DOCKET 14

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT	**FILED UNDER SEAL**
	No. 1:13EC297
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH ed_snowden@lavabit.com THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC	
	No. 1:13SW522
In re Grand Jury	No. 13-1

MOTION TO UNSEAL RECORDS AND VACATED NON-DISCLOSURE ORDERS AND MEMORANDUM OF LAW IN SUPPORT OF MOTION

Lavabit, LLC ("Lavabit") and Mr. Ladar Levison ("Mr. Levison") (collectively "Movants") move this Court to fully unseal records and vacate non-disclosure orders that are over two years old. While these records have been partially unsealed, Mr. Levison is still prevented from disclosing the target of the subpoenas, specifically the named individual and the email address(es) searched, and the non-disclosure orders are still in effect. The account holder at issue is Edward Snowden ("Snowden").

The Facts

Mr. Levison, a resident of Texas, formed Lavabit in 2004 as a secure and encrypted email service provider. At its peak, Lavabit provided email service to approximately 410,000 users worldwide.

In the spring of 2013, the United States launched a criminal investigation into the activities of Snowden. As part of this investigation, the federal government (1) subpoenaed Lavabit for billing and subscriber information related to Snowden's email account with Lavabit, (2) obtained an order requiring Lavabit to install a pen-trap device to intercept all electronic communications involving Snowden's account, and (3) issued a search warrant to Lavabit for all information necessary to access their encrypted data, Exhibit A through C. The latter involved a request for Lavabit's private encryption keys[1] which would allow the government to access the plain-text for all the traffic traversing the Lavabit network, including emails and customer passwords. After exhausting its options in court, and subsequently finding itself the subject of a contempt charge, Lavabit surrendered its private encryption key. Concurrently Mr. Levison chose to suspend the operation of Lavabit's email service.

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[1] Lavabit employed an industry standard to provide transport layer security ("TLS"), sometimes called a secure socket layer ("SSL"), to ensure the privacy and security of communications between Lavabit and its users. TLS makes use of two "keys", one public, and the other private, which work together to verify the identity of Lavabit's servers and setup an encrypted network connection. This encryption protects the data sent between the server and a user's email client, or web browser.

Snowden, the subject of the investigation, which led to the government demanding unfettered access to the private communications for all of Lavabit's customers, fled to Hong Kong in May 2013. He then traveled to Russia in June 2013, where he was granted temporary asylum. Media reports indicate that as of this writing, Snowden is still residing in Russia, and will remain so into the foreseeable future.

On June 14, 2013, the United States filed a criminal complaint against Snowden in the District Court for the Eastern District of Virginia, charging him with theft of government property and two violations of the 1917 Espionage Act. Though initially filed under seal, the United States unsealed the complaint a few days later. Snowden's actions, which involve leaking classified information about the surveillance activities conducted by the National Security Agency (NSA), has been covered by media outlets throughout the world ad nauseam. A direct account of his actions, and subsequent travel to Russia, was the subject of *Citizenfour*, an Oscar-winning documentary released in 2014.

Lavabit and Mr. Levison challenged the validity and constitutionality of the search warrant and orders. This Court denied Lavabit's request to quash the search warrant and grand jury subpoena, and twice denied the movants' motion to unseal court records. Lavabit appealed the decision to the Fourth Circuit Court of Appeals, and while the appeal was pending, this Court partially unsealed portions of the record, Exhibit D. The Court continued to redact the target's name and email addresses.

Two years later, a lifetime, in today's media cycle, the search warrant, grand jury subpoena, and other pleadings and orders remain partially sealed, and Mr. Levison is still subject to the non-disclosure orders of June 10, 28 and July 16, 2013 ("the non-disclosure orders"). As such, he may *never* disclose that Snowden's email accounts are what spawned the government's request and led to the subsequent legal proceedings.

I. THE NON-DISCLOSURE ORDERS ARE INVALID BECAUSE THEY VIOLATE MR. LEVISON'S FIRST AMENDMENT RIGHT TO FREE SPEECH

All three non-disclosure orders were issued by the Court pursuant to the Stored Communications Act ("SCA") at 18 U.S.C. § 2705(b). These orders constitute notice preclusion authorized by the SCA. Such an order is "a type of gag order." *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 879-80 (S.D. Tex. 2008). A restriction on speech survives judicial scrutiny only "if it 'is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 394 (4th Cir. 1993) (Murnaghan, J., concurring) (quoting *Simon & Schuster, Inc. v. New York Crime Victims Board*, 502 U.S. 105, 118 (1991)).

By requesting a gag order, the government's purpose is to preclude Mr. Levison from speaking about an entire topic, namely, the object of the search and seizure warrants to Lavabit and the underlying criminal investigation of Snowden. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (opining

that "the government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral..."). In fact, the non-disclosure orders prohibit Mr. Levison from disclosing the link between the federal government's, now public, investigation of Snowden, and his email accounts with Lavabit. Such restrictions qualify as content-based regulation of speech.[2] *See Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001). The Supreme Court has held that content-based regulation of speech is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-82 (1992) (noting that the "First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.").

Within First Amendment jurisprudence, government action in the form of an administrative or judicial order forbidding certain speech has been described as a "prior restraint." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4–14 (1984)) ("The term 'prior restraint' is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'"). "Temporary restraining

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[2] Although the government action at issue in this case does not involve a law in the ordinary sense, the Supreme Court has held that a government investigation is nonetheless subject to First Amendment scrutiny. *Watkins v. United States*, 354 U.S. 178, 197 (1957) ("While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of law-making. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking").

orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." Nimmer, at 4-16. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (striking down injunctions barring the New York Times and Washington Post from publishing excerpts from the "Pentagon Papers"). The gag order issued in this case is also a speech restrictive injunction and, thus, an example of prior restraint that is "constitutionally disfavored in this nation nearly to the point of extinction." *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 882 (S.D. Tex. 2008) (quoting *United States v. Brown*, 250 F.3d 907, 915 (5th Cir. 2001)).

Moreover, "[a]ny prior restraint on expression [arrives in court] with a 'heavy presumption' against its constitutional validity," with the government having the burden of proving that such a restriction is justified. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976) (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971). In *Nebraska Press*, the Supreme Court noted that a prior restraint is an immediate and irreversible sanction because it "freezes" speech, which is "the most serious and the least tolerable infringement on First Amendment rights." *Id.* at 559. Applying this reasoning, other courts have held that the Stored Communications Act and federal pen/trap statute do not permit gag orders of indefinite duration. *See, e.g. In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 895 (S.D. Tex. 2008) (holding that a 180-day period is "most reasonable as a default setting for sealing and non-disclosure" orders); *Matter*

of Grand Jury Subpoena for: [Redacted]@yahoo.com, No. 5:15-CR-90096-PSG, 2015 WL 604267, at *1 (N.D. Cal. Feb. 5, 2015) (denying government's motion to gag Yahoo!, pursuant to 18 U.S.C. 2705(b), "until further order of the court")).

In this case, the federal government has prohibited Mr. Levison from disclosing the target in the Lavabit proceedings, and freely discussing the underlying investigation concerning Snowden. This specific prohibition of an entire topic is a content-based restriction of Mr. Levison's speech under the First Amendment. For such a gag order to be constitutional, it must be narrowly tailored to serve a compelling government interest. *IOTA XI*, 993 F.2d at 394. In addition, the gag order in this case applies to Mr. Levison "until otherwise authorized" by the Court. Indeed, even in the very serious context of national security, the Supreme Court has found that a prior restraint is permissible only if the speech will "surely result in direct, immediate, and irreparable harm to our Nation or its people." *New York Times v. United States* (*Pentagon Papers*), 403 U.S. 713, 730 (1971) (per curium) (Stewart & White, JJ., concurring).[3]

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[3] The Stewart-White concurrence is the holding of the case because, of the six Justices who concurred in the judgment, Justices Stewart and White concurred on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds") (internal quotation omitted); accord, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 n. 9 (1988). In *New York Times v. United States*, Justices Black and Douglas would clearly have refused to enjoin publication even if the Government had

18 U.S.C. § 2705(b) authorizes notice preclusion, but only if the court has reason to believe that notification will result in:

(1) endangering the life or physical safety of an individual;

(2) flight from prosecution;

(3) destruction or tampering with evidence;

(4) intimidating of potential witnesses; or

(5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. § 2705(b)(1)-(5).

First, there is no evidence or insinuation in the government's filings to suggest that a disclosure by Mr. Levison or Lavabit of the sealed information would somehow endanger somebody's life or safety. Second, there is no risk that Snowden will flee from prosecution, as a result of such disclosure, because he has already fled from prosecution. Third, there is no risk that Snowden will tamper with his Lavabit accounts or otherwise alter his behavior if Mr. Levison were to disclose the information under seal because Lavabit is no

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met Stewart's test. *See, e.g., New York Times*, 403 U.S. at 730 (Black, J., concurring) (Black & Douglas, JJ., concurring) (no evidence that disclosure would cause "direct, immediate, and irreparable damage...") Justice Brennan also would likely have held more broadly. "[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. . . . [O]nly governmental . . . proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary." *Id.* at 725-27 (Brennan, J., concurring).

longer operating its email service. This makes it impossible for Snowden to access, let alone tamper with his accounts. The investigation is already two years old, so any compelling interest the government may have had, as defined in 18 U.S.C. § 2705(b), has long since expired. Without a compelling government interest, the continued suppression of Mr. Levison's speech cannot pass constitutional muster. *See United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).[4]

"[The Government] must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks and citations omitted). The government cannot meet this burden here because it cannot demonstrate that any actual harm will occur as a result of fully unsealing these documents. Indeed, its recited harms are now two years old, and any urgency to their claims, if it existed, has vanished with the passage of time. Even if the government had a compelling interest when the gag order was issued, the passage of time has tipped the scales and now favors the movant's First Amendment right to free speech. The Southern District of Texas recognized as much when it held that a 180-day period is "reasonable as a default setting for sealing and non-

[4] In *United States v. O'Brien*, the Supreme Court held that the government may regulate speech if: (1) the regulation is within the government's constitutional power; (2) the regulation furthers an important or substantial government interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

disclosure" orders. *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 895 (S.D. Tex. 2008). The gag order in this case, which prohibits Mr. Levison from speaking freely, has already eclipsed this "reasonable" period, as cited in *In re Sealing & Non-Disclosure,* by a factor of five.

Fourth, the gag order does not relate to other witnesses; it simply prohibits Mr. Levison from confirming that the Snowden investigation led to the Lavabit proceedings, and discussing the investigation in its proper context. Despite widespread media speculation that Snowden was the target, Mr. Levison has been required to tread carefully, and discuss them separately; an act of verbal contortion. He is perpetually in fear that a misstep will result in this Court holding him in contempt for violating its gag orders.

Fifth, there is no risk that a disclosure would jeopardize the investigation because the government's investigation of Snowden's actions is public knowledge. The media universally speculated that the government actually sought to search Lavabit for evidence related to Snowden. The government's prohibitions on speech do not protect the secrecy of, or otherwise imperil a government investigation, but rather prevent Mr. Levison from fully engaging in the public discourse involving Snowden, and the subsequent government investigation. *See In re A 18 U.S.C. § 2703 Order Issued to Google on June 10, 2011*, 2012 U.S. Dist. LEXIS 25770, at *2 (E.D. Va. 2012) (Jones, Jr., J.) (stating that the government's concern of confidentiality is moot, because the use of the government's tools in this matter have been widely publicized). *See,*

e.g. Ladar Levison, *Secrets, lies and Snowden's email: why I was forced to shut down Lavabit*, THE GUARDIAN, May 20, 2014, *available at* http://www.theguardian.com/commentisfree/2014/may/20/why-did-lavabit-shut-down-snowden-email.[5]

The gag orders preventing the release of information that this motion seeks to unseal are not narrowly tailored or designed to achieve a specific and important purpose. Instead, they are a prior restraint on Mr. Levison's speech, of unlimited duration, which have greatly affected Mr. Levison and Lavabit, while doing nothing to further the government investigation. As such, the gag orders represent a violation of the movants First Amendment's right to free speech.

II. THE LAW SUPPORTS THE RIGHT OF PUBLIC ACCESS TO THE SEALED DOCUMENTS

Despite the lack of statutory authority, the 2703(d) search warrant and other related documents, along with the 2705(b) Order, remain partially under seal and the subject of non-disclosure, or "gag" orders. The sealing of judicial records imposes a limit on the public's right of access, which derives from two sources, the First Amendment and the common law. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004) (citing *Stone v. University of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988)); *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (the press and public have a First Amendment right to attend a criminal trial); *Press-Enterprise Co. v. Superior*

[5] The title of this article was chosen by The Guardian editors, not Mr. Levison.

Court, 478 U.S. 1, 2 (1986) (the public has a First Amendment right of access to preliminary hearing and transcript).

a. The Common Law Right Of Access Attaches To The Search Warrant

"For a right of access to exist under the First Amendment or common law, the document must be a 'judicial record.'" *United States v. Applebaum*, 707 F.3d 283, 290 (4th Cir. 2013) (citing *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 63–64 (4th Cir. 1989)). In *Applebaum*, the Fourth Circuit held that § 2703(d) orders and subsequent orders issued by the court are judicial records because they are judicially created. *Id.* at 290. The Court also held that the common law presumption of access attaches to such documents. *Id.* at 291. In this case, the 2705(b) Order was issued pursuant to 18 U.S.C. § 2703(d), therefore it is a judicial record and a presumption of access attaches to it.

To overcome the common law presumption of access, a court must find that there is a "significant countervailing interest" in support of sealing that outweighs the public's interest in openness. *Id.* at 293. Under the common law, the decision to seal or grant access to warrant papers lies within the discretion of the judicial officer who issued the warrant. *Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 429 (4th Cir. 2005). If a judicial officer determines that full public access is not appropriate, he or she "must consider alternatives to sealing the documents," including granting some public access or releasing a redacted version of the documents. *Id.* (quoting *Baltimore Sun*, 886 F.2d at 66). In the present case, now, two years later, there is no longer a need for such

partial redactions because the government's investigation of Snowden is well known and widely publicized.

b. There Is No Statutory Authority To Seal The § 2705(d) Documents

There are no provisions in the SCA to seal orders or other documents. By contrast, the Pen/Trap Statute authorizes electronic surveillance and directs that pen/trap orders be sealed "until otherwise ordered by the court". 18 U.S.C. §§ 3123. Similarly, the Wiretap Act, another surveillance statute, expressly directs that applications and orders granted under its provisions be sealed. 18 U.S.C. § 2518(8)(b). Thus, Congress has specifically provided for sealing provisions when it has so desired. Additionally, where Congress includes particular language in one section of a statute but omits it in another, it is assumed that Congress acted intentionally. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Therefore, Congress has provided no statutory basis for sealing an application or order under the SCA that would overcome the common law right to access.

c. The First Amendment Right To Petition The Government For Redress Of Grievances Demands Public Access

The Petition Clause of the First Amendment protects the public's right to petition the government for redress of grievances. *Borough of Duryea, Pa. v. Guarnieri*, 131 S.Ct. 2488, 2494 (2011). "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights... to petition for redress of grievances." *Id.* at 2495 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). Free speech allows the

public to state its grievances and the right to petition ensures that it can communicate those grievances to the government. *Id.* The non-disclosure orders in this case deny Mr. Levison these fundamental rights and forbid him from discussing portions of his experience with the world freely and without fear.

The non-disclosure orders prohibit Mr. Levison from disclosing any information regarding the target of the underlying investigation. A representative democracy depends upon the people being afforded the opportunity to air their grievances to their representatives. Mr. Levison has been and continues to be denied the ability to petition the government for redress. These orders are the hallmark of an extremely unsettling expansion of government power that jeopardizes the privacy of thousands to aid the investigation of an individual. Even a partial concealment of these proceedings undermines Mr. Levison right to voice his political opinions and threatens the free formation of opinions on a matter of public import.

Conclusion

For the foregoing reasons, Lavabit and Ladar Levison respectfully move this Court to lift fully the non-disclosure orders issued to Mr. Levison.

LAVABIT LLC
By Counsel

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Certificate of Service

I certify that on this 11th day of December, 2015, this Motion to Unseal Records and Vacate Non-Disclosure Orders and Memorandum of Law in Support of Motion was hand delivered to the person at the addresses listed below:

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Jesse R. Binnall

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT	)	**FILED UNDER SEAL**
	)	No. 1:13EC297
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH ed_snowden@lavabit.com THAT IS STORED AT PREMISES CONTROLLED BY LAVABIT LLC	)	No. 1:13SW522
In re Grand Jury	)	No. 13-1

SEALING ORDER

Upon the motion of the United States, good cause having been shown, it is hereby ORDERED that:

The grand jury subpoena issued to Ladar Norman Levison for an appearance on July 16, 2013, shall be placed under seal until further order of this Court;

It is further ORDERED that the government shall serve Mr. Levison with a copy of this Order along with a copy of its motion to seal; and

It is further ORDERED that the government's motion to seal the grand jury subpoena and this Order shall be placed under seal.

Claude M. Hilton
United States District Judge

Alexandria, Virginia
July 16, 2013

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INSTALLATION AND USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT	)	(Under Seal) 1:13 EC 297

ORDER

This matter having come before the Court pursuant to an Application under 18 U.S.C. § 3122, by Andrew Peterson, Assistant United States Attorney, an attorney for the Government as defined by Fed. R. Crim. P. 1(b)(1), requesting an Order under 18 U.S.C. § 3123, authorizing the installation and use of a pen register and the use of a trap and trace device or process ("pen/trap device") on all electronic communications being sent from or sent to the account associated with ed_snowden@lavabit.com that is registered to subscriber Edward Snowden at Lavabit, LLC (hereinafter referred to as the "SUBJECT ELECTRONIC MAIL ACCOUNT"). The Court finds that the applicant has certified that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation into possible violation(s) of 18 U.S.C. §§ 641, 793(d)[redacted], and 798(a)(3) by Edward J. Snowden.

IT APPEARING that the information likely to be obtained by the pen/trap device is relevant to an ongoing criminal investigation of the specified offense;

IT IS ORDERED, pursuant to 18 U.S.C. § 3123, that a pen/trap device may be installed and used by Lavabit and the Federal Bureau of Investigation to capture all non-content dialing, routing, addressing, and signaling information (as described and limited in the Application), sent from or sent to the SUBJECT ELECTRONIC MAIL ACCOUNT, to record the date and time of the initiation and receipt of such transmissions, to record the duration of the transmissions, and to record user log-in data (date, time, duration, and Internet Protocol address of all log-ins) on the

EXHIBIT B

SUBJECT ELECTRONIC MAIL ACCOUNT, all for a period of sixty (60) days from the date of such Order or the date the monitoring equipment becomes operational, whichever occurs later;

IT IS FURTHER ORDERED, pursuant to 18 U.S.C. § 3123(b)(2), that Lavabit shall furnish agents from the Federal Bureau of Investigation, forthwith, all information, facilities, and technical assistance necessary to accomplish the installation and use of the pen/trap device unobtrusively and with minimum interference to the services that are accorded persons with respect to whom the installation and use is to take place;

IT IS FURTHER ORDERED that the United States take reasonable steps to ensure that the monitoring equipment is not used to capture any "Subject:" portion of an electronic mail message, which could possibly contain content;

IT IS FURTHER ORDERED that Lavabit shall be compensated by the Federal Bureau of Investigation for reasonable expenses incurred in providing technical assistance;

IT IS FURTHER ORDERED that, in the event that the implementing investigative agency seeks to install and use its own pen/trap device on a packet-switched data network of a public provider, the United States shall ensure that a record is maintained which will identify: (a) any officer(s) who installed the device and any officer(s) who accessed the device to obtain information from the network; (b) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (c) the configuration of the device at the time of its installation and any subsequent modification thereof; and (d) any information which has been collected by the device. To the extent that the pen/trap device can be set to automatically record this information electronically, the record shall be maintained electronically throughout the installation and use of the pen/trap device. Pursuant to 18 U.S.C. § 3123(a)(3)(B), as amended, such record(s) shall be provided ex parte and under seal to this Court within 30 days of the termination of this Order, including any extensions thereof;

IT IS FURTHER ORDERED, pursuant to 18 U.S.C. § 3123(d), that this Order and the Application be sealed until otherwise ordered by the Court, and that copies of such Order may be

furnished to the Federal Bureau of Investigation, the United States Attorney's Office, and Lavabit;

IT IS FURTHER ORDERED that Lavabit shall not disclose the existence of the pen/trap device, or the existence of the investigation to any person, except as necessary to effectuate this Order, unless or until otherwise ordered by the Court.

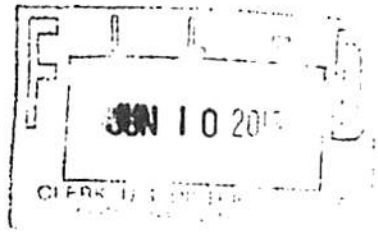
SO ORDERED:

/s/
Theresa Carroll Buchanan
United States Magistrate Judge

Hon. Theresa C. Buchanan
United States Magistrate Judge

Date: 6/28/13

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA



IN RE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER PURSUANT TO 18 U.S.C. § 2703(d)	MISC. NO. 1:13 EC 254
	Filed Under Seal

ORDER

The United States has submitted an application pursuant to 18 U.S.C. § 2703(d), requesting that the Court issue an Order requiring Lavabit LLC, an electronic communications service provider and/or a remote computing service located in Dallas, TX, to disclose the records and other information described in Attachment A to this Order.

The Court finds that the United States has offered specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation.

The Court determines that there is reason to believe that notification of the existence of this Order will seriously jeopardize the ongoing investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates. *See* 18 U.S.C. § 2705(b)(2), (3), (5).

IT IS THEREFORE ORDERED, pursuant to 18 U.S.C. § 2703(d), that Lavabit LLC shall, within ten days of the date of this Order, disclose to the United States the records and other information described in Attachment A to this Order.

IT IS FURTHER ORDERED that Lavabit LLC shall not disclose the existence of the application of the United States, or the existence of this Order of the Court, to the subscribers of the account(s) listed in Attachment A, or to any other person, unless and until otherwise

authorized to do so by the Court, except that Lavabit LLC may disclose this Order to an attorney for Lavabit LLC for the purpose of receiving legal advice.

IT IS FURTHER ORDERED that the application and this Order are sealed until otherwise ordered by the Court.

United States Magistrate Judge

June 10, 2013
Date

A TRUE COPY, TESTE:
CLERK, U.S. DISTRICT COURT
BY: _____
DEPUTY CLERK

ATTACHMENT A

I. The Account(s)

The Order applies to certain records and information associated with the following email account(s): Ed_snowden@lavabit.com.

II. Records and Other Information to Be Disclosed

Lavabit LLC is required to disclose the following records and other information, if available, to the United States for each account or identifier listed in Part I of this Attachment ("Account"), for the time period from inception to the present:

A. The following information about the customers or subscribers of the Account:

1. Names (including subscriber names, user names, and screen names);
2. Addresses (including mailing addresses, residential addresses, business addresses, and e-mail addresses);
3. Local and long distance telephone connection records;
4. Records of session times and durations, and the temporarily assigned network addresses (such as Internet Protocol ("IP") addresses) associated with those sessions;
5. Length of service (including start date) and types of service utilized;
6. Telephone or instrument numbers (including MAC addresses);
7. Other subscriber numbers or identities (including the registration Internet Protocol ("IP") address); and
8. Means and source of payment for such service (including any credit card or bank account number) and billing records.

B. All records and other information (not including the contents of communications) relating to the Account, including:

1. Records of user activity for each connection made to or from the Account, including log files; messaging logs; the date, time, length, and method of connections; data transfer volume; user names; and source and destination Internet Protocol addresses;

2. Information about each communication sent or received by the Account, including the date and time of the communication, the method of communication, and the source and destination of the communication (such as source and destination email addresses, IP addresses, and telephone numbers).

CERTIFICATE OF AUTHENTICITY OF DOMESTIC BUSINESS RECORDS PURSUANT TO FEDERAL RULE OF EVIDENCE 902(11)

I, _____, attest, under penalties of perjury under the laws of the United States of America pursuant to 28 U.S.C. § 1746, that the information contained in this declaration is true and correct. I am employed by Lavabit LLC, and my official title is _____. I am a custodian of records for Lavabit LLC. I state that each of the records attached hereto is the original record or a true duplicate of the original record in the custody of Lavabit LLC, and that I am the custodian of the attached records consisting of _____ (pages/CDs/kilobytes). I further state that:

a. all records attached to this certificate were made at or near the time of the occurrence of the matter set forth, by, or from information transmitted by, a person with knowledge of those matters;

b. such records were kept in the ordinary course of a regularly conducted business activity of Lavabit LLC; and

c. such records were made by Lavabit LLC as a regular practice.

I further state that this certification is intended to satisfy Rule 902(11) of the Federal Rules of Evidence.

_____ _____

Date Signature

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT	NO. 1:13 EC 297
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH ED_SNOWDEN@LAVABIT.COM THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC	NO. 1:13 SW 522
IN RE GRAND JURY SUBPOENA	NO. 13-1
	UNDER SEAL

ORDER

The United States has proposed partially unsealing records in this matter due to public disclosures made by Ladar Levison and Lavabit, LLC and for the purpose of creating a public record for Mr. Levison's appeal. The Court has considered the original sealing orders, the motions in support of the original sealing orders, the government's ex parte motion to unseal certain documents, and the prior pleadings of Mr. Levison, and hereby finds that:

(1) the government has a compelling interest in keeping certain information in the documents sealed, and the government has proposed redacted versions of the documents that minimizes the information under seal;

(2) the government's interest in keeping the redacted material sealed outweighs any public interest in disclosure; and

(3) having considered alternatives to the proposed redactions none will adequately protect that interest; it is hereby

ORDERED that the redacted versions of certain records filed in the above captioned matter are partially unsealed. The unsealed records are attached to this Order. To the extent any such record is covered by a non-disclosure Order issued pursuant to 18 U.S.C. § 2705(b), the non-disclosure obligation does not apply to the unsealed, redacted version of the document. The Clerk of the Court may publicly release the redacted version of any of the records attached to this Order. Any record not attached to this Order, as well as the unredacted copies of any record filed in the above-captioned matter, including the government's *ex parte*, sealed Motion to Unseal and Statement of Reasons will remain sealed until further Order of the Court.

Claude M. Hilton
The Honorable Claude M. Hilton
United States District Judge

Date: Oct. 2, 2013
Alexandria, VA