UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

IN RE SEALED SEARCH WARRANT DOCUMENTS ISSUED OCTOBER 25, 28 and 29, 2011

5:11-MJ-492 (ATB)

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ANDREW T. BAXTER
U.S. Magistrate Judge

MEMORANDUM-DECISION AND ORDER

On October 25, 28, and 29, 2011, five search warrants were issued by this court for various locations and safe deposit boxes in and around Syracuse, New York. Upon the application of the U.S. Attorney's Office, the search warrants, applications, and supporting affidavits were sealed at the time of issuance. The warrants were executed, and the returns were publicly filed, revealing that at least some of the locations searched were associated with Bernie Fine. (Dkt. Nos. 7-10, 15).

Between December 5th and 12th, four reporters for various media organizations–

Gary W. Craig, Brendan J. Lyons, Michael Gormley, and John O'Brien–filed *pro se* letter motions to unseal all documents related to the search warrants. (Dkt. Nos. 11, 12, 14, 16). On December 5th, the court invited responses from the United States Attorney's Office, the attorneys for Bernie Fine, and any other "interested party." (Dkt. No. 13). The attorneys for Bernie Fine filed a response on December 13th, stating that they had no objection to unsealing the remaining search warrant documents. (Dkt. No. 17). On December 14th, the United States Attorney's Office filed its opposition to the motions to unseal, noting *inter alia*, that the warrant documents related to an ongoing criminal investigation in which no indictments had been returned. (Dkt. No.18).

The court reads or construes the reporters' letter motions to include an application to intervene in this matter, which is granted for the limited purposes of their motions to unseal.[1] For the reasons stated below, the motions to unseal the

[1] The court notes that two of the *pro se* intervenors purport to represent or speak on behalf of the media organizations which employ them. (Dkt. Nos. 14, 16). It is well established that an entity may not be represented *pro se* by an individual, but may appear only through counsel. *See, e.g., Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 172 (2d Cir. 2001) (defendant corporation could only appear through counsel and could not be represented *pro se* by an individual); *Bell v. South Bay European Corp.*, 486 F. Supp. 2d 257, 260 (S.D.N.Y. 2007) ("[A] lay person may not represent an entity."). The *pro se* movants are being permitted to intervene only on their own personal behalf. Both members of the public and press have standing to seek access to certain pretrial criminal proceedings and documents under the First Amendment and common law. *See, e.g. Globe Newspaper Co. v.Super. Ct. for Norfolk County*, 457 U.S. 596, 609 n. 25, (1982); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978).

search warrant applications and affidavits are denied, without prejudice to being renewed after six months from the date of this opinion, or after the date when any indictment or guilty plea results from the investigation, if that occurs sooner.

DISCUSSION

Brendan J. Lyons seeks the unsealing of the documents filed in connection with the search warrants, explicitly asserting both a First Amendment and a common law right of access. The other motions will be construed as requesting the same relief on both grounds.

The federal circuit courts around the country have applied differing standards regarding the right of public access to search warrants, and the Second Circuit has yet to clarify its position, at least with respect to motions to unseal such warrants in the context of pending investigations. As the Second Circuit stated in *Gardner v. Newsday, Inc.*:

> In *Times Mirror Co. v. United States*, [873 F.2d 1210, 1218-19 (9th Cir.1989),] 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*, [855 F.2d 569, 573 (8th Cir.1988)], 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.*, [886 F.2d 60, 64-65 (4th Cir.1989),] 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.

> *Times-Mirror* focused on the question of rights of access "during the pre-indictment stage of an ongoing criminal investigation." [873 F.2d at 1221.] 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. Here, the warrant has been executed, a plea-bargain agreement has been reached, the government admits that its need for secrecy is over, and the time has arrived for filing the application with the clerk. . . . In these circumstances, there is a common law right to inspect what is commanded thus to be filed.

Gardner v. Newsday, Inc., 895 F.2d 74, 78-79 (2d Cir. 1990) (footnotes omitted) (ordering the release of a redacted version of the search warrant affidavit). Based on the guidance of *Gardner v. Newsday, Inc.*, the court will focus first on the common law claim of access to the subject search warrant documents, and then, as necessary, consider the movants' First Amendment claim. *Id.* at 78 (a court must first "look to the common law, for [a court] need not, and should not, reach the First Amendment issue if judgment can be rendered on some other basis").

I. Common Law Right of Public Access[2]

The Second Circuit has explained that "[t]he common law right of public access to judicial documents is firmly rooted in our nation's history[,]" and there exists a presumption of access to such documents. *Lugosch v. Pyramid Co.*, 435 F.3d 110, 119 (2d Cir. 2006). "The presumption of access is based on the need for federal courts . . .

[2] The court's analysis draws heavily on the reasoning of Chief U.S. Magistrate Judge Homer in several similar cases including *In Re Sealed Search Warrant*, No. 04-M-370 & -388, 2006 WL 3690639, at *2-5 (N.D.N.Y. Dec. 11, 2006)

to have a measure of accountability and for the public to have confidence in the administration of justice. . . ." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*").

In evaluating a claim to access under the common law, a court must determine (1) whether the documents to which access is sought constitute "judicial documents" giving rise to a presumption of access; (2) if so, the weight accorded the presumption; (3) the existence of any countervailing factors militating against public access; and (4) whether the presumption of access outweighs the countervailing factors. *Lugosch*, 435 F.3d at 119-26. The central focus of the inquiry is the relationship of the documents to the judicial process, not the particular motivations of those seeking access. *See Logusch*, 435 F.3d at 123; *Amodeo II*, 71 F.3d at 1050.

A. The Presumption of Access to "Judicial Documents"

Once filed, a search warrant application and affidavit are clearly judicial documents. In order to be designated a judicial document, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*"). An application and supporting affidavit provide the basis upon which a judge determines whether to issue a search warrant, and they are clearly relevant to and useful in the judicial process. *See, e.g., In Re Sealed Search Warrant*, 2006 WL 3690639, at *2-3.

The presumption of access to a judicial document varies in weight, depending upon the document's significance in the adjudicative process. "[W]here documents are used to determine litigants' substantive legal rights, a strong presumption of access attaches." *Lugosch*, 435 F.3d at 121 (citing *Amodeo II*, 71 F.3d at 1049). Documents filed in connection with search warrants are critical in protecting the right of individuals under the Fourth Amendment not to be subjected to government intrusion absent a judicial determination of probable cause. As a result, Chief Magistrate Judge Homer, of this District, has concluded, in several opinions, that the presumption of access attaching to the search warrant document "falls at the highest end of the continuum described in *Amodeo II* and *Lugosch* and carries the maximum possible weight." *See, e.g., In Re Sealed Search Warrant*, 2006 WL 3690639, at *2-3. While there are other considerations that would arguably limit the weight of the presumption of common law access to search warrant documents, at least in the pre-indictment stages of a criminal investigation,[3] this court will assume, *arguendo*, that a very strong presumption of access applies to the documents at issue in this case.

[3] Search warrants are part of the preliminary investigative process, and may or may not result in any criminal charge or litigation, or be relevant to the ultimate "adjudication" of any rights of criminal "litigants." Accordingly, the presumption of common law access to search warrant documents at the pre-indictment stage would carry significantly less weight than for documents presented at a criminal trial or in connection with post-indictment, pretrial proceedings.

B. Countervailing Factors

Notwithstanding the existence here of a presumption in favor of access, countervailing factors may exist which outweigh that presumption. *Lugosch*, 435 F.3d at 124. Such factors may include matters protected by legal privileges, *Lugosch*, 435 F.3d at 125; concerns for law enforcement efforts or judicial efficiency, *Amodeo II*, 71 F.3d at 1050; and the privacy interests of third-parties, *id.* at 1050-51; *Gardner*, 895 F.2d at 79-80. "[S]ome law enforcement interests are routinely accepted as higher values and countervailing factors, including: the protection of law enforcement techniques and procedures; the protection of the confidentiality of sources; the safety of witnesses and police officers; the privacy and reputation interests of those involved in an investigation, including victims, witnesses and potential targets; the protection of ongoing investigations in terms of preventing interference, flight, or other obstructionist activities; the protection of grand jury secrecy; and, the protection of national security." *U.S. v. Strevell*, 05-CR-477 (GLS), 2009 WL 577910, at *4 (N.D.N.Y. Mar. 4, 2009) (citations omitted).

Here, the government argues that disclosure of the search warrant applications and affidavits would jeopardize an "ongoing criminal investigation into the sensitive areas of child abuse and molestation." (Dkt. No. 18 at 6). It is clear from the record that the government's criminal investigation is ongoing and that no criminal charges

have been filed. The subject of the investigation is now aware of its existence. However, the search warrant applications and affidavits would disclose to the subject the range of potential criminal violations being investigated, the evidence obtained and relied upon by the government prior to the searches, and the information which particular individuals have provided to the government. If such information is disclosed to the subject of the investigation before the institution of charges, there exists a risk that the individual could attempt to conceal or destroy other evidence, influence information and testimony given by others, and otherwise delay and obstruct the investigation. *See, e.g.*, *In Re Sealed Search Warrants Issued June 4 and 5, 2008*, 08-M-208 (DRH), 2008 WL 5667021, at *4 (N.D.N.Y. July 14, 2008).

The various movants suggest that the strength of the government's interest in protecting the integrity of its ongoing investigation is weakened because of the extensive publicity regarding the probe, which has, by now, included public statements by four alleged victims of child sex abuse, the publication of a tape-recorded conversation between one alleged victim and the wife of the apparent subject of the investigation, and extensive public comments about the case and four alleged victims by the District Attorney of Onondaga County.[4] The public statements of the

[4] The District Attorney acknowledged that the ongoing federal investigation was being conducted separately from his review of related events, and the federal authorities have not made any substantive public comments about their probe.

four alleged victims, and the fact that the subject of the investigation does not object to unsealing, certainly indicates that the government's interest is protecting the privacy and safety of uncharged subjects and some individuals who may have provided information in connection with the investigation is greatly reduced. However, public disclosure of the search warrant affidavits at this early stage of the pending investigation could impede the probe by revealing, to the subject, critical aspects of the government's investigative plan, its theory of the case, and the thought processes of the investigative team about the relevant evidence. Moreover, even if the government's interest in protecting the privacy of the four alleged victims who have made public statements is attenuated, disclosure of the information provided to the federal authorities about alleged sexual abuse at the hands of the subject of the investigation could deter other possible victims from coming forward and cooperating with the investigation. *See, e.g.*, *In Re Sealed Search Warrants Issued June 4 and 5, 2008*, 2008 WL 5667021, at *4 (premature disclosure regarding cooperating witnesses may jeopardize the investigation by deterring these individuals and others from providing information in the future).

At this stage, the public has at least as great an interest in preserving the integrity and security of criminal investigations as in obtaining access to judicial documents. Where, as here, the investigation will eventually result in the filing of

charges or the determination not to do so, the interest in the integrity and security of that investigation outweighs the interest in immediate access to the documents. *See, e.g., In Re Sealed Search Warrants Issued June 4 and 5, 2008*, 2008 WL 5667021, at *4-5[5]. Thus, a balancing of common law factors compels the conclusion that the search warrant applications and affidavits should remain sealed at this time.[6]

II. Claims of First Amendment Right of Access

The Second Circuit has articulated two approaches to determine whether a First Amendment right of access applies to particular judicial documents. *Lugosch*, 435 F.3d at 120. The "logic and experience" approach recognizes a First Amendment right where the documents have historically been open to the public, and where public

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[5] The court recognizes that the government's concern that disclosure of the search warrant documents will threaten the integrity of its investigation will likely be reduced if charges are filed or if a final decision not to pursue charges is made. *See In Re Sealed Search Warrant*, 2006 WL 3690639, at *4-5 (the weight accorded countervailing factors diminishes after indictment or a decision not to prosecute). Accordingly, the court will reconsider this ruling if the movants renew their applications to unseal if and when any charges are filed, or if six months pass without the filing of any charges.

[6] A review of the applications and affidavits indicates that no portion of those documents may be unsealed without compromising the government's interest in the integrity and security of the investigation. The applications set forth the legal theories of the investigation. The affidavits assert in each paragraph facts discovered and relied upon by the government and the sources thereof. Accordingly, unsealing either the applications or affidavits, even in redacted form, cannot be accomplished at this stage without serious risk to the investigation. *See, e.g., In Re Sealed Search Warrants Issued June 4 and 5, 2008*, 2008 WL 5667021, at *5 (noting the Second Circuit's direction that district courts avoid sealing judicial documents in their entirety unless necessary, but denying a pre-indictment motion to unseal search warrant applications and affidavits, even in redacted form) (citing *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008).

access plays a significant role in the oversight and functioning of the judiciary. *Id*. The second approach considers the extent to which access to the documents is a necessary corollary of the public's capacity to attend relevant judicial proceedings. *Id*. This court concludes that, at least in the pre-indictment context, there would not be a First Amendment right of access to search warrant applications and affidavits under the standards established in *Lugosch*.

At least in the pre-indictment context, "there is no traditional right of public access to search warrant materials nor is there a traditional right for the public to attend search warrant proceedings, which are conducted *ex parte*." *In re San Francisco Chronicle*, 07-00256-MISC, 2007 WL 2782753, at *2 (E.D.N.Y. Sept. 24, 2007). Thus, there would be no First Amendment right to pre-indictment search warrant documents under the "logic and experience" approach. "Because there is no traditional public right to attend search warrant proceedings, public disclosure of the search warrant materials cannot be 'a necessary corollary of the capacity to attend the relevant proceedings[,]'" under the second approach discussed in *Lugosch*. *Id.* (citation omitted).

Even if there were a First Amendment right of access to search warrant documents relating to a pending investigation, this court would find the applications and affidavits in this case should not be unsealed at this time because of the

countervailing factors discussed above. Under the First Amendment, "[d]ocuments to which the public has a qualified right of access may be sealed only if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *United States v. Aref*, 533 F.3d at 82 (quotation marks and citation omitted). While "[o]ne seeking to deny First Amendment access confronts a heavier burden than one seeking to deny common law access[,]" the government's interests in protecting the integrity of its ongoing investigation in this case would overcome any First Amendment right of access that might apply to the search warrant documents at issue. *Strevell*, 2009 WL 577910, at *4. *See also In Re Sealed Search Warrants Issued June 4 and 5, 2008*, 2008 WL 5667021, at *5 n.3 (denying First Amendment claims of access to pre-indictment search warrant documents, in the alternative).

For the reasons stated above, it is hereby **ORDERED** that:

1. Gary W. Craig, Brendan J. Lyons, Michael Gormley, and John O'Brien are granted leave to intervene in this matter, in their personal capacities, to move to unseal the search warrant documents referenced herein;

2. The motions to unseal, insofar as they relate to the search warrants and returns are moot, in light of the fact that the government has publicly filed those documents (Dkt. Nos. 7-10, 15);

3. The motions to unseal (Dkt. Nos. 11, 12, 14, 16) are **DENIED** as to the the search warrant applications and affidavits, and such documents shall remain **SEALED** in their entirety.

4. The movants may renew their application to unseal the search warrant applications and affidavits after six months from the date of this opinion, or after the date when any indictment or guilty plea results from the investigation, if that occurs sooner.

DATED: December 19, 2011

Hon. Andrew T. Baxter
U.S. Magistrate Judge