

**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)

**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 Donald John Sachtleben (“Sachtleben”) (hereinafter, the “Sachtleben 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, miscellaneous 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. §§ 2703, related to the Sachtleben 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, related to the Sachtleben 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 Sachtleben 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 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 Sachtleben, a former Special Agent Bomb Technician for the Federal Bureau of Investigation (“FBI”) who in 2013 was indicted on charges that arose from alleged communications he had with members of the news media.

BACKGROUND FACTS

7. Applicant is informed and believes that Sachtleben was employed as a Special Agent Bomb Technician for the 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.

8. 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”). In November 2013, the Court accepted Sachtleben’s guilty plea and sentenced him to 43 months’ imprisonment for each of the aforementioned National Security Charges, to be served

concurrently, and ordered him to pay a \$200 assessment. *See* Judgment, *Sachtleben I* (S.D. Ind. filed Nov. 20, 2013), ECF No. 27.¹

9. The National Security Charges arose out of a government investigation into 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.

10. 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, from in or about January 2010 through in or about May 2012 Sachtleben provided Reporter A with information beyond the NIEF program. *Id.*

11. The Statement of Offense states that on or about May 2, 2012, Sachtleben disclosed to Reporter A information regarding the disruption of an attempted suicide bomb attack on a U.S. airline, and the recovery of a bomb in connection with that plot. *Id.* at 3–6. According to the Statement of Offense, 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 government had intercepted a bomb from Yemen and that the FBI was

¹ Simultaneously, Sachtleben pled guilty in a separate matter 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, *United States v. Sachtleben*, No. 1:12-cr-00127-WTL-TAB (S.D. Ind. filed Sept. 23, 2013), ECF No. 67. Sachtleben was sentenced to 97 months' imprisonment on each child pornography count, to be served concurrently. *See* Judgment, *Sachtleben*, No. 1:12-cr-00127-WTL-TAB (S.D. Ind. filed Nov. 20, 2013), ECF No. 82.

analyzing the bomb—facts that at the time constituted classified national defense information.

Id. at 6.

12. 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., entitled “US: CIA Thwarts New al-Qaida Underwear Bomb Plot.” *Id.* Upon information and belief, the “lead article” referred to in the Statement of Offense was published by The Associated Press and 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>.

13. The Statement of Offense also states that Sachtleben willfully possessed and retained in his residence numerous 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 government’s separate child pornography investigation. *Id.*

14. 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,² and/or Section 2703(d) orders³ from the district court in the course of its

² 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).

investigation of Sachtleben's communications with members of the news media. 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.

15. Investigators may have also used electronic surveillance tools, such as pen registers and/or trap and trace devices, or orders issued pursuant to Section 2703(d), to obtain journalists' communications records. According to news reports, investigators only identified Sachtleben as a suspected "leaker" after secretly obtaining Associated Press telephone records. *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>.

16. 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.

17. 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

³ 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).

the First Amendment and common law. No compelling government interest justifies the continued sealing of such records concerning the Sachtleben Matter, particularly now that the government's investigation and prosecution of Sachtleben has concluded.

REQUEST FOR RELIEF

18. The Reporters Committee seeks an order unsealing the Search Warrant Materials. Upon information and belief, each search warrant application filed by the government related to the Sachtleben 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's Office be directed to provide a list of the docket numbers associated with the Search Warrant Materials.

19. 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 Sachtleben 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's Office be directed to provide a list of the docket numbers associated with the PR/TT Materials.

20. 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 Sachtleben 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's Office be directed to provide a list of the docket numbers associated with the Section 2703(d) Materials.

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

Dated: January 31, 2017

Respectfully submitted,

/s/ Katie Townsend

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPLICATION FOR ACCESS TO CERTAIN SEALED RECORDS** and supporting **MEMORANDUM OF POINTS AND AUTHORITIES** was filed with the Clerk of Court using the CM/ECF system, and served on counsel for the following via email and U.S. Mail:

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This the 31st day of January, 2017.

/s/ Katie Townsend

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