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Plugging Gov't Leaks Is Challenging, But Not A Pipe Dream

By **Kenneth Notter** (December 5, 2024, 4:25 PM EST)


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The government typically investigates leaks, but what happens when the government is the leak?

That is a question two high-profile criminal defendants — New York City Mayor Eric Adams and Sean "Diddy" Combs — recently faced.

In October, Adams accused federal prosecutors and FBI agents of leaking grand jury material and other sensitive information to the media.[1] The leaks, he argued, violated grand jury secrecy rules and unfairly prejudiced his defense, warranting an evidentiary hearing to determine the scope of the misconduct and sanctions for that misconduct.

The U.S. District Court for the Southern District of New York, however, denied the motion in November, ruling that Adams failed to prove that certain leaks revealed grand jury material or that the government was responsible for the other leaks.[2]

In early October, Combs also accused federal agents of leaking a "stream of false and prejudicial statements" to the media, including a graphic video showing him assaulting a victim.[3]

To remedy the leaks, Combs moved for an evidentiary hearing, a gag order preventing the government from leaking additional material, and an order preventing the government from introducing at trial any evidence that had been leaked. The Southern District of New York has not yet ruled on Combs' motion.

As these high-profile examples show, leaks of information gathered during a criminal investigation must be taken seriously. They can undermine a defendant's right to a fair trial, dissuade witnesses who have information that could help a defendant from coming forward, and ruin a defendant's reputation, even if the defendant is later vindicated at trial.

Yet as Adams has learned, and Combs may soon learn, obtaining relief for leaks is an uphill battle. By understanding the applicable rules and the available remedies, and following certain best practices, defense lawyers can mitigate the harm from leaks and, potentially, obtain some relief for clients.

Rules Designed to Stop Leaks

A web of rules exists to prevent the government from unfairly prejudicing a defendant's rights by leaking information obtained during criminal investigations.

At the constitutional level, the guarantee of due process of law in the Fifth and 14th Amendments includes the right to a fair trial. In rare cases, government leaks can render a trial so "unfair, biased, or slanted," in the words of the U.S. District Court for the Eastern District of Louisiana's 2013 decision in U.S. v. Bowen, as to deny a defendant of that right.[4]

Certain federal laws also limit what the government can disclose about targets of investigations, or anyone else. The Privacy Act, for example, prohibits federal agencies, including the U.S. Department of Justice, from disclosing information in government records about a person, absent an applicable exception.[5] Information gathered during criminal investigations generally falls within the Privacy Act's protections.[6]

The Federal Rules of Criminal Procedure offer added protection by prohibiting prosecutors and others from disclosing any "matter occurring before the grand jury."[7] That prohibition prevents the government from disclosing not only what is actually said in the grand jury, but also "the identities of witnesses or jurors, the substance of testimony, [or] the strategy or direction of the investigation," as articulated by the U.S. Court of Appeals for the District of Columbia Circuit in its 1980 decision in U.S. Securities and Exchange Commission v. Dresser Industries Inc.[8]

DOJ policy goes further to restrict what prosecutors and agents may say publicly about criminal investigations. It forbids any DOJ employee from making any statement or releasing any information "for the purpose of influencing the outcome of a defendant's trial" or any statements of any kind regarding a "defendant's character," potential witnesses or evidence, and opinions "as to the accused's guilt."[9]

DOJ policy separately prohibits the disclosure of any "non-public, sensitive information" obtained during investigations "to anyone, including to family members, friends, or even colleagues."[10]

Local court rules also address government disclosure of information relating to ongoing criminal cases. The rules in the Southern District of New York, where the Adams and Combs cases are pending, specifically prevent prosecutors and law enforcement agents from disclosing nonpublic information that is likely to "interfere with a fair trial or otherwise prejudice the due administration of justice."[11]

State and local bar associations' rules of professional conduct for attorneys typically impose additional restrictions on prosecutors, prohibiting any "extrajudicial comments which serve to heighten condemnation of the accused."[12]

Together, these rules create a comprehensive prohibition on prosecutors or law enforcement agents from disclosing harmful, nonpublic information about defendants or subjects of investigation.

Potential Remedies

The available remedies for violations of these rules also appear — on paper — to be robust. Courts overseeing criminal cases have the authority to dismiss an indictment to remedy prejudice from a government leak or to impose less drastic remedies, like ordering a change of venue, declaring a mistrial, sequestering the jury, imposing a gag order on the government, sanctioning prosecutors and more.[13]

In practice, however, courts have proved resistant to punishing government leaks in criminal cases with anything stronger than a reprimand.[14] In the Adams case, for example, the court declined to hold a hearing to determine whether the government was the source of the leaks, despite seemingly compelling circumstantial evidence.[15]

Judicial resistance to granting relief does not mean defendants are powerless in the face of leaks. Adams, for instance, may be able to use the alleged leaks at trial to undermine government witnesses by suggesting the government ran a sloppy, leak-ridden investigation in violation of the DOJ's own policies.

Individuals harmed by leaks have also found mixed success in suing the government or the individual leakers for civil damages. The Privacy Act specifically allows individuals to sue the government for improperly disclosing information about them.[16]

In Hatfill v. Gonzales in the U.S. District Court for the District of Columbia, a suspect in the 2001 anthrax attacks did just that after the government leaked information about him, and he ultimately received a $4.6 million settlement from the government in 2008.[17]

And courts have allowed subjects of leaks to pursue some other civil claims, such as defamation, against prosecutors or law enforcement related to leaks.[18]

Best Practices

Though subjects of leaks face long odds in obtaining meaningful relief, there are steps defense counsel can take to mitigate the harm and increase the chances of winning at least some relief for their clients.

Prepare clients, and chart a path forward.

Clients facing trial or under investigation often feel helpless. Nearly the entire process is beyond their or their lawyers' control. And leaks exacerbate that feeling of helplessness, allowing the government to control not only the investigation and trial, but also the public narrative.

Counsel can alleviate some of that helpless feeling by preparing clients for the possibility of leaks and charting a plan to address leaks if they occur. Just knowing that counsel is thinking ahead and has a plan can lighten a client's emotional burden.

Track press about the case, and compare articles against discovery.

In every case, but particularly in high-profile cases, counsel should set news alerts to track any articles, blog posts, or other discussion of the case or client. Counsel should also save copies of any articles to preserve evidence of any leaks in case the articles are later removed.

Doing so allows counsel to identify leaks and assess public perception of the case.

After receiving documents from the government in discovery, counsel should try to determine — from metadata, warrant applications and more — when the government first obtained the evidence that was leaked.

Lining up the timing of the leak with the government's possession of the evidence can bolster the circumstantial evidence that the government was, in fact, the source of the leak.

Consider retaining a public relations firm.

For the few defendants who can afford it, retaining a public relations consultant can help combat harmful

leaks by getting the client's narrative before the public. Of course, counsel must educate the consultant about the rules discussed above.

Counsel, not the client, should ordinarily retain the consultant to preserve the attorney-client privilege. And the engagement letter should state why the consultant's services are needed to provide legal advice to the client.

Clients and lawyers should mark communications with the consultant "confidential" and "attorney-client privileged." Even then, whether a given communication with a consultant will be privileged is fact-specific and jurisdiction-specific.

Document concerns, and put the government on notice.

Where counsel has a good faith belief that a leak has or is likely to occur, it is essential to document the potential leak, the basis for the belief that the government is responsible, and the resulting harm. That documentation will prove invaluable in drafting a later motion seeking relief from the court or in preparing a civil suit against the government or individuals.

In appropriate circumstances, counsel should consider sending a letter to prosecutors or agents identifying the potential leak; requesting an investigation of the leak; listing the governing rules and policies prohibiting leaks; notifying the government of the harm to the client; and explaining the available remedies, including civil liability.

The letter should also specifically request that the government preserve and produce, among other things, any materials related to the leak or other communications with the press.

Though the government is unlikely to respond to the letter, such a letter can lay a foundation for proving that a future leak was done willfully, which increases the odds of obtaining relief. And by reminding the government of the potential consequences, the letter may also deter future leaks.

Seek realistic remedies, but also preserve arguments for appeal.

If it is necessary to seek relief from a court, counsel must remember that courts are reluctant to grant relief like dismissing an indictment or sanctioning prosecutors.

Though counsel may need to request that relief to preserve the argument for appeal, they should be sure to also request less drastic relief, such as an order allowing discovery into the suspected source of the leak or for permission to use a questionnaire during voir dire to ensure selected jurors have not been influenced by the leak.

Conclusion

As Adams and Combs have learned, even though a series of rules exist to prevent leaks, they still happen. And when they do, counsel face long odds of obtaining relief for clients. But attorneys can increase those chances and help mitigate the harm by understanding the governing rules and available remedies, and implementing certain best practices.

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[1] Mem. in Supp. Mot. for Evidentiary Hr'g and Sanctions, United States v. Adams, No. 1:24-cr-556 (S.D.N.Y.), Dkt. 19 (filed Oct. 1, 2024).

[2] United States v. Adams, No. 1:24-cr-556, 2024 WL 4702754 (S.D.N.Y. Nov. 4, 2024).

[3]M em. in Supp. Mot. for Evidentiary Hr'g and Various Relief, United States v. Combs, No. 1:24-cr-542 (S.D.N.Y.), Dkt. 31 (filed Oct. 9, 2024).

[4] United States v. Bowen, 969 F. Supp. 2d 546 (E.D. La. 2013).

[5] 5 U.S.C. §552a(b); see McCready v. Nicholson, 465 F.3d 1, 7-8 (D.C. Cir. 2006).

[6] See, e.g., Hatfill v. Gonzales, 505 F. Supp. 2d. 33, 38-39 (D.D.C. 2007) (information leaked about suspect in 2001 anthrax attacks fell within the Privacy Act).

[7] Fed. R. Crim. P. 6(2)(B); see id. 6(3)(B) (preventing other government personnel from disclosing grand jury information learned from a prosecutor).

[8] SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1382 (D.C. Cir. 1980).

[9] 28 C.F.R. §§50.2(b)(2), 50(b)(6).

[10] U.S. Dep't of Justice, Justice Manual §1-7.100.

[11] S.D.N.Y. L.R. 23-1(a).

[12] D.C. Rules of Professional Conduct 3.8.

[13] See Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (ordering convicted defendant released due in part to prosecutors leaking information); Bennett L. Gershman, Prosecutorial Misconduct §§6:16-6:38 (2d ed. rev. 2024) (summarizing remedies).

[14] See, e.g., United States v. Silver, 103 F. Supp. 3d 370, 373 (S.D.N.Y. 2015) (criticizing U.S. Attorney's conduct but ordering no relief).

[15] Adams, 2024 WL 4702754, at *3.

[16] 5 U.S.C. §552a(g)(4); see Hatfill, 505 F. Supp. 2d. at 37.

[17] Scott Shane & Eric Lichtblau, Scientist Is Paid Millions by U.S. in Anthrax Suit, The New York Times (June 28, 2008), https://www.nytimes.com/2008/06/28/washington/28hatfill.html.

[18] See, e.g., Nadler v. Mann, 951 F.2d 301, 306 (11th Cir. 1992) (allowing defamation claim against prosecutor to proceed).