UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY INVESTIGATION	Misc. Action No. 17-2587 (BAH) Chief Judge Beryl A. Howell **FILED UNDER SEAL**

MEMORANDUM OPINION

Pending before the Court are motions filed on October 13, 2017, by a licensed real estate brokerage and one of its realtors (collectively "the respondents") to quash two grand jury subpoenas seeking brokerage records and the realtor's testimony, respectively, regarding the purchase of real property, including in Virginia, by four individuals and their affiliated entities (collectively "the Clients"). Brokerage's Mot. Quash Subpoena at 1, ECF No. 1; Realtor's Mot. Quash Subpoena at 1, ECF No. 3 (collectively "Resps.' Mots."); Resps.' Mots., Exs. A, Grand Jury Subpoenas, dated Oct. 2, 2017 ("Grand Jury Subpoenas").[1] According to the respondents, compliance with the subpoenas would be "unreasonable or oppressive," under Federal Rule of Criminal Procedure Rule 17(c)(2), because disclosure of the records and testimony sought would violate D.C. Code § 42-1703 and Va. Code § 54.1-2132, both of which statutes require "that a real estate licensee shall maintain confidentiality of all personal and financial information received." Brokerage's Mem. Supp. Mot. Quash Subpoena ¶ 9, ECF No. 1; Realtor's Mem.

[1] [Redacted.]

Supp. Mot. Quash Subpoena ¶ 9, ECF No. 3 (collectively "Resps.' Mems."). Upon consideration of the government's response, Gov't's Resp. Mots. Quash Subpoena ("Gov't Resp."), ECF No. 2, and argument presented at the hearing on October 17, 2017, the respondents' motions to quash were denied at the hearing and the respondents were directed to comply with the grand jury subpoenas and produce the requested records by October 20, 2017. Oct. 17, 2017 Hr'g Tr. ("Hr'g Tr.") at 12:17–21, ECF No. 4; Minute Order, dated Oct. 17, 2017. The reasons for denial of the motions to quash are more fully set out below.

I. LEGAL STANDARD

The Supreme Court has made clear that "[a] grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States v. R. Enters., Inc.*, 498 U.S. 292, 298 (1991) (internal quotation marks omitted). "[T]he law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority," and, thus, "a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." *Id.* at 300–01. The grand jury may seek information from "widely drawn" sources, with the duty to testify long recognized "as a basic obligation that every citizen owes his Government." *United States v. Calandra*, 414 U.S. 338, 345 (1974); *see also id.* (noting "that citizens generally are not constitutionally immune from grand jury subpoenas and that the longstanding principle that the public has a right to every man's evidence is particularly applicable to grand jury proceedings." (quoting *Branzburg v. Hayes*, 408 U.S. 665, 682, 688 (1972) (alterations and internal quotation marks omitted))).

"The investigatory powers of the grand jury are nevertheless not unlimited," but subject to limits imposed by Federal Rule of Criminal Procedure 17(c), "which governs the issuance of subpoenas *duces tecum* in federal criminal proceedings." *R. Enters., Inc.*, 498 U.S. at 299; *see Calandra*, 414 U.S. at 346 (observing that "the grand jury's subpoena power is not unlimited"). This rule provides that, on motion, "the court may quash or modify the subpoena if compliance would be unreasonable or oppressive." FED. R. CRIM. P. 17(c)(2). A grand jury "may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." *Calandra*, 414 U.S. at 346. "Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs." *Id*.

II. DISCUSSION

The grand jury subpoenas at issue require production of records and testimony regarding six categories of information relating to the Clients' real estate transactions, "including all records related to the source of funds used to purchase, sell, or transfer the property, receipts, audited financials, escrow records, communications between the broker and its client, and 'all other documents' including instructions for transfer of funds," all of which contain "personal and sensitive financial information" provided by the Clients, who have not consented to disclosure. Resps.' Mems. ¶¶ 4–5, 10. In the respondents' view, their compliance with the subpoenas would violate their "statutory fiduciary duties" set forth in District of Columbia and Virginia law, "barring a demonstration of good ca[u]se and an Order of the Court." *Id*. ¶ 19. The respondents are wrong: the information the grand jury subpoenas seek is not privileged under state or federal law and the government need not make any special showing to obtain these records, nor would production be "unreasonable or oppressive." FED. R. CRIM. P. 17(c)(2).

The respondents' motions raise the issue whether real estate brokerage records are accorded a form of state statutory protection such that judicial intervention is required before such records may be produced pursuant to a federal grand jury subpoena. The respondents take the position that a court order compelling compliance with federal grand jury subpoena is required to overcome the confidentiality protection afforded to real estate brokerage records under District of Columbia and Virginia law. They rely on identical provisions of District of Columbia and Virginia statutes that require a real estate licensee engaged by a buyer, such as the Clients, to "[m]aintain confidentiality of all personal and financial information received from the client during the brokerage relationship and any other information that the client requests during the brokerage relationship be maintained confidential unless *otherwise provided by law* or the buyer consents in writing to the release of such information." D.C. Code § 42-1703(b)(1)(C); Va. Code § 54.1-2132(A)(3) (emphasis added). The government does not dispute that these statutes extend confidential treatment to the subpoenaed information, but argues that "the laws do not impose an absolute duty of confidentiality on real estate agents" or excuse compliance with "a legal obligation—enforceable by a federal court—to respond to the grand jury's request for documents, testimony, or both." Gov't Resp. at 4.

At the outset, the respondents and the government have identified no case law, and the Court has not uncovered any, from the District of Columbia or Virginia discussing, let alone concluding, that these statutory provisions create any state-law evidentiary privilege barring disclosure of real estate brokerage records pursuant to lawful process requiring such disclosure. Although the respondents expressly disclaim argument that these statutes create an evidentiary privilege, their counsel explained that the dearth of authority in these jurisdictions has generated uncertainty as to whether real estate brokerages and realtors breach their fiduciary and statutory

confidentiality obligations by complying with subpoenas, absent a court order compelling such compliance.[2] Hr'g Tr. at 5:12–22, 6:13–25, 7:15–20.

In determining whether a statute creates a privilege that bars otherwise lawful discovery, courts have a "duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result." *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961); *see also In re England*, 375 F.3d 1169, 1177 (D.C. Cir. 2004) ("[T]he terms of a statute should be strictly construed to avoid a construction that would suppress otherwise competent evidence." (internal quotation marks omitted)). In assessing the reach of state and even federal confidentiality statutes, courts are careful to distinguish "between privilege and protection of documents, the former operating to shield the documents from production in the first instance, with the latter operating to preserve confidentiality when produced." *Virmani v. Novant Health Inc.*, 259 F.3d 284, 287 n.4 (4th Cir. 2001); *see also Pearson v. Miller*, 211 F.3d 57, 68 (3d Cir. 2000) ("Statutory provisions providing for duties of confidentiality do not automatically imply the creation of evidentiary privileges binding on courts."); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984) (observing, in the FOIA context, that "[i]f information . . . is exempt from disclosure to the general public under FOIA, it does not automatically follow the information is privileged . . . ."); *In re Grand Jury*

[2] In any event, the existence of a state-law privilege does not control whether federal courts recognize such a privilege under Federal Rule of Evidence 501. *See United States v. Gillock*, 445 U.S. 360, 373 (1980) ("Rule 501 requires the application of federal privilege law . . . in federal court. . . . [T]he fact that there is an evidentiary privilege under [state law], which [one] could assert . . . in state court does not compel an analogous privilege in a federal [action]."). "[A] party seeking judicial recognition of a new evidentiary privilege under Rule 501 [must] demonstrate with a high degree of clarity and certainty that the proposed privilege will effectively advance a public good," *In re Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir. 1998), that is "sufficiently important . . . to outweigh the need for probative evidence," *Jaffee v. Redmond*, 518 U.S. 1, 9–10 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). No such demonstration has been made here, especially given "the general rule disfavoring testimonial privileges" that follows from the "general duty to give what testimony one is capable of giving." *Id.* at 9 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)); *see also Trammel*, 445 U.S. at 50 ("[P]rivileges [must be] accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960))).

Proceedings, 832 F.2d 554, 560 (11th Cir. 1987) (concluding that a Florida statute requiring secrecy of grand jury testimony did not establish an evidentiary privilege under Florida law).

Here, D.C. Code § 42-1703(b)(1)(C) and Va. Code § 54.1-2132(A)(3), by their plain terms, merely impose a duty to "maintain confidentiality" of real estate brokerage records, but expressly limit the scope of this duty with the phrase "*unless otherwise provided by law*." D.C. Code § 42-1703(b)(1)(C); Va. Code § 54.1-2132(A)(3).[3] Such language falls far short of "clearly and strongly" establishing an evidentiary privilege, as required "to contradict th[e] broad objective favoring disclosure in judicial proceedings," *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1343 (D.C. Cir. 1984) (internal quotation marks omitted), especially in light of a court's obligation to strictly construe a statute to avoid "suppress[ing] otherwise competent evidence," *St. Regis Paper Co.*, 368 U.S. at 218.[4] Instead, this express limitation on the scope of the confidentiality duty allowing disclosure when "*otherwise provided by law*" confirms that a real estate broker's duty of confidentiality under District of Columbia and Virginia law is not absolute, and does not absolve a broker of complying with lawful process. The Federal Rules of Criminal Procedure direct that "[a] subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates," and impose a legal obligation to comply with the subpoena, which obligation is enforceable in a contempt action against "a

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[3] The phrases "otherwise provided by law" or "otherwise provided for by law" appear elsewhere in various provisions of District of Columbia and Virginia law governing real estate brokerages and brokers. *See, e.g.*, D.C. Code § 42-1703(g)(3) ("Except as otherwise agreed to in writing, a licensee owes no further duties to a client after termination, expiration, or completion of performance of the brokerage relationship, except to . . . keep confidential all personal and financial information received from the client during the course of the brokerage relationship and any other information that the client requests during the brokerage relationship be maintained confidential, unless otherwise provided by law . . . ."); Va. Code § 54.1-2137(C) (same); D.C. Code § 47-2853.196(k) ("Designated representatives may not disclose . . . personal or financial information received from the clients during the brokerage relationship and any other information that the client requests during the brokerage relationship be kept confidential, unless otherwise provided for by law . . . ."); Va. Code § 54.1-2139.1(A) (same).

[4] At least one commentator has concluded, upon surveying the legal landscape, that no real estate brokerage records privilege exists. *See* Stephen Williams, *Real Estate Professional-Client Privilege: Fact or Fiction?*, 35 REAL ESTATE L.J. 542 (2007).

witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district." FED. R. CRIM. P. 17(c)(1), (g). Thus, federal subpoenas generally and federal grand jury subpoenas, in particular, impose legal obligations, enforceable by a federal court, to respond to requests for documents, testimony, or both. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (noting "the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation"). Production of information pursuant to a federal grand jury subpoena thus is "otherwise provided by law" within the meaning of D.C. Code § 42-1703(b)(1)(C) and Va. Code § 54.1-2132(A)(3). *See also In re Grand Jury Subpoena*, 41 F. Supp. 2d 1026, 1028, 1035–36 (D. Alaska 1999) (rejecting bank's argument that compliance with federal grand jury subpoena for depositor records would require bank to violate state law barring disclosure "except when . . . required by federal or state law or regulation," and concluding that this statutory language "relieves financial institutions in Alaska of any obligation to await a court order before releasing financial records" because of the "well established obligation to respond to grand jury subpoenas regardless of whether those subpoenas are accompanied by court orders").

This conclusion resolves the issue raised by the respondents whether a court order compelling compliance with a federal grand jury subpoena is necessary for such compliance to fall within the express exception for disclosure set out in both statutes. Indeed, neither statute purports on its face to require a court order compelling compliance with a subpoena to overcome real estate brokerage records confidentiality—only that "law" "provide[]" for disclosure. D.C. Code § 42-1703(b)(1)(C); Va. Code § 54.1-2132(A)(3). Thus, real estate records are subject to production in accordance with a federal grand jury subpoena absent a court order mandating

compliance with the subpoena, given that, as explained, such a subpoena itself triggers a legal obligation to comply. *Id*.

This construction of the District of Columbia and Virginia statutory provisions upon which the respondents rely is bolstered by other statutes in the same jurisdictions. For example, District of Columbia law elsewhere provides that a realtor may not "[w]illfully breach[] a statutory, regulatory, or ethical requirement of the profession or occupation, *unless ordered by a court*." D.C. Code § 47-2853.17(a)(16) (emphasis added). As this language demonstrates, when a court order is required, the legislature knows how to make this specific requirement explicit. By contrast to D.C. Code § 47-2853.17(a)(16), the phrase "otherwise provided by law," as used in D.C. Code § 42-1703(b)(1)(C), makes no reference to a separate court order and, thus, does not preclude compliance with the legal obligations triggered by a federal grand jury subpoena, pending such a court order. *See Sebelius v. Auburn Regional Med. Ctr.*, 568 U.S. 145, 156 (2013) ("Congress's use of certain language in one part of the statute and different language in another can indicate that different meanings were intended." (internal quotation marks omitted)); *Wallaesa v. FAA*, 824 F.3d 1071, 1083 (D.C. Cir. 2016) ("If Congress had intended that narrow meaning, it knew how to say so."). Similarly, another Virginia statute prevents a corporation from indemnifying a director under certain circumstances "[u]nless ordered by a court," Va. Code §§ 13.1-697(D), 13.1-876(D), indicating that the Virginia General Assembly, like the Council of the District of Columbia, knew how to use more specific language when a more specific requirement of a court order was intended. In short, neither D.C. Code § 42-1703(b)(1)(C) nor Va. Code § 54.1-2132(A)(3) require a separate court order before a real estate brokerage or broker must comply with a federal grand jury subpoena.[5]

[5] While a realtor may not "[w]illfully breach[] a statutory, regulatory, or ethical requirement of the profession or occupation, unless ordered by a court," D.C. Code § 47-2853.17(a)(16), no professional or

Doe v. DiGenova, 779 F.2d 74 (D.C. Cir. 1985), lends support to this conclusion. *Doe* interpreted the Privacy Act of 1974, which authorizes disclosure of certain information pursuant to an "order of a court." 5 U.S.C. § 552a(b)(11). The D.C. Circuit considered whether a federal grand jury subpoena is an "order of a court" but found this question too close a call to resolve on the basis of statutory text alone, ultimately turning to legislative history and statutory purpose to conclude that a subpoena is not an "order of a court." 779 F.2d at 81–85; *see Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 212 (D.C. Cir. 2013) ("We do not resort to legislative history to cloud a statutory text that is clear." (alterations omitted) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994))). Significantly, the *Doe* Court opined that had the Privacy Act authorized disclosure pursuant to "legal process" or "process of a United States court," a grand jury subpoena would be enough to compel disclosure without an additional court order, observing that such a subpoena "is signed by the clerk of the court, is issued in the name of the court, and carries with it the contempt power." 779 F.2d at 81–84. The phrase "otherwise provided by law," used in the District of Columbia and Virginia statutes at issue here, is akin to the phrases "legal process" and "process of a United States Court," considered by the *Doe* Court, and is broader than the phrase "order of a court." While the *Doe* Court viewed the question of whether a federal grand jury subpoena is an "order of a court" a close textual call, *id.* at 81, whether such a subpoena obliges compliance as a matter of "law," as D.C. Code § 42-1703(b)(1)(C) and Va. Code § 54.1-2132(A)(3) use that phrase, is a question easily answered in the affirmative. The language of the District of Columbia and Virginia statutes thus make clear

occupational obligation to keep records confidential is implicated when those records are disclosed as "otherwise provided by law," *id.* § 42-1703(b)(1)(C). The language of "unless ordered by a court" D.C. Code § 47-2853.17(a)(16) thus does not require a real estate brokerage or broker to obtain a court order before producing confidential client records pursuant to a federal grand jury subpoena.

that real estate brokerage records may be produced pursuant to a federal grand jury subpoena without the necessity of an additional court order.

Sound considerations of judicial economy also support this conclusion. The respondents' counsel has represented that realtors fear that compliance with any subpoena directing production of client records, absent a separate court order, may place them in professional jeopardy for violating client confidentiality. Hr'g Tr. at 5:12–22, 6:13–25. The Virginia Real Estate Board "has the power to fine any licensee" and "suspend or revoke any license . . . where the licensee . . . has been found to have violated" client confidentiality requirements, 18 Va. Admin. Code § 135-20-155, while the District of Columbia Real Estate Commission may sanction realtors who "[w]illfully breach[] a statutory . . . or ethical requirement of the profession or occupation" via fines, reprimands, imposition of probation or courses of remediation, or revocation or suspension of a license or privilege to practice in the District of Columbia, D.C. Code § 47-2853.17(a)(16), (c)(2)-(7). As such, counsel represented, real estate brokers in these two jurisdictions "always" move to quash upon receipt of subpoenas directing production of client records, without regard to a subpoena's validity, because they understand that a court order directing compliance will shield them from professional sanctions entirely.[6] Hr'g Tr. at 6:13–19.

To require a real estate brokerage or broker to rush to court to move to quash an admittedly-valid grand jury subpoena, in order to obtain an order compelling compliance, imposes a burden on the time and resources of the court, the respondent, and the government, as well as a concomitant delay in federal grand jury proceedings. D.C. Code § 42-1703(b)(1)(C)

[6] While the respondents indicate that the typical context in which this situation arises involves subpoenas in civil proceedings, this Memorandum Opinion addresses only federal grand jury subpoenas. *See R. Enters. Inc.*, 498 U.S. at 297, 299 (distinguishing grand jury subpoenas as "much different from a subpoena issued in the context of a prospective criminal trial" and observing that in assessing whether compliance would be unreasonable or oppressive, "what is reasonable depends on the context" (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985))).

and Va. Code § 54.1-2132(A)(3) should not be construed to require such a wasteful expenditure absent a clear textual indication to the contrary, which, as explained, neither statute contains. This is especially so considering that the financial-related records in a real estate brokerage or broker's possession, such as those records sought by the federal grand jury subpoenas at issue here, are generally the same type of financial records that banks may maintain and that would not be shielded from production if sought directly from the bank. *See, e.g.*, *United States v. Miller*, 425 U.S. 435, 444 (1976) (observing, with respect to records maintained under the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*, that "the issuance of a subpoena to a [bank] to obtain the records of that [bank] does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time of the subpoena is issued."). To the extent that the District of Columbia and Virginia statutes relied upon by the respondents here impose confidentiality obligations on real estate brokers and agents consistent with their fiduciary obligations, many professions share similar fiduciary obligations, even if not statutorily codified. As the government correctly points out, "[i]f those professional duties created obstacles to complying with the grand jury, it would frustrate the investigation of numerous forms of criminal activity." Gov't Resp. at 6 (citing *In re Subpoena To Testify Before Grand Jury*, 787 F. Supp. 722, 724 (E.D. Mich. 1992) (declining to excuse certified public accountant from testifying before grand jury and producing client records based on state statute creating accountant-client privilege)).

Moreover, to quash the federal grand jury subpoenas because state law confidentiality protections apply to the records sought would seriously impair a federal grand jury's ability to investigate conduct that violates federal criminal law. "[T]he public," as a general matter, "has a right to every man's evidence," *United States v. Nixon*, 418 U.S. 683, 709 (1974) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1949)), in order for the grand jury to fulfill its

"unique role in our criminal justice system" as "an investigatory body charged with the responsibility of determining whether or not a crime has been committed," *R. Enters., Inc.*, 498 U.S. at 297. To frustrate compliance with a federal grand jury subpoena based on state law-afforded confidentiality protections would in effect allow states to control federal grand jury proceedings through local statute by determining which categories of information may be withheld or only produced pursuant to a court order. Such a result would unduly interfere with the grand jury's "investigatory function," *id.*, and invert the ordinary relationship of federal supremacy over state law. *See* Sara Beale *et al.*, *Grand Jury Law and Practice* § 6:8 (2d ed. 2016) ("[F]ederal law does not recognize various rules of non-disclosure in force in particular states, such as rules prohibiting the release of patient records, hospital peer review records, and bank records. If a federal grand jury subpoenas information that is not subject to disclosure under state laws of this type, creating a conflict between state and federal law, federal law governs under the supremacy clause."). "[A]lthough principles of comity command careful consideration, . . . where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." *United States v. Gillock*, 445 U.S. 360, 373 (1980); *see also United States v. Cartledge*, 928 F.2d 93, 97 (4th Cir. 1991) ("The federal interest" in "enforcement of the federal criminal statutes . . . outweighs any state interest which might be implicated under this statute.").

Accordingly, as a matter of first impression, neither the District of Columbia nor Virginia statutes requiring real estate brokerages and brokers to maintain the confidentiality of buyers' records create a real estate brokerage records evidentiary privilege or require a separate court

order enforcing a valid federal grand jury subpoena to overcome the confidentiality protections before a brokerage or broker may comply with the subpoena.[7]

III. CONCLUSION

For the foregoing reasons, the respondents' motions to quash subpoena are denied. The government is directed to advise the Court by October 27, 2017, of its view of whether this Memorandum Opinion may be unsealed, with footnote 1 redacted, and of any other proposed redactions prior to such unsealing. An order consistent with this Memorandum Opinion issued on October 17, 2017.

Date: October 23, 2017

BERYL A. HOWELL
Chief Judge

[7] To the extent that the District of Columbia and Virginia statutes reflect an interest in protecting the confidentiality of buyers' real estate brokerage records, the secrecy of grand jury proceedings adequately protects those interests. *Accord In re Subpoena to Testify Before Grand Jury*, No. 07-mc-1500, 2007 WL 1098884, at *2 (E.D. La. Apr. 10, 2007) ("While the Court recognizes the zealousness with which Louisiana would guard its citizens[']tax records, this confidentiality will be protected by the secret nature of the grand jury proceedings.... The secrecy of these proceedings will not undermine the purpose of [state tax confidentiality law].").