View on our website.

GIBSON DUNN

White Collar Defense & Investigations Update February 12, 2026

Grand Jury Secrecy Reinforced: Ninth Circuit Bars FOIA Discovery of Subpoenaed Documents Produced Pursuant to Rule 6(e)

This decision clarifies ambiguity around pre-existing documents and the scope of Rule 6(e), providing strong protection for companies responding to federal grand jury subpoenas.

In a significant ruling for companies responding to federal grand jury subpoenas, the Ninth Circuit has issued what may be its most definitive decision to date on the scope of Federal Rule of Criminal Procedure 6(e) and its interaction with the Freedom of Information Act (FOIA). In *Kalbers v. U.S. Department of Justice and Volkswagen AG*,[1] the court held that FOIA Exemption 3, incorporating Rule 6(e) bars disclosure of documents that the government possesses solely because they were produced in response to a grand jury subpoena. This includes pre-existing documents such as emails, corporate records and other documents created before and independent of the grand jury investigation.

Takeaways

- The Ninth Circuit held that documents in the government's possession solely because of a grand jury subpoena are categorically protected from disclosure by the government under Rule 6(e), even if the documents pre-dated the grand jury investigation.
- The decision should give greater assurance to companies producing documents in response to a grand jury subpoena that the documents will not subsequently be obtained from the DOJ by plaintiff's counsel, state regulators or other interested parties.

- While *Kalbers* was decided in the context of a FOIA request addressed to DOJ, companies may still face discovery requests in civil litigation for documents they produced pursuant to a grand jury subpoena. Companies should attempt to use the language and reasoning in *Kalbers* to reject demands for wholesale reproduction or cloned discovery requests by other regulators or civil litigants who try to get these documents.
- Documents being produced pursuant to Rule 6(e) should be clearly labeled as such to strengthen confidentiality protections.

Background

Rule 6(e) of the Federal Rules of Criminal Procedure strictly prohibits the government from disclosing any "matter occurring before the grand jury."[2] This has been widely understood to prevent the disclosure of grand jury transcripts, witness testimony, subpoenas, and other documents relating to the grand jury proceedings themselves. However, the degree to which the rule prevents the disclosure of pre-existing documents that are simply received by a grand jury pursuant to subpoena has been less clear.[3] That uncertainty has posed risks for companies responding to grand jury subpoenas, particularly because plaintiffs' counsel, state regulators, and other parties frequently seek access to the evidence considered by the federal grand jury to advance their own subsequent civil or regulatory claims.

The *Kalbers* case arose when Lawrence Kalbers, a professor at Loyola Marymount University, took an interest in a settlement agreement between the DOJ and the Defendant in a matter involving emissions testing. Kalbers filed a FOIA request with the Department of Justice seeking all documents that the Defendant produced to the DOJ during a criminal grand jury investigation that ultimately resulted in a plea agreement. The DOJ had obtained approximately six million documents through a grand jury subpoena, nearly all of which were labeled "FOIA Confidential – Produced Pursuant to Rule 6(e)".

The district court ordered production of the documents, adopting the Special Master's recommendation that—unlike witness lists, subpoenas, or testimony summaries—the documents themselves did not reveal grand jury deliberations. DOJ and the Defendant appealed.[4]

The Ninth Circuit's Decision

The Ninth Circuit reversed in substantial part, holding that Rule 6(e) bars disclosure of documents that the government possesses only because of a grand jury subpoena. The court explained that disclosure of such materials—particularly in the aggregate—would allow requesters to "reverse engineer" the grand jury's investigation by revealing what topics, time periods, and individuals were of interest to prosecutors.[5]

Critically, the court rejected the argument that pre-existing documents lose Rule 6(e) protection simply because they were created outside the grand jury process. Instead, the relevant inquiry is how the government obtained the documents, not when or why the documents were originally created.[6]

The court further clarified that prior Ninth Circuit cases like *U.S. v. Dynavac, Inc.* and *In re Optical Disk Drive Antitrust Litig.*, allowed the disclosure of documents that were in the possession of an

independent source (a private corporation, in the case of *Dynavac*) or were in the possession of the government independent of a grand jury proceeding (FBI recordings made independent of the grand jury proceeding, in the case of *Optical Disk*).[7] If the documents are in the government's possession only through the grand jury subpoena, Rule 6(e) protection applies.[8]

Significance and Practice Considerations

This decision clarifies ambiguity around pre-existing documents and the scope of Rule 6(e), providing strong protection for companies responding to federal grand jury subpoenas. It confirms that Rule 6(e) shields not only grand jury transcripts and deliberations, but also the document productions themselves, as disclosure would reveal the nature or scope of the investigation.

The language in *Kalbers* supports broad protections over documents produced pursuant to grand jury subpoenas. The circuits are varied on the level of protection that Rule 6(e) provides. While few cases have held that the subpoena file itself is protected,[9] the Sixth Circuit has established a strong presumption that any documents provided for a grand jury investigation constitute "matters occurring before the grand jury," and are therefore protected.[10] By contrast, the Second Circuit has taken a narrower view of Rule 6(e), emphasizing that "documents are not cloaked with secrecy merely because they are presented to a grand jury,"[11] and that the government must show that disclosing the documents would reveal protected aspects of the grand jury's investigation in order to justify withholding them.[12] The D.C. Circuit has held that there is "no per se rule against disclosure of any and all information which has reached the grand jury chambers" and it required a case-specific inquiry into whether disclosure would reveal a secret aspect of the grand jury's investigation.[13]

Overall, *Kalbers* is a favorable decision for targets of grand jury investigations and third parties alike, reinforcing the confidentiality of grand jury processes and providing meaningful assurance that the DOJ will not be compelled under FOIA to produce documents to third parties. While companies may still face discovery requests and demands in civil litigation for documents produced pursuant to grand jury subpoena, the language and reasoning in *Kalbers* provide compelling arguments to reject wholesale reproduction and cloned discovery requests.

The *Kalbers* decision also underscores the practical importance of labeling documents produced in response to a grand jury subpoena as grand jury material. The Ninth Circuit relied heavily on the fact that the vast majority of documents at issue were expressly marked as produced pursuant to Rule 6(e), treating those labels as strong evidence that disclosure would reveal matters occurring before the grand jury.[14] At the same time, *Kalbers* makes clear that production to the grand jury limits disclosure only by the government—principally by barring third parties from obtaining the documents through FOIA. It does not transform the documents themselves into privileged material or otherwise shield them from disclosure by the producing company if sought from an independent source, including through civil discovery.[15]

The decision may also affect how companies weigh voluntary production versus responding to a grand jury subpoena at least within the Ninth Circuit. While voluntary production can signal cooperation, only documents produced in response to a grand jury subpoena are eligible to receive stronger protection from FOIA disclosure because of Rule 6(e) under *Kalbers*, which in some cases may favor compelled production where disclosure risk is a key concern.

[1] *Kalbers v. Volkswagen AG,* Nos. 24-1048 & 24-1477, (9th Cir. Jan. 30, 2026).

[2] *See* Federal Rules of Criminal Procedure (Dec. 1, 2024), https://www.uscourts.gov/sites/default/files/2025-02/federal-rules-of-criminal-procedure-dec-1-2024_0.pdf.

[3] *See* Article, Toward a Safety Valve for Sharing Documents Obtained by Grand Jury Subpoena in Parallel Investigations, in Department of Justice Journal of Federal Law and Practice Volume 70, Issue 3, 105, 113, (Aug., 2022), https://www.justice.gov/usao/page/file/1532986/dl?inline.

[4] *Kalbers v. Volkswagen AG,* Nos. 24-1048 & 24-1477, slip op. at 9–10 (9th Cir. Jan. 30, 2026).

[5] *Kalbers v. Volkswagen AG,* Nos. 24-1048 & 24-1477, slip op. at 14–16 (9th Cir. Jan. 30, 2026).

[6] *Kalbers v. Volkswagen AG*, Nos. 24-1048 & 24-1477, slip op. at 17–18, 21–22 (9th Cir. Jan. 30, 2026).

[7] *Kalbers v. Volkswagen AG*, Nos. 24-1048 & 24-1477, slip op. at 17–18, 21–22 (9th Cir. Jan. 30, 2026); *United States v. Dynavac*, Inc., 6 F.3d 1407, 1411–14 (9th Cir. 1993); *In re Optical Disk Drive Antitrust Litig.*, 801 F.3d 1072, 1077–78 (9th Cir. 2015).

[8] *Kalbers v. Volkswagen AG*, Nos. 24-1048 & 24-1477, slip op. at 21 (9th Cir. Jan. 30, 2026).

[9] *Kalbers v. Volkswagen AG*, Nos. 24-1048 & 24-1477, slip op. at 16 (9th Cir. Jan. 30, 2026).

[10] *In re Grand Jury Proc.*, 851 F.2d 860, 863 (6th Cir. 1988).

[11] *United States v. Lartey*, 716 F.2d 955, 964 (2d Cir. 1983).

[12] *Grynberg v. U.S. Dep't of Justice*, 758 F. App'x 162, 164 (2d Cir. 2019).

[13] *Lopez v. Dep't of Justice*, 393 F.3d 1345, 1349 (D.C. Cir. 2005).

[14] *Kalbers v. Volkswagen AG*, Nos. 24-1048 & 24-1477, slip op. at 22–23 (9th Cir. Jan. 30, 2026).

[15] *Kalbers v. Volkswagen AG*, Nos. 24-1048 & 24-1477, slip op. at 17–18, 21–22 (9th Cir. Jan. 30, 2026); *cf. United States v. Dynavac, Inc.*, 6 F.3d 1407, 1411–12 (9th Cir. 1993).

The following Gibson Dunn lawyers prepared this update: Jina Choi, Winston Chan, Diana Feinstein, Ben Wagner, and Erin Williams.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any leader or member of the firm's White Collar Defense & Investigations practice group, or the authors:

Jina L. Choi – San Francisco (+1 415.393.8221, jchoi@gibsondunn.com)

Winston Y. Chan – San Francisco (+1 415.393.8362, wchan@gibsondunn.com)

Diana M. Feinstein – Los Angeles (+1 213.229.7351, dfeinstein@gibsondunn.com)

Benjamin Wagner – Palo Alto (+1 650.849.5395, bwagner@gibsondunn.com)