DOCKET 16

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	)	No. 1:13EC297
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH **[REDACTED]** THAT IS STORED AT PREMISES CONTROLLED BY LAVABIT LLC	)	No. 1:13SW522
In re Grand Jury	)	No. 13-1

RESPONSE OF THE UNITED STATES TO MOTION TO UNSEAL RECORDS AND VACATE NON-DISCLOSURE ORDERS

Lavabit LLC and Ladar Levison have moved this Court for an order authorizing the public disclosure of all information currently under seal in the referenced dockets. The United States opposes Lavabit's motion and asks that the Court instead enter the attached Protective Order.

The history of these proceedings is well-documented. *See In re Under Seal*, 749 F.3d 276, 279 (4th Cir. 2014). And while this Court's sealing and non-disclosure orders remain in effect, the only information not publicly disclosed is the identity of the target of the investigation and that person's email address. *See In re Under Seal*, Fourth Circuit Appeal 13-4625, Joint Appendix Volume I, Docket Entry 27, filed October 10, 10, 2013. The government opposes the

public disclosure of the identity of the target of the investigation and the target's email address, as such disclosure would reveal a matter occurring before the grand jury, which is prohibited under Rule 6(e)(2) of the Federal Rules of Criminal Procedure. Lavabit, on the other hand, seeks an order requiring the government to reveal that information so that Ladar Levison can "freely discuss the underlying investigation" involving this one subscriber.

The question before this Court is whether the information at issue, the identity of a target of a grand jury investigation, which is contained in pleadings and orders under both the Pen/Trap Statute, 18 U.S.C. §§ 3123–27, and the Stored Communications Act, 18 U.S.C. §§ 2701–12, is subject to a public right of access under the First Amendment and/or common law. The First Amendment analysis is frequently called the "experience and logic" test. Courts ask (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. *See Baltimore Sun v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989), quoting *Press Enterprises Co. v. Superior Court*, 478 U.S. 1, 8-1-)1988). The common law right of access, on the other hand, involves a balancing of interests whereby a court must consider whether the public's right to access is outweighed by a significant countervailing interest in continued sealing. *See Under Seal v. Under Seal*, 326 F.3d 479, 486 (4th Cir. 2003).

The information Lavabit wants to unseal (Lavabit's subscriber and the subscriber's email address) is revealed in the un-redacted pleadings and orders that are a part of the pre-indictment investigation of the case. *See Application of the United States of America for an Order Pursuant to 18 U.S.C. Section 2703(d)*, 707 F.3d 283, 292 and 295 (4th Cir. 2013) (finding that §2703(d) orders, pen registers, and wiretaps are pre-indictment investigative matters akin to grand jury

investigations). As noted above, the government is barred by Rule 6(e)(2) of the Federal Rules of Criminal Procedure from disclosing publicly the identity of a target of a grand jury investigation, an investigation that is not closed but ongoing.

In this context, the Fourth Circuit has said that public access does not play a significant role in the functioning of investigations involving §2703(d) orders, and there is, accordingly, no First Amendment right to access them. *Id.* at 292, quoting *In re Sealed Case*, 199 F.3d 522, 526 (D.C.Cir. 2000). The Fourth Circuit reasoned:

> Section 2703(d) proceedings can be likened to grand jury proceedings. In fact, they are a step removed from grand jury proceedings, and are perhaps even more sacrosanct. Proceedings for the issuance of § 2703(d) orders are also like proceedings for the issuance of search warrants, which we have noted are not open. *See Goetz*, 886 F.2d at 64 (observing that the Supreme Court has twice "recognized that proceedings for the issuance of search warrants are not open"). Because secrecy is necessary for the proper functioning of the criminal investigations at this § 2703(d) phase, openness will frustrate the government's operations. Because § 2703(d) orders and proceedings fail the logic prong, we hold that there is no First Amendment right to access them.

707 F.3d at 292 (footnote omitted).

As to whether there is a common law right of access to the identity of Lavabit's subscriber, Lavabit explains very little about the public's interest in this matter other than to say that Lavabit has been precluded from "freely discussing the underlying investigation." To the contrary, Lavabit can – and has – discussed the underlying investigation publicly in the context of its appeal to Fourth Circuit, resulting in a lengthy published opinion. In addition, a cursory internet search reveals that Ladar Levison has spoken out publicly on numerous other occasions about the case, his appeal, and internet privacy and encrypted email topics generally. Whether the government should be able to compel Lavabit – or any other service provider – to turn over unencrypted email account information for users of encrypted email service is certainly an issue

that can be debated and discussed in public forums without identifying a specific subscriber. Indeed, if Ladar Levison is to be believed (based on what he has said in a number of articles and videotaped interviews), he fought the government's demands on principle for all of his encrypted email customers. Revealing the name of the particular subscriber at issue in this case does not change the nature of the dialogue in which Levison plans to engage. Moreover, whether or not this is a high-profile investigation does not justify public access to the target's identity and should play no role in the Court's analysis. *Id.* at 293-94.

The government concedes that Lavabit should be able to notify its subscriber of the existence of the proposed orders and underlying pleadings in this case. The subscriber, of course, much like the grand jury witness, is under no obligation of secrecy with regard to any of the underlying sealed information.

The United States proposes that the Court enter the attached Protective Order. The protective order would allow Lavabit to notify its subscriber and would give the public access to all of the pleadings and orders in these several dockets with only the identity of the target and the target's email account information redacted from the public record. The proposed order would

also require the government to move to unseal the protected information promptly once the grand jury investigation is completed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2016, I electronically filed the foregoing *Response of the United States to Motion to Unseal Records and Vacate Non-Disclosure Orders* with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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