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The Honorable Andrew T. Baxter
United States Magistrate Judge
Northern District of New York
Federal Courthouse
100 South Clinton Street
Syracuse, NY 13261-7396

Re: Letter Motions to Unseal Search Warrant Documents
Magistrate Case No. 05:MJ-492 (ATB)

Dear Judge Baxter:

I am writing in response to your letter dated November 30, 2011, in which you invited the government and other interested parties to respond to letter motions you received from Gary W. Craig, a reporter with the Rochester Democrat and Chronicle, and Brendan Lyons, a reporter with the Albany Times Union. Those letter motions asked you to unseal search warrant documents in the above-captioned case. Since you sent your letter, two similar requests were filed, one by Michael Gormley, an editor with the Associated Press, the other by John O'Brien, a reporter from the Syracuse Post Standard.

As you know, the government did not seek sealing of the search warrant returns in this matter and those returns, along with the warrants themselves, have been publicly filed on CM/ECF. As a result, the only materials that remain under seal are the warrant applications, along with the supporting affidavits. Those documents should remain under seal because the United States Attorney's Office for the Northern District of New York, along with federal and local law enforcement agencies, is conducting a criminal investigation and no indictment has been returned. Disclosure of information in the warrant affidavits will jeopardize the ongoing investigation and may result in harm or embarrassment to one or more potential witnesses. As explained below, under these

circumstances, governing law, and prudence dictate that the search warrant applications and affidavits remain under seal.

The leading decision to address whether a court should grant a motion to unseal search warrant materials in a situation like the one here – where there is an ongoing criminal investigation and no indictment has been returned – is *Times Mirror v. United States*, 873 F.2d 1210 (9th Cir. 1989). In that case, upon government request, "the search warrants, supporting affidavits and inventories" related to an ongoing investigation into procurement fraud had been sealed indefinitely. *Id.* at 1211. Several media outlets moved to unseal the documents in two federal districts. After both district court judges denied those requests, the movants appealed, arguing that there was both a First Amendment right of access, *id.* at 1212, and a common law right of access to the materials. *Id.* at 1218. They further argued that Rule 41(g) of the Federal Rules of Criminal Procedure provided grounds for access.[1] *Id.* at 1219. The Ninth Circuit flatly rejected all three arguments.

The Court first determined that there is "no First Amendment right of access to search warrant proceedings and materials when an investigation is ongoing but before indictments have been returned." *Id.* at 1219. Next, noting that any right to access under the common law requires a showing that disclosure would serve the ends of justice, the Court held that "this threshold [ends of justice] requirement cannot be satisfied while a preindictment investigation is ongoing. As we explained in our discussion of appellants' First Amendment claim, the ends of justice would be frustrated, not served, if the public were allowed access to warrant materials in the midst of a preindictment investigation into suspected criminal activity." *Id.* at 1219. Finally, the Court rejected the notion that Rule 41(g) creates a right to access, holding instead that "it merely provides for the efficient and orderly maintenance of warrant materials." *Id.* at 1220. Accordingly, the Court concluded

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[1] At the time, Rule 41(g) provided that:

> The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

Substantially similar language now appears in Rule 41(i).

that "[t]he public has no qualified First Amendment right of access to warrant materials during the preindictment stage of an ongoing criminal investigation. Nor is the public entitled to access to the materials under either the common law or Fed.R.Crim.P. 41(g)." *Id.* at 1221.

Although other courts have adopted less categorical approaches, they nonetheless have been unwilling to unseal search warrant materials when government investigations may be jeopardized by such disclosure. For example, in *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn*, 855 F.2d 569 (8th Cir. 1988), the Eighth Circuit recognized a qualified First Amendment right of access to warrant materials, *id.* at 574, but nonetheless denied access to the materials at issue, in either complete or redacted form, based on the government's articulated concerns that disclosure would jeopardize its investigation. *Id.* In closing, the court noted that "we hold that the qualified first amendment right of public access extends to the documents filed in support of search warrants and that the documents may be sealed if the district court specifically finds that sealing is necessary to protect a compelling government interest and that less restrictive alternatives are impracticable." *Id.* at 575; *see also Matter of Search of Fair Finance, Fair Financial, Obsidian Enterprises*, 2010 WL 3210975 (N.D.Ohio,2010) (rejecting First Amendment and common law claims made in effort to unseal warrant materials in ongoing investigation); *see also* Monnat & Nichols, Unsealing Search Warrant Materials for Uncharged Clients, 30 Champion (July 2006) at 23 ("The United States Supreme Court has held that the public has a First Amendment right of access to information contained in official court records, but that right is normally only extended to historically-open records. In light of the fact that search warrant proceedings have traditionally been both *ex parte* and closed to the public, most courts to have considered this issue have held that no First Amendment interests are implicated by the sealing of search warrant materials.") (footnotes omitted).

In *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989), the Fourth Circuit addressed whether the press has a right of access "to inspect and copy affidavits supporting search warrants in the interval between execution of the warrants and indictment." *Id.* at 62. The *Baltimore Sun* court concluded that "[i]n concert with the Ninth Circuit, we hold that the press does not have a first amendment right of access to an affidavit for a search

warrant." *Id.* at 64-65. The Fourth Circuit did, however, part company with the Ninth Circuit by recognizing a qualified common law right of access, one that "is committed to the sound discretion of the judicial officer who issued the warrant." *Id.* at 65. When deciding whether to seal search warrant documents, a judicial officer, after "taking into consideration . . . all of the relevant facts and circumstances, . . . may file all or some of the papers under seal for a stated time or until further order." *Id.* Under the Fourth Circuit approach, the common law right of access "ordinarily involves disclosing some of the documents [which can include the warrant and returns] or giving access to a redacted version." *Id.* at 65.

The Second Circuit has recognized these differing approaches but has yet to decide which, if any, to adopt in the context of a request to unseal a search warrant when there is an ongoing investigation. *See Application of Newsday*, 895 F.2d 74 (2d Cir. 1990) (permitting unsealing after a guilty plea and when the government admitted that there was no reason for continued secrecy). In its decision, the Second Circuit wrote that:

> In *Times Mirror Co. v. United States*, the Ninth Circuit held that there was no constitutional or common law right to inspect a warrant application during the pendency of the investigation. On the other hand, in *In re Search Warrant for Secretarial Area Outside the Office of Thomas Gunn*, the Eighth Circuit held that there was a qualified constitutional right of access to search warrant applications once the warrant had been executed, even if the investigation had not been completed. Taking a middle position, the Fourth Circuit, in *In re Baltimore Sun Co.*, agreed with the Ninth Circuit that there was no constitutional right of access, but held that a common law right of inspection attached once the warrant had been filed.
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> *Times-Mirror* focused on the question of rights of access "during the pre-indictment stage of an ongoing criminal investigation." In this case, Gardner resists disclosure at a later point, after he has pled guilty to a criminal information. Without deciding whether we would concur in *Times-Mirror*'s result, we decline to extend its holding.

Id. at 78-79.

Although application of any of these approaches should result in a rejection of the unsealing motions, there are sounds reasons for this Court to adopt the Ninth Circuit's approach. The important public interest in a complete investigation into suspected criminal activity is furthered by a clear rule ensuring that the details of the investigation will remain sealed while the investigation is ongoing. The threat of premature disclosure of facts and sources threatens the integrity of the investigation. By always maintaining the sealing of search warrant affidavits during an ongoing investigation, the Ninth Circuit approach promotes informed judicial review of search requests by encouraging law enforcement to include more complete information in warrant applications. The risk of disclosure of search warrant affidavits during an ongoing investigation will tempt affiants to provide only the bare minimum information necessary to show probable cause, or even to forego warrants altogether in reliance on an exception to the warrant requirement (thereby removing the salutary involvement of a neutral and detached magistrate judge).

Even if this Court applies a less categorical approach, one similar to those crafted by the Fourth or Eighth Circuits, it should still deny the motions. As the Seventh Circuit has recognized, disclosure of a search warrant affidavit during an ongoing investigation can cause a number of harms:

> the identity of unnamed subjects not yet charged would be revealed; there may be mistaken notions concerning who might and might not be cooperating with the government or who may be subjects; there may be misunderstandings about the parameters of the government's investigation; the privacy of the innocent and the implicated would be threatened; and the cooperation of present and potential witnesses could be compromised or influenced. We add that disclosing even a redacted version of the search warrant affidavit would enable the subjects of the investigation the opportunity to alter, remove or withhold records.

Matter of EyeCare Physicians of America, 100 F.3d 514, 519 (7th Cir. 1996).

Disclosure here presents all of the above-described risks. It will jeopardize the government's ongoing investigation into the sensitive area of child abuse and molestation. Unsealing will, for example, disclose to the target the extent and nature of the government's information at the time it sought the warrants and lay bare its investigative steps. It would also reveal personal and potentially embarrassing information about witnesses who have come forward. *See Application of Newsday*, 895 F.2d at 79 ("We hold that the common law right of access is qualified by recognition of the privacy rights of the persons whose intimate relations may thereby be disclosed."). Although there has been much information publicly disclosed about this case, not everything in the affidavits is in the public realm. Even release only of those portions of the affidavits that describe matters that are publicly known could hinder the government's efforts by providing the target with insight into the nature of the investigation. Further, disclosure could jeopardize the safety of at least one of the sources of information in the affidavits.

For all of the reasons stated above, the government requests that the applications and affidavits remain sealed in their entirety.

Very truly yours,

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cc: Lisa M. Fletcher
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