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	**No. 20-mc-0095 (BAH)**

REPLY TO GOVERNMENT'S REPLY AND OPPOSITION TO APPLICATION OF JASON LEOPOLD AND BUZZFEED, INC. FOR PUBLIC ACCESS TO CERTAIN SEALED COURT RECORDS

Petitioners Jason Leopold and BuzzFeed, Inc. ("Petitioners") respectfully submit the following reply to the Government's Reply and Opposition to Petitioners' Application to Unseal Certain Records ("Government Opposition" or "Gov. Opp.").

By their Application for Public Access to Certain Sealed Court Records ("Petitioners' Application" or "Pet'rs' Appl."), Petitioners seek an order unsealing judicial orders of three types—warrants issued pursuant to the Stored Communications Act ("SCA"), *see* 18 U.S.C. §§ 2701–2712, court orders issued pursuant to 18 U.S.C. § 2703(d) of the SCA, and court orders issued pursuant to the Pen Register Act ("PRA"), §§ 18 U.S.C. 3121–3127—authorizing the U.S. Drug Enforcement Agency ("DEA") to conduct electronic surveillance for non-Title 21 law enforcement purposes since May 31, 2020. *See* Petitioners' Application at 2–3. Petitioners' Application also seeks the unsealing of related judicial records, including court docket sheets, and applications filed by the Government to obtain such judicial orders (collectively, the "Sealed Records"). *Id*.

Petitioners do not ask the Government to "confirm or deny" the existence of any criminal investigation. Petitioners seek an order unsealing judicial records to which the strong common

law presumption of public access applies—or, at minimum, in the case of the PRA orders, to which the "common-law standard enshrined" in the balancing test of *United States v. Hubbard*, 650 F.2d 293, 317 (D.C. Cir. 1980) ("*Hubbard*") applies. *See In re: In the Matter of the Application of Jason Leopold to Unseal Certain Electronic Surveillance Applications and Orders,* 964 F.3d 1121, 1129–30 (D.C. Cir. 2020) ("*Leopold*"). The Government's refusal to provide public reasons for opposing Petitioners' Application for an order unsealing those judicial records—on the ground that the Government purportedly cannot "confirm or deny" the existence of any criminal investigation—is untethered to the law, and to the circumstances here.

To be clear, the Justice Department's extraordinary grant of non-Title 21 law enforcement authority to the DEA was temporary; it was authorized for a two-week period beginning on May 31, 2020. *See* Appl. Ex. B. Further, the purpose of that temporary delegation of authority was to enable DEA Special Agents and Task Force Officers to, *inter alia*, "conduct covert surveillance" as part of the general federal law enforcement response to what were, at the time, ongoing demonstrations nationwide, including in Washington, D.C., sparked by the police killing of George Floyd on May 25, 2020; that delegation of authority was not connected to any specific criminal investigation. *Id*. Accordingly, there is no reason for the Court to assume, as the Government suggests, that the Sealed Records are connected to any specific criminal investigation, or that unsealing them would disclose the existence of any specific criminal investigation. Nor is there any reason for the Court to assume—more than five months after the Justice Department granted the DEA non-Title 21 law enforcement authority, and in light of the temporary nature of that delegation of authority—that any related criminal investigation that did exist remains ongoing.

"Under the *Hubbard* test, a 'seal may be maintained only if the district court, after considering the relevant facts and circumstances of the particular case, and after weighing the

interests advanced by the parties in light of the public interest and the duty of the courts, concludes that justice so requires.'" *Leopold*, 964 F.3d at 1131 (quoting *MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665–66 (D.C. Cir. 2017) ("*MetLife*") (internal quotation marks omitted)). As discussed in more detail herein, if it is the Government's position that jeopardy to an ongoing criminal investigation necessitates maintaining the Sealed Records, or portions thereof, under seal at this time, the Government must make such a showing to the Court. Furthermore, it should be required to do so in a manner that affords Petitioners a full and fair opportunity to challenge the Government's arguments for continued sealing. To the extent the Government, in order to meet its burden, is permitted to make a sealed, *ex parte* submission to the Court, the extent to which that submission is sealed must comply with the public's right of access to judicial records; Petitioners oppose the Government's request to submit the entirety of its substantive arguments in response to Petitioners' Application to the Court in a sealed, *ex parte* filing.

For the reasons herein, Petitioners respectfully request that the Court grant their Application and unseal the Sealed Records. To the extent the Court permits additional briefing or other submissions from the Government regarding its opposition to such unsealing, Petitioners respectfully request that such submissions be public to the greatest extent possible, and that Petitioners be afforded an opportunity to respond to the Government's arguments. In the event the Court, in applying the *Hubbard* balancing test, determines that the Sealed Records, or portions thereof, should remain under seal at this time, Petitioners respectfully request that the Court set a date by which (1) the records must be unsealed; or (2) the Government must demonstrate to the Court why the materials should remain under seal.

I. Petitioners Seek an Order Unsealing Certain Judicial Records; to Oppose Unsealing, the Government Must Demonstrate, under *Hubbard*, that the Seal Should be Maintained.

The Government does not—and cannot—dispute that the sealed SCA warrant and SCA § 2703(d) materials sought to be unsealed by Petitioners are judicial records to which the strong common law presumption of public access applies. *Leopold*, 964 F.3d at 1129. Nor can the Government dispute that "the common-law standard enshrined in the *Hubbard* balancing test" should be applied to all the Sealed Records. *Id*. at 1130–31 (explaining that, in evaluating requests to unseal PRA materials, district courts "should apply the traditional *Hubbard* balancing test—albeit without a thumb on the scale in the case of pen register orders."). Yet rather than attempt to satisfy that standard as to any of the Sealed Records, the Government instead argues that it "can neither admit nor deny the existence of such records publicly," Gov. Opp. at 3, and accuses Petitioners of using "an inappropriate legal vehicle to compel a prosecutor to admit or deny the existence of any ongoing criminal investigation." *Id.* at 4.

The Government is wrong. Petitioners do not ask the Government to "confirm or deny" the existence of any criminal investigation. *Id*. Petitioners seek an order from the Court unsealing specified judicial records. And, indeed, as Petitioners have reported, the temporary non-Title 21 law enforcement authority granted to the DEA by the Justice Department was in service of a general law enforcement response to protests, not to investigate any particular crime. *See* Pet'rs' Mem. at 3–4; *see also* Appl. Ex. B. Petitioners are aware of nothing to indicate that the Sealed Records—which arise from an extraordinary grant of non-Title 21 law enforcement authority to the DEA that enabled it to, *inter alia*, conduct sweeping electronic surveillance of large crowds of demonstrators—are connected to any specific criminal investigation. Moreover, even if the Sealed

Records, or portions thereof, did at one time relate to specific criminal investigations, it is unlikely, nearly six months later, that those investigations remain ongoing.[1]

The Government's position—that it may refuse to "confirm or deny" the existence of the Sealed Records—is untethered to the well-settled law governing the common law right of access to judicial records,[2] and it fundamentally misrepresents the two D.C Circuit cases it cites.

First, the Government incorrectly accuses Petitioners of misapplying the D.C. Circuit's decision in *Leopold* by purportedly "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." Gov. Opp. at 6. Petitioners made no such assertion. What the D.C. Circuit's decision in *Leopold* makes clear is that all of the Sealed Records are "judicial records," 964 F.3d at 1128, to which the "common-law standard enshrined in the *Hubbard* balancing test" applies, *id*. at 1130. And, as to SCA warrant and SCA § 2703(d) materials, there is a strong common-law presumption in favor of public access to those records. *Id*. at 1129; *see also Hubbard*, 650 F.2d at 317 (noting the "important presumption in favor of public access to all facets of criminal court proceedings"). It is Petitioners' position that the D.C. Circuit's decision

[1] Indeed, in the *Leopold* matter now on remand from the D.C. Circuit, the Government has recently proposed to the Court that, on a forward-moving basis, it will file a "Notice to Unseal" dockets and other judicial records in any PRA, SCA warrant, and SCA § 2703(d) matter still under seal six months (180 days) after the date it was initially filed, absent a motion, supported by a sufficient showing, to maintain the materials under seal for an additional 180 day time period. *See In the Matter of the Appl. of Jason Leopold to Unseal Certain Electronic Surveillance Appls. and Orders*, No. 1:13-mc-712, ECF No. 67, at 8–9, 18 (Oct. 31, 2020).

[2] The Government's response appears to draw on what is known in the context of the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), as a "*Glomar*" response. Courts permit federal executive branch agencies, in certain circumstances, to refuse to confirm or deny the existence of agency records requested under FOIA where to acknowledge (or deny) their existence would harm an interest protected by one of FOIA's enumerated exemptions. *See, e.g.*, *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1981); *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009). This is not a FOIA case; Petitioners seek access to sealed records of the Court. The *Glomar* doctrine simply has no application here.

in *Leopold* requires application of that presumption of access and the *Hubbard* balancing test to the Sealed Records.

Second, *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991) does not, as the Government claims, "authorize[] the sealing of pleadings including electronic surveillance records, as long as they were sealed to protect an ongoing criminal investigation." Gov. Opp. at 6. In *Robinson*, the D.C. Circuit acknowledged in dicta the unremarkable proposition that "evidence that the release of a plea agreement may threaten an ongoing criminal investigation . . . may well be sufficient to justify sealing a plea agreement" that is subject to the public's qualified First Amendment right of access. 935 F.2d at 291. As to the plea agreement before it in that case, the D.C. Circuit held that the government had failed to meet its burden to demonstrate a compelling interest to justify ongoing sealing. *Id*. *Robinson* quite simply offers no support for the arguments in the Government's Opposition.

To the extent it is the Government's position that unsealing of the Sealed Records, or portions thereof, would threaten an ongoing criminal investigation, the Government must make such a showing to the Court. Specifically, it must demonstrate that the *Hubbard* factors weigh in favor of continued sealing and that, where applicable, the strong common law presumption in favor of access is overcome. *Leopold*, 964 F.3d at 1131. It cannot simply pretend that the Sealed Records do not exist.

II. Any Further Briefing or Submissions to the Court in Opposition to Petitioners' Application Should Be Filed Publicly to the Greatest Extent Possible.

In its Opposition, the Government indicates that it is willing to "provide the District Court, *ex parte* and under seal, an answer." Gov. Opp. at 5 (positing that "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."). It is not clear from the Government's Opposition the type of sealed, *ex*

parte submission it contemplates filing with the Court. However, *any* such submission by the Government would itself be a judicial record to which the common law presumption of access applies. *See MetLife*, 865 F.3d at 667–68 (D.C. Cir. 2017) (holding, *inter alia*, that a sealed, *ex parte* declaration is a judicial record because it was "intended to influence" the court and played a central "role . . . in the adjudicatory process."); *see also In re Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006) ("If the public is to see [a court's] reasoning, it should also see what informed that reasoning."). Accordingly, the Government should be permitted to make a submission to the Court *ex parte* and under seal only if—and only to the extent that—the public's presumptive right to inspect that judicial record is overcome. *See MetLife*, 865 F.3d at 667–68. In addition, Petitioners should be given a full and fair opportunity to respond to the grounds for continued sealing of the Sealed Records proffered by the Government, including any legal arguments advanced by the Government.

For these reasons, if the Government is permitted to make a sealed, *ex parte* submission to the Court—in order to, for example, provide details of specific ongoing investigations that the Government contends will be jeopardized if the Sealed Records are made public—Petitioners respectfully request that sealing of that submission be narrowly tailored and supported by a specific need for sealing, and that the Court require the Government to publicly file a redacted version of that submission. *See In re Search Warrants Issued on May 21, 1987*, No. 87-mc-186, 1990 WL 113874, at *6 (D.D.C. 1990) (noting that, under the common law right of access, the Court "attempt[s] to provide broad access to the public, as is its common law right, and minimize the redactions[.]"); *see also In re McCormick & Co., Inc., Pepper Prod. Mktg. & Sales Practices Litig.*, 316 F. Supp. 3d 455, 465 (D.D.C. 2018) (parties made "overbroad requests to maintain information

in confidence that is relevant to the Court's decision-making . . . which should therefore be presumptively accessible to the public.").

Finally, in the event the Court, in applying the *Hubbard* balancing test, determines that the Sealed Records, or portions thereof, should remain under seal at this time, Petitioners respectfully request that the Court set a date by which (1) the records must be unsealed; or (2) the Government must demonstrate to the Court why the materials should remain under seal.

CONCLUSION

For the reasons herein, Petitioners respectfully request that the Court grant their Application and unseal the Sealed Records. To the extent the Court permits additional briefing or other submissions from the Government regarding its opposition to such unsealing, Petitioners respectfully request that such submissions be public to the greatest extent possible, and that Petitioners be afforded an opportunity to respond to the Government's arguments. In the event the Court, in applying the *Hubbard* balancing test, determines that the Sealed Records, or portions thereof, should remain under seal at this time, Petitioners respectfully request that the Court set a date by which (1) the records must be unsealed; or (2) the Government must demonstrate to the Court why the materials should remain under seal.

Respectfully submitted,

/s/ Katie Townsend
Katie Townsend
DC Bar No. 1026115
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
ktownsend@rcfp.org

Counsel of Record for Petitioners Jason Leopold and Buzzfeed, Inc.