

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

JAN 17 2012

Alexandria Division

IN THE MATTER OF THE SEARCH OF
THE PREMISES KNOWN AS

)
) UNDER SEAL

) Misc. No. 1:12SW38
)

**MOTION TO SEAL THE APPLICATION FOR, AND AFFIDAVIT IN SUPPORT OF,
THE SEARCH WARRANT PURSUANT TO LOCAL RULE 49(B)**

Upon the return of its executed search warrant,¹ the United States, by and through undersigned counsel, pursuant to Local Rule 49(B) of the Local Criminal Rules for the United States District Court for the Eastern District of Virginia, asks for an Order to seal the application for, and the affidavit in support of, the search warrant, together with this motion to seal and proposed Order, until further motion of the United States. In support of this motion, the government states as follows:

1. At the present time, law enforcement officers with the Federal Bureau of Investigation are conducting an investigation into national security violations, including disclosure of classified information identifying a covert officer, 50 U.S.C. sec. 421; transmission and mishandling of national defense information, 18 U.S.C. sec. 793; and making false statements, 18 U.S.C. sec. 1001. This investigation also concerns possible obstruction of justice.

2. Premature disclosure of the specific details of this ongoing investigation (as reflected, for example, in the affidavit in support of the search warrant) would jeopardize this

¹ Pursuant to Local Rule 49(B), “[n]o separate motion to seal is necessary to seal a search warrant *from the time of issuance to the time the executed warrant is returned.*” (Emphasis added). This is because, as Rule 49(B) additionally mandates, “[u]ntil an executed search warrant is returned, search warrants and related papers are not filed with the Clerk.”

ongoing criminal investigation, could lead to the flight of the subject of the investigation, and lead to the destruction of evidence. In particular, there are concerns that the subject of the investigation may have sought already to destroy evidence relevant to the matter.

3. The United States has considered alternatives less drastic than sealing and has found none that would suffice to protect this investigation at this time.

4. It is generally recognized that the public has a common law right of access, but not a First Amendment right of access, to judicial documents, including documents associated with *ex parte* proceedings such as search warrant affidavits. *Media General Operations, Inc. v. Buchanan*, 417 F.3d 424, 429 (4th Cir. 2005); *In re Washington Post Company v. Hughes*, 923 F.2d 324, 326 (4th Cir. 1991). “But the right of access is qualified, and a judicial officer may deny access to search warrant documents if sealing is ‘essential to preserve higher values’ and ‘narrowly tailored to serve that interest.’” *Media General Operations*, 417 F.3d at 429 (citations omitted); *see also In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984) (“[t]he trial court has supervisory power over its own records and may, in its discretion, seal documents if the public’s right of access is outweighed by competing interests”). Sealing search warrants and their accompanying affidavits and application is within the discretionary powers of a judicial officer where, among other things, an “‘affidavit contain[s] sensitive details of an ongoing investigation’ and it is ‘clear and apparent from the affidavits that any disclosure of the information there would hamper’ th[e] ongoing investigation.” *Media General Operations* 417 F.3d at 430 (citations omitted); *see also In re Search Warrant for Matter of Eye Care Physicians of America*, 100 F.3d 514, 518 (7th Cir. 1996).

5. Before a district court generally may seal judicial records or documents, it must (a) provide public notice of the request to seal and allow interested parties a reasonable

opportunity to object, (b) consider less drastic alternatives to sealing the documents, and (c) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives. *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000).

6. However, regarding the notice requirement in the specific context of a search warrant, the Fourth Circuit has cautioned that “the opportunity to object” cannot “arise prior to the entry of a sealing order when a search warrant has not been executed.” *Media General Operations*, 417 F.3d at 429. “A rule to the contrary would endanger the lives of officers and agents and allow the subjects of the investigation to destroy or remove evidence before the execution of the search warrant.” *Id.*; see also *Franks v. Delaware*, 438 U.S. 154, 169 (1978). Accordingly, in the context of search warrants, “the notice requirement is fulfilled by docketing ‘the order sealing the documents,’ which gives interested parties the opportunity to object after the execution of the search warrants.” *Media General Operations*, 417 F.3d at 430 (quoting *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989)); see also Local Rule 49(B) (“Until an executed search warrant is returned, search warrants and related papers are not filed with the Clerk.”).

7. As to the requirement of a court’s consideration of alternatives, the Fourth Circuit counsels that, “[i]f a judicial officer determines that full public access is not appropriate, she ‘must consider alternatives to sealing the documents,’ which may include giving the public access to some of the documents or releasing a redacted version of the documents that are the subject to the government’s motion to seal.” *Media General Operations*, 417 F.3d at 429 (quoting *Goetz*, 886 F.2d at 66).

8. Finally, regarding the requirement of specific findings, the Fourth Circuit’s precedents state that, “in entering a sealing order, a ‘judicial officer may explicitly adopt the

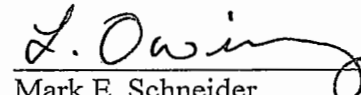
facts that the government presents to justify sealing when the evidence appears creditable,” *Media General Operations*, 417 F.3d at 429 (quoting *Goetz*, 886 F.2d at 65), so long as the ultimate “decision to seal the papers” is “made by the judicial officer,” *Goetz*, 886 F.2d at 65. “Moreover, if appropriate, the government’s submission and the [judicial] officer’s reason for sealing the documents can be filed under seal.” *Goetz*, 886 F.2d at 65; *see also In re Washington Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986) (“if the court concludes that a denial of public access is warranted, the court may file its statement of the reasons for its decision under seal”).

9. Pursuant to Local Rule 49(B)(3), the application and the affidavit will remain sealed until further motion by the United States.

WHEREFORE, the United States respectfully requests that the application for, and the affidavit in support of, the search warrant, and this motion to seal and proposed Order be sealed until further motion of the United States.

Respectfully submitted,

PATRICK J. FITZGERALD
Special Attorney to the Attorney General



Mark E. Schneider
Iris Lan
Special Attorneys

Ryan Fayhee
Trial Attorney
National Security Division

Lisa Owings
Assistant United States Attorney