

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SEP - 4 2007

JAMES R. LARSEN, CLERK DEPUTY
SPOKANE, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

**IN RE: THE MATTER OF THE
GRAND JURY SUBPOENA FOR
THCF MEDICAL CLINIC
RECORDS**

NO. MJ-07-4071-00

**ORDER GRANTING MOTIONS
TO QUASH GRAND JURY
SUBPOENAS**

Before the Court is the State of Oregon's Motion to Quash Subpoena to Testify Before Grand Jury (Ct. Rec. 1); and THCF Medical Clinic's Motion to Quash Grand Jury Subpoena (Ct. Rec. 6).

FACTS

On May 24, 2007, the Government served a Subpoena to Testify Before Grand Jury on the State of Oregon, Department of Human Services, Oregon Medical Marijuana Program. On the same day, the Government filed a Subpoena to Testify Before Grand Jury on the Hemp and Cannabis Foundation, THCF Medical Clinic. The Subpoenas identified seventeen persons of interest. The Subpoena directed at the State of Oregon asked for any and all documents pertaining to these seventeen persons, including, but not limited to: Original Application for Registration; Renewal Applications for Registration; Original Attending Physician's Statement; Attending Physician's Statement for all renewals; Notices of Violation and or Termination of Rights under Program;

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1 Medical Marijuana Registry Identification Card; Designated Caregiver Registry
2 Identification Card; Medical Records and or Charts; and Annual History Request
3 Form. The Subpoena directed at THCF Medical Clinic sought any and all
4 documents pertaining to the seventeen identified persons, including, but not
5 limited to: Documentation of Medical Authorization to Possess Marijuana for
6 Medical Purposes in the State of Washington; Medical Statements and/or Reports;
7 Correspondence; Reports of any violation and or termination of the Authorization;
8 and Written Applications.

9 The State of Oregon and the THCF Clinic moved to quash the subpoenas,
10 pursuant to Federal Rules of Criminal Procedure 17(c)(2). A hearing was held on
11 the motions on August 1, 2007, in Yakima, Washington. The Government was
12 represented by Assistant United States Attorney James Hagarty. Third-party
13 THCF Medical Clinic was represented by Graham Boyd and Alison Holcomb;
14 third-party State of Oregon Department of Human Services, Oregon Medical
15 Marijuana Program was represented by Ward Marshall, Liani Reeves, and
16 Shannon O'Fallon.

17 DISCUSSION

18 The Supreme Court in *United States v. R. Enterprises, Inc.*, provided a
19 succinct and instructive description of the role the grand jury plays in the United
20 States' criminal justice system:

21 The grand jury occupies a unique role in our criminal justice
22 system. It is an investigatory body charged with the responsibility of
23 determining whether or not a crime has been committed. Unlike [a
24 district court], whose jurisdiction is predicated on a specific case or
25 controversy, the grand jury can investigate merely on suspicion that
26 the law is being violated, or even just because it wants assurance that
27 it is not. The function of the grand jury is to inquire into all
28 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. A grand jury investigation is not fully
carried out until every available clue has been run down and all
witnesses examined in every proper way to find if a crime has been
committed.

1 A grand jury subpoena is thus much different from a subpoena
2 issued in the context of a prospective criminal trial, where a specific
3 offense has been identified and a particular defendant charged. The
4 identity of the offender, and the precise nature of the offense, if there
5 be one, normally are developed at the conclusion of the grand jury's
6 labors, not at the beginning. In short, the Government cannot be
7 required to justify the issuance of a grand jury subpoena by
8 presenting evidence sufficient to establish probable cause because the
9 very purpose of requesting the information is to ascertain whether
10 probable cause exists.

11 498 U.S. 292, 297 (1991) (citations omitted).

12 Although the reach of the grand jury is broad and it operates with great
13 independence, “the powers of the grand jury are not unlimited and are subject to
14 the supervision of a judge.” *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).
15 Specifically, Federal Rule of Criminal Procedure 17(c)(2) provides a limit to the
16 power of the grand jury. It provides that a district court may quash or modify a
17 subpoena “if compliance would be unreasonable.”

18 Federal courts have recognized various ways in which a subpoena may be
19 unreasonable or oppressive under Rule 17(c). For instance, courts have
20 recognized that parties may assert constitutional, statutory, or common-law
21 privilege in support of a motion to quash. *See id.* (“the public . . . has a right to
22 every man’s evidence,’ except for those persons protected by a constitutional,
23 common-law, or statutory privilege.”). In the absence of such a privilege, a
24 subpoena may still be unreasonable or oppressive if it is irrelevant,¹ abusive or
25 harassing,² overly vague,³ or excessively broad.⁴ Courts have relied on Rule 17(c)
26 to quash a subpoena that intrudes gravely on significant interests outside the scope
27 of a recognized privilege, if compliance is likely to “entail consequences more
28

¹*United States v. R. Enters.*, 498 U.S. at 301.

²*In re Grand Jury Subpoena*, 175 F.3d 332, 340 (4th Cir. 1999); *United States v. (Under Seal)*, 714 F.2d 347, 350 (4th Cir. 1983).

³*United States v. Loe*, 248 F.3d 449, 466 (5th Cir. 2001).

⁴*In re Grand Jury Proceedings*, 601 F.2d 162, 165 (5th Cir. 1979).

1 serious than even severe inconveniences occasioned by irrelevant or overbroad
2 requests for records.” *In re Grand Jury Matters*, 751 F.2d 13, 18 (1st Cir. 1984).

3 Here, the State of Oregon and THCF Medical Clinic have the burden of
4 demonstrating unreasonableness. *R. Enters.*, 498 U.S. at 301. The Court starts
5 with the presumption that, “absent a strong showing to the contrary, a grand jury
6 acts within the legitimate scope of its authority.” *Id.* at 300.

7 The State of Oregon argues that the subpoena should be quashed for two
8 reasons. First, the privacy interests in its citizens trump the Government’s interest
9 in enforcing the subpoena. Second, the information sought by the Government is
10 not relevant. The THCF Medical Clinic asserts the subpoena is an unwarranted
11 invasion of physician-patient relationship and privilege.

12 At the hearing, the Court questioned the relevance of medical records of
13 patients to the prosecution of marijuana growers and distributors.⁵ The
14 Government orally narrowed the focus of the subpoena. The Government stated
15 that it is now only interested in obtaining information showing current addresses
16 and phone numbers of the seventeen named individuals, along with the specific
17 dosages being prescribed to these individuals. The purpose for seeking this
18 information, expressed at the hearing, is to prove that the subjects of the grand jury
19 investigation distributed marijuana to these individuals in violation of federal law.

20 In determining whether to quash the subpoena, the Court must weigh the
21 State of Oregon’s expressed interest in protecting the integrity of its medical
22 marijuana program and the confidentiality of its citizen’s medical records and the
23 THCF Medical Clinic’s interest in protecting the physician-patient privilege

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25 ⁵Relevance is one of the components of the ‘reasonableness’ analysis
26 conducted by the Court in determining whether to quash a subpoena. *See id.* at
27 301 (holding that where a subpoena is challenged on relevancy grounds, the
28 motion to quash must be denied unless the district court determines that there is no
reasonable possibility that the category of materials the Government seeks will
produce information relevant to the general subject of the grand jury's
investigation).

1 against the Government's interest in conducting a criminal investigation. *See In re*
2 *Grand Jury, John Doe No. G.J. 2005-2*, 478 F.3d 581, 585 (4th Cir. 2007)
3 (balancing a city's significant interest in preserving the confidentiality of its
4 investigations and forestalling a potential violation of a person's Fifth Amendment
5 rights against the United States interest in its criminal investigation).

6 The Government's professed need for the requested information is that it
7 has been investigating three individuals and it wants to obtain this information to
8 establish distribution amounts. For instance, the Government could call one of the
9 seventeen persons listed in the subpoena to testify that she purchased marijuana
10 from the alleged distributor. The dosage amounts could be used to compute and
11 substantiate a distribution amount. The Government says that it needs current
12 addresses and phone numbers for these seventeen individuals and presumes that
13 both the State of Oregon and THCF Medical Clinic have the current addresses and
14 prescribed dosages for the seventeen individuals.

15 The Court agrees that the State of Oregon has a significant interest in
16 protecting the integrity of its medical marijuana program. Voters in Oregon
17 approved the Oregon Medical Marijuana Act (OMMA) in 1998. Under Oregon
18 law, Oregonians suffering from debilitating medical conditions are allowed to use
19 small amounts of marijuana to mitigate the symptoms or effects of the person's
20 debilitating medical conditions. Or. Rev. Stat. §§ 475.300, 475.302(8) (2007).

21 A person with a debilitating medical condition can apply for and receive a
22 medical marijuana registry identification card from the Oregon Medical Marijuana
23 Program (OMMP). In order to register, a person must provide written
24 documentation from the person's attending physician that states that the person
25 has a debilitating medical condition and that the medical use of marijuana may
26 mitigate the symptoms or effects of the person's debilitating medical condition.
27 Or. Rev. Stat. § 475.309(2)(a).

28 Under Oregon law, all names and other identifying information regarding

1 medical marijuana registrants are confidential and protected from disclosure,
2 except to authorized employees of the OMMP and authorized employees of state
3 or local law enforcement, to the extent necessary to verify that a person is a lawful
4 possessor of a medical marijuana registry identification card. Or. Rev. Stat. §
5 475.331(a) and (b); Or. Admin. R. 333-008-0050 (2007).

6 If the State of Oregon were to comply with the subpoena, it would be
7 violating its own laws. Notwithstanding the confidentiality provision found in the
8 OMMA, the Oregon Public Records Acts protects health information from
9 disclosure without authorization from the individual. Or. Rev. Stat. § 192.496(1).
10 Moreover, individuals could be deterred from participating in the program if it
11 were possible for the federal government to obtain this type of information.⁶ The
12 THCF Medical Clinic also has a significant interest in protecting the physician-
13 patient relationship, although this interest is not necessarily implicated if the Court
14 were to accept the Government's narrowed scope of the subpoena.

15 These interests are balanced against the Government's interest in pursuing
16 its criminal investigation. The Court has reviewed the documents submitted by
17 the Government upon order of the Court. These documents have addresses and
18 phone numbers, along with dosages for the majority of the individuals.⁷ The
19 Government asserts that some of these addresses and phone numbers are not
20 current. The Government has not indicated which of the seventeen individuals it
21 was unable to contact, nor has it provided the efforts it has undertaken to obtain
22 the current location of these individuals. Normally, phone records, driver's
23 licenses and motor vehicle records are not confidential sources of such
24 information. The Government has not shown why it needs to obtain all of the

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26 ⁶An individual can face federal criminal charges or civil penalties for
possession of marijuana. 21 U.S.C. §§ 844, 844a.

27 ⁷One document refers to a recommendation that the patient be provided 14
28 plants. The majority of the documents that set forth a dosage specify the dosage to
be PRN, or as needed.

1 addresses and phone numbers from the State of Oregon and the THCF Medical
2 Clinic rather than from some other source.

3 On the showing made, the Government's subpoena is unreasonable. As
4 written originally, it sought records that have marginal, if any, relevance. It
5 clearly sought medical records, which contain highly personal, confidential, and
6 sensitive information, in order to obtain current addresses, phone numbers, and
7 dosages of the individual. Even as narrowed, the Government already has
8 significant dosage information from the records produced. It is likely that the
9 Government can obtain the location of individuals by other means. The Court
10 would not normally quash a subpoena on the grounds that the information was
11 available by other means or that it sought medical information. *See In re Grand*
12 *Jury, John Doe No. G,J. 2005-2, 478 F.3d at 587* (holding that the existence of an
13 alternative means of obtaining information is insufficient to render a subpoena
14 unreasonable or subpoenaed material irrelevant to a grand jury investigation).
15 Such information has been routinely ordered to be produced to federal grand juries
16 in appropriate circumstances. However, the context of these subpoenas makes
17 these factors more determinative. The State of Oregon is a sovereign. While
18 subject to the Supremacy Clause of the Federal Constitution, the State has an
19 important interest in the integrity of its authorized medical programs and in
20 keeping its contract with its citizens to preserve the confidentiality of their
21 records. It is clear that the State's sovereignty can be trumped by a federal
22 subpoena; however, more is needed to be shown as to relevance and necessity than
23 has been shown here. There is an obvious tension between the State's
24 authorization of the production and use of marijuana as a medicine and the federal
25 authority to make such activity a crime. The point at which that tension should be
26 broken by the compelled production of records to a federal grand jury has not been
27 reached with these subpoenas. The same can be said for the Clinic's records. The
28 Clinic's concern that compliance can negatively affect the patient-physician

1 relationship is significant. Even as narrowed, compliance with the subpoena
2 would require the Clinic to divulge dosage amounts for specific individuals. Such
3 information is highly confidential to the patient under the Oregon program. While
4 such medical records can be ordered to be produced under normal circumstances,
5 the Clinic's records represent the implementation of the State's program and are
6 integral to the success of the program. Absent a further showing of necessity and
7 relevance, compliance with the subpoena would impact significant State and
8 medical privacy interests and is unreasonable.

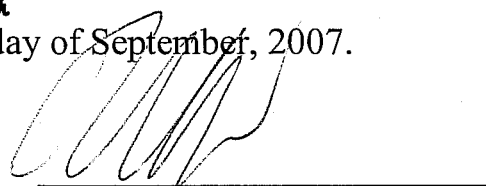
9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. The State of Oregon's Motion to Quash Subpoena to Testify Before
11 Grand Jury (Ct. Rec. 1) is **GRANTED**.

12 2. The THCF Medical Clinic's Motion to Quash Grand Jury Subpoena
13 (Ct. Rec. 6) is **GRANTED**.

14 **IT IS SO ORDERED.** The District Court Executive is directed to enter
15 this Order and provide copies to counsel.

16 **DATED** this 4th day of September, 2007.

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19 **ROBERT H. WHALEY**
20 Chief United States District Court

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