

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

IN RE:) **Misc. Case No. 1:01MC00005**
GRAND JURY) **MEMORANDUM OPINION**
SUBPOENA DUCES TECUM) **By: PAMELA MEADE SARGENT**
) **United States Magistrate Judge**

This case came to be heard on May 3, 2001, upon a motion, (“the Motion”), filed on behalf of the Director of the Washington County, Virginia, Department of Social Services, (“the Department”), to quash a grand jury subpoena duces tecum, (“the Subpoena”), issued by the United States Attorney for the Western District of Virginia to compel the production from the Department of “any and all applications/documents for assistance” from a certain individual whose name is listed on the Subpoena.

Counsel for the Department appeared at the hearing and stated that the Department objected to complying with the Subpoena, unless an appropriate court order was entered allowing it to produce the requested records. The Department has represented that it possesses records pertaining to the individual’s application for and/or receipt of benefits under the Medicaid, food stamp and Aid to Families with Dependent Children, (“AFDC”), programs. In particular, the Department argues that state and federal law provides that the Department’s records pertaining to assistance and services provided any individual shall be confidential and shall not be disclosed except in limited circumstances for purposes connected with the administration of the public welfare program at issue. *See* VA. CODE ANN. § 63.1-53 (Michie 1995); 7

U.S.C.A. § 2020(e)(8) (West 1999) (food stamps); 42 U.S.C.A. §1396a(a)(7) (West Supp. 2000) (Medicaid); 7 C.F.R. § 272.1(c) (2000) (food stamps); 42 C.F.R. §§ 431.300 to 431.306 (1999) (Medicaid); 45 C.F.R. § 205.50(a) (AFDC) (1999).

The government has chosen not to reveal whether it is seeking these records as part of an investigation connected with the administration of any of these public welfare programs. Instead, the government argues that the state and federal statutes and regulations cited above do not prohibit the Department from complying with a federal grand jury subpoena for these records, regardless of the reason for which the information is sought. Based on my review of the federal statutes and regulations and relevant case law, I agree, and I will deny the Motion to quash the Subpoena.

In *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991), the Supreme Court recognized that the grand jury occupies a unique role in the American justice system.

...It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” *United States v. Morton Salt Co.*, 338 U.S. 632,... (1950). The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush...

R. Enterprises, 498 U.S. at 297 (citations omitted). The Court also recognized, however, that the investigatory powers of a grand jury are not unlimited. 498 U.S. at

299. The scope of the grand jury's powers is narrowed by the "longstanding principle that 'the public ... has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege...." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (quoting *United States v. Bryan*, 339 U.S. 323 (1950)). See also FED. R. EVID. 1101(c), (d)(2) (Rule 501 regarding privileges applies to grand jury proceedings).

Furthermore, subpoenas are not insulated from court review merely because they are issued in connection with a sitting grand jury. *In re Grand Jury Subpoena*, 829 F.2d 1291, 1296 (4th Cir. 1987). "The subpoena duces tecum 'remains at all times under the control and supervision of a court.'" *In re Grand Jury Subpoena*, 829 F.2d at 1297 (quoting *United States v. Doe*, 457 F.2d 895, 898 (2nd Cir. 1972) cert. denied sub nom. *Schwartz v. U.S.*, 410 U.S. 941 (1973) (citations omitted)). See also *United States v. Calandra*, 414 U.S. 338, 346 (1974).

Rule 501 of the Federal Rules of Evidence provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501. This rule recognizes four types of privilege: 1) those created by the Constitution; 2) those created by "Act of Congress;" 3) those created by Supreme Court rule; and 4) those recognized by the common law. FED. R. EVID. 501. The facts

and circumstances of this case do not involve any assertion of privilege created by the Constitution or by Supreme Court rule. Instead, the issues are whether Congress has provided that these records should be privileged and, if not, should the court recognize a common-law privilege protecting these records from disclosure to the grand jury.

In determining whether Congress has created a privilege which protects these documents, the court must be mindful of the fact that privileges should not be lightly created. *See United States v. Nixon*, 418 U.S. 683, 710 (1974). In fact, the Fourth Circuit has recognized that privileges set up “stumbling blocks in the jury’s search for truth,” therefore, statutes purporting to create a privilege should be strictly construed. *Krizak v. W.C. Brooks & Sons, Inc.*, 320 F.2d 37, 45 (4th Cir. 1963). Furthermore, the Supreme Court has held that statutes prohibiting general disclosure of information do not bar judicial discovery absent an express prohibition against such disclosure. *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1962).

...Ours is the duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result.... Indeed, when Congress has intended...reports not to be subject to compulsory process it has said so.

St. Regis Paper Co., 368 U.S. at 218. *See* 49 U.S.C.A. § 504(f) (West 1997) (motor carrier accident reports required to be filed by Secretary of Transportation cannot be used or admitted in any civil action for damages). *See also In re Nelson* 873 F.2d 1396, 1397 (11th Cir. 1989).

The courts and commentators have recognized that numerous federal statutes and

regulations contained provisions concerned with the confidentiality of various records. See *Zambrano v. I.N.S.*, 972 F.2d 1122, 1125 (9th Cir. 1992); *Association for Women in Science v. Califano*, 566 F.2d 339, 346 (D.C. Cir. 1977); 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5437 (2d ed. 1980); 23 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2019 (2d ed. 1993). These laws have been placed in three categories: 1) those in which the provisions expressly bar disclosure in legal proceedings; 2) those in which the provisions expressly allow for disclosure in legal proceedings; and 3) those in which the provisions are silent on the issue of disclosure during legal proceedings. *Zambrano*, 972 F.2d at 1125 (citing *Association for Women in Science*, 566 F.2d at 346). Based on my review of the statutes and regulations at issue here, it appears that none of them contain provisions which expressly allow for, or bar, disclosure of these records in legal proceedings.

The federal statutes and regulations governing the food stamp program do not address disclosure in legal proceedings or in response to a subpoena. Federal law requires any state participating in the federal food stamp program to adopt “safeguards which limit the use or disclosure of information obtained from applicant households to persons directly connected with the administration or enforcement of” the provisions of the federal food stamp program or other federal or federally assisted state public welfare programs. 7 U.S.C.A §2020(e)(8) (West 1999). This statute states that such information shall be made available to local, state or federal law enforcement officials in only two instances: 1) the investigation of an alleged violation of law or regulation pertaining to the federal food stamp program; or 2) a request for disclosure of information on a fugitive from justice. 7 U.S.C.A § 2020(e)(8)(B), (D) (West 1999).

The federal regulations pertaining to the administration of the food stamp program require states to restrict the use or disclosure of information obtained from food stamp applicants or recipients to certain instances listed in 7 C.F.R. § 272.1(c) (2000). These regulations state that this information may be disclosed to local, state or federal law enforcement officials only for the purpose of investigating an alleged violation of the Food Stamp Act or any governing regulation. 7 C.F.R. § 272.1(c)(vi) (2000).

Under federal law, a state's plan for providing medical assistance, including benefits provided through the Medicaid program, must "provide safeguards which restrict the use of disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan." 42 U.S.C.A. § 1396a(a)(7) (West Supp. 2000). The federal regulations pertaining to the Medicaid program require the states to adopt statutes which prohibit the disclosure of information gathered from applicants and recipients of Medicaid for any purpose other than those specifically listed in 45 C.F.R. § 205.50(a). These regulations allow for disclosure to law enforcement officials of information gathered from applicants or recipients of Medicaid in only two instances: 1) an investigation, prosecution or criminal or civil proceeding conducted in connection with the administration of specifically listed federally funded public welfare programs; 45 C.F.R. § 205.50(a)(1)(i)(B); or 2) a request for disclosure of the current address of a recipient who is a fugitive felon; 45 C.F.R. § 205.50(a)(1)(v).

The regulations also state:

- (iv) In the event of the issuance of a subpoena for the case record

or for any agency representative to testify concerning an applicant or recipient, the court's attention is called, through proper channels to the statutory provisions and the policies or rules and regulations against disclosure of information.

(v) The same policies are applied to requests for information from a governmental authority, the courts, or a law enforcement officer ... as from any other outside source.

45 C.F.R. § 205.50(a)(2)(iv), (v) (1999).

The federal regulations pertaining to the AFDC program also require the states to adopt "safeguards that restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan." 42 C.F.R. § 431.300(a) (1999). These regulations define "purposes directly related to" the plan as: 1) establishing eligibility; 2) determining the amount of assistance; 3) providing services for recipients; and 4) conducting or assisting an investigation, prosecution, or civil or criminal proceeding "related to the administration of the plan." 42 C.F.R. § 431.302 (1999).

The regulations also state:

- (e) The agency's policies must apply to all requests for information from outside sources, including governmental bodies, the courts, or law enforcement officials.
- (f) If a court issues a subpoena for a case record or for any agency representative to testify concerning an applicant or recipient, the agency must inform the court of the applicable statutory provisions, policies and regulations restricting disclosure of information.

42 C.F.R. § 431.306(e), (f) (1999).

While the regulations governing the Medicaid and AFDC programs mention requests for disclosure from courts and subpoenas, these regulations do not state that these records are privileged from disclosure to the courts. Nor do these regulations state that these documents may not be used in legal proceedings. Instead, these regulations address only the appropriate agency response to such a request. Also, my research has not revealed that any federal court has previously held that these records are privileged.¹ Therefore, based on my duty to strictly construe statutes purporting to create new privileges, I find that the statutes and regulations at issue here do not create a statutory privilege protecting these records from disclosure in this case.

The more difficult issue under the facts of this case, however, is whether the court should extend the common-law “required reports” or “confidential reports” privilege to protect these records from production in this case. A number of federal courts have recognized a common-law qualified “required reports privilege” stemming from state laws which require citizens to reveal personal information under a promise of confidentiality. *See, e.g., In re Hampers*, 651 F.2d 19 (1st Cir. 1981) (state income tax records); *In re Grand Jury Subpoena Dated November 14, 1989*, 728 F.Supp. at 371-72 (state public assistance records). It is important to note here, that while Virginia law places restrictions on the disclosure and use of these records, the Virginia law was adopted pursuant to specific federal statutory and regulatory directives. Therefore, the

¹My research has revealed one case in which the government has conceded that it was not entitled to the records of individuals receiving federally funded public assistance for use in a grand jury investigation unrelated to the administration of these programs. *In re Grand Jury Subpoena Dated November 14, 1989*, 728 F.Supp. 368, 369 (W.D. Pa. 1990).

issue in this case is not whether this court should recognize a state-created privilege, but rather whether the court should recognize that federal confidentiality rules require these records to be privileged from production in this case. Furthermore, this is a criminal, not a civil proceeding, and federal privilege law controls in federal criminal proceedings. *U.S. v. Cartledge*, 928 F.2d 93, 96 (4th Cir. 1991).

At least one other circuit has recognized that similar confidentiality requirements create a qualified privilege which requires the balancing of the litigant's need for the information against the government's need to protect the information from disclosure. *See Association for Women in Science*, 566 F.2d at 346-47. *See also Tobias v. Kwiatek*, 98 F.R.D. 513, 516 (D. Vt. 1983).

This privilege covers a wide range of situations in which the government seeks to protect from disclosure confidential reports which it has received from citizens. It is directly analogous to the informer's privilege, for it is based on the governmental interest in protecting the flow of information concerning the subject of the report in question.

Association for Women in Science, 566 F.2d at 343. *See Roviario v. United States*, 353 U.S. 53, 62 (1957).

I do not, however, believe it is necessary to decide in this case whether such a qualified privilege exists because, even if these records were to be subject to such a privilege, I find that the facts and circumstances of this case would warrant disclosure in response to a grand jury subpoena. I recognize that the agencies that administer the public welfare benefits at issue here, as well as society in general, have an interest in seeing that those who are in need of benefits seek these benefits without fear that the

information they provide will be disclosed to the public or used by the government for some other purpose. I do not, however, find that this interest outweighs “the normally predominant principal of utilizing all rational means for ascertaining the truth,” especially with regard to grand jury investigations. See *In re Grand Jury Subpoena*, 204 F.3d 516, 519 (2000) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

An appropriate order shall be entered.

Dated: This ____ day of June 2001.

UNITED STATES MAGISTRATE JUDGE