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 No. 20-mc-00095(BAH)**

GOVERNMENT'S REPLY AND OPPOSITION
TO PETITIONER'S APPLICATION TO UNSEAL CERTAIN RECORDS

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully replies in opposition to the Petitioner's motion to unseal certain records. The motion is an inappropriate legal vehicle to require the Government to comment on possible ongoing criminal investigations, and the petition should be denied because it misapplies legal authority in its effort to justify the immediate and wholesale unsealing of the class of records at issue. The Government submits the following argument in support of its reply and opposition.

1. On September 17, 2010, Petitioner filed an application and memorandum in support of the wholesale unsealing of a large class of court records that, if they exist at all, are filed under seal only by the United States Attorney's Office for the District of Columbia, or by trial attorneys of the U.S. Department of Justice, because they pertain to ongoing criminal investigations. Petitioner seeks an order from this court to unseal all judicial process filed by the Drug Enforcement Administration (DEA) pursuant to a grant of an expansion of legal authority for non-Title 21 enforcement duties. They allege that this grant of authority occurred on May 31, 2020, and lasted for a 14 day period thereafter. The Government objects to the petitioner's request.

The Category of Records Requested to be Unsealed are Characterized as Electronic Surveillance Orders

2. As the Government understands the request, petitioner asked the Court for an Order unsealing court records related to any requests—made by or on behalf of the DEA—for judicial

authorization to pursue in electronic surveillance applications and orders for any non-Title 21 investigative or law enforcement purpose. Specifically, petitioner seeks an order to unseal the following:

> " 1. all original or renewed applications and supporting documents 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 (collectively, "Warrant Materials");
>
> 2. all original or renewed applications and supporting documents 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 (collectively, "PR/TT Materials"); and
>
> 3. all original or renewed applications and supporting documents 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 (collectively, "Section 2703(d) Materials");
>
> because [of the] the Justice Department's 14-day delegation of "non-Title 21 enforcement duties to the DEA pursuant to 21 U.S.C. § 878(a)(5), as reflected in the May 31, 2020 memorandum from Acting Administrator Shea."

(Document 1-1, Application, page 5). For sake of simplicity, the Government will refer to the above class of records collectively, as "electronic surveillance records."

Government Has Standing to Object as an Aggrieved Party

3. As a threshold issue, the United States Attorney's Office for the District of Columbia has standing to object to and contest the mass unsealing sought by petitioner, because we meet the definition of an aggrieved party under United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980), United States v. Leopold, 964 F.3d 1121, 1129 (D.C. Cir. 2020).

Leopold reiterated that the Government can contest the common law right of access to sealed judicial records "which the Government can rebut only by showing competing interest that compel a conclusion that justice requires maintaining a seal." (citing the Hubbard, Id. at 1131, reciting the six factors governing the requisite analysis) .

4. If such electronic surveillance pleadings were filed (and to be sure we can neither admit nor deny the existence of such records publicly), they would not have been filed by anyone in the Chief Counsel's Office of the Drug Enforcement Administration, or by any agent or employee of the DEA. Electronic surveillance pleadings, if they are filed at all, are filed by Assistant U.S. Attorneys of the District of Columbia, or by trial attorneys of the U.S. Department of Justice. Such records begin with the filing of an application that may be filed at the request of the DEA, but not by the DEA. Consequently, we can safely say that no such electronic surveillance pleadings filed by the DEA exist.

5. We do not wish to mince words with petitioners. We understand that they seek DEA related electronic surveillance records regardless of who initiated the filing. Accordingly, we are proceeding to answer their application. To be certain, we object to the requested immediate disclosure of sealed electronic surveillance records they request, if any exist at all.

6. Nevertheless, we can assure the petitioners that if such electronic surveillance pleadings were filed, and they were not under seal, then those records would already be in the public domain and accessible via PACER account, an ECF account, or by searching for such records on the computer system outside the Clerk's Office for the U.S. District Court for the District of Columbia.

Government is Prohibited from Commenting About the Possible Existence of Sealed Records.

7. If the electronic surveillance records sought by Petitioner existed, then they would pertain to an ongoing criminal investigation, the existence of which we can neither confirm nor deny.

8. Absent an order from the Court, ethical rules also prohibit the Government from answering petitioner directly, unless and until any such applicable records are closed. Once closed, the pertinent records can be unsealed and thereby become publicly disclose able as they are no longer part of an ongoing criminal investigation. The Department of Justice regulations direct that its employees (including Assistant U.S. Attorneys) "generally will not confirm the existence of or otherwise comment about ongoing investigations. . . DOJ personnel shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress before charges are publicly filed." Justice Manual 1.7-400 (updated April 2018). Furthermore, the Department of Justice's regulatory prohibitions are echoed in the Disciplinary Rules of Professional Conduct of the Bar of the District of Columbia. For example, Disciplinary Rule 3.6 (Trial Publicity) and Rule 3.8(f) limit prosecutors from commenting on criminal matters like those at issue here. Consequently, in circumstances like the present, Government prosecutors can neither confirm nor deny the existence of an ongoing criminal investigation.

9. As a consequence of the ethical rules prohibiting prosecutors from admitting or denying the existence of a criminal investigation (not already the subject of a public prosecution), petitioner's application is an inappropriate legal vehicle to compel a prosecutor to admit or deny the existence of any ongoing criminal investigation.

Government Suggests the Court Permit an Ex Parte under Seal Representation

10. We do not wish to be appear to be cagey or dismissive of petitioner's request for unsealing here. We can, however provide the District Court, *ex parte* and under seal, an answer. This step, if permitted, may prove to be a simple way to aid the court in resolving this application. Under Hubbard, supra, the District Court has the authority to analyze and determine whether or not sealed cases should be disclosed, and may do so by weighing the six factors articulated to make such a determination. United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980); United States v. Leopold, 964 F.3d 1121, 1131 (D.C. Cir. 2020) (citing the six factors to be analyzed by the District Court). Accordingly, the District Court may wish to hear *ex parte* and under seal, what the Government cannot state openly in a public response to petitioner's application.

A Powerful Interest by the Press in On Going Criminal Investigations Does Not Justify the Wholesale Unsealing of Electronic Surveillance Records Requested Here

11. Petitioner claims that, as a member of the press (apparently Leopold is the lead petitioner in what is actually a consortium of press and journalists), it has what it characterizes as a "powerful interest in access" immediately to the electronic surveillance records requested. We do not doubt that interest, however, we object because this interest for unsealing any pertinent court records, if they exist, does not and cannot overcome the need to maintain the seal on ongoing criminal investigations.

12. Petitioner repeatedly cites Leopold, supra, in support of the common law rule of public access to the kinds of judicial pleadings at issue. On the contrary, Leopold does not support the immediate unsealing of electronic surveillance records pertinent to ongoing criminal investigations. The Leopold decision directed that the Government and the Clerk of the Court implement a procedure for unsealing "closed" electronic surveillance cases. It was careful to

protect the legitimacy of sealing ongoing criminal investigations until they become closed. It directed the eventual unsealing of electronic surveillance records once the criminal investigation is no longer ongoing. It did not overrule Washington Post v. Robinson, 935 F.2d 282 (D.C. Cir. 1991), which authorizes the sealing of pleadings including electronic surveillance records, as long as they were sealed to protect an ongoing criminal investigation. In rejecting "undue administrative burden" as a reason to keep sealed electronic surveillance records of cases sealed indefinitely, it did not direct the immediate wholesale unsealing of all such records including those that are legitimately sealed to protect an ongoing criminal investigation. Here, petitioner misapplies the holding in Leopold, supra, by asserting that it, supports and directs the District Court to immediately unseal all pertinent electronic surveillance records, even those sealed to protect an ongoing criminal investigation.

13. To be sure, the Government does not object to unsealing any electronic surveillance records when there is no longer an ongoing criminal investigation and as long as they are not sealed for other legitimate reasons: for example Federal Rule of Criminal Procedure 6(e) (grand jury materials); or pursuant to the sealing directives of the wiretap statute, 18 U.S.C. §2518(8)(b); or for other good cause. This is what the Leopold decision directs.

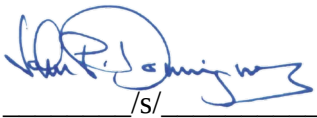
14. We suspect that the press likely will always have an interest in ongoing criminal investigations, strong or moderately curious. That interest, however characterized, is and should be subordinated to the competing interest that allow law enforcement to conduct and complete a criminal investigation free from public disclosure. Washington Post v. Robinson, supra. Neither the Leopold decision, nor the decision in Washington Post v. Robinson, supra, denigrates the role a free press has in watching over the functions of Government. Our opposition here is not dismissive of the function a free press performs in holding all functions of the Government

accountable, at least eventually. Here the interest of the free press is subordinated to the interest of allowing law enforcement to conduct criminal investigations independent of press and/or public revelations. Such is the ruling in Washington Post v. Robinson, supra. Thereafter, when a criminal investigation closes, public access is allowed, at least in those situations where Congress has not permitted continued sealing, as in the class of electronic surveillance orders.

WHEREFORE, we submit that the District Court should deny petitioners the relief they have requested, and delay the grant of access to any pertinent electronic surveillance records, if any were filed, until the relevant records are no longer involved in an ongoing criminal investigation.

Respectfully submitted,

MICHAEL R. SHERWIN
Acting United States Attorney
N.Y. Bar Number 4444188


_____/s/_____
JOHN P. DOMINGUEZ
Assistant United States Attorney
Federal Major Crimes Section
555 4th Street, N.W.
Washington, D.C. 20530
D.C. Bar No. 959-809
John.Dominguez@usdoj.gov
Cell: 202-809-8686