Cooley

Protecting Grand Jury Materials From FOIA: Lessons From the Ninth Circuit's Kalbers Decision

February 4, 2026

The US Court of Appeals for the Ninth Circuit's recent decision in *Kalbers v. DOJ* confirms that documents produced solely in response to a grand jury subpoena are protected from disclosure under the Freedom of Information Act (FOIA). The ruling underscores how companies and counsel can preserve the confidentiality of documents by adopting consistent, deliberate document-production practices from the outset of an investigation.

Background

In *Kalbers*, a professor sought nearly six million documents Volkswagen produced to the US Department of Justice (DOJ) during the so-called Dieselgate criminal investigation. 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)." Rule 6(e) of the Federal Rules of Criminal Procedure bars disclosure of "matter[s] occurring before the grand jury," and in turn, FOIA exempts disclosure of any information protected by federal law, including Rule 6(e)'s grand jury secrecy mandate. The district court nonetheless ordered disclosure, reasoning that DOJ had not shown which documents were actually presented to the grand jury or that releasing them would necessarily reveal grand jury matters.

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. It further explained that grand jury protection can be overcome only if the requester can show that the government obtained the documents 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 requestor fails to satisfy any of these factors, Rule 6(e) bars disclosure.

The court remanded for further proceedings on four documents that lacked the Rule 6(e) label.

Key takeaways

1. Label documents clearly and consistently

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 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.

2. The 'independent source' limitation

The central inquiry is whether the government possesses the documents only because of the grand jury subpoena. Here, DOJ had no independent source for the Volkswagen materials, so disclosure was barred. The court contrasted this with cases like *United States v. Dynavac*, where the government possessed the same materials through a separate administrative process; in such circumstances, disclosing them does not necessarily reveal anything about the grand jury's work. If an independent source exists, Rule 6(e) protection may not apply.

3. Internal investigations don't create an escape hatch

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 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 DOJ through a subpoena, that collection is treated as grand jury material regardless of the documents' origins.

Bottom line

The *Kalbers* decision makes clear that Rule 6(e) provides robust protection 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. Ensuring that protection requires thoughtful document handling from the onset of dealing with the government in a criminal matter.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Andrew D. Goldstein Washington, DC	agoldstein@cooley.com +1 202 842 7805
Ephraim McDowell Washington, DC	emcdowell@cooley.com +1 202 776 2310
Sahar Atassi Washington, DC	satassi@cooley.com +1 202 776 2139

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.