

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

ROBERT KEVIN FLEMING, ET AL.,)	
)	
Plaintiffs,)	Case No. 2:98CV00215 (Lead)
)	
v.)	OPINION AND ORDER
)	
UNITED STATES OF AMERICA,)	
)	By: James P. Jones
Defendant.)	United States District Judge
)	

The defendant in these consolidated actions has filed a renewed petition for disclosure of grand jury testimony. For the reasons hereafter set forth, the petition will be denied.

I

On December 7, 1998, the seven plaintiffs filed separate actions, identical in substance, pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C.A. §§ 2671-2680 (West 1994 & Supp. 2000) (“FTCA”). The plaintiffs contend that the United States is liable for damages resulting from an underground coal mine explosion on December 7, 1992, at the Southmountain No. 3 Mine, in Wise County, Virginia. The basis for the claimed liability of the United States under the FTCA arises from alleged failures by employees of the Mine Safety and Health Administration

("MSHA"), an agency of the United States, in connection with inspections of the coal mine and enforcement of the federal mine safety laws.

After denying the defendant's motions to dismiss, the court entered a scheduling order on November 23, 1999, fixing the trial date to begin on December 4, 2000, and providing a discovery deadline of September 15, 2000. On July 26, 2000, the United States filed a petition seeking the disclosure of grand jury testimony of all Southmountain officers and employees given in connection with the federal prosecution in 1994 of the company and two of its employees. That prosecution ended in guilty pleas by the mining company to willful violations of mine safety standards, falsification of records, and false statements.

The petition for disclosure was denied by order of August 1, 2000. On November 2, 2000, the United States filed the present renewed petition for disclosure. Oral argument on the petition was held on November 13, 2000, and it is ripe for decision.

II

At issue in the present petition is Federal Rules of Criminal Procedure 6(e)(3)(C)(i), which in pertinent part provides that disclosure may be made "when so directed by a court preliminary to or in connection with a judicial proceeding."

According to the Supreme Court, the burden is on the applicant for disclosure of confidential grand jury materials to establish “a strong showing of particularized need . . . before any disclosure will be permitted.” *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 443 (1983). In demonstrating particularized need, the party must establish that (1) the material “is needed to avoid a possible injustice in another judicial proceeding,” (2) “the need for disclosure is greater than the need for continued secrecy,” and (3) the “request is structured to cover only material so needed.” *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979). Once the proceeding of the grand jury ends, the interests of secrecy are reduced, but not eliminated. *See id.* “[S]tringent protection of the secrecy of completed grand jury investigations may be necessary to encourage persons to testify fully and freely before future grand juries.” *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 566 n.11 (1983).

While the applicant for disclosure here does not know the exact nature of the testimony before the grand jury, it asserts that such testimony may refresh the testimony of those who did testify before the grand jury because of the fact that the mine explosion occurred nearly eight years ago and memories were more likely fresher when the grand jury met, closer to the events in question in the case. To support this argument, the United States has supplied the court with excerpts of discovery depositions taken of fifteen miners, most of whom stated that they had testified before

the grand jury.¹ The deposition extracts indicate that the witnesses had, to a greater or lesser degree, forgotten some of the details of the events surrounding the issues in this case, such as the identity of those miners who violated the rule against smoking underground, the exact location of mine ventilation devices, and the mine conditions prior to the explosion. Based on these depositions, which were not available when the initial petition for disclosure was filed, the United States urges disclosure of all grand jury testimony, not only for these deposition witnesses, but for all persons who may have testified before the grand jury as to the mine explosion.

As with the initial petition, I find that insufficient particularized need has been shown. In the first place, as the plaintiffs point out, the miners were all subjected to sworn interrogation by MSHA following the explosion, even before the grand jury met, and the parties have copies of those interrogations. The availability of alternative sources of information has been held to defeat a showing of particularized need. *See Dale v. Bartels*, 532 F. Supp. 973, 976 (S.D.N.Y. 1982), *aff'd in part and rev'd in part on other grounds*, 732 F.2d 278 (2d Cir. 1984).

While some of the miners admitted in their discovery depositions that they had lied to MSHA or before the grand jury about smoking underground, those admissions

¹ The parties do not know how many officers or employees testified before the grand jury, although they believe that it was more than the fifteen persons whose deposition extracts were presented to the court.

do not assist the present application, since the deponents have now conceded their past false testimony. Smoking underground by the individual miners was obviously a sensitive subject to them and there is no evidence that their willingness to lie about it in the past makes their present deposition testimony less trustworthy. In fact, it appears that with the passage of time they are now more willing to admit their involvement in this dangerous and illegal practice.

There is also no showing that questioning before the grand jury would have produced more relevant information than the MSHA interrogations. While it is possible that the grand jury investigated issues that were different from those with which MSHA was concerned at the time of its interrogations, there is certainly no evidence of any such difference.

Finally, I am persuaded to exercise my discretion to deny the request for disclosure because of its lateness. The discovery deadline is long closed in this case and the trial is only two weeks away. To disclose the grand jury testimony now would either impose unfair prejudice on the plaintiffs or require a postponement of the trial. Neither of these alternatives is justified under the circumstances.

III

For the foregoing reasons, it is **ORDERED** that the Defendant's Renewed

Petition for Disclosure of Grand Jury Testimony (Doc. No. 64) is denied.

ENTER: November 21, 2000

United States District Judge