IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE THE APPLICATION OF REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR ACCESS TO CERTAIN SEALED COURT RECORDS	Misc. Action No. 1:17-mc-8 Related to Criminal Nos. 1:13-cr-00200-WTL-TAB (CLOSED) and 1:12-cr-00127-WTL-KPF (CLOSED)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE APPLICATION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS FOR PUBLIC ACCESS TO CERTAIN SEALED COURT RECORDS

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PRELIMINARY STATEMENT

The Reporters Committee for Freedom of the Press ("Reporters Committee") seeks access to certain sealed court records concerning the completed "leak" investigation and related criminal prosecution of Donald John Sachtleben ("Sachtleben") (the "Sachtleben Matter"). Specifically, the Reporters Committee seeks an order unsealing 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:

- 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. §§ 2701–2712, that relates to the Sachtleben Matter (collectively, the "Search Warrant Materials");
- 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, that relates to the Sachtleben Matter (collectively, the "PR/TT Materials"); and
- any order pursuant to 18 U.S.C. § 2703(d) of the SCA, regardless of whether or not the order was issued or executed, that relates to the Sachtleben Matter (collectively, the "Section 2703(d) Materials").

Court records of this type are routinely maintained under seal and are generally not reflected on publicly available dockets. Accordingly, the Reporters Committee does not know the docket number(s) associated with the Search Warrant Materials, PR/TT Materials, and Section 2703(d) Materials it seeks to unseal.

The United States government's prosecution of Sachtleben for allegedly disclosing classified national defense information to members of the news media was and remains the subject of intense public interest. Unsealing the Search Warrant Materials, PR/TT Materials, and Section 2703(d) Materials will shed light on the government's investigation and prosecution of Sachtleben, which has now concluded, and will also provide the public and the press with valuable insight into the government's approach to leak investigations and prosecutions more generally. In particular, unsealing of these materials will inform the press and the public about the government's use of electronic surveillance tools like PR/TT devices and Section 2703(d) orders in connection with leak investigations.

FACTUAL BACKGROUND

1. The government's investigation and prosecution of Sachtleben for disclosing information to members of the news media.

Sachtleben was employed as a Special Agent Bomb Technician for the Federal Bureau of Investigation ("FBI") from in or about 1983 through in or about 2008, during which time he held a Top Secret security clearance and was assigned to a number of FBI terrorism related investigations. *See* Statement of Offense, *United States v. Sachtleben*, No. 1:13-cr-0200-WTL-TAB ("*Sachtleben I*") (S.D. Ind. filed Sept. 23, 2013), ECF No. 7 at 2.

In September 2013, Sachtleben pled guilty in this Court to one count of unauthorized disclosure of national defense information, in violation of 18 U.S.C. § 793(d), and one count of unauthorized possession and retention of national defense information, in violation of 18 U.S.C. § 793(e) (hereinafter, the "National Security Charges"). *See* Plea Agreement, *Sachtleben I* (S.D. Ind. filed Sept. 23, 2013), ECF No. 6 (the "Plea Agreement"). Simultaneously, Sachtleben pled guilty in this Court in a separate matter, *United States v. Sachtleben*, No. 1:12-cr-00127-WTL-TAB (S.D. Indiana) ("*Sachtleben II*"), to one count of distribution of child pornography in

violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). *See* Superseding Plea Agreement, *Sachtleben II* (S.D. Ind. filed Sept. 23, 2013), ECF No. 67. In November 2013, the Court accepted Sachtleben's guilty pleas in both cases. He was sentenced to 43 months' imprisonment for each of the National Security Charges, to be served concurrently. He was sentenced to 97 months' imprisonment on each child pornography count, to be served concurrently, and ordered to pay a $200 assessment. *See* Judgment, *Sachtleben I* (S.D. Ind. filed Nov. 20, 2013), ECF No. 27; Judgment, *Sachtleben II* (S.D. Ind. filed Nov. 20, 2013), ECF No. 82.

According to the government, Sachtleben's charges and subsequent guilty plea arose out of two separate criminal investigations—one involving child pornography and the other national security—that were initiated by different investigators and prosecutors six hundred miles apart. *See* Government's Combined Sentencing Memorandum, *Sachtleben I* (S.D. Ind. filed Oct. 21, 2013), ECF No. 20 at 1 (the "Government's Sentencing Memorandum"). According to the government, on May 11, 2012, Sachtleben was arrested on charges of distribution and possession of child pornography, and on November 7, 2012, Sachtleben filed a petition to enter a guilty plea to those charges. *Id*. at 2. Subsequently, Sachtleben was informed that he was the target of a separate national security criminal investigation based in Washington, D.C. *Id*. at 3. The government and Sachtleben agreed to present the parties' plea agreements to this Court in a single proceeding. *Id*.

The National Security Charges arose out of a government investigation into, *inter alia*, Sachtleben's communications with at least one reporter. Although it does not identify the reporter by name, the Statement of Offense to which Sachtleben pled guilty references Sachtleben's communications with a "Reporter A." *See* Statement of Offense at 3–7.

According to the Statement of Offense, Sachtleben retired from the FBI in 2008 and was rehired as a contractor, during which time he continued to have regular access to classified and national defense information. *See* Statement of Offense at 2. The Statement of Offense states that beginning in or about the fall of 2009, Sachtleben developed a "source-reporter relationship" with Reporter A that initially focused on Sachtleben's contract work on the FBI's National Improvised Explosives Familiarization ("NIEF") training program. *Id*. at 3. According to the Statement of Offense, in or about January 2010 through in or about May 2012, Sachtleben provided Reporter A with information beyond the NIEF program. *Id*.

The Statement of Offense sets out the following related to the alleged disclosure of information concerning the disruption of a planned suicide bomb attack on a U.S. airline, and the recovery of a bomb in connection with that plot: On or about April 30, 2012, the bomb arrived at an FBI laboratory for forensic analysis. *Id*. On or about May 2, 2012, Sachtleben used his FBI-issued badge to enter the examination space where the bomb was being examined; he also logged into the FBI's classified computer system from a computer terminal located across the hallway from the examination space. *Id*. at 5. Hours later, Sachtleben and Reporter A spoke by telephone. *Id*. at 5–6. That afternoon, Reporter A and another reporter from Reporter A's news organization contacted government officials and stated that they knew that the United States had intercepted a bomb from Yemen and that the FBI was analyzing the bomb; at the time, both facts constituted classified national defense information. *Id*. at 6.

According to the Statement of Offense, beginning on May 7, 2012, multiple news organizations published articles about the disrupted suicide bomb plot, and the lead article was published by Reporter A's news organization on May 7, 2012 at 4 p.m., and was entitled "US: CIA Thwarts New al-Qaida Underwear Bomb Plot." *Id*. On May 7, 2012, The Associated Press

published an article with that title that was authored by reporters Adam Goldman and Matt Apuzzo. *See* Adam Goldman and Matt Apuzzo, *US: CIA Thwarts New al-Qaida Underwear Bomb Plot*, Yahoo (May 7, 2012), *available at* https://yhoo.it/2iKu6VL.

According to the Statement of Offense, Sachtleben willfully possessed and retained in his residence numerous pieces of classified documents stored on electronic media. Statement of Offense at 7. One CD/DVD containing a "Secret" classification marking was seized in or about May 2012 in connection with the child pornography investigation. *Id*.

The government's investigation and prosecution of Sachtleben for disclosing information to members of the news media were immediate subjects of intense public interest. The media reported extensively on the Sachtleben Matter. *See, e.g.*, Sari Horwitz, *Former FBI Agent to Plead Guilty in Leak to AP*, Wash. Post (Sept. 23, 2013), *available at* http://wapo.st/2jt5kv0; *Former FBI Agent Sentenced to Three Years in Prison for Associated Press Leak*, Guardian (Nov. 14, 2013), *available at* http://bit.ly/2iP2uif. Although the Sachtleben Matter ended years ago, public interest in the case has been ongoing, periodically spurred by similar high-profile leak investigations and President Obama's recent commutation of Chelsea Manning's sentence. *See* Amy Davidson, *Five Reasons that President Obama was Right to Commute Chelsea Manning's Sentence*, New Yorker (Jan. 18, 2017), *available at* http://bit.ly/2jc0qBR; Matt Apuzzo, *Ex-C.I.A. Officer Sentenced in Leak Case Tied to Times Reporter*, N.Y. Times (May 11, 2015), *available at* https://nyti.ms/2jE4PQS.

2. Search Warrant Materials, PR/TT Materials, and Section 2703(d) Materials related to the Sachtleben Matter remain under seal.

Documents filed with the Court in the Sachtleben prosecution indicate that the government sought and obtained search warrants, and likely also obtained pen register or trap

and trace orders,[1] and/or Section 2703(d) orders[2] from the district court in the course of its national security investigation of Sachtleben. The sentencing memorandum submitted by the government references "emails, text messages, and conversations" between Sachtleben and Reporter A. *See* Government's Sentencing Memorandum at 11. The Statement of Offense quotes extensively from text messages sent between Sachtleben and Reporter A. *See* Statement of Offense at 3–7. According to the government, "[t]he emails and text messages between Sachtleben and Reporter A . . . were obtained from Sachtleben's electronic devices." *Id*. at 3; Government's Sentencing Memorandum at 11 n.1. Moreover, according to news reports, investigators were only able to identify Sachtleben as a suspect after secretly obtaining phone records from The Associated Press. *See* Charlie Savage, *Former F.B.I. Agent to Plead Guilty in Press Leak*, N.Y. Times (Sept. 23, 2013), *available at* https://nyti.ms/1z5TbSC.

The Reporters Committee is not aware of any search warrants, orders authorizing the use of pen registers and/or trap and trace devices, or Section 2703(d) orders, or any applications or other materials related thereto, connected to the Sachtleben Matter that have been unsealed. The Reporters Committee therefore requests that such court records—including the relevant dockets and docket sheets—be unsealed, and that, to the extent necessary to facilitate such unsealing, the

[1] Pen registers and trap and trace devices are law enforcement surveillance tools the use of which is governed by 18 U.S.C. §§ 3121–3127 (the "Pen Register Act" or "PRA"). "Pen registers record telephone numbers, e-mail addresses, and other dialing, routing, addressing, or signaling information that is transmitted by instruments or facilities—such as telephones or computers—that carry wire or electronic communications." OIG, *A Review of the FBI's Use of Pen Register and Trap and Trace Devices Under the Foreign Intelligence Surveillance Act in 2007 through 2009 — Executive Summary* at 1 (June 2015), *available at* https://oig.justice.gov/reports/2015/o1506.pdf. "Trap and trace devices record similar information that is *received* by such instruments or facilities." *Id*. (emphasis added).

[2] Under 18 U.S.C. § 2703 of the Stored Communications Act ("SCA") a court may issue an order authorizing the government to require electronic communication service or remote computing service providers to disclose the contents of a subscriber or consumer's wire or electronic communications in electronic storage for more than 180 days and certain communications metadata related to a subscriber or customer. 18 U.S.C. § 2703(a), (b)(1), (c)(1)-(2).

U.S. Attorney's Office be directed to provide a list of the specific docket numbers associated with the applications and orders sought to be unsealed by this Application.

ARGUMENT

I. The press and the public have a powerful interest in access to the sealed Warrant Materials, PR/TT Materials, and Section 2703(d) Materials.

Openness is "an indispensable attribute" of our judicial system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). It guards against unfairness and inequity in the application of laws, as "the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"). "Public scrutiny over the court system serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding." *In re Associated Press*, 162 F.3d 503, 506 (7th Cir. 1998) ("*In re Associated Press*"). "Not only do [judicial] records often concern issues in which the public has an interest, in which event concealing the records disserves the values protected by the free-speech and free-press clauses of the First Amendment, but also the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret." *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002); *see also Carlson v. United States*, 837 F.3d 753, 759 (7th Cir. 2016) (explaining that records filed in court are presumptively open to the public).

The U.S. Supreme Court has also recognized that the news media plays a vital role in facilitating public monitoring of the judicial system.

> A responsible press has always been regarded the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the

> police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). Thus, "[w]hile media representatives enjoy the same right of access as the public," they often "function[] as surrogates for the public" by, for example, attending proceedings, reviewing court documents, and reporting on judicial matters to the public at large. *Richmond Newspapers*, 448 U.S. at 573.

For these reasons, it is well-settled that the public and the press have a right of access to court documents, generally, that arises from the public's interest in observing the consideration and disposition of matters by federal courts. *See Union Oil Co. of California v. Leavell,* 220 F.3d 562, 567–68 (7th Cir. 2000) (noting that "[j]udicial proceedings are public rather than private property, . . . and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible" (internal citations omitted)).

The public's right of access is especially strong in matters, like the Sachtleben Matter, that concern actions taken by the executive branch. As the U.S. Court of Appeals for the Seventh Circuit has explained, "'in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch.'" *Smith v. United States Dist. Court for S. Dist*., 956 F.2d 647, 650 (7th Cir. 1992) (quoting *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987)) ("*Smith*"); *see also United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (noting that the right to access public documents is "critical to our type of government in which the citizenry is the final judge of the proper conduct of public business" (internal quotations omitted)); *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) (stating the "courts must impede scrutiny of the exercise of [judicial] judgment only in the rarest of circumstances," especially "when a judicial decision accedes to the requests of a coordinate branch").

Moreover, the press and the public have a particularly powerful interest in obtaining access to the specific court records that are the subject of this Application. The Reporters Committee seeks to unseal court records relating to judicial authorization for the government's use of certain electronic surveillance tools—a process that is generally shrouded in secrecy. And it seeks access to such records in connection with a closed investigation in which the government obtained, through search warrants, email communications with multiple journalists. Public access to still sealed court records concerning search warrants, orders authorizing the use of pen registers and trap and trace devices, and Section 2703(d) orders in connection with the Sachtleben Matter will provide the public and the press with much-needed insight into the government's use of electronic surveillance tools in leak investigations in general, and in connection with the Sachtleben Matter, specifically.

II. The press and the public have a constitutional and common law right to access the sealed Search Warrant Materials, PR/TT Materials, and Section 2703(d) Materials.

"[T]he public's right of access to court proceedings and documents is well-established." *In re Associated Press*, 162 F.3d at 506 (quoting *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)). This right is "[b]orn of the common law," but "also has constitutional underpinnings." *Id.*; *see also Matter of Cont'l Illinois Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (stating that the public's right to access judicial records is "fundamental to a democratic state" and "of constitutional magnitude" (internal quotations omitted)).

The common law creates a presumption of access to all judicial records and documents in both civil and criminal cases. *See Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978); *Smith*, 956 F.2d at 650 (stating that the First Circuit has clearly defined "judicial records" as "materials on which a court relies in determining the litigants' substantive rights" (internal quotations

omitted)); *see also United States v. Blagojevich*, 612 F.3d 558, 563 (7th Cir. 2010) (stating that there is a common-law right of access to "information that affects the resolution of federal suits"). Under Seventh Circuit precedent, whether the First Amendment also affords a right of access to a document at any particular stage in the criminal process turns on considerations of "experience and logic," *i.e.* (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." *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 9 (1986) ("*Press-Enterprise II*"); *In re Associated Press*, 162 F.3d at 506. If both questions are answered affirmatively, the constitutional right of access applies. *Id*.

A. The First Amendment and common law rights of access apply to the Search Warrant Materials.

1. *The public has a First Amendment right of access to the Search Warrant Materials.*

The Seventh Circuit has never considered whether the First Amendment right of access attaches to search warrant materials where, as here, the government's investigation and prosecution have concluded. The Eighth Circuit has held that there is a First Amendment presumption of access to search warrant materials once a warrant has been executed, *see In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) ("*In re Gunn*"), and courts within the Ninth Circuit have recognized a First Amendment right of access to search warrant materials in closed investigations, *see United States v. Loughner*, 769 F. Supp. 2d 1188, 1195 (D. Ariz. 2011) (finding a qualified First Amendment right of access to search warrant materials after criminal investigation had concluded); *United States v. Kott*, 380 F. Supp. 2d 1122, 1124–25 (C.D. Cal. 2004), *aff'd on other grounds*, 135 Fed. Appx. 69 (9th Cir. 2005).

Courts that have rejected claims of access under the First Amendment to search warrant materials have done so in cases involving an ongoing government investigation. *See Times Mirror Co. v. United States*, 873 F.2d 1210, 1221 (9th Cir. 1989) (denying pre-indictment access to search warrants); *United States v. All Funds on Deposit at Wells Fargo Bank*, 643 F. Supp. 2d 577, 580, 583 (S.D.N.Y. 2009) (finding no First Amendment right of access to affidavits supporting search warrant applications "at this juncture," when government was still "actively investigating matters discussed in the affidavits"). For example, in *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 62 (4th Cir. 1989) ("*Baltimore Sun*"), the Fourth Circuit considered "whether either the first amendment or the common law confers a qualified right of access to inspect and copy affidavits supporting search warrants *in the interval between execution of the warrants and indictment*." (Emphasis added.) It held that an affidavit filed in support of a search warrant application was a "judicial record" to which a qualified common law right of access applies pre-indictment, but it rejected a claim for access to such an affidavit under the First Amendment. *Id*. at 64–65 (noting that such an affidavit "may describe continuing investigations, disclose information gleaned from wiretaps that have not yet been terminated, or reveal the identity of informers whose lives would be endangered").

To Applicant's knowledge, the sole case in this Circuit to address access to search warrant materials in any respect is *In re EyeCare Physicians of America*, 910 F. Supp. 414 (N.D. Ill. 1996), *aff'd sub nom. In re EyeCare Physicians of America*, 100 F.3d 514 (7th Cir. 1996)—a case involving a pre-indictment motion by the target of a grand jury investigation to unseal an affidavit in support of a search warrant. "[P]refer[ing] the approach taken by the Fourth Circuit" in *Baltimore Sun*, the district court in *In re EyeCare Physicians of America* recognized a qualified common law right of access to the affidavit. *Id*. at 415 (stating that the district court

"was most concerned with protecting the common law right to inspect and copy judicial records"). After reviewing the affidavit in question, the district court adopted a magistrate judge order denying the motion for access, concluding that sealing of the affidavit at the pre-indictment stage was necessary to protect the government's ongoing investigation, and thus that the common law right had been overcome. *Id*. at 416–17 (but expressing concern regarding the "length of time between the execution of the search warrant . . . and the present (more than a year)" and noting that the "extraordinary step of sealing judicial records . . . cannot last forever.") On appeal, the Seventh Circuit affirmed. It agreed with the district court that the affidavit was subject to the common law right of access, and that the common law right had been overcome in light of the risk disclosure would pose to the "ongoing investigation." *In re EyeCare Physicians of America*, 100 F.3d at 515, 519. The Seventh Circuit's opinion in *In re EyeCare Physicians of America* did not address the First Amendment right of access. *See id*. at 515–19.

Experience and logic dictate that the First Amendment right of access applies to the Search Warrant Materials at issue here. The government has concluded its investigation and prosecution of Sachtleben, who pled guilty and was sentenced in 2013. As other courts have recognized, such post-investigation search warrant materials "have historically been available to the public." *In re Application of N.Y. Times*, 585 F. Supp. 2d 83, 88 (D.D.C. 2008). In addition, public access to the Search Warrant Materials will play "a significant positive role in the functioning" of the process at issue. *Press-Enterprise II*, 478 U.S. at 8. Public access will "serve[] as a check on the judiciary," *In re Application of N.Y. Times*, 585 F. Supp. 2d at 90, as well as a potential "curb on prosecutorial . . . misconduct," *In re Gunn*, 855 F.2d at 573.

2. *The public has a common law right of access to the Search Warrant Materials.*

As noted above, the Seventh Circuit has already recognized the public's common law right of access to search warrant materials. *See In re EyeCare Physicians of America*, 100 F.3d at 517. Other federal courts of appeals have likewise almost uniformly found that search warrant materials—particularly those from closed investigations like the Sachtleben Matter—are judicial records to which the common law right of access applies. *See In re Search of Fair Finance*, 692 F.3d 424, 433 (6th Cir. 2012); *United States v. Business of Custer Battlefield Museum and Store*, 658 F.3d 1188, 1192 (9th Cir. 2011); *In re Application of Newsday, Inc.,* 895 F.2d 74, 79 (2d Cir. 1990) (a search warrant application is "a public document subject to a common law right of access" at the post-investigation stage); *Matter of Application & Affidavit for a Search Warrant*, 923 F.2d 324, 330 (4th Cir. 1991) (recognizing the public's common law right of access to a search warrant affidavit before trial and finding that the public had "significant interests" in access, and "[i]n the context of the criminal justice system, these interests may be magnified."); *Baltimore Sun*, 886 F.2d at 64–65.

While the Seventh Circuit in *In re EyeCare Physicians of America*, 100 F.3d 514, affirmed a district court order maintaining search warrant affidavits under seal, it did so at the pre-indictment stage, and made clear that it did so because the investigation at issue was ongoing. *Id*. at 517–19 (explaining that if the search warrant affidavits were unsealed while the investigation was ongoing "the identity of unnamed subjects not yet charged would be revealed; there may be mistaken notions concerning who might and might not be cooperating with the government or who may be subjects; there may be misunderstandings about the parameters of the government's investigation; the privacy of the innocent and the implicated would be threated; and the cooperation of present and potential witnesses could be compromised or influenced").

None of these concerns are applicable here. Because the investigation and prosecution of Sachtleben have long-since concluded, the Search Warrant Materials should be unsealed pursuant to the common law right of access to judicial records.

B. The First Amendment and common law rights of access apply to the Section 2703(d) and PR/TT Materials.

1. *The public has a First Amendment right of access to the Section 2703(d) and PR/TT Materials.*

The Section 2703(d) Materials and PR/TT Materials at issue here are analogous to search warrant materials from closed investigations. As discussed above, other courts have held that search warrant materials are subject to the First Amendment right of access in the post-investigation context. *See, e.g., Loughner*, 769 F. Supp. 2d at 1195. Applying the experience and logic test, the First Amendment right of access applies to both the Section 2703(d) Materials and PR/TT Materials.

First, the tradition of public access to post-investigation search warrant materials applies to the Section 2703(d) Materials and PR/TT Materials. *See U.S. v. El-Sayegh,* 131 F.3d 158, 161 (D.C. Cir. 1997) (stating that "[a] new procedure that substituted for an older one would presumably be evaluated by the tradition of access to the older procedure"); *see also United States v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1998) (noting that the experience prong may be satisfied by establishing a history of access to information "reasonably analogous" to the information sought). As the D.C. district court recognized in *In re Application of N.Y. Times*, "post-investigation warrant materials . . . have historically been available to the public," as shown by the "routine historical practice" of filing warrant applications and receipts with the clerk of court without seal. *See In re Application of N.Y. Times*, 585 F. Supp. 2d at 88. Moreover, that court found that the historic common law right of access to warrant materials,

which was "an appropriate consideration to take into account when examining the scope of First Amendment," also "weigh[ed] strongly in favor of a First Amendment qualified right of access to warrant materials." *Id*. at 89. Because the Section 2703(d) and PR/TT Materials are analogous to search warrant materials, they should be evaluated by this same historic tradition of access. *See El-Sayegh*, 131 F.3d at 161; *Gonzales*, 150 F.3d at 1256.

Second, as with post-investigation search warrants, logic strongly supports a First Amendment right of access to the Section 2703(d) and PR/TT Materials at issue here. *See In re Application of N.Y. Times*, 585 F. Supp. 2d at 90 ("Specifically, with respect to warrants, openness plays a significant positive role in the functioning of the criminal justice system, at least in the post-investigation stage."). Indeed, because Section 2703(d) orders and orders authorizing the use of PR/TT devices function like warrants, but may be obtained on a showing *lower* than the probable cause standard that must be satisfied to obtain a search warrant under Federal Rule of Criminal Procedure 41, *see* 18 U.S.C. § 2703(d) and 18 U.S.C. § 3123(a)(1), access to such materials arguably plays an even *more* "significant positive role in the functioning of the criminal justice system." *In re Application of N.Y. Times Co.,* 585 F. Supp. 2d at 90.[3] Access to the Section 2703(d) and PR/TT Materials at issue here will allow the public to scrutinize the arguments the government put forth in support of their applications for Section 2703(d) orders and orders authorizing the use of PR/TT devices in connection with its investigation of Sachtleben, as well as the basis for any court order granting or denying such

[3] Orders authorizing the installation and use of PR/TT devices may be obtained *ex parte* by the government on a certification that "the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation." 18 U.S.C. § 3123(a)(1). A Section 2703(d) order may be issued "if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

applications. Thus, such access will allow the public to serve as a check on prosecutors and ensure that judges are not "serving as a rubber stamp" for the issuance of such orders, *In re Application of N.Y. Times*, 585 F. Supp. 2d at 90, consistent with the principle that "[w]hat happens in the halls of government is presumptively public business." *Union Oil Co. of California*, 220 F.3d at 568; *see also In re Gunn*, 855 F.2d at 573.

To date, no federal court of appeals has squarely addressed the question of whether the First Amendment right of access applies to Section 2703(d) orders in the context of a closed investigation. The only federal court of appeals to address access to Section 2703(d) orders, the Fourth Circuit, did so in the context of an ongoing criminal investigation and concluded that the First Amendment right of access did not apply in that context. *In re United States for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 292 (4th Cir. 2013) ("*In re United States*"). In that case, petitioners sought access to Section 2703(d) orders and related documents at the "pre-grand jury phase of an ongoing criminal investigation." *Id.* at 286. Again, in contrast, there is no ongoing investigation here; Sachtleben was indicted, he pled guilty, and he was sentenced. Accordingly, *In re United States* is distinguishable.

2. *The public has a common law right of access to the Section 2703(d) and PR/TT Materials.*

The common law right of access clearly applies to the Section 2703(d) and PR/TT Materials. As with search warrant materials, Section 2703(d) orders and orders authorizing the use of PR/TT devices, as well as any subsequent, related court orders, are judicial records. *See, e.g., In re United States*, 707 F.3d at 290 ("[I]t is commonsensical that judicially authored or created documents are judicial records"). Keeping with this principle, courts have held that the common law right of access attaches to Section 2703(d) orders, as well as orders authorizing the use of PR/TT devices. *See id.* at 290 (stating that the court had "no difficulty holding that the

actual § 2703(d) orders and subsequent orders issued by the court are judicial records"); *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d)*, 830 F. Supp. 2d 114, 151–52 (E.D. Va. 2011) (applying the common law right of access balancing test to materials related to a Section 2703(d) order); *In re Sealing & Non-Disclosure of PR/TT/2703(D) Orders*, 562 F. Supp. 2d 876, 891 (S.D. Tex. 2008) (writing that "opinions, orders, judgments, docket sheets, and other information related to the court's public functions" are in the "top drawer of judicial records" that are "hardly ever closed to the public"). Accordingly, the Section 2703(d) orders, orders authorizing the use of PR/TT devices, and any subsequent, related court orders issued in connection with the Sachtleben investigation and prosecution are judicial records subject to a strong presumption of access under the common law.

In addition, just as applications and supporting affidavits for search warrants are judicial records, applications and supporting affidavits for Section 2703(d) orders and orders authorizing the use of PR/TT devices are likewise judicial records because, among other things, they are considered by the court in determining whether to issue the order being sought by the government. *See Baltimore Sun Co.*, 886 F.2d at 64; *In re United States*, 707 F.3d at 290 (holding that motions filed under Section 2703(d) were judicial records because they were filed with the objective of obtaining judicial action or relief pertaining to Section 2703(d) orders); *see also Blagojevich*, 612 F.3d at 563 (noting that the common law right applies to "information that affects the resolution of federal suits"). Section 2703(d) provides that the court shall issue a Section 2703(d) order "only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe" the communications content or communications metadata "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Thus, the applications and supporting affidavits form the basis for the court's

determination of whether the government has met the statutory standard for issuance of a Section 2703(d) order, which is "essentially a reasonable suspicion standard." *In re United States*, 707 F.3d at 287. Likewise, before a court enters an order authorizing the installation and use of a pen register or trap and trace device, it must conclude that "the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation." 18 U.S.C. § 3123(a)(1). The government's application thus plays a decisive role in the court's determination as to whether use of a PR/TT device should be authorized or a Section 2703(d) order issued.

Finally, motions related to Section 2703(d) orders and PR/TT orders other than applications also play a key role in the adjudicatory process and therefore are judicial records. Such derivative motions are filed with the objective of obtaining judicial action or relief, and the court relies upon such filings in granting or denying the relief sought. Consistent with this reasoning, the Fourth Circuit has held that derivative Section 2703(d) motions are judicial records because they play a role in the adjudicative process; namely, "they were filed with the objective of obtaining judicial action or relief pertaining to § 2703(d) orders." *In re United States*, 707 F.3d at 291. For these reasons, any derivative Section 2703(d) and PR/TT motions are judicial records to which the common law right of access applies.

III. The press and the public have both a constitutional and common law right to access the court dockets for the Search Warrant Materials, PR/TT Materials, and Section 2703(d) Materials.

Both the constitutional and common law rights of access extend to court dockets reflecting court records or proceedings related to search warrants, PR/TT devices, and Section 2703(d) orders. The common law right extends to dockets because sealing dockets in their entirety creates a "two-tier system, open and closed," that erodes "[c]onfidence in the accuracy

of [the court's] records" and "the authority of its rulings and respect due its judgments." *CBS, Inc. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 765 F.2d 823, 826 (9th Cir. 1985). In addition, several Circuits have recognized that the constitutional right of access also extends to court dockets. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93–94 (2d Cir. 2004) (holding that docket sheets in civil and criminal proceedings "enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them"); *Doe v. Pub. Citizen*, 749 F.3d 246, 268 (4th Cir. 2014) (holding that there is a First Amendment right of access to dockets in civil proceedings); *Tri-Cty. Wholesale Distributors, Inc. v. Wine Grp., Inc.*, 565 F. App'x 477, 490 (6th Cir. 2012) ("The First Amendment access right extends to court dockets, records, pleadings, and exhibits . . ."). The public and the press therefore have a right to access the docket sheets reflecting the Search Warrant, Section 2703(d), and PR/TT Materials.

IV. The Government cannot meet its burden to overcome the presumption of access to the Search Warrant Materials, PR/TT Materials, and Section 2703(d) Materials.

A. The government cannot demonstrate a compelling interest that justifies the continued sealing of the Search Warrant, Section 2703(d), and PR/TT Materials.

Although the First Amendment right of access is not absolute, overcoming the presumption is a "formidable task." *In re Associated Press*, 162 F.3d at 506. A document to which the First Amendment right of access applies may remain under seal only if "specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press–Enterprise II*, 478 U.S. at 13–14 (quoting *Press–Enterprise I*, 464 U.S. at 510). Thus, the presumption of disclosure may be overridden only if: (1) there is "an overriding interest likely to be prejudiced by an open courtroom," (2) the closure sought is "no broader than is necessary to protect that interest," (3) the trial court has

considered "alternatives to closure," and (4) the trial court made "findings sufficient to support the closure." *United States v. Sonin*, 167 F. Supp. 3d 971, 978 (E.D. Wis. 2016) (citing *Waller v. Georgia*, 467 U.S. 39, 48 (1984) and *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004)). "In applying this test, courts have held that any doubts must be resolved in favor of disclosure." *Id*. (internal quotations omitted).

Because the government's investigation and prosecution of Sachtleben has concluded, there can be no compelling interest in the continued sealing of the Search Warrant, Section 2703(d), and PR/TT Materials. Moreover, even assuming *arguendo* that the government could identify some compelling interest that justified sealing some portion of the Search Warrant, Section 2703(d), or PR/TT Materials, redaction—not wholesale sealing—would be warranted. *See Press-Enterprise I*, 464 U.S. at 510 (closure of records must be narrowly tailored to serve the compelling government interest); *In re Application of N.Y. Times*, 585 F. Supp. 2d at 91.

B. The government cannot overcome the common law presumption in favor of disclosure of the Search Warrant, Section 2703(d), and PR/TT Materials.

The common law creates a "strong presumption in favor of public access," "that can be counter-balanced by other considerations." *Smith*, 956 F.2d at 650. Under the common law right of access, the party seeking access to a document first identifies "a proper interest in the information it seeks." *United States v. Corbitt*, 879 F.2d 224, 227 (7th Cir. 1989). "Once such an interest is shown, a presumption arises that disclosure is appropriate; the party opposing disclosure may only defeat the presumption by identifying, with specificity, interests in confidentiality which outweigh the right of access." *Id*. In evaluating interests in confidentiality, courts in the Seventh Circuit will consider, *inter alia*, whether there is an "on-going criminal trial where a defendant's right to a fair trial might be prejudiced," *Smith*, 956 F.2d at 650, whether the request is "an attempt to open divorce papers in order to spread scandal, or anything of the kind,"

id., whether "the court had already permitted considerable public access to the contents of the records in questions, . . . [and] whether further access would appreciably enhance public understanding of an important historical occurrence," *United States v. Edwards*, 672 F.2d 1289, 1293 (7th Cir. 1982) (internal quotations omitted). *See also In re Associated Press*, 162 F.3d at 511. The common law right to access "should be denied only where actual, as opposed to hypothetical, factors demonstrate that justice so requires." *Edwards*, 672 F.2d at 1290.

Applying this standard, the Search Warrant, Section 2703(d), and PR/TT Materials should be unsealed. First, the public interest in access to the Search Warrant, Section 2703(d), and PR/TT Materials is exceptionally strong. As the Seventh Circuit has recognized, a "proper interest" in seeking to unseal information under the common law right of access includes "the citizen's desire to keep a watchful eye on the workings of public agencies." *Corbitt*, 879 F.2d at 227 (quotations omitted). The sealed materials at issue here are sought for that purpose. Specifically, the materials would inform the public's understanding of the Sachtleben Matter, one of a number of high-profile leak prosecutions pursued by the government under the Obama Administration. The Sachtleben prosecution and investigation were the subjects of considerable public attention, and the public has "legitimate concerns about methods and techniques of [that] . . . investigation," *Matter of Application and Affidavit for a Search Warrant*, 923 F.2d at 330, including how the government obtained and used search warrants, Section 2703(d) orders, and pen registers and trap and trace devices. *See also Nixon*, 435 U.S. at 597–98 (recognizing two "interest[s] necessary to support the issuance of a writ of compelling access": public oversight of public agencies and an intention to publish information concerning the operation of government).

Second, there are minimal, if any, interests in confidentiality here. As explained above, there is no ongoing criminal trial or investigation in the Sachtleben Matter. The Sachtleben

Matter has concluded, and Sachtleben has been sentenced. Moreover, none of the court records at issue are being sought for an improper purpose; the Reporters Committee seeks access to them for the benefit of the press and public at large. In addition, some of the information sought is already in the public forum. The public knows that Sachtleben's email communications were a target of search warrants, that he was indicted for allegedly disclosing national defense information to journalists, and that he pled guilty to related criminal charges. Accordingly, even though the Search Warrant, Section 2703(d), and PR/TT Materials are sealed, much of their underlying subject matter is in the public forum, weighing in favor of disclosure.

In sum, because the common law balancing test weighs heavily in favor of disclosure and no factors weigh against disclosure, the Court should grant the Reporters Committee's Application to unseal the Search Warrant, Section 2703(d), and PR/TT Materials.

CONCLUSION

The Court should, for the foregoing reasons, grant the Reporters Committee's Application for an order unsealing the Search Warrant, Section 2703(d), and PR/TT Materials.

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Respectfully submitted,

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