

## D.C. Court Unseals Search Warrant Materials Related Digital Media and Data Privacy Law Blog

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Posted in Access to Search Warrants

A few months ago, we reported about access to search warrant materials and the Eve Carson case in North Carolina. In the Carson case, the trial court released the search warrant materials under the common-law right of access once the police investigation of Carson's death had been completed.

In November 2008, the U.S. District Court for the District of Columbia recognized a qualified First Amendment right of access to search warrant materials related to the completed 2001 anthrax attack investigations. Specifically, the district court ordered search warrants materials related to Dr. Stephen J. Hatfill and Ms. Peck Chegne (Hatfill's girlfriend at the time of the searches) to be unsealed.

As has been well reported by the news media, the federal government in 2002 identified Dr. Hatfill as a "person of interest" in the anthrax mailings. Investigators conducted a search of his residence in August 2002, and the search garnered significant media attention. The investigation of Hatfill went on for some time, but ultimately the government determined Hatfill was not the anthrax mailer. Then, in July 2008, the government announced that it believed Dr. Bruce Ivins was responsible for the anthrax attacks after Dr. Ivins committed suicide. Following this announcement, several media organizations filed papers with the court to unseal the search warrant materials related to Hatfill, Chegne, and Ivins—the Ivins materials were unsealed by the court in September 2008, but the Hatfill and Chegne materials remained under seal.

The question before the district court in this case was whether the public has a common-law right of access to post-investigation search warrant materials (a right the government conceded in the case) or a qualified First Amendment right of access. The court recognized the distinction between a right of access based on the common law or on the First Amendment as significant because different legal standards apply to each.

The common law right of access test is a multi-factor balancing test. If the First Amendment qualified right of access applies, however, the government has the burden of demonstrating that a compelling interest is advanced by denying access to the documents and that the denial of access is narrowly tailored to serve that interest.

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In other words, it would be much more difficult to justify keeping the search warrants sealed under a First Amendment analysis than a common-law analysis.

To decide this matter of first impression in the D.C. Circuit, the district court applied a well established two-part test to determine whether a First Amendment right of access should apply to search warrant materials related to investigations that have concluded. Under the “‘experience’ and ‘logic’ test,” the court analyzes two factors:

- (1) whether the place and process have historically been open to the press and general public, and
- (2) whether ‘public access plays a significant positive role in the functioning of the particular process in question.’

The district court found that factor one of the test weighed in favor of a First Amendment qualified right because, according to the court, the post-investigation search warrant materials sought in the case are of a kind that have historically been available to the public. Warrant applications and returns are routinely filed with the clerk of court without seal. Moreover, federal courts have recognized a common-law right of access to judicial records and documents for well over 100 years, clearly establishing a tradition of access.

Factor two of the test likewise supported a First Amendment based right of access. In considering the second factor, the court first stated that it would start with the “proposition” (not explicitly a “presumption”) that the press and the public have a right of access to court proceedings and documents unless there is some compelling justification for closure. According to the court, such openness ensures that established procedures are followed or, if not, that irregularities are corrected. It also boosts the public’s confidence in the judicial process.

Regarding search warrant materials, in particular, the court stated:

[W]ith respect to warrants, openness plays a significant positive role in the functioning of the criminal justice system, at least at the post-investigation stage. As noted by the Times, warrant materials are often used to adjudicate important constitutional rights such as the Fourth Amendment protection against unreasonable searches and seizures. Public access to warrant materials serves as a check on the judiciary because the public can ensure that judges are not merely serving as a rubber stamp for the police.

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With both factors of the “‘experience’ and ‘logic’ test” met, the court found that the public has a qualified First Amendment right of access to post-investigation search warrant materials. Because the First Amendment right of access is qualified and not absolute, the search warrant materials at issue in the anthrax case would remain sealed if the government was able to show a “compelling interest” in keeping the materials from public view. Of course, demonstrating a compelling interest favoring closure after an investigation has been completed is generally more difficult than when an investigation is still under way.

In the case of the anthrax investigation, the government first attempted to justify keeping the search warrant materials secret to protect Hatfill’s privacy, but the court did not find this interest sufficient to justify keeping the materials sealed. According to the court, Hatfill’s association with the anthrax case was already well known, so there was no risk that the identify of some “innocent third person” would be disclosed to the media for the first time. Also, as the court noted, Hatfill filed a lawsuit against the Department of Justice (now settled) and, therefore, “placed some details of the searches in the public eye.”

The government also argued that there was a compelling interest in keeping the search warrant materials secret to protect the identities of confidential informants. The court agreed that protecting confidential informants constitutes a compelling interest; but, according to the court, there are less restrictive means to protect the identifies of informants than outright denying access to the materials. The court wrote:

Under the First Amendment qualified right of access test, the government must demonstrate that total restriction of the right of access is narrowly tailored to accomplish its compelling interests. In this case, the Court agrees that the government has demonstrated a compelling interest—promoting effective law enforcement—in keeping the identity of informants secret. However, that interest can be accomplished by simply redacting the identity and personal identifiers of the informants, which the Court will direct the government to do in this case.

The court ordered that the search warrant materials concerning Hatfill and Chegne should both be disclosed, subject to limited redactions to protect the identities of confidential informants. Even though Chegne was “an innocent party and [had] not put any of the details regarding the searches in the public eye,” her identity and the fact that her residence was searched during the anthrax investigation had already been reported by the media and disclosed by Hatfill in his lawsuit.

Although the court found that the media applicants prevailed on the basis of the First Amendment qualified right of access, the court also analyzed the case under the common law and found that media would prevail under the common law.

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This case is a definite victory for media organizations, but it should be noted that the court was careful to point out that its ruling was narrow. The court clarified that it did not recognize a First Amendment right “as robust” as that recognized in the Eighth Circuit, which recognizes a right of access to search warrant materials while an investigation is still open. The court also stated that its holding did not conflict with decisions of the Fourth and Ninth Circuits, which have both declined to recognize a First Amendment qualified right of access to warrant materials while an investigation is still ongoing—neither the Fourth or the Ninth Circuits have decided whether there is such a right once an investigation has concluded.