

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION**

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

1156 15th Street NW
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Washington, D.C. 20005

Misc. Action No. _____

Related to:
Criminal No. 1:10-cr-00181-RDB

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 Thomas Andrews Drake (“Drake”) (hereinafter, the “Drake 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, 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. §§ 2701–2712, relating to the Drake 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, relating to the Drake 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 Drake 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 associated 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 Drake, a former National Security Agency (“NSA”) officer who, in 2010, was indicted under the Espionage Act for charges that arose from a government investigation into his alleged encrypted email communications with a journalist.

BACKGROUND FACTS

7. Applicant is informed and believes that Drake was an employee at the NSA from 2001 through 2008, during which time he held a Top Secret security clearance. *See Statement of Facts, United States v. Drake*, No. 1:10-cr-00181-RDB (“*Drake*”) (D. Md. filed Jun. 10, 2011), ECF No. 158, at ¶ 1 (the “Statement of Facts”).

8. On or about April 14, 2010, Drake was indicted on five counts of willful retention of national defense information in violation of 18 U.S.C. § 793(e); one count of obstruction of justice in violation of 18 U.S.C. § 1519; and four counts of making false statements in violation of 18 U.S.C. § 1001(a). *See Indictment, Drake* (D. Md. filed Apr. 14, 2010), ECF No. 1 (the “Indictment”).

9. On or around June 10, 2011, the government decided not to pursue the ten original charges. *See Motion to Dismiss the Indictment at the Time of Sentencing, Drake* (D. Md. filed Jun. 10, 2011), ECF No. 155, at 2. The government and Drake entered into a plea agreement pursuant to which Drake pleaded guilty to a single count of exceeding his unauthorized use of an agency computer in violation of 18 U.S.C. § 1030(a)(B). *See Criminal Information, Drake* (D. Md. filed Jun. 10, 2011), ECF No. 157; *Plea Agreement, Drake* (D. Md. filed Jun. 10, 2011), ECF No. 158 (“Plea Agreement”).

10. On or about July 15, 2011, the Court accepted Drake’s guilty plea, sentenced him to one year of probation and 240 hours of community service, and ordered him to pay a \$25 assessment. *See Judgment, Drake* (D. Md. filed Jul. 15, 2011), ECF No. 169.

11. According to the Statement of Facts to which Drake stipulated in connection with his plea agreement, during his employment at the NSA, Drake had access to classified computer systems, such as the NSA’s internal intranet, NSANet. *See Plea Agreement*, ECF No. 158, at Statement of Facts ¶ 1. The Statement of Facts also states that Drake, from in or about February 2006 through approximately March 2007, intentionally accessed NSANet, obtained official NSA information, and provided said information orally and in writing to another person not permitted or authorized to receive the information. *Id.* at ¶ 4. According to the Indictment filed by the government, Drake used a secure email service called Hushmail to communicate with an individual identified therein as “Reporter A.” *See Indictment*, ECF No. 1, at ¶ 11.

12. Multiple news stories reported that “Reporter A” was Siobhan Gorman, a former reporter for the *Baltimore Sun* who covered intelligence agencies. *See, e.g., Scott Shane, Former N.S.A. Official is Charged in Leaks Case*, N.Y. Times (Apr. 15, 2010), at <http://nyti.ms/1BQCo4B>; Marc Ambinder, *NSA Employee Indicted for ‘Trailblazer’ Leaks*, The

Atlantic (Apr. 15, 2010), at <https://perma.cc/RVP9-WTGN>. In 2006 and 2007, the *Baltimore Sun* published a series of articles by Gorman discussing waste and mismanagement problems at the NSA (the “Gorman Articles”). *See* Ellen Nakashima, *Former NSA Executive Thomas A. Drake May Pay High Price for Media Leak*, Wash. Post (Jul. 14, 2010), at <https://perma.cc/4ABQ-7TE3>; *see also* Siobhan Gorman, *Management Shortcomings Seen at NSA*, Baltimore Sun (May 6, 2007), at <https://perma.cc/8358-AZME>; Siobhan Gorman, *NSA Rejected System That Sifted Phone Data Legally*, Baltimore Sun (May 18, 2006), at <https://perma.cc/XZP7-B82C>. News stories also reported that during his tenure at the NSA, Drake used sanctioned channels to lodge complaints about waste, mismanagement, and privacy violations at the NSA, but believed that his concerns were not addressed. *See* Nakashima, *supra*; David Welna, *Before Snowden: The Whistleblowers Who Tried to Lift the Veil*, NPR (Jul. 22, 2014), at <https://perma.cc/T7F7-GZAE>.

13. Applicant is informed and believes that, following Drake’s indictment, the parties engaged in discovery; the government filed a series of status reports with the Court concerning that discovery. In advance of a telephonic status conference scheduled for August 27, 2010, the government filed the first such status report describing discovery materials it had provided to Drake. *See* Discovery Update, *Drake* (D. Md. filed Aug. 26, 2010), ECF No. 22, at 2–4 (“First Status Report”). That report indicates that, in the course of its investigation, the government gathered phone records, applied for and executed search warrants, gathered the results of search warrants, collected emails sent to and from Drake’s NSA email address, and seized roughly fifteen computer hard drives from Drake’s home. *Id.* Approximately one month later, in advance of a discovery status conference scheduled for September 24, 2010, the government filed a second discovery update describing outstanding discovery disputes and acknowledging

the existence of more specific categories of discovery, such as emails between Drake and Reporter A. *See* Second Status Report, *Drake* (D. Md. filed Sep. 23, 2010), ECF No. 23, at 2–3 (“Second Status Report”). True and correct copies of the First and Second Status Reports are attached hereto as Exhibits 1 and 2, respectively.

14. The First and Second Status Reports indicate that the government sought and obtained search warrants in connection with its investigation of Drake. *See* Exhibits 1 and 2.

15. In addition to search warrants, it is likely that the government also sought and obtained 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 Drake Matter.

16. Because the government in its Indictment and Second Status Report refer to communications between Drake and “Reporter A,” those filings indicate that the government used electronic surveillance tools to obtain communications records of a journalist in connection with its investigation and prosecution of Drake. *See generally id.*; Indictment, ECF No. 1.

17. To Applicant’s knowledge, 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, that relate to the Drake Matter have been unsealed and placed on the public docket.

18. 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 related to the Drake Matter, particularly now that the government’s investigation and prosecution of Drake has concluded.

REQUEST FOR RELIEF

19. The Reporters Committee seeks an order unsealing the Search Warrant Materials. Upon information and belief, each search warrant application related to the Drake 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 be directed to provide a list of the docket numbers associated with the Search Warrant Materials.

20. The Reporters Committee also seeks an Order unsealing the 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 Drake 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 be directed to provide a list of the docket numbers associated with the PR/TT Materials.

21. The Reporters Committee also seeks an Order unsealing the 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 Drake 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 be directed to provide a list of the docket numbers associated with the Section 2703(d) Materials.

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

ORAL ARGUMENT REQUESTED

23. The Reporters Committee respectfully requests oral argument.

Dated: January 23, 2017

Respectfully submitted,

/s/ Katie Townsend
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**Of Counsel for Applicant the Reporters
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPLICATION FOR ACCESS TO CERTAIN SEALED RECORDS** as well as the supporting Memorandum of Points and Authorities and Proposed Order were filed with the Clerk of Court, and served on counsel for the following via email and U.S. Mail:

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This the 23rd day of January, 2017.

/s/ Katie Townsend

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION**

UNITED STATES OF AMERICA

v.

THOMAS ANDREWS DRAKE,

Defendant.

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* CRIMINAL NO. 10-181(RDB)
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DISCOVERY UPDATE

The United States of America, appearing by and through its undersigned attorneys, respectfully submits the following discovery update to the Court. This update is meant to inform the Court of the status of discovery provided by the government to defendant Thomas A. Drake in advance of the telephone status conference scheduled for August 27, 2010.

Since the grand jury returned its indictment on April 14, 2010, the government, in the interest of early and fulsome disclosure, has provided the defense with unclassified discovery as well as the overwhelming majority of the classified discovery in this case. In addition, the government has gone beyond the requirements of Rule 16 of the Federal Rules of Criminal Procedure by providing early disclosure of all of the reports of interviews conducted in this case by both the Federal Bureau of Investigation and the National Security Agency's Office of Counter-Intelligence. The government has also already provided the agent notes of the interviews with defendant Drake.

A. Unclassified Discovery

The unclassified Rule 16 discovery provided to the defendant falls generally into the following categories:

- Statements of the Defendant: the government has provided redacted copies of the defendant's FBI interviews, as well as non-disclosure agreements he signed throughout his NSA career. The interview reports provided through unclassified discovery are redacted to omit those portions which contain classified information.
- Documents and Tangible Objects: the government has provided phone records, search warrant materials (including photographs), search warrant results, FOIA requests, and personnel records of the defendant.

In addition, the government has provided potential Jencks Act materials, including redacted versions of interview reports and internal communications, as well as information that could be considered impeachment information or information otherwise material and favorable to the defense under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972).

B. Classified Discovery

In conjunction with the Protective Order Regarding Classified Information entered by this Court on June 29, 2010, and working together with the Court Security Officer appointed by the Court for this case, the government has made every attempt possible to facilitate the disclosure of classified discovery to the defense. The classified discovery has augmented the unclassified discovery, for example by providing unredacted copies of the interview reports and

notes mention above. In addition, the classified discovery includes unredacted warrant materials, unredacted NSA materials, and emails sent to and from the defendant's NSA email address.

To help the defendant and his attorneys view and use this discovery, the government has at its own expense provided the defendant with a stand alone viewing station, consisting of a computer tower, monitor, keyboard, and mouse—all of which are located in a Secure Compartmented Information Facility (SCIF) which can house classified information. This station contains the unredacted discovery materials discussed above, including interview reports, agent notes, and warrant materials, as well as a wealth of additional classified information related to the defendant's employment at the NSA.

The government has also made available the physical items—other than computer hard drives, which are discussed below—seized from the searches conducted at the defendant's home. These items, many of which contain classified information, are stored at an off-site FBI location, and the defendant's attorneys have made arrangements to view these documents on August 31, 2010. There are also a limited number of potentially discoverable items housed at the NSA's offices, and the government will make those documents available to the defense for viewing as well.

C. Outstanding Issues

The main outstanding discovery issue concerns the review of the computer hard drives seized from the defendant's home. The government has provided the defendant with a list of each drive (or other digital media), and it offered to have an NSA employee unaffiliated with the prosecution solicit search terms from the defendant, search requested hard drives for responsive

files or data, and provide the search results to the defense. The defendant declined this procedure, however, and requested actual copies of the hard drives.

Due to the large number of hard drives recovered, the government has worked with the defense to reach a solution. The government has identified the two most relevant hard drives from the roughly fifteen seized, and it stands ready to provide copies of those hard drives, as well as a computer which can connect to the viewing station already installed in the SCIF. However, the defendant must be able to provide the forensic review software and hardware necessary to review these hard drives, and this software and hardware, because it will have processed classified information, must remain in the SCIF after the completion of this case. The government stands ready to further inform the Court regarding this issue as necessary.

Respectfully submitted,

/s/
William M. Welch II
Senior Litigation Counsel
Criminal Division
United States Department of Justice

John P. Pearson
Trial Attorney
Public Integrity Section
United States Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2010, I filed a copy of this motion using the Court's CM/ECF system, which will send a copy to counsel for the defendant, and I also sent a copy of this motion to counsel for the defendant by electronic mail.

s/ John P. Pearson

John P. Pearson
Trial Attorney
Public Integrity Section
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EXHIBIT 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION**

UNITED STATES OF AMERICA

v.

THOMAS ANDREWS DRAKE,

Defendant.

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* CRIMINAL NO. 10-181(RDB)
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SECOND STATUS REPORT

The United States of America, appearing by and through its undersigned attorneys, respectfully submits the following discovery update to the Court. This update is meant to inform the Court of the status of discovery in advance of the discovery status conference scheduled for September 24, 2010.

The Government believes that there will be a need to discuss any classified information at tomorrow's upcoming status conference. However, to the extent that any party believes it necessary to refer to any particular individual or NSA program other than the defendant, then the parties should refer to the pseudonyms used in the Indictment.

Since the date of the last discovery status conference, the defendant has requested, and the Government has provided, some additional discovery. On September 3, 2010, the Government provided the grand jury testimony of the two testifying special agents and associated grand jury exhibits. In addition, the Government provided a Powerpoint presentation used during a reverse proffer with the defendant and his prior counsel earlier this year. Therefore, the defendant effectively now has many, but not all, of the trial exhibits that the Government intends to introduce at trial and the prosecutive theory of the case.

In addition, counsel for defendant Drake have made several visits to review the evidence seized from the defendant's residence in November 2007. The Government understands that defense counsel have completed their review, but have reserved the right to inspect the evidence at a later time if necessary.

On August 30, 2010, and again on September 21, 2010, the Government received a request for additional discovery items and information. The Government hopes to schedule a conference call with defense counsel prior to the status conference in order to resolve some of the issues in advance, obtain further clarification regarding what exactly the defendant seeks, and to note several factual inaccuracies. For the Court's benefit, the discovery issues basically involve the following:

1. A request for the FBI 302s memorializing the interviews of four particular individuals;
2. A request for an itemized list of discovery produced to the Courthouse SCIF by the Government;
3. Clarification regarding the defendant's NSA email account;
4. Clarification regarding the defendant's NSA computer account;
5. A request for copies of the items shown to the defendant during his four interviews;
6. Clarification regarding the production of the handwritten notes belong to the defendant's prior counsel;
7. A request for the emails between the defendant and Reporter A;
8. A request for all memoranda or reports prepared by the NSA in connection with the investigation of the defendant; and,

9. The state of the mirror images of the defendant's hard drives from his personal computers.

Briefly, the Government believes that all of the issues are readily resolvable, subject to further clarification from the defendant in some instances.

Copies of Items 1 and 5 have been made and will be delivered to the SCIF next week.

Regarding Item 2, the Government needs to know what the defendant means by an "itemized" list, but nonetheless is prepared to provide a list of some sort. The Government, however, will need access to the SCIF computer onto which the Government previously had loaded its classified discovery so that it can double check that the Government's electronic copy of the classified discovery matches the classified discovery on the SCIF computer.

Items 3 and 4 will require further clarification from the defendant. However, certainly as it relates to the defendant's emails, the defendant has a mirror image of what the Government possesses.

Item 6 will require further clarification from the defendant, and the Government is awaiting additional information from a particular NSA employee who handled this item. However, the Government believes that the defendant has a complete set of the unredacted notes of the defendant's prior counsel.

Item 7 is located on the defendant's personal computers seized pursuant to a federal search warrant in November 2007. If necessary, the Government can provide hard copies of Item 7.

Item 8 will require further clarification from the defendant.

Regarding Item 9, the Government had been waiting for defense counsel to inform the undersigned whether or not the Office of the Federal Public Defender had the funds to purchase

the software and ancillary computer equipment required to perform forensic searches on the defendant's personal computers. As set forth in our August 2010 discovery report to the Court, the Government had stated that

[t]he government has identified the two most relevant hard drives from the roughly fifteen seized, and it stands ready to provide copies of those hard drives, as well as a computer which can connect to the viewing station already installed in the SCIF. However, the defendant must be able to provide the forensic review software and hardware necessary to review these hard drives, and this software and hardware, because it will have processed classified information, must remain in the SCIF after the completion of this case.

To date, the defendant has provided no such information to the undersigned, and the Government understands that the defendant's computer forensic expert has not been cleared yet. The Government hopes to obtain more information and resolve this issue through the conference call.

Dated this 23rd day of September, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23rd, 2010, I caused an electronic copy of the *Motion for Protective Order* to be served via ECF upon James Wyda and Deborah Boardman, counsel for defendant Drake.

/s/ William M. Welch II
Senior Litigation Counsel
United States Department of Justice