

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**IN THE MATTER OF THE SEARCH )  
OF THE OFFICES AND STORAGE )  
AREAS UTILIZED BY STEPHEN )  
P. AMATO, D.C., D/B/A DR. STEVEN )  
AMATO, D.C., P.C., THE CENTER )  
FOR ALTERNATIVE HEALING, )  
AND MAINECURE[.]S.COM, INC., )  
LOCATED AT 17 WATER )  
STREET, DAMARISCOTTA, MAINE )**

**Docket No. 05-MJ-05-B**

**MEMORANDUM DECISION AND ORDER  
ON MOTION TO UNSEAL**

Stephen P. Amato, D.C., the putative target of a search warrant executed on January 25, 2005 at his offices at 17 Water Street in Damariscotta, Maine and in an adjacent vehicle, moves the court to unseal the affidavit submitted by the government in support of that warrant. *See* Dr. Amato’s Motion To Unseal the Affidavit Submitted by the Government in Support of the Search Warrant Issued on January 24, 2005, etc. (“Motion”) (Docket No. 6) at 1. The government opposes his request. *See* Government’s Opposition to Dr. Steven Amato’s Motion To Unseal Search Warrant Affidavit, etc. (“Opposition”) (Docket No. 11) at 1-2. The area of dispute is, in a certain sense, narrow. Dr. Amato states that he has no quibble as a general matter with the sealing of a search-warrant affidavit prior to execution of a search. *See* Motion at 6. And the government, for its part, suggests that at some point along the way – for example, after completion of its investigation – such a document properly can be unsealed. *See* Opposition at 3. They clash over the gray area in the middle – post-search and pre-indictment – raising difficult and sensitive issues that pit a target’s demand to view the document that purportedly justified what may have been a serious and even

unlawful governmental intrusion against the government's desire to avoid compromise of an ongoing investigation in which it may have invested considerable resources.<sup>1</sup> With the benefit of oral argument held before me on April 1, 2005, during which counsel for both sides ably presented their positions, I now grant the Motion in part and deny it in part, ruling that Dr. Amato and his counsel, alone, should be permitted to access a redacted version of the affidavit.

### **I. Backdrop**

Dr. Amato is a chiropractor who is the sole proprietor of a practice based in Damariscotta, Maine. *See* Motion at 2, ¶ 1.<sup>2</sup> On January 24, 2005 United States Magistrate Judge William S. Brownell issued a warrant authorizing the search of the offices and storage areas (and certain motor vehicles, if present) utilized by Dr. Amato at 17 Water Street in Damariscotta. *See id.*, ¶ 2. According to the search warrant, probable cause supporting the warrant's issuance was presented in an affidavit submitted to the magistrate judge by Marco Trevino, a Federal Bureau of Investigation ("FBI") special agent ("Trevino Affidavit"). *See id.*, ¶ 3. The government also filed, and Magistrate Judge Brownell granted, a motion to seal certain documents, including the Trevino Affidavit. *See* Motion To Seal (Docket No. 1); Order (Docket No. 2). The Motion To Seal, which, at Dr. Amato's request, was itself unsealed at oral argument without objection from the government, sought sealing of the documents "for the reason that this matter relates to an ongoing federal health care fraud investigation, disclosure of the contents of these documents and related information may compromise the progress of the investigation, and the affidavit for search warrant contains confidential

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<sup>1</sup> For ease of reference, I use the word "target" as shorthand to refer to a person such as Dr. Amato who is the owner of property that has been searched and seized but who has not to date been charged with a crime. I use the word "pre-indictment" as shorthand to refer to the period of time prior to the charging of a crime, whether by way of information, complaint or indictment.

<sup>2</sup> The government contests none of the background facts recited by Dr. Amato. *See* Opposition at 1-2. Hence, for purposes of resolution of the instant motion, I accept them at face value.

health information of several patients and former patients of the target which should be protected from public disclosure until further Order of this Court.” Motion To Seal.

The Trevino Affidavit was neither incorporated into the search warrant nor attached to it when the warrant was presented to Dr. Amato. *See* Motion at 3, ¶ 5. The search warrant required executing officers to seize any items “constituting evidence, fruit, and/or instrumentalities of the crimes” described in 18 U.S.C. §§ 1347 (health-care fraud), 1035 (false statements relating to health-care matters) and 1341 (frauds and swindles; mail fraud). *See id.* ¶ 6; *see also* 18 U.S.C. §§ 1035, 1341, 1347. It simultaneously required officers to seize records relating to any “health care benefit program” as defined in 18 U.S.C. § 24(b),<sup>3</sup> specifically (i) all medical records or patient charges reflecting services provided to patients covered by any health care program, (ii) provider copies of all claim forms submitted to any health care benefit program, (iii) documentation of all payments made by any health care program, (iv) all documentation of any contact with any health care benefit program, including via e-mail, (v) all documentation of billing instructions and related guidance, and (vi) all documentation of training or instructions regarding billing. *See* Motion at 3-4, ¶ 7.

In addition, the search warrant required seizure of all financial records, including (i) all documentation of cash receipts and cash disbursement and (ii) all documentation regarding financial statements and tax returns. *See id.* at 4, ¶ 8. Finally, it required seizure of all electronic devices and related items, including all computer equipment, electronic data storage devices, computer passwords, computer software and documentation regarding electronic equipment. *See id.*, ¶ 9.<sup>4</sup>

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<sup>3</sup> A “health care benefit program” is defined as “any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.” 18 U.S.C. § 24(b).

<sup>4</sup> With respect to all of the above-mentioned records, the search warranted authorized only seizure of records of Steven P. Amato, D.C., Dr. Steven Amato, D.C., P.C., the Center for Alternative Healing, Oceangate Chiropractic Park and Mainecures.com, Inc. and only for the period January 1, 2000 to the present. *See* Attachment 1 to Search Warrant (Docket *(continued on next page)*)

Pursuant to the search warrant, Trevino and other law enforcement officers conducted a search of Dr. Amato's offices and a vehicle located at the Water Street address on January 25, 2005. *See id.*, ¶ 11. The government provided to counsel for Dr. Amato a copy of an inventory of seized items that was prepared by Trevino. *See id.* at 5, ¶ 13. The government provided photocopies of all documents taken during the search, as well as electronic copies of optical and magnetic media taken during the search. *See id.*, ¶ 14.<sup>5</sup> At the time of the search, Trevino also served administrative subpoenas on Dr. Amato in his capacity as a corporate officer of Mainecures, a now-defunct business entity, and Steven Amato, D.C., P.C., a business entity comprising a separate chiropractic practice. *See id.* n.8. On March 31, 2005 Dr. Amato filed a motion to quash both subpoenas. *See Dr. Amato's Motion To Quash Two Administrative Subpoenas Duces Tecum Compelling Production of Documents and Tangible Items Concerning Mainecures.com, Inc., and Dr. Steven Amato, D.C., P.C., etc. (Docket No. 2), Stephen P. Amato v. United States, Docket No. 05-MC-29-P-DMC (D. Me.)*.

## II. Discussion

Dr. Amato seeks access to the Trevino Affidavit "to validate the Government's justification for the search, as well as to assess the grounds for a motion for return of property or for other relief pursuant to Fed. R. Crim. P. 41(g)." Motion at 1 (footnote omitted). Rule 41(g) provides:

**Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the

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No. 3) at 1.

<sup>5</sup> In his Motion, Dr. Amato stated that the government had not yet provided "mirror images" taken of Dr. Amato's computer equipment although it had indicated they would be forthcoming. *See Motion at 5, ¶ 14.* However, at oral argument, counsel for Dr. Amato acknowledged that Dr. Amato has now received copies of every item seized in the search.

court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed. R. Crim. P. 41(g). Dr. Trevino claims a right of access to the affidavit on three alternative bases: (i) the Fourth Amendment, (ii) the common-law right to inspect and copy public records and documents, including judicial records, and (iii) the text of Rule 41(g) itself. *See* Motion at 5-22.

The government argues, as a threshold matter, that the Motion fails because there is no mystery as to whether Dr. Amato could obtain relief at this juncture pursuant to Rule 41(g): He clearly could not. *See* Opposition at 3-5. Hence, the government reasons, there is no point in affording him access to the Trevino Affidavit at this time. *See id.* Alternatively, the government posits that (i) neither the First Circuit nor this court has ever recognized a target's pre-indictment, Fourth Amendment right of access to a search-warrant affidavit (as a result of which Dr. Amato has no such right), (ii) while Dr. Amato has a qualified common-law right of access to the affidavit, his showing of need for access is outweighed (at least at this point in time) by the government's showing of need for continued secrecy, and (iii) Rule 41 does not itself confer any substantive right to inspect a search-warrant affidavit, but merely serves as a mechanism to facilitate the common-law right of access. *See id.* at 5-10.<sup>6</sup>

Implicit in the government's threshold argument is the premise that the weakness of Dr. Amato's potential Rule 41(g) case is fatal to his Motion on any of its three stated grounds. With respect to Dr. Amato's constitutional claim, that is not so. For the reasons that follow, I find that:

1. Such a constitutional right exists (a question that is properly resolved without consideration of the strength or weakness of any Rule 41(g) motion Dr. Amato ultimately might care to bring).

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<sup>6</sup> While, in its brief, the government argued that Dr. Amato had "[a]t most" a qualified common-law right of access to the Trevino Affidavit, *see* Opposition at 5-6, counsel for the government clarified at oral argument that the government does not dispute that he does in fact have such a qualified right of access. Counsel continued to maintain, however, that the *(continued on next page)*

2. As a result, the burden is on the government to make a showing of compelling need for continued secrecy, rather than on Dr. Amato to demonstrate the strength of his own need for access to the affidavit.

3. To the extent I am satisfied that the government has met that burden, its concerns are adequately addressed by redaction of the document, coupled with limitation of disclosure of the redacted document to Dr. Amato and his counsel.<sup>7</sup>

I need not, and do not, reach Dr. Amato's arguments for access predicated on his alternative common-law and Rule 41 theories.

#### **A. Existence of Fourth Amendment Right**

The question whether a search target has a post-search, pre-indictment Fourth Amendment right of access to a search-warrant affidavit presents an issue of first impression in this circuit and this district.<sup>8</sup> Inasmuch as appears, few courts from other jurisdictions have addressed this precise question, and they have reached clashing conclusions. *Compare, e.g., In re Grand Jury Proceedings*, 115 F.3d 1240, 1246 (5th Cir. 1997) (no such right exists); *In re EyeCare Physicians of Am.*, 100 F.3d 514, 517 (7th Cir. 1996) (same), *with United States v. Oliver*, No. 99-4231, 2000 WL 263954, at \*\*2 (4th Cir. Mar. 9, 2000) (such a right exists)<sup>9</sup>; *In re Search Warrants Issued on Apr. 26, 2004*, 353 F. Supp.2d 584, 585-

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government's showing of the need for secrecy outweighed Dr. Amato's showing of the need for access.

<sup>7</sup> During a conference with Magistrate Judge Brownell, counsel for Dr. Amato agreed with counsel for the government that if the court ordered an unsealing of the Trevino Affidavit, disclosure would be made only to Dr. Amato and his attorneys. *See* Dr. Amato's Reply to the Government's Opposition to Dr. Amato's Motion To Unseal the Search Warrant Affidavit, etc. ("Reply") (Docket No. 15) at 2-3.

<sup>8</sup> In *Shea v. Gabriel*, 520 F.2d 879 (1st Cir. 1975), the First Circuit, assuming *arguendo* that it had jurisdiction over a target's appeal of denial of his pre-indictment Rule 41(e) motion for return of property, noted that it would uphold the denial of that motion and a related request to unseal the underlying search-warrant affidavit if it reached the merits. *See Shea*, 520 F.2d at 880-82. However, inasmuch as appears, the target made no argument that he had access to the affidavit on Fourth Amendment grounds. *See id.*

<sup>9</sup> As the government points out, *see* Opposition at 6-7, it is not clear whether *Oliver* stands for the proposition that a  
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86 (D. Md. 2004), *aff'g In re Search of 8420 Ocean Gateway Easton*, 353 F. Supp.2d 577 (D. Md. 2004) (same); *In re Search of Up N. Plastics, Inc.*, 940 F. Supp. 229, 230 (D. Minn. 1996) (same); *In re Search Warrants Issued Aug. 29, 1994*, 889 F. Supp. 296, 299 (S.D. Ohio 1995) (same); *Sloan v. Sprouse*, 968 P.2d 1254, 1258 (Okla. Crim. App. 1998) (same). After careful consideration, I am persuaded that the First Circuit would be inclined to side with the United States District Court for the District of Maryland and other courts that have reasoned that the right of access in question is a natural corollary of the Fourth Amendment.

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The Supreme Court has noted, “a major function of the warrant is to provide the property owner with sufficient information to reassure him of the entry’s legality.” *Michigan v. Tyler*, 436

U.S. 499, 508 (1978). And the First Circuit has underscored:

Fourth Amendment rights are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

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target has a pre-indictment Fourth Amendment right to view an underlying search-warrant affidavit. Oliver took the appeal in question after he was not only indicted but also convicted, and the court did not clarify whether he had moved to unseal the affidavit before or after his indictment. *See Oliver*, 2000 WL 263954, at \*\*1-\*\*2. Further, the court employed equivocal language, stating that a “defendant” (as opposed to a target) had a Fourth Amendment right to view a search-warrant affidavit “after the search has been conducted[.]” *See id.* at \*\*2. Nonetheless, the decision cites to cases that have squarely held that such a pre-indictment right exists, *see id.*, and at the least constitutes dictum that a target has a “post-search” Fourth Amendment right of access.

*United States v. Khounsavanh*, 113 F.3d 279, 285 (1st Cir. 1997) (citation and internal quotation marks omitted).

The first (and leading) case declining to recognize the existence of a Fourth Amendment right in the circumstances in issue is *EyeCare*, in which the United States Court of Appeals for the Seventh Circuit stated, in relevant part:

EyeCare also asserts that the Fourth Amendment recognizes a right of access to sealed affidavits. EyeCare’s argument does not rest upon the terms of the Fourth Amendment, for the text of that Amendment does not address, even implicitly, the problem of lack of access to sealed search warrant affidavits. The Warrant Clause of the Fourth Amendment circumscribes the *issuance* of warrants, but does not address access to the affidavits employed to support them.

*EyeCare*, 100 F.3d at 517 (footnote omitted) (emphasis in original).<sup>10</sup> Subsequently, the United States District Court for the District of Maryland took issue with the above-quoted passage from *EyeCare*, thoughtfully and persuasively reasoning:

By its plain words, the [Fourth] Amendment insulates the public from “unreasonable” intrusions and sets forth the specific requirement that search warrants be supported by probable cause. Implicit in that language is the public’s right to challenge both the reasonableness of the search and the degree to which the warrant was supported by probable cause. Without the right of access to the affidavit on which the search warrant was based, the search subject could *never* make such a challenge. As stated by the learned Justice Harlan, “constitutional provisions for the security of person and property should be liberally construed.” *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 29 L.Ed. 746 (1886). This is because “[a] close and literal construction deprives them of

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<sup>10</sup> Inasmuch as appears, only one court has followed *EyeCare*’s lead on this point. In the context of considering whether the court below properly could have exercised so-called “anomalous jurisdiction” in entering a *sua sponte* pre-indictment conditional suppression order, the United States Court of Appeals for the Fifth Circuit weighed “whether the government displayed a callous disregard for the constitutional rights of the plaintiff” – one of several factors relevant to the question whether such jurisdiction should be exercised. *In re Grand Jury Proceedings*, 115 F.3d at 1246 (citation and internal punctuation omitted). The Fifth Circuit considered whether the government had shown callous disregard of the appellees’ rights by virtue of sealing a search-warrant affidavit, concluding that it had not inasmuch as, per *EyeCare*, the appellees had no Fourth Amendment right to view the affidavit. *See id.* (“This court ordinarily abides by the decisions of our sister circuits, and we do so with respect to this sensible decision.”). The Fifth Circuit discussion is brief and does not recognize the existence of lower court decisions holding to the contrary. Thus, it is not in itself persuasive authority with respect to this issue.

half their efficacy, and leads to gradual depreciation of the right, as if it existed more in sound than in substance.” *Id.*

*In re Search Warrants Issued on Apr. 26, 2004*, 353 F. Supp.2d at 588 (emphasis in original). The First Circuit, as well, has recognized that there are circumstances in which a right is implicit in the text of the Bill of Rights. *See, e.g., United States v. Richardson*, 894 F.2d 492, 495-96 (1st Cir. 1990) (“The sixth amendment right to effective assistance of counsel encompasses the corollary that defendants have a right to choose their counsel.”); *Souza v. Travisono*, 498 F.2d 1120, 1123 n.6 (1st Cir. 1974) (“The crucial constitutional principle at play in determining the necessity of law student access [for prisoners] is the more fundamental right of access to the courts, and the corollary right to obtain legal assistance to facilitate such access.”) (citations omitted).

The Fourth Amendment commands that warrants not issue save upon probable cause. U.S. Const. amend. IV. That language implies a right, in a person whose property has been subjected to search and/or seizure pursuant to a warrant, to challenge whether the warrant was in fact predicated on probable cause. That, in turn, implies a right to view the underlying materials that purportedly established probable cause for the search. *See, e.g., In re Search Warrants Issued on Apr. 26, 2004*, 353 F.Supp.2d at 589 (“This [Fourth Amendment] protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of laws.”) (quoting *Weeks v. United States*, 232 U.S. 383, 391 (1914), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961)).

What is more, as the District Court for the District of Maryland points out, the history and structure of Rule 41 buttress a finding of such a right. *See id.* at 589-91. As the court observes, the sealing of a search-warrant affidavit historically has been an exceptional measure. *See id.* at 589; *see also, e.g., In re*

*Search Warrant for Second Floor Bedroom*, 489 F. Supp. 207, 212 (D.R.I. 1980) (“It is important . . . that the government demonstrate a real possibility of harm before the Court takes the unusual step of sealing a search warrant affidavit not based directly on grand jury testimony.”); Charles Alan Wright, Nancy J. King & Susan R. Klein, *3A Federal Practice and Procedure* § 672, at 332-33 (3d ed. 2004) (“The court has power to order the affidavits sealed, but this is an extraordinary action, and should be done only if the government shows a real possibility of harm.”) (footnotes omitted).

In keeping with this history, until 1972 Rule 41 required that the warrant itself state the grounds for its issuance and the names of any affiants. *See* Fed. R. Crim. P. 41 advisory committee’s note (1972 Amendments). The requirement was eliminated as “unnecessary paper work[,]” with the advisory committee presuming (arguably as a matter of Fourth Amendment right): “A person who wishes to challenge the validity of a search warrant has access to the affidavits upon which the warrant was issued.” *Id.*

In addition, as counsel for Dr. Amato pointed out at oral argument, it is significant that Rule 41(g) continues to provide (in the disjunctive) that “[a] person aggrieved by an unlawful search and seizure of property *or* by the deprivation of property may move for the property’s return.” Fed. R. Crim. P. 41(g) (emphasis added).<sup>11</sup> Clearly, an individual cannot know whether he or she has been “aggrieved by an unlawful search or seizure” unless he or she can meaningfully ascertain whether that is the case. I am mindful of the government’s point – which I consider well-taken – that since 1989 the scope of the remedy available pre-indictment under Rule 41 has been greatly circumscribed. *See* Fed. R. Crim. P. 41 advisory

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<sup>11</sup> The government does not appear to dispute that Rule 41(g) affords a pre-indictment remedy. In any event, there can be no doubt that it does. *See, e.g., United States v. Roberts*, 852 F.2d 671, 673 (2d Cir. 1988) (noting that Rule 41(e), predecessor to Rule 41(g), provided, *inter alia*, pre-indictment procedure for return of property); *In re Ninety-One Thousand Dollars in U.S. Currency*, 715 F. Supp. 423, 427 (D.R.I. 1989) (“[F]ederal courts have variously found the authority to hear pre-indictment motions for return of property not only in the statutory grant of jurisdiction embodied in Rule 41(e) but also in the longstanding, non-statutory doctrine of equitable or ‘anomalous’ jurisdiction[.]”).

committee's note (1989 Amendments) ("The amendment deletes language dating from 1944 stating that evidence shall not be admissible at a hearing or at a trial if the court grants the motion to return property under Rule 41(e) [predecessor to Rule 41(g)].")<sup>12</sup>; *see also, e.g., Flores v. Goldsmith*, No. 5:02MCL, 2002 WL 31422859, at \*6 (E.D. Tex. Aug. 14, 2002), *aff'd*, 112 Fed. Appx. 361 (5th Cir. 2004) (holding that as result of 1989 amendment, Rule 41(e) does not provide cause of action for pre-indictment suppression of evidence); *J.B. Manning Corp. v. United States*, 86 F.3d 926, 927-28 (9th Cir. 1996) (same). Nonetheless, even accepting for the sake of argument that (i) the only remedy available pursuant to Rule 41(g) is return of property, and (ii) Dr. Amato is unlikely to prevail were he to bring such a motion inasmuch as, *inter alia*, he already has copies of all documents seized, his particular circumstances are beside the point. What matters, for purposes of the broader question presented, is that Rule 41(g) provides a pre-indictment right to seek return of property on two alternative bases, one of which is the commission of an unlawful search and seizure. *See, e.g., In re Search of 8420 Ocean*, 353 F. Supp.2d at 579 & n.2 (agreeing with government that Rule 41 offered "little remedy" to target who had not been deprived of use of seized property; nonetheless holding that target had Fourth Amendment right of access to search-warrant affidavit).

Finally, as the District Court for the District of Maryland eloquently observes, there is something fundamentally unsatisfactory in the suggestion that a target has, at most, the same right of access to the

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<sup>12</sup> Rule 41(e) formerly governed motions for return of property. As part of a general restyling not intended to affect its substance, it was redesignated Rule 41(g). *See* Fed. R. Crim. P. 41 advisory committee's note (2002 Amendments); *In re Search of Law Office, Residence, & Storage Unit Alan Brown*, 341 F.3d 404, 408 n.3 (5th Cir. 2003). Thus, it remains appropriate to look for guidance to caselaw construing former Rule 41(e).

documents purporting to establish probable cause for an intrusion into his or her home, office or vehicle as any disinterested person on the street:<sup>13</sup>

[The] balancing test under the common law does not adequately address the interests of subjects of governmental searches. The common law right of access derives from the presumption of openness which the Supreme Court has ascribed to judicial proceedings and judicial records. The public's interest in accessing court records and proceedings often runs counter to, and often must be balanced against, the interests of a criminal defendant (or the subject of a criminal investigation). This is particularly true in cases such as the instant one. Here, the Proper[ty] Owner has a strong interest in *preventing* public disclosure. However, the Property Owner has an abiding interest in challenging the reasonableness of the government's invasion of his property and/or his privacy. This interest is simply not addressed by the common law right of access.

*In re Search Warrants Issued on Apr. 26, 2004*, 353 F. Supp.2d at 590 (citations omitted) (emphasis in original).

For all of the foregoing reasons, I am satisfied that the First Circuit would recognize, in a target property owner, a post-search, pre-indictment Fourth Amendment right to inspect the underlying search-warrant affidavit.

### **B. Government Showing of Compelling Need**

Borrowing a page from First Amendment jurisprudence, courts recognizing a property owner's Fourth Amendment right of access to a search-warrant affidavit have held that "[i]n order to prevent a subject from inspecting the contents of a search affidavit, the government must demonstrate to the court that: 1) there is a compelling governmental interest requiring materials to be kept under seal, and 2) there is no less restrictive means, such as redaction, available." *Id.* at 591; *see also, e.g., In re Search Warrants Issued Aug. 29, 1994*, 889 F. Supp. at 301-02.

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<sup>13</sup> I refer to the common-law right of access, pursuant to which "the decision to grant or deny access is left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *United States v. Cianci*, 175 F. Supp.2d 194, 201 (D.R.I. 2001) (citation and internal quotation marks omitted).

In its Opposition, the government contends that even assuming *arguendo* the existence of a constitutional right of access, the court should decline to unseal the Trevino Affidavit inasmuch as:

1. Dr. Amato's case for seeing the affidavit is without merit. *See* Opposition at 10.
2. The affidavit provides a detailed roadmap of the government's investigation through the date of the warrant, as a result of which, if disclosure were made, Dr. Amato would know what documents the government deemed significant at a time when he is seeking to quash administrative subpoenas. *See id.*
3. Because the affidavit includes the names and statements of several cooperating witnesses, including detailed information about their medical condition and medical treatments and medical information concerning family members, disclosure of this information to Dr. Amato and to the public would have a chilling effect on the government's ability to maintain their continued cooperation or obtain the cooperation of other witnesses whose testimony might be relevant. *See id.*

I address each of these points in turn, concluding:

1. The burden is on the government to prove its continued need for secrecy.
2. The government's "roadmap" concern is not well-taken (except to the extent it bears on concern about the release of particular patient/witness identities and testimony, which I discuss below). I take judicial notice that Dr. Amato is represented by well-regarded counsel who include a former Assistant United States Attorney and a former government agent. At oral argument, counsel for Dr. Amato persuasively posited that there is no mystery about where the government is going: This is a run-of-the-mill investigation into whether Dr. Amato's billing practices are acceptable, not an organized-crime or terrorism case. As his counsel pointed out, Dr. Amato has had a limited number of patients over the time period in question. Dr. Amato already knows that what is in issue here is whether services rendered were medically necessary and were performed as billed and (in general) whether his reimbursement requests were

supportable. In short, there is no demonstrable harm to the government in revealing to Dr. Amato its strategic roadmap through the date of execution of the warrant – something he essentially already has figured out.

3. As counsel for Dr. Amato pointed out at oral argument, and his counterpart conceded, the government misspoke in its papers in expressing concern about revealing patient identities and treatment information to the public. Counsel for both sides have agreed that the Trevino Affidavit should not, at this time, be made public. Nonetheless, counsel for the government expressed concern about affording even Dr. Amato access to the identities and detailed testimony of patient/witnesses at this time. I am unwilling simply to dismiss this concern out of hand.

As of the time of oral argument, the government still was in the process of seeking to gather documents (having issued the subpoenas that Dr. Amato now is contesting) and finding and interviewing witnesses. As counsel for the government represented at oral argument, and his counterpart confirmed, Dr. Amato is himself in the midst of conducting his own counter-investigation. At oral argument, counsel for the government posited that, under the circumstances, granting Dr. Amato access to the entire fifty-page Trevino Affidavit might well chill the investigation by deterring existing or future witnesses from cooperating and even tempting Dr. Amato to hide or destroy relevant documents. Counsel for Dr. Amato rejoined that the government offers nothing but pure speculation that Dr. Amato would (in effect) go so far as to commit the crime of obstructing justice.<sup>14</sup> He argued that the government fails to demonstrate the sort of “compelling” interest in protection of a witness that would be present if, for example, there were a *bonafide*

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<sup>14</sup> Examples of federal statutes criminalizing obstruction of justice are 18 U.S.C. § 1512 (proscribing tampering with a witness, victim or informant), 18 U.S.C. § 1518 (proscribing obstruction of a criminal investigation of health-care offenses) and 18 U.S.C. § 1519 (proscribing destruction, alteration or falsification of records in federal investigations).

concern about endangerment of a witness's life; rather, in his view, the government simply seeks to misuse the cloak of secrecy for strategic advantage.

While the government has offered no hard evidence to prove that its witnesses' testimony would be chilled, there is a line of caselaw recognizing a so-called "informer's privilege." *See, e.g., In re Search of 1638 E. 2nd St.*, 993 F.2d 773, 774 (10th Cir. 1993) ("Under the [informer's] privilege, the state is normally entitled to refuse to disclose the identity of a person who has furnished information relating to an investigation of a possible violation of law. The underlying concern of the doctrine is the common-sense notion that individuals who offer their assistance to a government investigation may later be targeted for reprisal from those upset by the investigation. The government is entitled to assert the privilege without showing that reprisal or retaliation is likely.") (citations and internal quotation marks omitted); *In re 8420 Ocean*, 353 F. Supp.2d at 580 n.4 (acknowledging that informer's privilege presents "a powerful argument, at least for redaction[,] given that "the rule ordinarily is that the government need not make a threshold showing that reprisal or retaliation is likely, because of the significant policy considerations behind the privilege, as well as the difficulty of such proof.") (citation and internal quotation marks omitted). The government does not invoke the privilege by name; however, it raises the types of concerns that underlie it: "[B]ecause the affidavit includes the names and statements of several cooperating witnesses, including detailed information about their medical condition and medical treatments, and medical information concerning family members, the disclosure of this information to Dr. Amato and to the public would have a chilling effect on the government's ability to maintain their continued cooperation, or obtain the cooperation of other witnesses that may be relevant to this investigation." Opposition at 10.

Regardless whether the government, by way of this argument, adequately invokes the privilege or whether the patient-witnesses technically qualify as "informers," I think it appropriate in this case to borrow

a page from the teachings of this line of caselaw. While there is no hint that Dr. Amato has threatened or retaliated against any of his patients or otherwise committed any act of obstruction of justice, he and the government are conducting simultaneous investigations. This inherently places the pool of patients whose testimony is critical to both sides in a delicate and awkward position. Indeed, at oral argument counsel for the government represented that a concerned witness had contacted the government about Dr. Amato's counter-investigation. Counsel made clear that he did not mean to suggest that Dr. Amato had done anything illegal; however, his example underscores the wisdom of application of a common-sense approach – at least, in these circumstances – to the question whether the government has shown a compelling need to keep the identities of its cooperating witnesses secret at this time. *See, e.g., Roviario v. United States*, 353 U.S. 53, 59 (1957) (“The [informer’s] privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, *by preserving their anonymity, encourages them to perform that obligation.*”) (emphasis added).

The informer’s privilege is not absolute; it yields “when the identification of the informant or of a communication is essential to a balanced measure of the issues and the fair administration of justice. The party opposing the privilege may overcome it upon showing his need for the information outweighs the government’s entitlement to the privilege.” *In re Search of 1638 E. 2nd St.*, 993 F.2d at 774 (citation and internal quotation marks omitted). Again, I think it appropriate in these circumstances to apply the teachings of the privilege by analogy. Dr. Amato has not shown, at this point in the investigation, that he is already aware of the identities of the patient/witnesses named in the Trevino Affidavit or the gist of their statements therein. Nor has he shown that at this time his need for that information outweighs the government’s interest in maintaining its cooperating witnesses’ privacy. That is so, in my view, because his needs can be accommodated without intruding on that sphere of privacy. In addition to containing summaries of

interviews with specific patient/witnesses, the Trevino Affidavit contains a detailed overview of the progress of the investigation as of the date of application for the search warrant. That overview is sufficient to enable Dr. Amato to assess, for purposes of any potential Rule 41(g) motion, whether probable cause for issuance of the search warrant was shown.

The government accordingly has demonstrated a compelling need to keep the identities of cooperating patient-witnesses secret from Dr. Amato, at least so long as investigations are ongoing.

### **C. Feasibility of Redaction**

I turn to the question whether the Trevino Affidavit practicably can be redacted to accommodate Dr. Amato while preserving secrecy to the extent the government has made a compelling showing for its need. At oral argument counsel for the government argued, and I agree, that simple redaction of patients' names would not protect their privacy as against Dr. Amato. The Trevino Affidavit's summaries of patient interviews contain a number of details about the patients' and their families' medical conditions and treatment by Dr. Amato from which he readily could discern their identities. Hence, I am persuaded that all summaries of patient interviews (contained in paragraphs 16-35 of the "Facts and Circumstances" portion of the affidavit) should be redacted. In addition, one portion of the Preliminary Investigation section, paragraph 11(d), contains patient-identifying information that warrants redaction.

The Trevino Affidavit, as redacted, in my view nonetheless supplies the essence of what the government considered to be its probable cause for obtaining the search warrant in issue. As counsel for Dr. Amato himself stated at oral argument, the issue is not whether the government interviewed Patients X, Y and Z versus Patients A, B and C but rather whether, overall, the government demonstrated probable cause for issuance of the warrant authorizing search of his business premises and vehicle and seizure of a number of records. This redaction should leave him in a position to accomplish that goal. *See, e.g., In re*

*Search of 8420 Ocean*, 353 F. Supp.2d at 578 (court “prepared a redacted affidavit which addresses the concerns of the government while providing to Dr. Thompson the justification for the broad search of his medical offices. While one paragraph was redacted totally . . . and substantial redaction was done to other paragraphs to protect the identity of the complaining witnesses, much of the affidavit can be unsealed, allowing Dr. Thompson to learn the basis for the significant governmental intrusion into his medical practice and to evaluate any motion under Fed. R. Crim. P. 41, without undue interference to the investigation or to the privacy of the complaining witnesses.”).

I have prepared a version of the Trevino Affidavit redacted in the manner outlined above. A copy of the redacted affidavit will be provided to the government with this memorandum decision and order but not to Dr. Amato. I will release a copy of the redacted affidavit on April 26, 2005 to Dr. Amato’s counsel, unless the government files an objection to this decision on or before April 25, 2005.<sup>15</sup> In the event of the filing of a timely objection, the redacted affidavit will be provided *in camera* to Judge Singal, the Article III judge who has been assigned this case. In the absence of an objection by the government or if the government’s objection is overruled, Dr. Amato shall have a period of ten days from the date on which his counsel receives the redacted affidavit within which to file an objection to this decision and/or the redactions made to the affidavit. This ruling is without prejudice to Dr. Amato’s right to move to unseal the remainder of the Trevino Affidavit at a later date should he choose to do so.

So ordered.

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<sup>15</sup> In the civil context, Federal Rule of Civil Procedure 72 provides a ten-day period for the filing of objections to a magistrate judge’s pre-trial ruling on a non-dispositive matter or recommended decision on a dispositive matter. *See* Fed. R. Civ. P. 72. While there is no comparable criminal rule, proposed new Federal Rule of Criminal Procedure 59, currently pending Supreme Court approval with an effective date of December 1, 2005, would provide a parallel ten-day deadline for objection to a magistrate judge’s pre-trial ruling on a non-dispositive matter or recommended decision on a dispositive matter. In the circumstances, I am certain that the district judge will deem the civil-rule model to apply and will consider any objection filed within the time frame specified herein.

Dated this 14th day of April, 2005.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

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