

§ 59.4 Procedures.¹

(a) *Provisions governing the use of search warrants generally.* (1) A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party unless it appears that the use of a subpoena, summons, request, or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought, and the application for the warrant has been authorized as provided in paragraph (a)(2) of this section.

(2) No federal officer or employee shall apply for a warrant to search for and seize documentary materials believed to be in the private possession of a disinterested third party unless the application for the warrant has been authorized by an attorney for the government. Provided, however, that in an emergency situation in which the immediacy of the need to seize the materials does not permit an opportunity to secure the authorization of an attorney for the government, the application may be authorized by a supervisory law enforcement officer in the applicant's department or agency, if the appropriate U.S. Attorney (or where the case is not being handled by a U.S. Attorney's Office, the appropriate supervisory official of the Department of Justice) is notified of the authorization and the basis for justifying such authorization under this part within 24 hours of the authorization.

(b) *Provisions governing the use of search warrants which may intrude upon professional, confidential relationships.*

(1) A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party physician,²

¹Notwithstanding the provisions of this section, any application for a warrant to search for evidence of a criminal tax offense under the jurisdiction of the Tax Division must be specifically approved in advance by the Tax Division pursuant to section 6-2.330 of the U.S. Attorneys' Manual.

²Documentary materials created or compiled by a physician, but retained by the physician as a matter of practice at a hospital or clinic shall be deemed to be in the private possession of the physician, unless

lawyer, or clergyman, under circumstances in which the materials sought, or other materials likely to be reviewed during the execution of the warrant, contain confidential information on patients, clients, or parishioners which was furnished or developed for the purposes of professional counseling or treatment, unless—

(i) It appears that the use of a subpoena, summons, request or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought;

(ii) Access to the documentary materials appears to be of substantial importance to the investigation or prosecution for which they are sought; and

(iii) The application for the warrant has been approved as provided in paragraph (b)(2) of this section.

(2) No federal officer or employee shall apply for a warrant to search for and seize documentary materials believed to be in the private possession of a disinterested third party physician, lawyer, or clergyman under the circumstances described in paragraph (b)(1) of this section, unless, upon the recommendation of the U.S. Attorney (or where a case is not being handled by a U.S. Attorney's Office, upon the recommendation of the appropriate supervisory official of the Department of Justice), an appropriate Deputy Assistant Attorney General has authorized the application for the warrant. Provided, however, that in an emergency situation in which the immediacy of the need to seize the materials does not permit an opportunity to secure the authorization of a Deputy Assistant Attorney General, the application may be authorized by the U.S. Attorney (or where the case is not being handled by a U.S. Attorney's Office, by the appropriate supervisory official of the Department of Justice) if an appropriate Deputy Assistant Attorney General is notified of the authorization and the basis for justifying such authorization under this part within 72 hours of the authorization.

the clinic or hospital is a suspect in the offense.

(3) Whenever possible, a request for authorization by an appropriate Deputy Assistant Attorney General of a search warrant application pursuant to paragraph (b)(2) of this section shall be made in writing and shall include:

(i) The application for the warrant; and

(ii) A brief description of the facts and circumstances advanced as the basis for recommending authorization of the application under this part.

If a request for authorization of the application is made orally or if, in an emergency situation, the application is authorized by the U.S. Attorney or a supervisory official of the Department of Justice as provided in paragraph (b)(2) of this section, a written record of the request including the materials specified in paragraphs (b)(3) (i) and (ii) of this section shall be transmitted to an appropriate Deputy Assistant Attorney General within 7 days. The Deputy Assistant Attorneys General shall keep a record of the disposition of all requests for authorizations of search warrant applications made under paragraph (b) of this section.

(4) A search warrant authorized under paragraph (b)(2) of this section shall be executed in such a manner as to minimize, to the greatest extent practicable, scrutiny of confidential materials.

(5) Although it is impossible to define the full range of additional doctor-like therapeutic relationships which involve the furnishing or development of private information, the U.S. Attorney (or where a case is not being handled by a U.S. Attorney's Office, the appropriate supervisory official of the Department of Justice) should determine whether a search for documentary materials held by other disinterested third party professionals involved in such relationships (e.g. psychologists or psychiatric social workers or nurses) would implicate the special privacy concerns which are addressed in paragraph (b) of this section. If the U.S. Attorney (or other supervisory official of the Department of Justice) determines that such a search would require review of extremely confidential information furnished or developed for the purposes of professional counseling or treatment, the provisions of this sub-

section should be applied. Otherwise, at a minimum, the requirements of paragraph (a) of this section must be met.

(c) *Considerations bearing on choice of methods.* In determining whether, as an alternative to the use of a search warrant, the use of a subpoena or other less intrusive means of obtaining documentary materials would substantially jeopardize the availability or usefulness of the materials sought, the following factors, among others, should be considered:

(1) Whether it appears that the use of a subpoena or other alternative which gives advance notice of the government's interest in obtaining the materials would be likely to result in the destruction, alteration, concealment, or transfer of the materials sought; considerations, among others, bearing on this issue may include:

(i) Whether a suspect has access to the materials sought;

(ii) Whether there is a close relationship of friendship, loyalty, or sympathy between the possessor of the materials and a suspect;

(iii) Whether the possessor of the materials is under the domination or control of a suspect;

(iv) Whether the possessor of the materials has an interest in preventing the disclosure of the materials to the government;

(v) Whether the possessor's willingness to comply with a subpoena or request by the government would be likely to subject him to intimidation or threats of reprisal;

(vi) Whether the possessor of the materials has previously acted to obstruct a criminal investigation or judicial proceeding or refused to comply with or acted in defiance of court orders; or

(vii) Whether the possessor has expressed an intent to destroy, conceal, alter, or transfer the materials;

(2) The immediacy of the government's need to obtain the materials; considerations, among others, bearing on this issue may include:

(i) Whether the immediate seizure of the materials is necessary to prevent injury to persons or property;

(ii) Whether the prompt seizure of the materials is necessary to preserve their evidentiary value;

(iii) Whether delay in obtaining the materials would significantly jeopardize an ongoing investigation or prosecution; or

(iv) Whether a legally enforceable form of process, other than a search warrant, is reasonably available as a means of obtaining the materials.

The fact that the disinterested third party possessing the materials may have grounds to challenge a subpoena or other legal process is not in itself a legitimate basis for the use of a search warrant.

§ 59.5 Functions and authorities of the Deputy Assistant Attorneys General.

The functions and authorities of the Deputy Assistant Attorneys General set out in this part may at any time be exercised by an Assistant Attorney General, the Associate Attorney General, the Deputy Attorney General, or the Attorney General.

§ 59.6 Sanctions.

(a) Any federal officer or employee violating the guidelines set forth in this part shall be subject to appropriate disciplinary action by the agency or department by which he is employed.

(b) Pursuant to section 202 of the Privacy Protection Act of 1980 (sec. 202, Pub. L. 96-440, 94 Stat. 1879 (42 U.S.C. 2000aa-12)), an issue relating to the compliance, or the failure to comply, with the guidelines set forth in this part may not be litigated, and a court may not entertain such an issue as the basis for the suppression or exclusion of evidence.

PART 60—AUTHORIZATION OF FEDERAL LAW ENFORCEMENT OFFICERS TO REQUEST THE ISSUANCE OF A SEARCH WARRANT

Sec.

60.1 Purpose.

60.2 Authorized categories.

60.3 Agencies with authorized personnel.

AUTHORITY: Rule 41(h), Fed. R. Crim. P (18 U.S.C. appendix).

§ 60.1 Purpose.

This regulation authorizes certain categories of federal law enforcement officers to request the issuance of search warrants under Rule 41, Fed. R. Crim. P., and lists the agencies whose officers are so authorized. Rule 41(a) provides in part that a search warrant may be issued “upon the request of a federal law enforcement officer,” and defines that term in Rule 41(h) as “any government agent, * * * who is engaged in the enforcement of the criminal laws and is within the category of officers authorized by the Attorney General to request the issuance of a search warrant.” The publication of the categories and the listing of the agencies is intended to inform the courts of the personnel who are so authorized. It should be noted that only in the very rare and emergent case is the law enforcement officer permitted to seek a search warrant without the concurrence of the appropriate U.S. Attorney’s office. Further, in all instances, military agents of the Department of Defense must obtain the concurrence of the appropriate U.S. Attorney’s Office before seeking a search warrant.

[Order No. 826-79, 44 FR 21785, Apr. 12, 1979, as amended by Order No. 1026-83, 48 FR 37377, Aug. 18, 1983]

§ 60.2 Authorized categories.

The following categories of federal law enforcement officers are authorized to request the issuance of a search warrant:

(a) Any person authorized to execute search warrants by a statute of the United States.

(b) Any person who has been authorized to execute search warrants by the head of a department, bureau, or agency (or his delegate, if applicable) pursuant to any statute of the United States.

(c) Any peace officer or customs officer of the Virgin Islands, Guam, or the Canal Zone.

(d) Any officer of the Metropolitan Police Department, District of Columbia.

(e) Any person authorized to execute search warrants by the President of the United States.