kalbers means knowing not only what Rule 6(e) of the Federal Rules of Criminal Procedure protects, but also where its protections end and what companies must manage on their own.

Background

Grand jury secrecy is a foundational principle of the federal criminal process. It protects the integrity of investigations, preserves witness privacy and shields the reputations of individuals who may never face charges.

Rule 6(e) codifies that principle by prohibiting the government from disclosing "matter[s] occurring before the grand jury." That prohibition has long been understood to cover grand jury transcripts, witness testimony, subpoenas and other materials that relate directly to the grand jury's work.

Whether Rule 6(e) extends to documents compiled and turned over to the government in response to a subpoena, however, has been a more contested question. For companies responding to grand jury subpoenas, that uncertainty has created persistent exposure: Plaintiffs counsel, state regulators and other interested parties have routinely sought the same materials through FOIA and other mechanisms, using access to the grand jury record to develop parallel civil or regulatory cases.

In Kalbers, professor Lawrence Kalbers sought nearly six million documents Volkswagen produced to the DOJ during the so-called Dieselgate criminal investigation.[1] Volkswagen had provided the materials in response to a federal grand jury subpoena, and almost all were stamped "FOIA Confidential — Produced Pursuant to Rule 6(e)."

Because Rule 6(e) bars disclosure of "matter[s] occurring before the grand jury," and FOIA exempts information withheld under federal law, including Rule 6(e)'s secrecy mandate, the DOJ treated the documents as categorically protected.

The U.S. District Court for the Central District of California, adopting the special master's recommendation, nonetheless ordered disclosure, reasoning that the DOJ had not shown which documents were actually presented to the grand jury, or that releasing them would necessarily reveal grand jury matters.

A unanimous panel of the Ninth Circuit reversed, holding that Rule 6(e) protects documents from FOIA disclosure when the government obtained them solely through a grand jury subpoena. The court reasoned that disclosing such documents would reveal the scope and focus of the grand jury's investigation. According to the court, even if individual documents appeared innocuous, their collective disclosure would allow requesters to reverse engineer what topics, time periods and individuals were of interest to prosecutors.

The court further explained that grand jury protections can be overcome only where the documents were obtained from a source independent of the grand jury subpoena; the requester seeks the documents for a purpose unrelated to the grand jury investigation; and disclosure would not compromise the grand jury process. If the government can disprove any of these factors, Rule 6(e) bars disclosure.

The court ultimately held that the millions of documents marked as Rule 6(e) material were exempt from disclosure under FOIA, but it remanded for further proceedings on the treatment of four documents that lacked the Rule 6(e) label.

Key Takeaways and Practice Considerations

Labeling Documents to Preserve Confidentiality

Almost all of the six million documents Volkswagen produced were stamped "FOIA Confidential — Produced Pursuant to Rule 6(e)," and the Ninth Circuit relied heavily on that labeling to conclude they were grand jury materials. The labels created a clear record tying the documents to the subpoena, and the court emphasized that the DOJ could not redact them because doing so would itself disclose the connection to the grand jury investigation.

Without this labeling, the government would have faced a more difficult task of demonstrating the materials' protected status. The court remanded only as to the four unlabeled documents. Accordingly, companies should ensure that all productions are consistently marked and that their protocols document when and how materials are provided to the government.

The Independent Source Limitation

The central inquiry under Kalbers is whether the government possesses the documents only because of the grand jury subpoena. Here, the DOJ had no independent source for the Volkswagen materials, so disclosure was barred.

The court contrasted this with cases like 1993's U.S. v. Dynavac Inc., where the government had obtained the same materials through an administrative process separate from the grand jury.[2] In such circumstances, disclosing the documents does not necessarily reveal anything about the grand jury's work.

If an independent source exists, Rule 6(e) protections may not apply. This underscores that companies should carefully track all channels through which materials are shared with the government, as any alternative pathway could weaken Rule 6(e) protections.

Internal Investigations and Rule 6(e)

The requester argued that Volkswagen's internal investigation materials should fall outside Rule 6(e) because they were created for purposes independent of the grand jury

proceeding. The Ninth Circuit rejected that argument.

The court noted that Volkswagen had commissioned the internal investigation because of the DOJ's criminal investigation, and the materials were funneled to the government solely through the grand jury subpoena process.

When internal investigation documents flow to the DOJ through a subpoena, that collection is treated as grand jury material regardless of the documents' origins. As such, internal investigation materials do not create an escape hatch from Rule 6(e) and receive the same FOIA protections as other grand jury material.

Beyond the Ninth Circuit

Companies whose investigations span multiple jurisdictions should be aware that federal courts apply different analytical frameworks in determining whether Rule 6(e) protections attach.

Several courts have adopted what the Ninth Circuit has described as the "effect test," which asks whether disclosure of the requested material would reveal a confidential aspect of the grand jury's workings.[3]

Under that standard, courts require the government to demonstrate a nexus between the requested documents and the secrecy interests the grand jury process is designed to protect, such as whether disclosure would reveal the identities of witnesses or jurors, the substance of testimony, the direction or strategy of the investigation, or juror deliberations or questions.[4]

The Sixth Circuit, however, has long applied a strong but rebuttable presumption that materials produced in the course of a grand jury investigation fall within Rule 6(e)'s secrecy protections.[5] Understanding these variations can help companies anticipate how courts outside the Ninth Circuit may evaluate the confidentiality of subpoenaed materials.

The Limits of Voluntary Cooperation

Kalbers has the potential to complicate the incentives around cooperation and the voluntary disclosure of documents to the government. The DOJ's corporate enforcement policies reward early and voluntary cooperation, and that credit can meaningfully affect charging decisions and penalty calculations.

Kalbers, however, guarantees Rule 6(e) protections only for documents that the government receives in response to a grand jury subpoena. The case does not address documents shared in anticipation of, or alongside, grand jury subpoenas, leaving open the question of whether voluntary productions made before or at the same time as a grand jury investigation could nevertheless be exempt under FOIA.

A FOIA plaintiff could argue that voluntary production means the government obtained the documents from a source independent of the grand jury subpoena.

To protect against such arguments, companies can negotiate with the government to ensure that, in connection with its initial disclosures, the government opens a Rule 6(e) grand jury investigation. That way, productions can be made pursuant to the Rule 6(e) investigation, strengthening the argument that the documents provided should receive FOIA protections.

In addition, when companies choose to cooperate voluntarily, they should still clearly mark materials as "FOIA Confidential — Produced Pursuant to Rule 6(e)" to preserve the strongest available arguments for confidentiality.

Bottom Line

The Ninth Circuit's decision clarifies that Rule 6(e) provides robust protections when documents are in the government's possession only through a grand jury subpoena and not from an independent source. Proper labeling creates a clear record that strengthens this protection and makes it easier for the government to demonstrate protected status.

At the same time, Kalbers underscores the limits of Rule 6(e). Materials the government receives outside the subpoena or grand jury process may not be protected, and productions made voluntarily may not be viewed as done pursuant to Rule 6(e).

The companies best positioned to benefit from Kalbers are those that treat grand jury confidentiality — and careful labeling — as protocol from the outset of a criminal investigation, not issues to revisit only after documents are already in the government's hands.

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[1] United States v. Volkswagen AG, No. 2:16-cr-20394 (E.D. Mich.).

[2] United States v. Dynavac Inc., 6 F.3d 1407 (9th Cir. 1993).

[3] Dynavac, 6 F.3d at 1412-13 (describing the approaches of the Third, Fourth, Seventh, Eighth, Tenth, and D.C. Circuits and declining to adopt the effect test).

[4] See, e.g., In re: Grand Jury Matter (Catania), 682 F.2d 61, 63 (3d Cir.1982); Senate of Puerto Rico v. United States Dept. of Justice, 823 F.2d 574, 582 (D.C. Cir.1987).

[5] In re: Grand Jury Proc., 851 F.2d 860, 867 (6th Cir. 1988).