

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE APPLICATION OF JASON
LEOPOLD AND BUZZFEED, INC. FOR
ACCESS TO CERTAIN SEALED COURT
RECORDS

Case: 1:20-mc-00095
Assigned To : Howell, Beryl A.
Assign. Date : 09/17/2020
Description: Misc.

No. _____

Oral Argument Requested

APPLICATION OF JASON LEOPOLD AND BUZZFEED, INC. FOR PUBLIC ACCESS
TO CERTAIN SEALED COURT RECORDS

1. U.S. Drug Enforcement Administration (“DEA”) investigative authority, as set forth in 28 C.F.R. § 0.100 and in the Controlled Substances Act, 21 U.S.C. § 801, *et seq.*, is limited to enforcing federal crimes related to drugs. On June 2, 2020, journalist Jason Leopold (“Leopold”) of BuzzFeed, Inc. (“BuzzFeed”) (collectively, “Applicants”) reported that the DEA had been granted a temporary delegation of “non-Title 21 enforcement duties” by the Attorney General pursuant to 21 U.S.C. § 878(a)(5), empowering the DEA to enforce all federal criminal laws, on a nationwide basis, in the wake of protests sparked by the police killing of George Floyd in Minneapolis, Minnesota on May 25, 2020. *See Exhibit A*, Jason Leopold and Anthony Cormier, *The DEA Has Been Given Permission To Investigate People Protesting George Floyd’s Death*, BuzzFeed News (June 2, 2020), <https://www.buzzfeednews.com/article/jasonleopold/george-floyd-police-brutality-protests-government>.

2. Applicants’ reporting relied on a two-page memorandum, dated May 31, 2020, from Timothy Shea, Acting Administrator of the DEA, to the Deputy Attorney General. A true and correct copy of that memorandum is attached hereto as **Exhibit B**. The memorandum

reflects that the DEA requested—and was granted—a “designat[ion] to enforce any federal crime committed as a result of protests over the death of George Floyd . . . on a nationwide basis for a period of fourteen days.” See **Exhibit B** at 1. According to the memorandum, this 14-day temporary designation authorized DEA Special Agents and Task Force Officers to, *inter alia*, “conduct covert surveillance[,]” and “engage in investigative and enforcement activity” to enable “DEA to assist to the maximum extent possible in the federal law enforcement response to protests which devolve into violations of federal law[.]” *Id.*

3. By this Application, Applicants respectfully move the Court for an Order unsealing three categories of judicial records filed with the Court related to requests for judicial authorization for the DEA to engage in electronic surveillance for any non-Title 21 investigative or law enforcement purpose. Specifically, Applicants seek an order unsealing:

- a) all original or renewed applications and supporting documents, including affidavits, filed with the Court on or after May 31, 2020, for any search warrant under the Stored Communications Act (“SCA”), *see* 18 U.S.C. §§ 2701–2712, sought by or for the DEA for a non-Title 21 investigative or law enforcement purpose, regardless of whether the warrant was issued or executed, as well as any other court records related to such applications, including court orders, motions to seal, docket sheets, and any related docket entries (collectively, the “Warrant Materials”);
- b) all original or renewed applications and supporting documents, including affidavits, filed with the Court on or after May 31, 2020, seeking authorization for the DEA to use a pen register or trap and trace device pursuant to 18 U.S.C. §§ 3121–3127 for a non-Title 21 investigative or law enforcement purpose, regardless of whether such authorization was granted or a pen register or trap and trace device was used, as well

as any other court records related to such applications, including court orders, motions to seal, docket sheets, and any related docket entries (collectively, the “PR/TT Materials”); and

- c) all original or renewed applications and supporting documents, including affidavits, filed with the Court on or after May 31, 2020, for any order pursuant to 18 U.S.C. § 2703(d) of the SCA sought by or for the DEA for a non-Title 21 investigative or law enforcement purpose, regardless of whether the order was issued or executed, as well as any other court records related to such applications, including court orders, motions to seal, docket sheets, and any related docket entries (collectively, the “Section 2703(d) Materials”).

4. Upon information and belief, the materials sought by this Application were filed in a number of separate, miscellaneous matters, each of which was assigned a unique docket number. Applicants do 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

5. BuzzFeed operates BuzzFeed News, a global news organization that provides original online reporting across multiple platforms. BuzzFeed has over 50 million unique monthly visitors to its News site.

6. Jason Leopold is a senior investigative reporter at BuzzFeed News and a 2018 Pulitzer finalist for international reporting.

7. Applicants, like all members of the press and the public, have a powerful interest in obtaining access to court documents concerning judicial authorization for the use of law enforcement tools that allow government agencies to collect or otherwise obtain electronic

communications and/or electronic communications records. Where the government obtains a 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.

8. Applicants have a particularly strong interest in obtaining access to such court records relating to the DEA’s exercise of delegated non-Title 21 enforcement authority—specifically, the DEA’s electronic surveillance of protestors for non-Title 21 law enforcement purposes. The extent of the DEA’s unusual, temporary involvement in the general federal law enforcement response to nationwide protests—and particularly the DEA’s use of electronic surveillance tools for such non-Title 21 law enforcement purposes—is unquestionably a subject of legitimate public interest and public concern.

BACKGROUND FACTS

9. The killing of George Floyd on May 25, 2020 sparked nationwide protests against police violence, which peaked “on June 6, when half a million people turned out in nearly 550 places across the United States,” Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. Times (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

10. On May 30, 2020, Attorney General William Barr issued a statement accusing “anarchistic and far left extremists, using Antifa-like tactics” of engaging in violence at those protests, and pledging that Department of Justice components, including the DEA, would “support . . . local efforts and take all action necessary to enforce federal law.” Department of

Justice, Office of Public Affairs, *Attorney General William P. Barr's Statement on the Death of George Floyd and Riots* (May 30, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-s-statement-death-george-floyd-and-riots>.

11. On June 1, 2020, President Donald Trump similarly asserted broad federal authority to respond to the nationwide demonstrations, stating that he was “mobilizing all available federal resources—civilian and military—to stop the rioting and looting” Statement by the President (June 1, 2020), <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-39/>.

12. The May 31, 2020 memorandum from Acting Administrator Shea to the Deputy Attorney General that was obtained by BuzzFeed News, indicates that the DEA asked for and was granted the authority, “on a nationwide basis for a period of fourteen days,” to “(1) conduct surveillance and protect against threats to public safety; (2) share intelligence with federal, state, local, and tribal counterparts; (3) if necessary, intervene as Federal law enforcement officers to protect both participants and spectators in the protests; and (4) if necessary, engage in investigative and enforcement activity including, but not limited to, conducting interviews, conducting searches, and making arrests for violation of federal law.” See **Exhibit A**. In requesting this authority, the DEA stated: “Police agencies in certain areas of the country have struggled to maintain and/or restore order.” *Id.*

13. On June 2, 2020, the same day that BuzzFeed News published the May 31, 2020 memorandum from Acting Administrator Shea, it was reported that Attorney General Barr had personally ordered law enforcement to clear the area outside of the White House for the president’s photo op in front of St. John’s Church the previous day. Carol D. Leonnig, et al., *Barr personally ordered removal of protesters near White House, leading to use of force against*

largely peaceful crowd, Wash. Post (June 2, 2020), https://www.washingtonpost.com/politics/barr-personally-ordered-removal-of-protesters-near-white-house-leading-to-use-of-force-against-largely-peaceful-crowd/2020/06/02/0ca2417c-a4d5-11ea-b473-04905b1af82b_story.html. This incident drew criticism from many, including retired military officers. See Peter Baker, et al., *How Trump’s Idea for a Photo Op Led to Havoc in a Park*, N.Y. Times (June 2, 2020), <https://www.nytimes.com/2020/06/02/us/politics/trump-walk-lafayette-square.html>; see also Tom Jackman & Carol D. Leonnig, *National Guard officer says police suddenly moved on Lafayette Square protesters, used ‘excessive force’ before Trump visit*, Wash. Post (July 27, 2020), <https://www.washingtonpost.com/nation/2020/07/27/national-guard-commander-says-police-suddenly-moved-lafayette-square-protesters-used-excessive-force-clear-path-trump/>.

14. On June 5, 2020, BuzzFeed News reported that an email obtained by its reporters “showed that the DEA [on June 2, 2020] was seeking to send 25 agents to assist with ‘security’ in Washington[, D.C.] as well as members of the DEA’s Special Response Team, which among other activities conducts surveillance.” Jason Leopold and Anthony Cormier, *Lawmakers Call for Halt To Covert Surveillance of Protesters by DEA*, BuzzFeed News (June 5, 2020), <https://www.buzzfeednews.com/article/jasonleopold/lawmakers-call-for-halt-to-covert-surveillance-of>.

15. The article highlighted concerns about the DEA’s “history and practice of disproportionately targeting people of color” and the implications of a “wider deployment of the DEA” for non-Title 21 law enforcement purposes—concerns raised in a letter to Attorney General Barr and Acting Administrator Shea by Rep. Jerrod Nadler (D-NY) and Rep. Karen Bass (D-CA). *Id.* As BuzzFeed News reported, Rep. Andy Levin (D-MI), Rep. Ilhan Omar (D-

MN), and Rep. Jamie Raskin (D-MD) also sent a separate letter expressing concern that the May 31, 2020 memorandum providing DEA with a temporary delegation of non-Title 21 law enforcement authority “fails to describe or place any guardrails around” DEA’s extended surveillance powers, “thus opening the door to sweeping, warrantless surveillance activities inconsistent with the preservation of civil liberties.” *Id.*

16. On information and belief, DEA Special Agents and Task Force Officers may have sought, via Justice Department attorneys, search warrants under the SCA, pen register or trap and trace orders, and/or Section 2703(d) orders in connection with the DEA’s exercise of its temporary non-Title 21 authority. On information and belief, no applications or other judicial records relating to such requests have been unsealed.

17. As explained more fully in the accompanying Memorandum of Points and Authorities, the press and the public have a common law right of access to these judicial records, and no countervailing government interest justifies their continued sealing.

REQUEST FOR RELIEF

18. Applicants seek an order unsealing the Warrant Materials. On information and belief, each search warrant application filed by the government requesting a warrant in connection with the DEA’s exercise of non-Title 21 law enforcement authority 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, Applicants also requests that the DEA, the United States Attorney’s Office, and/or the Department of Justice be directed to provide a list of the docket numbers associated with the Warrant Materials.

19. Applicants also seek an Order unsealing the PR/TT Materials. On information and belief, each application for an order authorizing the use of a pen register or trap and trace device filed by the government in connection with the DEA's exercise of non-Title 21 law enforcement authority 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, Applicants also request that the DEA, the United States Attorney's Office, and/or the Department of Justice be directed to provide a list of the docket numbers associated with the PR/TT Materials.

20. Applicants also seek an Order unsealing the Section 2703(d) Materials. On information and belief, each application for an order pursuant to 18 U.S.C. § 2703(d) filed by the government in connection with the DEA's exercise of non-Title 21 law enforcement authority 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, Applicants also request that the DEA, the United States Attorney's Office, and/or the Department of Justice be directed to provide a list of the docket numbers associated with the Section 2703(d) Materials.

21. Applicants seek any further relief that the Court deems just and proper.

ORAL ARGUMENT REQUESTED

22. Applicants respectfully request oral argument.

Dated: September 17, 2020

Respectfully submitted,

/s/ Katie Townsend
Katie Townsend
D.C. Bar No. 1026115
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
ktownsend@rcfp.org

*Counsel of Record for Applicants Jason
Leopold and BuzzFeed, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPLICATION FOR PUBLIC ACCESS TO CERTAIN SEALED COURT RECORDS** was filed with the Clerk of Court by electronically transmitting the Application to the Clerk's Office via its Intake e-mail address, DCDml_Intake@dcd.uscourts.gov, and served on the following via U.S. Mail:

United States Attorney's Office
555 4th St., NW
Washington, DC 20530

United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

United States Drug Enforcement Administration
8701 Morrisette Drive,
Springfield, VA 22152

This the 17th day of September, 2020.

/s/ Katie Townsend
Katie Townsend