

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

**IN RE THE APPLICATION OF
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS FOR ACCESS
TO CERTAIN SEALED COURT
RECORDS**

Misc. Action No. _____

Related to:
Criminal No. 1:12-cr-00127-LMB
1:12-mj-00033-JFA

Oral Argument Requested

**APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS FOR PUBLIC ACCESS TO CERTAIN SEALED COURT RECORDS**

1. The Reporters Committee for Freedom of the Press (the “Reporters Committee” or “Applicant”) respectfully moves this Court for an Order unsealing certain court records related to the United States government’s completed criminal investigation and prosecution of John C. Kiriakou (“Kiriakou”) (hereinafter, the “Kiriakou Matter”). The Reporters Committee seeks to unseal any and all applications and supporting documents, including affidavits, seeking any of the following; any court orders granting or denying any of the following; and any other court records related to the following, such as returns, motions to seal, miscellaneous dockets and docket entries:

(a) any search warrant, regardless of whether the warrant was issued or executed, and including warrants under the Stored Communications Act (“SCA”), *see* 18 U.S.C.

§§ 2703, related to the Kiriakou Matter (collectively, the “Search Warrant Materials”);

(b) authorization for the use of any pen register or trap and trace device pursuant to 18 U.S.C. §§ 3121–3127, regardless of whether such authorization was granted or a pen register or trap and trace device was used, related to the Kiriakou Matter (collectively, the “PR/TT Materials”); and

(c) any order pursuant to 18 U.S.C. § 2703(d) of the SCA, regardless of whether or not the order was issued or executed, related to the Kirakou Matter (collectively, the “Section 2703(d) Materials”).

2. Upon information and belief, the materials subject to this Application were filed in a number of separate, miscellaneous matters, each of which was assigned a unique docket number. The Reporters Committee does not know and cannot ascertain based on publicly available information the docket numbers of the miscellaneous matters that fall within the scope of this Application.

INTEREST OF THE APPLICANTS

3. The Reporters Committee is an unincorporated nonprofit association of reporters and editors dedicated to safeguarding the First Amendment rights and freedom of information interests of the news media and the public. The Reporters Committee has participated as a party and as *amicus curiae* in First Amendment and freedom of information litigation since 1970. The Reporters Committee frequently represents the interests of the press and the public in court cases involving access to judicial proceedings and court records.

4. The Reporters Committee, like all members of the public and the press, has a strong interest in observing and understanding the consideration and disposition of matters by federal district courts. That interest is heightened when the federal government is a party.

5. The public and the press also have a powerful interest in obtaining access to court documents concerning judicial authorization for the use of law enforcement tools that allow the government to collect or otherwise obtain electronic communications and/or electronic communications records. Where the government obtains a search warrant allowing it to collect such information, and especially where—as in the case of orders pursuant to 18 U.S.C. § 2703(d) of the SCA and orders authorizing the use of pen registers and/or trap and trace devices—no warrant is required for the government to obtain such information, judicial oversight and, in turn, public oversight of the judicial process, is necessary to guard against government overreach.

6. In addition, the public and the press have a particularly strong interest in access to court records related to the government’s investigation and prosecution of Kiriakou, a former Central Intelligence Agency (“CIA”) officer who, in 2012, was indicted on charges that arose from alleged communications he had with members of the news media.

BACKGROUND FACTS

7. Applicant is informed and believes that Kiriakou was employed as an intelligence officer with the CIA from in or about 1990 through in or about 2004, during which time he held a Top Secret security clearance. *See* Statement of Facts, *United States v. Kiriakou*, No. 1:12-cr-00127-LMB (“*Kiriakou*”) (E.D. Va. filed Oct. 23, 2012), ECF No. 115, 1–2, 4 (the “Statement of Facts”).

8. On January 23, 2012, the government filed a criminal complaint against Kiriakou, alleging one count of disclosing information identifying a covert officer in violation of 50 U.S.C. § 421(b); two counts of communicating national defense information in violation of 18 U.S.C. § 793(d); and one count of “trick and scheme to conceal a material fact” in violation of 18 U.S.C. § 1001(a)(1). *See* Criminal Complaint, *Kiriakou* (E.D. Va. filed Jan. 23, 2012), ECF No. 1 (the

“Complaint”). Applicant is informed and believes that on that same day, an arrest warrant for Kiriakou was issued by Magistrate Judge John F. Anderson and executed in Washington, D.C. *See Arrest Warrant, Kiriakou*, (E.D. Va. filed Jan. 23, 2012), ECF No. 5 (“Arrest Warrant”).

9. On April 5, 2012, the government filed an indictment in this Court, charging Kiriakou with one count of disclosing information identifying a covert officer in violation of 50 U.S.C. § 421(a); three counts of communicating national defense information in violation of 18 U.S.C. § 793(d); and one count of “trick and scheme to conceal a material fact” in violation of 18 U.S.C. § 1001(a)(1). *See Indictment, Kiriakou* (E.D. Va. filed Apr. 5, 2012), ECF No. 22 (the “Indictment”). Kiriakou was arraigned on April 13, 2012 before U.S. District Judge Leonie M. Brinkema. *See Minute Entry, Kiriakou* (E.D. Va. filed Apr. 13, 2012), ECF No. 26 (“Minute Entry”); Transcript of Arraignment, *Kiriakou* (E.D. Va. filed Jun. 8, 2012), ECF No. 40 (“Arraignment Transcript”).

10. On or about October 23, 2012, Kiriakou and the government entered into a plea agreement whereby Kiriakou pleaded guilty to one count of disclosing information identifying a covert officer in violation of 50 U.S.C. § 421(b). *See Minute Entry for Change of Plea Hearing, Kiriakou* (E.D. Va. filed Oct. 23, 2012), ECF No. 113. The remaining counts set forth in the Indictment were dismissed on the government’s motion. *Id.*; *see also Plea Agreement, Kiriakou* (E.D. Va. filed Oct. 23, 2012), ECF No. 114; Order Re: Dismissal of Counts, *Kiriakou* (E.D. Va. filed Oct. 23, 2012), ECF No. 116.

11. On or about January 25, 2013, the Court sentenced Kiriakou to thirty months imprisonment and three years of supervised release, and ordered him to pay a \$100 assessment. *See Judgment, Kiriakou* (E.D. Va. filed Jan. 25, 2013), ECF No. 128.

12. In connection with his guilty plea, Kiriakou stipulated to a Statement of Facts. *See* Statement of Facts, ECF No. 115, *supra*. According to the Statement of Facts, while employed with the CIA, Kiriakou had regular access to restricted information in Sensitive Compartmented Information (“SCI”) categories, such as information relating to CIA programs, operations, methods, sources, and personnel. *Id.* at 2–3.

13. According to the Statement of Facts, as part of a CIA counterterrorism program known as the Rendition, Detention, and Interrogation Program (the “RDI Program”), the CIA participated in an operation to capture a specific terrorism subject in Pakistan in or around March 2002 (the “Abu Zubaydah operation”). *Id.* at 4.

14. According to the Statement of Facts, on or about July 11, 2008 to on or about April 8, 2009, after he had left the CIA, Kiriakou corresponded via email with “Journalist A” and disclosed classified information about a covert CIA agent, including the agent’s name and the association of the agent with the CIA, the RDI Program, and a particular RDI operation. *Id.* at 5–6.

15. The Statement of Facts further states that in or about 2007 and 2008, Kiriakou corresponded via email with “Journalist A” and “Journalist B” and disclosed classified information that a CIA analyst was associated with the Abu Zubaydah operation. *Id.* at 7.

16. Multiple news stories identify “Journalist A” as freelance journalist Matthew Cole. *See, e.g.,* Steve Coll, *The Spy Who Said Too Much*, *The New Yorker* (Apr. 1, 2013), at <https://perma.cc/ZNL8-HBTG>; Josh Gerstein, *Three Journalists Subpoenaed by Defense in CIA Leak Case*, *Politico* (Oct. 11, 2012), at <https://perma.cc/EEU5-WEJ9>. The Indictment also indicates that “Journalist B” is *New York Times* reporter Scott Shane and that the CIA analyst whose association with the Abu Zubaydah operation Kiriakou allegedly disclosed is Deuce

Martinez. *See* Indictment, ECF No. 22 at 12; Scott Shane, *Inside a 9/11 Mastermind's Interrogation*, N.Y. Times (Jun. 22, 2008), at <http://nyti.ms/1Tg4AE>m; *see also* Coll, *supra*; Gerstein, *supra*. The Indictment states that “Journalist B” publicly identified a CIA analyst’s role in the Abu Zubaydah operation in an article published in *The New York Times* on June 22, 2008, titled “Inside the Interrogation of a 9/11 Mastermind[.]” Indictment, ECF No. 22 at 12. On or about June 22, 2008, *The New York Times* published an article by Shane titled “Inside a 9/11 Mastermind’s Interrogation” that identified Martinez and quoted Kiriakou. *See* Shane, *supra*.

17. According to the Statement of Facts, unbeknownst to Kiriakou, “Journalist A” passed information obtained from Kiriakou to an investigator assisting in the defense of detainees at Guantanamo Bay. *See* Statement of Facts, ECF No. 115 at 7.

18. The Statement of Facts further states that in 2009 Kiriakou authored a book, *The Reluctant Spy: My Secret Life in the CIA’s War on Terror*, about his work on behalf of the CIA. *Id.* at 8. According to the Statement of Facts, Kiriakou sought clearance from the CIA’s Publications Review Board (“PRB”) for the manuscript prior to publication. *Id.* The Statement of Facts states that in his manuscript Kiriakou described a classified investigative technique that was used in the Abu Zubaydah operation, known as the “magic box,” and falsely stated to the PRB that the technique was fictionalized. *Id.* at 8–10.

19. Documents filed in connection with the Kiriakou Prosecution indicate that the government sought and obtained authorization from the district court to use electronic surveillance tools in connection with its investigation of Kiriakou. *See generally* Complaint, ECF No. 1; Indictment, ECF No. 22; Statement of Facts, ECF No. 115.

20. According to the Affidavit filed with the Complaint, the government obtained emails “from search warrants served on two email accounts associated with Kiriakou.” Affidavit to Complaint, *Kiriakou* (E.D. Va. filed Jan. 23, 2012), ECF No. 2, 14. To Applicant’s knowledge, however, none of these search warrants, or related material such as applications, have been unsealed and placed on the public docket.

21. In addition to the search warrants used to gather emails from two email accounts associated with Kiriakou, it is likely that the government also sought and obtained additional search warrants, orders authorizing the use of pen registers and/or trap and trace devices, and/or orders pursuant to 18 U.S.C. § 2703(d), in connection with the Kiriakou Matter.

22. Because the government, in its Complaint, alleged that Kiriakou “repeatedly made unauthorized and illegal disclosures of classified information to persons, including reporters, not authorized to receive classified information,” *id.* at 5–6, the government may have utilized electronic surveillance tools to obtain communications records of journalists. *See generally id.* (noting at least three journalists with whom Kiriakou communicated).

23. To Applicant’s knowledge, however, no search warrants, Section 2703(d) orders, orders authorizing the use of pen registers and/or trap and trace devices, or related material such as applications, have been unsealed and placed on the public docket. The related docket before Magistrate Judge John F. Anderson likewise reflects no orders, motions, or applications related to requests by the government for authorization to use electronic surveillance tools, like search warrants under the SCA and Section 2703(d) orders, in connection with the Kiriakou Matter. *See generally United States v. Kiriakou*, 1:12-mj-00033-JFA (E.D. Va. 2012).

24. As explained more fully in the accompanying Memorandum of Points and Authorities, the press and the public have a right of access to these judicial records under both

the First Amendment and common law. No compelling government interest justifies the continued sealing of such records concerning the Kiriakou Matter, particularly now that the government's investigation and prosecution of Kiriakou has concluded.

REQUEST FOR RELIEF

25. The Reporters Committee seeks an order unsealing the Search Warrant Materials. Upon information and belief, each search warrant application filed by the government related to the Kiriakou Matter was assigned a unique docket number, but no listing of these docket numbers is publicly available. Accordingly, in addition to seeking unsealing of the relevant dockets, and to facilitate the Court's resolution of this Application, the Reporters Committee also requests that the United States Attorney's Office be directed to provide a list of the docket numbers associated with the Search Warrant Materials.

26. The Reporters Committee also seeks an Order unsealing any and all PR/TT Materials. Upon information and belief, each application for an order authorizing the use of a pen register or trap and trace device filed by the government related to the Kiriakou Matter was assigned a unique docket number, but no listing of these docket numbers is publicly available. Accordingly, in addition to seeking unsealing of the relevant dockets, and to facilitate the Court's resolution of this Application, the Reporters Committee also requests that the United States Attorney's Office be directed to provide a list of the docket numbers associated with the PR/TT Materials.

27. The Reporters Committee also seeks an Order unsealing any and all Section 2703(d) Materials. Upon information and belief, each application for an order pursuant to 18 U.S.C. § 2703(d) filed by the government related to the Kiriakou Matter was assigned a unique docket number, but no listing of these docket numbers is publicly available. Accordingly, in

addition to seeking unsealing of the relevant dockets, and to facilitate the Court's resolution of this Application, the Reporters Committee also requests that the United States Attorney's Office be directed to provide a list of the docket numbers associated with the Section 2703(d) Materials.

28. The Reporters Committee seeks any further relief that the Court deems just and proper.

ORAL ARGUMENT REQUESTED

29. The Reporters Committee respectfully requests oral argument.

Dated: January 23, 2017

Respectfully submitted,

/s/ Caitlin Vogus

Caitlin Vogus
VA Bar No. 81054
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
cvogus@rcfp.org

*Counsel for Applicant the Reporters
Committee for Freedom of the Press*

Katie Townsend*
Bruce D. Brown*
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310

**Of Counsel for Applicant the Reporters
Committee for Freedom of the Press*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPLICATION FOR ACCESS TO CERTAIN SEALED RECORDS** was filed with the Clerk of Court using the CM/ECF system, and served on counsel for the following via email and U.S. Mail:

Robert Powel Trout
John Francis Hundley
Plato Cacheris
Trout Cacheris PLLC
1350 Connecticut Ave., NW, Suite 300
Washington, DC 20036
Attorneys for Defendant
John Kiriakou

Jesse Isaac Winograd
Gowen Rhoades Winograd & Silva PLLC
513 Capital Court, NE, Suite 100
Washington, DC 20002
Attorney for Defendant
John Kiriakou

Karen Diane Williams
Akin Gump Strauss Hauer & Feld LLP (DC)
1333 New Hampshire Ave., NW
Washington, DC 20036
Attorney for Defendant
John Kiriakou

George R. A. Doumar
Doumar Martin PLLC
2000 N. 14th St., Suite 210
Arlington, VA 22201
Attorney for Interested Party
Journalist A

William Lassiter Doffermyre
1622 W. Main St.
Richmond, VA 23220
Attorney for Interested Party
Julie Tate

Iris Lan
James L. Trump
Mark Schneider
Ryan Fayhee
William N. Hammerstrom, Jr.
U.S. Attorney's Office (Alexandria)
2100 Jamieson Ave.
Alexandria, VA 22314

Lisa Lee Owings
Federal Energy Regulatory Commission
FERC Office of Enforcement
888 1st St., NE
Washington, DC 20426

This the 23rd day of January, 2017.

/s/ Caitlin Vogus

Caitlin Vogus