

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOHN and SHIELA PRIORE, :
As Beneficiaries and as Administrator/ :
Administratrix of the Estate of their late :
Daughter, ERICA KNOWLES, :
Plaintiffs, :
 :
v. : C.A. No. 13-195S
 :
DEAN C. PHILBRICK, WHALE ROCK :
RESTAURANT, LLC d/b/a TURTLE :
SOUP, and KINGSTOWN SUSHI, INC. :
d/b/a KABUKI RESTAURANT AND :
LOUNGE, :
Defendants. :

**MEMORANDUM AND ORDER
GRANTING MOTION TO QUASH
OF NON-PARTY RHODE ISLAND DEPARTMENT OF ATTORNEY GENERAL**

This case arises out of a motor vehicle tragedy that occurred on February 15, 2012, in which Plaintiffs’ decedent, a passenger in a vehicle operated by Defendant Dean Philbrick, was killed. The federal Complaint is based on the claim that Defendant Philbrick had been drinking to excess, first at the premises of his employer, Defendant Whale Rock Restaurant, LLC d/b/a Turtle Soup (“Whale Rock”) and later at Defendant Kingstown Sushi, Inc., d/b/a Kabuki Restaurant and Lounge (“Kingstown”). Defendant Philbrick was indicted by a state grand jury supervised by the Washington County Superior Court for driving under the influence and driving to endanger, death resulting (“Philbrick Grand Jury”). Ultimately, he pled nolo contendere to the charges and is currently serving a sentence of incarceration.

This civil wrongful death case was filed in the federal court based on diversity jurisdiction; it alleges that Defendant Philbrick and the two restaurants – Defendants Whale

Rock and Kingstown – are liable for negligent service of alcohol pursuant to Rhode Island’s Liquor Liability Act, R.I. Gen. Laws § 3-14-6(b). It also seeks punitive damages from Defendants Philbrick and Whale Rock.

On August 2, 2013, Whale Rock served the Rhode Island Department of the Attorney General with a subpoena duces tecum seeking “any and all grand jury testimony, statements, tapes and/or transcripts” from the Philbrick Grand Jury. The Attorney General has objected to the subpoena and moved to quash on grounds that it seeks documents that are privileged and/or protected from disclosure, asserting Fed. R. Civ. P. 45(c)(3)(A)(iii). Because this diversity case is governed by state substantive law, it is the state law of privilege that applies to the determination of whether state grand jury testimony should be disclosed. In re Grand Jury Proceedings, 832 F.2d 554, 559-60 (11th Cir. 1987) (Fed. R. Evid. 501 provides that in a federal civil case, “state law governs privilege regarding a claim or defense for which state law supplies the rule of decision”); Goldstein v. City of Long Beach, 603 F. Supp. 2d 1242, 1250 (C.D. Cal. 2009) (same).

This motion to quash requires the Court to wade into virgin waters in this district and determine a threshold question: whether the federal court should decide in the first instance how to protect the secrecy of the records of a state grand jury, which is an arm of the Rhode Island Superior Court, In re Young, 755 A.2d 842, 843 (R.I. 2000) (mem.), before the Superior Court has been given an opportunity to do so. If the answer is yes, then this Court must proceed to consider the merits of this motion, which turns on whether Defendant Whale Rock has adequately established “particularized need” for the subpoenaed grand jury records. Because Whale Rock cannot clear the threshold hurdle, the Attorney General’s motion to quash must be granted. ECF No. 22.

It is well settled that “when state grand jury proceedings are subject to disclosure, comity dictates that the federal courts defer action on any disclosure requests until the party seeking disclosure shows that the state supervisory court has considered his request and has ruled on the continuing need for secrecy.” Socialist Workers Party v. Grubisic, 619 F.2d 641, 645 (7th Cir. 1980). This principle stems from the seminal decision of the United States Supreme Court in Douglas Oil Co. v. Petrol Stops Northwest, where it held that, generally, the request for disclosure of grand jury minutes must be directed towards the court under whose auspices the grand jury was impaneled. 441 U.S. 211, 225 (1979). Since these decisions, federal courts have uniformly held that “elementary principles of federalism and comity” demand that a federal court presented with a motion to compel disclosure of a matter pending before a state grand jury should direct the party first to petition the judicial officer possessing supervisory authority to grant or deny such access. Camiolo v. State Farm Fire & Cas. Co., 334 F.3d 345, 354-57 (3d Cir. 2003) (citing Younger v. Harris, 401 U.S. 37, 44-45 (1971)) (where state procedure requires that a party seeking disclosure must petition state supervising judge for release of grand jury materials, federal court will abstain from ruling until litigant has complied with state law)); Am. Tank Transp., Inc. v. First People’s Cmty. Fed. Credit Union, 86 F.3d 1148, at *7 (4th Cir. 1996) (unpublished table opinion) (proper and necessary for district court to acknowledge and honor state court ruling based on basic principles of comity); Brunson v. City of Dayton, 163 F. Supp. 2d 919, 922-23 (S.D. Ohio 2001) (principles of comity demand that state court judge who supervised grand jury have first opportunity to decide whether testimony and exhibits can be released); Shell v. Wall, 760 F. Supp. 545, 546-47 n.2 W.D.N.C. 1991) (comity requires federal courts to give great deference to state court decision to maintain grand jury materials in secret;

“[a]t a minimum comity requires a movant to first attempt to obtain state grand jury materials from the state court in whose care those materials are entrusted”).

Federal courts that have proceeded directly to a determination of the scope of state grand jury secrecy have done so only in cases where important federal interests vindicating federal substantive policy were at issue in the federal case. See, e.g., Cruz v. Kennedy, No. 97-Civ.-4001, 1997 WL 839483, at *1-2 (S.D.N.Y. Dec. 19, 1997) (in Section 1983 case, federal interests militate in favor of compelling disclosure); In re Subpoena Duces Tecum directed to the Honorable Kevin M. Dillon, 824 F. Supp. 330, 335 (W.D.N.Y. 1992) (federal grand jury investigation’s particularized need for state grand jury records outweighs comity concerns).

Accordingly, the motion of the Attorney General to quash the subpoena duces tecum is granted, ECF No. 22, without prejudice to the right of Defendant Whale Rock to return to this Court,¹ after it has petitioned the Superior Court, with a showing of particularized need² for a narrowly tailored set of the Philbrick Grand Jury records based upon the specific considerations of this litigation.

So ordered.

¹ In response to the Attorney General’s Motion to Quash, Whale Rock filed an Objection and a separate Petition for Disclosure of Grand Jury Documents. ECF Nos. 23, 23-2. The Objection is overruled and the Petition is denied without prejudice to any further proceedings that may be necessary in this Court after Whale Rock has petitioned the Superior Court.

² While not necessary to the determination that comity requires this Court to defer until the Superior Court has had an opportunity to address the issue, I note that Whale Rock’s showing of particularized need is far from what has been deemed adequate by the Rhode Island courts. Thus, the Rhode Island Supreme Court has cautioned against an “open sesame” approach that would justify the disclosure of grand jury minutes in any civil case where a litigant makes a generalized request based on convenience, trial preparation, impeachment or refreshment of recollection, as Whale Rock has done here. See In re Young, 755 A.2d at 843; In re Mark Jackson Grand Jury, No. 09-6902, 2010 WL 677721, at *1 (R.I. Super. Ct. Feb. 23, 2010) (party seeking disclosure must demonstrate that need for disclosure outweighs need to preserve secrecy). The mere fact that the targets of the grand jury investigation may have waived any claim to secrecy (which they have not done here) does not automatically eliminate the privileged status of the grand jury minutes, nor does the fact that the grand jury has completed its work. See In re Young, 755 A.2d at 843, 847; In re Grand Jury, No. 10-6179, 2010 WL 5042899, at *1 (R.I. Super. Ct. Dec. 3, 2010); In re Mark Jackson Grand Jury, 2010 WL 677721, at *1; see also Shell, 760 F. Supp. at 547-48. Accordingly, if this Court were to consider the merits of Whale Rock’s argument, it would quash this subpoena based on its failure to establish particularized need.

ENTER:

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
September 3, 2013