

FILED 23 MAR '15 10:32 USDC-ORE

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DIANE ROARK,

Case No.: 6:12-CV-01354-MC

Plaintiff,

v.

**PLAINTIFF'S MOTION TO UNSEAL
DOCUMENTS**

UNITED STATES OF AMERICA,

Defendant.

Plaintiff moves that the Court unseal all documents and records pertaining to Plaintiff that were sealed by a Title III court since the year 2000 and have not yet been unsealed. Plaintiff prays that the Court release them in their entirety or with only minimal justified redactions. This motion supports Plaintiff's prior motion to compel production of documents because the search documents requested in that motion may be sealed. However, the instant motion is broader and is being pursued regardless of the outcome of her motion to compel.

The instant motion extends beyond any surreptitious government search(es) before July 26, 2007. It covers any type of search or other document pertaining to her that was sealed by a Title III court from 2000 through 2015. The motion includes, but is not limited to, all sealed documents such as

affidavits, warrants, applications, authorizations, renewals, and related or supportive records. Search records may include physical, wire, oral, and electronic searches and tampering at her home property or elsewhere, including telephone and computer use, collection of any type of business or government records, and any surveillance techniques.

A record should be provided of all government entities receiving any of Plaintiff's private collected information.¹ Plaintiff seeks an order to all such agencies to expunge collected information, if such an order is proper under the instant motion.

Until October 2003, when Plaintiff moved to her current residence in Oregon, she resided in Hyattsville, Maryland in the Southern District of the U.S. District Court of Maryland. She worked until April 2002 in the District of Columbia.

I. INTRODUCTION

Federal Rule of Civil Procedure 41(g) provides that “any person aggrieved by illegal search and seizure” of property may seek its return. Plaintiff has presented *prima facie* evidence that one or more searches of her home were conducted prior to July 25, 2007. This evidence is contained in an unsealed affidavit supporting a warrant executed in a search and seizure of July 26, 2007, at Plaintiff's residence. Any search(es) before July 25, 2007 were illegal because Plaintiff has never been notified of them as required.² The affidavit and warrant referred to “documents missing heading and footers;” the government has since returned some documents matching that description and admitted that it retains others. This creates a strong presumption that property seized pursuant to the illegal search was “fruit of the poisonous tree” and should be returned. There were also indications that electronic searches

¹ In *Mayfield v. U.S.*, U.S. District Court of Oregon, Civil No. 04-1427-AA, Sept. 2007, p. 14, plaintiffs alleged that their private information from searches was disseminated to at least eight federal agencies.

² *U.S. v. Freitas*, 800 F.2d 1451 (9th Cir. 1986).

were conducted prior and subsequent to July 26, 2007. Plaintiff has submitted a motion compelling provision of records necessary for the Court's consideration of summary judgment, including any pertaining to searches before July 25, 2007.

Since the 2007 raid, there have been indications of electronic eavesdropping and wiretapping. A Trojan Horse including a key logger was found on Plaintiff's computer in December 2014. In 2010, there was obvious physical trespass on the curtilage of her property. Telephone monitoring appeared to continue for years after the 2007 raid. Interference with email transmission and with computer functionality, especially in the days prior to Plaintiff's legal deadlines, is experienced.

Records of pre-indictment searches may be sealed by Title III courts. Fourth Amendment requirements are evaded by using the Foreign Intelligence Surveillance Court,³ which may also issue group warrants. The affidavit for the July 26, 2007 overt search of Plaintiff's home was unsealed after Maryland associates who also were searched on that date secured the unsealing of affidavits substantially identical to hers, through the District Court of Maryland.

The requested court records are material to Plaintiff's 41(g) action seeking return of property seized pursuant to an obvious illegal search and could also establish that her rights otherwise have been violated. Production of these records also can inform Congress and the public about government use of its seizure power and about unpublicized or denied methods used in domestic search and surveillance performed by the FBI and intelligence agencies. There has been intense public interest in government infringement on citizens' rights since *New York Times* revelations in December 2005, and publication since June 2013 of NSA papers provided by Edward Snowden.⁴

³ Judge Ann Aiken of the U.S. District Court of Oregon explained how amended FISA law is thus interpreted in, *Id.*, *Mayfield v. U.S.*, pp. 17-20, 30, 34-36. "Except for the investigations that result in criminal prosecutions, FISA targets never learn" that their premises have been searched or their communications intercepted (pp. 36-38).

⁴ See a March 16, 2015 Pew Research Report on awareness of and reaction to revelations about NSA's

II. FACTUAL BACKGROUND

Plaintiff was incorrectly suspected of providing to the *New York Times*, by December 2005, classified information about domestic surveillance conducted by the National Security Agency. In July 2011, the prosecutor told a Maryland court that the government found no evidence against Plaintiff and three associates (Attachment 1). The government informed this Court in 2013 during Plaintiff's constitutional case that it was no longer investigating her and did not intend to do so in the future.

In November 2011, Plaintiff and four associates sued in Maryland for return of property after the government continued to be unresponsive to requests in this regard. Removed from the Maryland case in 2012 due to incorrect venue, Plaintiff then sued in Oregon.

As in the settled Maryland case, the government seeks to retain a yet unknown number of Plaintiff's records, on grounds that so far two examined documents allegedly contain classified material and others contain unclassified information, notably NSA employee and retiree last names. Plaintiff has refuted the alleged classifications. She has disputed the government's right either to seize unclassified information under an unsupported interpretation of the National Security Agency Act of 1959 and contrary to practice with its own employees and retirees, or to seize complete documents rather than returning minimally redacted documents.

To date, the government proposes to retain paper and electronic Microsoft Word documents totaling 1,083 pages (Declaration of Laura J. Pino, Attachment 3, Sept. 30, 2014). Results of two distinct and disputed key word searches of over 10,000 electronic emails have yet to be examined by the government.

domestic surveillance at <http://www.pewinternet.org/2015/03/16/americans-privacy-strategies-post-snowden/>.

The government seeks summary judgment, but Plaintiff cross-motivated for partial summary judgment, stating that some issues might be solved but others, notably illegal searches, might require discovery. Later Plaintiff moved to compel production of documents in four areas, on grounds that material facts raised by Plaintiff have not been addressed or admitted by the government. One of these four areas concerned prima facie evidence (directions to seize Plaintiff's "documents missing headers and footers") that there was an unnotified surreptitious search before the raid that seized her property.

III. LEGAL ANALYSIS

Under Federal Rule of Civil Procedure 5.2(d), "[t]he court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record." Classified information may be redacted from the public record (*U.S. v. Ressam*, 221 F. Supp. 2D 1252 (W.D. Wash. 2002)). In a closely watched case, the Ninth Circuit recently decided partially to unseal an administrative demand for information pertaining to a federal investigation (*In re National Security Letter, Under Seal v. Holder*, No. 13-15957, D.C. No. 3:11-cv-02173-SI, Mar. 4, 2015), at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000715.

Search warrants often are sealed to protect the confidentiality of ongoing investigations; this is a temporary justification and the public has a qualified right of access to search warrants and their supporting documentation once temporary reasons for the seal have expired (*In re Newsday, Inc.*, 895 F.2d 74, 79 (2d Cir. 1990); *In re New York Times*, 585 F. Supp. 23 83 (D.D.C. 2008)).

In this case, with the investigation of Plaintiff that began about 9 years ago now officially ended, and with the prosecutor having conceded the government had no evidence of criminal intent or

action, there is no overriding interest that overcomes either Plaintiff's Fourth Amendment right to the complete record in her case or the public's First Amendment and common law right of access to the Court record.

If the Court finds that there is any remaining overriding interest in sealing part of the record, the sealing must be narrowly tailored and requires justification. (*Globe Newspaper Co. v. Superior Court*, 456 U.S. 596, 606-07; *Times Mirror Co. v. U.S.*, 873 F.2d 1210, 1211 n.1 (9th Cir., 1989), *Pintos v. Pacific Creditors Assoc.*, 565 F.3d 1106, 1115 (9th Cir. 2009)). To retain some information under seal, a party must demonstrate that substantial harm or injury would result, and that this harm outweighs the public's right to the knowledge. Absent a show of good cause, the court should unseal.

In federal district court, except for records that are “traditionally kept secret,” such as grand jury indictments and most grand jury hearings, there is a strong presumption in favor of public access, unless there is particularized harm resulting from disclosure. In the Ninth Circuit, the trial court enjoys considerable leeway in making decisions about access (*San Jose Mercury News v. U.S. Dist. Court*, 187 F.3d 1096, 1102 (9th Cir. 1999)). Court records should be sealed to keep confidential only what must be secret, temporarily or permanently as the situation requires. “Good cause” is generally required when the information to be sealed is attached to a nondispositive motion; information attached to dispositive motions such as summary judgment requires a higher showing of “compelling reasons.” (*AmerGen Energy Company, LLC v. U.S.*, 115 Fed. Cl. 132, 137-38 (2014)). Both standards require specific, concrete examples of harm from disclosure, *Id.* at 147. Broad, conclusory allegations of harm do not meet either standard, *Id.* at 143. Instead, parties must “articulate the specific prejudice or harm that will flow from disclosure.” (*Id.* at 147.)

Sealing merely to protect parties from embarrassment is inappropriate (*Kamakana v. City and*

County of Honolulu, 447 F.3d 1172, 1178-79 (9th Cir. 2006); *Oliner v. Kontrabecki*, 745 F.3d 1024 (9th Cir. 2014)). Members of the news media and public may intervene to challenge a sealing (*Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 949 (9th Cir. 1998)). Courts should be careful to seal only portions of the record that require sealing (*U.S. v. Brooklier*, 685 F.2d 1162, 1172 (9th Cir. 1982)). Courts should be skeptical of arguments that following proper procedure is too burdensome (*Banks v. Office of the Senate Sergeant-at-Arms*, 233 F.R.D. 1, 10-11 (D.D.C. 2005)). Because the reasons for sealing often are temporary, courts should follow procedures that ensure unsealing when possible. (*Id.*, *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 940, 948 (“consistent with history, case law requires release of transcripts when the competing interests precipitating hearing closure are no longer viable.”))

A. The First Amendment and Common Law Establish a Presumption Favoring Right of Access to Judicial Records and Documents.

There is an especially strong presumptive First Amendment right of public access to judicial documents that is rooted in common law (*Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 602 (1978); *Valley Broadcasting Co. v. U.S. Dist. Court*, 798 F.2d 1289, 1293, (9th Cir. 1986)). The public's right of access is strong even under common law (*Id.*, *San Jose Mercury News v. U.S. Dist. Court*, 1102-03) and is “fundamental to a democratic state” (*United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C.Cir. 1976) *rev'd on other grounds sub nom Nixon v. Warner Communications*, 435 U.S. 589 (1978)). Openness in criminal cases “enhances both...basic fairness...and the appearance of fairness so essential to public confidence in the system.” *Press-Enter Co. v. Superior Court of California*, 464 U.S. 501, 508 (1984). Openness also increases the likelihood that warrents issued are not overbroad. *Id.*, *Nixon v. Warner Coms.* at 598.

Once the presumption of public access attaches, a court cannot simply seal documents or

records indefinitely without considering countervailing factors. Rather, a court must “weigh the interests advanced by the parties in light of the public interest and the duty of the courts” to determine whether the documents should remain sealed. The government bears the burden of “showing some significant interest that outweighs the presumption” of access. To rebut that presumption, it must demonstrate that “countervailing interests heavily outweigh the public interests in access.” *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004) (quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)).

Courts have used a two-prong test to determine right of access under the First Amendment. (*Phoenix Newspapers, Inc., v. U.S. Dist. Court*, 156 F.3d 940 (9th Cir. 1998)). The history or experience, prong analyzes whether the proceeding historically has been open. The logic or function prong analyzes whether public access fosters good operation of the courts and government.

B. Plaintiff has a strong interest in access to search documents.

Since November 2011, about three months after criminal prosecution of an associate was terminated days before trial, Plaintiff has diligently attempted to regain access to all of her property that the government has now possessed for over 7 years.

Plaintiff was employed at the White House National Security Council Staff and at the House Permanent Select Committee on Intelligence for over 18 years to oversee the proper and legal execution of U.S. intelligence responsibilities. It is an issue to which she devoted much of her professional life and about which she feels strongly. This was evidenced by her numerous approaches to cleared high-level officials after the 9/11 attacks, objecting to domestic surveillance. As a direct result of these interventions, she was unjustifiably subjected to the very surveillance techniques despite lack of probable cause of crime to which she had so strongly objected.

Under Rule 41(g), courts should consider, *inter alia*, “whether the Government displayed a callous disregard for the constitutional rights of the movant.” Plaintiff’s argument for return of property would be strengthened by revelation of improper government searches. In a concurring Ninth Circuit opinion, Judge Kozinski stated that if the government refuses to forswear the ability to retain or use data that should have been segregated initially, the judge “should order that the seizable and non-seizable data be separated by an independent third party under the supervision of the court, or deny the warrant altogether. *U.S. v. Comprehensive Drug Testing*, 621 F.3d 1162, 1178 (9th Cir. 2010).

U.S. law is rooted in English legal doctrine. In 1604, Edward Coke stated in *Semayne's case* that “the house of every one is to him as his castle and fortress, as well for his defense against injury and violence as for his repose,” thus requiring a lawful warrant for search and seizure. Under the U.S. Fourth Amendment, the government may not violate “the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures,” and warrants may be issued only “upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.” The Supreme Court described the fundamental purpose of the Fourth Amendment as guaranteeing “the privacy, dignity and security of persons against certain arbitrary and invasive acts by officers of the Government, without regard to whether the government actor is investigating crime or performing another function.” *Mapp v. Ohio* 367 U.S. 643 (1961).P

In *Katz v. U.S.*, 389 U.S. (1967), the Supreme Court held that Fourth Amendment protections extend to the privacy of individuals, including electronic communications, not just to physical locations. A property seizure occurs when a government intrusion meaningfully interferes with an individual’s possessory interest. *U.S. v. Jacobsen*, 466 U.S. 109 (1984). Evidence resulting from an

illegal search may be inadmissible, in Felix Frankfurter's phrase, as "fruit of the poisonous tree." The government may also be forced to return seized property. A warrant is required under the basic rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable." *Arizona v. Gant*, 556 U.S. 332 (2009), at p. 338.

C. Suspected sealed documents in this case would be of weighty concern to the public.

After passage of the post-9/11 PATRIOT Act, Congress and the public were formally assured that power to conduct delayed notification searches would not lead to searches lacking any notification whatsoever. After revelations of NSA domestic surveillance beginning in 2005 and increasing since 2013, a major public outcry elicited government assurances that these surveillance powers were limited to suspected terrorist activity and would not be abused domestically.

Revelation that these and other promises are being broken could have a major impact on public debate over the proper scope of government authorities as well as the trustworthiness of national security agencies and of our government in general. Accountability and transparency under the Bill of Rights are fundamental to the rule of law and maintenance of a democratic society.

III. CONCLUSION

The prosecutor in Plaintiff's case has admitted that there was no evidence of Plaintiff's guilt, yet there have been indications of prolonged physical, electronic and wire searches targeting Plaintiff, even years after the very lengthy leak investigation beginning in January 2006 ended.

The investigation was politically charged due to embarrassment, political fallout and alleged compromise of intelligence sources and methods from leaked revelations. The White House, which had sponsored and severely restricted knowledge of the program, expressed outrage and determination to apprehend the culprits.

Plaintiff prays that the Court uphold Plaintiff's Fourth Amendment right and the public's common law and First Amendment rights by unsealing court documentation of resulting searches of any and all types that were wrongly directed against Plaintiff, removing Title III court protection for all such information subject to the Court's authority.

Respectfully submitted,

A handwritten signature in cursive script, reading "Diane Roark", written over a horizontal line.

Diane Roark, *pro se*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Plaintiff's Motion to Unseal Documents** was mailed to James E. Cox, Jr. on March 19, 2015 to the following address:

James E. Cox, Jr., Esq.

1000 SW Third Ave., Suite 600

Portland, OR 97204-2902

A handwritten signature in cursive script, reading "Diane Roark", written over a horizontal line.

Diane Roark, *pro se*

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 1:10-CR-181-RDB

THOMAS A. DRAKE,

Defendant.

July 15, 2011

**Transcript of Proceedings
SENTENCING**

**Before The Honorable RICHARD D. BENNETT
United States District Judge**

APPEARANCES:

For the Plaintiff: William M. Welch
John P. Pearson
United States Department of Justice

For the Defendant: James Wyda
Federal Public Defender

Deborah L. Boardman
Assistant Federal Public Defender

Proceedings recorded by mechanical stenography, transcript
produced with computer-aided transcription.

*Roark v. U.S.
Motion to Unseal Records, Attachment 1*

1 is a man of honesty and integrity, and I want to focus in on
2 that theme as it relates to this particular crime because
3 that's what the court is addressing.

4 What he pled to is really theft. That's what he
5 pled to. He stole information from NSA and he stole it off a
6 computer. And honesty is disconsonant, it's not really a
7 part of the concept of theft. And my point in making this
8 argument is to impress upon the court that what he did was
9 intentional. It wasn't an accident. It wasn't a mistake.
10 By their own admission in the sentencing memorandum, the
11 decision to begin to provide information to the reporter was
12 not taken lightly; in other words, he thought about it a lot.

13 And the other point that I want to make is that
14 what he decided to do with respect to the reporter and
15 everybody else that he was sharing information to was not a
16 episodic or a sudden moment of decision, but rather it was a
17 progression of a series of steps and decisions he had been
18 making for a number of years. And as we pointed out in our
19 sentencing memorandum, this is something that he had been
20 doing since approximately June of 2000. He had been doing it
21 with different people in different venues.

22 THE COURT: None of whom were charged, correct?

23 MR. WELCH: That's correct.

24 THE COURT: Isn't he the only one who was charged
25 in this case, Mr. Welch?

1 MR. WELCH: That's correct. But it doesn't
2 change the fact that what he did, beginning in late 2005,
3 2006, had been going on by him for five to six years at that
4 point.

5 THE COURT: How does the court mesh that with the
6 fact that other people involved with it are never charged?

7 MR. WELCH: In a couple of different ways.
8 Number one, with respect to the other people, we didn't have
9 the evidence of intent like we had with Mr. Drake. When Mr.
10 Drake was interviewed, he admitted that he had taken this
11 information off NSA computers and brought it home.

12 Secondly, these other individuals no longer
13 worked at NSA by 2005, 2006. At least three of them had been
14 retired as of the end of 2001, a fourth had been retired from
15 the Hill in June of 2002. And that's what made their conduct
16 distinguishable from his conduct.

17 In addition, on top of that, when he admitted to
18 the conduct that he engaged in, both vis-a-vis the interviews
19 and his guilty plea, at the time he was a senior executive at
20 NSA. He was one of the top echelon of the managers there.
21 He set the tone. He was to set the example of how other
22 individuals were to conduct themselves within NSA. That's
23 what makes him different than the other individuals.

24 THE COURT: I find it a little bit unique, Mr.
25 Welch, given the great breadth with which the government

1 usually uses the conspiracy statute under 18 United States
2 Code, Section 371, you and I both know full well that the
3 government under the law could easily have charged other
4 people as conspiring to commit the violations that he was
5 originally charged with, so it isn't just a matter of proof,
6 it's a matter of government selection, is it not? It's a
7 prosecutorial decision.

8 MR. WELCH: But I think it was a matter of proof.
9 In other words, let's remember what he was charged with. He
10 was charged with retention, and that meant we had to have
11 evidence of an agreement by others knowing that he was taking
12 documents home and had them in his home. And at the end of
13 the day, at least it was in the judgment of individuals who
14 reviewed the case, including myself, that the evidence was
15 deficient as it related to that agreement, those other
16 individual's knowledge that he was retaining official NSA
17 information within his home.

18 So with respect to punishment, the court ought to
19 consider where he was at the time he made this decision to
20 engage in the criminal conduct with which he pled. In other
21 words, this is something that had been going on for four or
22 five years.

23 My second point, and it touches on what makes his
24 disparate from other individuals, is the idea of deterrence.
25 And the reason I want to stress this particular point, Your

1 Honor, is because when you sentence Mr. Drake, you send a
2 message. You send a message to him, but you send a message
3 to others. And this courtroom is full of people, but there
4 are many, many more people who listen to what your message
5 will be.

6 And it's easy to isolate on Mr. Drake. It's easy
7 to focus on the letters of support. It's easy to focus on
8 the evidence that the government presents to counter or to
9 offer what we believe to be a more robust view of what was
10 going on. It's easy to focus on the documents at hand. What
11 it's not easy to focus on is the silent, what I will call
12 them, the silent majority of people who live by these
13 non-disclosure agreements, by their obligations to adhere to
14 protecting official NSA information, and they do it every
15 single day.

16 There are thousands of employees, whether they're
17 in NSA, CIA, DIA, who every single day go to work and they
18 adhere to their obligations to protect official government
19 information. They do it when they show up at eight o'clock,
20 they do it when they leave at 6:00 p.m. There are some
21 people who do not tell their families what they do for a
22 living because they take this obligation so seriously. And
23 that's what makes this defendant so dissonant with the
24 silent majority, if you will. And they come from all walks
25 of life; they are the janitors, they are the maintenance

1 people, they are the staff, they are the senior executives.
2 And those are the people who will listen and look at your
3 sentence to see what the message is. Does their obligation
4 that they live every single day have meaning?

5 Put another way, does his violation of that
6 obligation have any meaning.

7 THE COURT: What message is sent by the
8 government, Mr. Welch -- there are messages sent not only by
9 the court, but by the government. What kind of message is
10 sent by the government when the government dismisses a ten
11 count indictment a year after indictment, on the eve of
12 trial, after days and days of hearings under the Classified
13 Information and Procedures Act, and in what I find to be an
14 extraordinary position taken by the government, probably
15 unprecedented in this courthouse, for a case of this profile,
16 literally on a Thursday afternoon before a Monday trial,
17 subject to the government to be prepared as you will in a
18 moment to dismiss the entire ten count indictment and allow
19 the defendant to plead guilty to a misdemeanor? What message
20 is sent by the government as to those people as to whom
21 you're speaking?

22 MR. WELCH: I think the message being sent is in
23 these sorts of cases, we are going to bring them and we are
24 going to try hard, and if at the end of the day, for whatever
25 reason, the government believes that the evidence is coming

1 up short, then we have to deal with what we have to deal
2 with.

3 THE COURT: Just in terms of a housekeeping
4 matter, government exhibit 155, government document 155 is
5 now pending before me, the motion to dismiss the indictment,
6 and you're now moving to dismiss the ten count indictment, is
7 that correct?

8 MR. WELCH: That's right.

9 THE COURT: That motion will be granted and the
10 indictment will be dismissed. But go ahead, Mr. Welch, I
11 didn't mean to interrupt you.

12 MR. WELCH: You did not.

13 So with respect to deterrence, the sentence that
14 you impose conveys a very important message, and an important
15 message I know that the court will adhere to.

16 So the reason that we ask for the one year
17 probation, the 250 hours of community service and the fine is
18 because that does send a message. It's also a sentence
19 consistent with a case of equal notoriety, profile, and that
20 is the Berger case. That is the case involving the former
21 national security advisor who in 2005 pled to a misdemeanor.

22 THE COURT: This same misdemeanor?

23 MR. WELCH: He pled to a different misdemeanor.

24 But again, it was --

25 THE COURT: What was the sentence imposed in that