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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA; *SAN FRANCISCO BAY GUARDIAN*,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

CASE No.: 12-cv-4008-MEJ

PLAINTIFFS' REPLY

Hearing Date: January 30, 2014
Time: 10:00 a.m.
Location: Courtroom B, 15th Floor
Judge: Hon. Maria-Elena James

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

At issue on this summary judgment motion is the public's right to access documents filed in court that would shed light on the government's surveillance practices. Defendant DOJ contends that it can completely shield its copies of these court-filed documents from public view because the court file is sealed and claims that at least some documents are exempt under the Pen Register Statute. DOJ's position is unsound as a matter of law and policy.

First, reiterating arguments rejected by the D.C. Circuit in *Morgan v. United States Dep't of Justice*, 923 F.2d 195 (D.C. Cir. 1991), DOJ ignores the distinction between a sealing order and a protective order. The former prevents the public from obtaining direct access to documents through a court's normally public docket. The latter affirmatively prohibits a party from disclosing specified documents. Only a protective order directed at DOJ can justify withholding documents under FOIA. DOJ offers no facts to support a conclusion that the sealing orders at issue here were intended to act also as protective orders. It has therefore failed to meet its burden under FOIA of justifying withholding these documents. *Second*, DOJ ignores the plain language of the Pen Register Statute, which on its face only requires the sealing of a type of document *not* sought in Plaintiffs' FOIA request. *Compare* 18 U.S.C. § 3123(d)(1) (requiring sealing of pen register "order"), *with* Pltfs' FOIA Request (attached as Kenney Decl. (Doc. 43-1), Exh. A) at 3 (seeking "[a]ll requests, subpoenas, and applications for court orders or warrants" but not seeking orders themselves). *Third*, DOJ emphasizes the importance of maintaining the confidentiality of criminal investigations and suggests that the public interest in access to court documents can be adequately vindicated through a motion to unseal. But policy arguments about the need for continued secrecy are misplaced because the documents at issue here all involve *closed* investigations, in which the original justification for sealing no longer applies; and no motion to seal is feasible because DOJ refuses to identify the relevant docket number, information that would presumably be necessary to bring a motion to unseal.

In sum, DOJ's position is unsupported by FOIA, the sealing orders, and the Pen Register

Statute, and would prevent the public from reviewing documents (post-investigation search warrant and related materials) that would shed light on the government's surveillance practices and to which the common law undisputedly provides a right of access. *See United States v. Bus. of the Custer Battlefield Museum & Store Located at Interstate 90, Exit 514*, 658 F.3d 1188, 1192 (9th Cir. 2011) (search warrant materials subject to qualified common law right of access after close of investigation).

II. ARGUMENT

A. DOJ Has Not Met Its Burden Of Proving The Documents Are Exempt From Disclosure

1. DOJ Has Not Shown That The Sealing Orders Are Protective Orders

The agency has offered no basis for rejecting or distinguishing the D.C. Circuit's decision in *Morgan*, which reversed a district court's ruling that DOJ could withhold documents in a FOIA request where they had been ordered sealed in a separate proceeding. Instead, DOJ's sealing order argument rests on the erroneous position – rejected in *Morgan* – that sealing orders are necessarily protective orders.

Morgan was a FOIA suit for a document that a criminal defendant had previously and unsuccessfully moved to unseal in his separate criminal proceeding. 923 F.2d at 196. *Morgan* explained that "[i]n both civil and criminal cases, … a court may issue a protective order that specifically prohibits future disclosure of" specified information. *Id.* at 197 n.2. "Such a protective order would … justify the agency's decision to deny a FOIA request for the information." *Id.* But given the distinction between a sealing order and a protective order, a sealing order without more does not justify an agency's decision to withhold documents under FOIA. "If the seal was designed only to prohibit Morgan from obtaining the notes from the court record of his criminal trial, Morgan's FOIA complaint is a valid attempt to obtain the notes under the FOIA, not a collateral attack on the sealing order. Similarly, if the seal was not intended to prohibit the DOJ from releasing the notes, the DOJ shows no lack of respect for the judicial process or the [court that entered the sealing order] by granting Morgan's FOIA request."

Id. at 198. Thus, the agency in a FOIA suit bears "the burden of demonstrating that the court issued the seal with the intent to prohibit the [agency] from disclosing the notes as long as the seal remains in effect." *Id.*

DOJ attempts to distinguish this case from *Morgan* on the ground that under this Court's local rules, sealed documents "shall be kept from public inspection, including inspection by attorneys and parties to the action." Crim. L.R. 56-1(e). DOJ then goes on to argue that obtaining sealed documents through a FOIA action would be an effort "to evade this Court's sealing orders." DOJ Reply (Doc. 55) at 6:3. DOJ's argument is the very rationale adopted by the district court in *Morgan* and *rejected* by the D.C. Circuit. 923 F.2d at 196 (district court held that sealing orders entered in other proceeding "were not subject to collateral attack in another court under the FOIA"). The facts here are parallel to *Morgan*. Morgan had been unable to obtain the sealed document in his underlying criminal proceeding. *Id.* Thus, as in *Morgan*, the sealing order "kept [the document] from public inspection, including inspection by attorneys and parties to the action." Crim. L.R. 56-1(e). But that fact was not dispositive of the FOIA question. "[T]he reason for the seal," the Court explained, "may be only to prohibit the public from viewing the notes in the public court record; it may not have been intended to affect any future decision by the DOJ to release the notes voluntarily or pursuant to a FOIA request." 923 F.2d at 197.[1]

The primary evidence DOJ offers in support of its position that the sealing orders at issue prohibit the agency from releasing the documents is the "common understanding" within the U.S. Attorney's Office that sealing orders "impose[] a responsibility on [the agency] not to disclose sealed documents to the public." Supp. Kenney Decl. (Doc. 55-1) ¶ 4; *see also id.* ¶ 3. This is inadequate for three reasons.

[1] DOJ attempts to dismiss *Morgan* as "out-of-circuit" authority. DOJ Reply at 5. While the case is not binding on this Court, DOJ offers no explanation as to why the reasoning of the appellate court that handles the most FOIA litigation in this country is not persuasive or should not be followed in this case. In the absence of Ninth Circuit guidance, this Court should look to *Morgan*.

First, as DOJ itself emphasizes, "the relevant test under FOIA concerns what the Orders require, and not what plaintiffs" or the defendant "think they should require." DOJ Reply at 9:15-16. If the analysis turned on the disclosure obligations agencies "consider themselves to have," Supp. Kenney Decl. ¶ 3, agencies could withhold documents under FOIA based on their preferences and practices, rather than their actual legal obligations. "Deference to the determination of the agency that the exemption applies is not due." *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1172 (9th Cir. 2000). Here, DOJ's declarations offer nothing more than a conclusory legal assertion as to the significance of the sealing orders. This is insufficient to meet an agency's burden under FOIA. *See Billington v. United States Dep't of Justice*, 233 F.3d 581, 584 (D.C. Cir. 2000) ("bald assertion [in declaration] that … amounts to little more than recitation of the statutory standard … is insufficient").

Second, DOJ's "common understanding" of the significance of the sealing order is legally incorrect because it conflates sealing orders and protective orders – the same mistake made by DOJ and the district court in *Morgan*. "A sealing order merely protects information in the court files from public perusal. Unless included within, or accompanied by, a *protective order*, the parties who have possession of copies of the sealed information are free to use it in whatever lawful manner the information can be used." *United States v. Sekhon*, 2007 WL 1752589, *2 (E.D. Cal. June 15, 2007); *id.* at *3 (denying as "unnecessary" government's motion to unseal sealed search warrant affidavit so that it could introduce affidavit in separate immigration proceedings); *see also* Fed. R. Civ. P. 5.2(d) (discussing sealing orders), *with* Fed. R. Civ. P. 5.2(e) (discussing protective orders). Where a sealing order is intended only to limit "public inspection, including inspection by attorneys and parties to the action," Crim. L.R. 56-1(e), "it may not have been intended to affect any future decision by the DOJ to release the notes voluntarily or pursuant to a FOIA request." *Morgan*, 923 F.2d at 197.[2]

[2] By way of illustration, an individual may file documents in the court's public file pertaining to her own social security and financial account information in redacted form, and then file the unredacted information under court seal. *See* Fed. R. Civ. P. 5.2(a), (d). The sealing order limits

(continued on next page)

To elaborate, a sealing order entered in connection with a pen register or other surveillance order must be seen in context. The purpose of the sealing order is to protect the integrity of the investigation; sealing the documents furthers this interest by limiting public access to the document through the court's public docket, thereby preventing the target from learning of the investigation. There would be no reason for a court also to prevent the government from voluntarily releasing information about a surveillance order, because the government would not do so if it would harm the investigation. At the same time, the government's interest in protecting the integrity of an investigation is adequately protected – even in the fact of a FOIA request – because the statute authorizes agencies to withhold information, disclosure of which would jeopardize a pending investigation. *See* 5 U.S.C. § 552(b)(7)(A). But there would be no reason for a court, in granting a pen register or similar order, to go beyond sealing the document and also to prohibit DOJ from disclosing it. Such an order would preempt a FOIA analysis, and prohibit disclosure long after the need for sealing (the pendency of an investigation) has expired. *Cf. Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003) (where party "obtained … blanket protective order … it could not reasonably rely on the order to hold these records under seal forever"). As a result, and as the D.C. Circuit explained in *Morgan*, there is no reason to assume that a sealing order was necessarily intended to preclude DOJ from releasing the document voluntarily or pursuant to FOIA.

Third, the key evidence in this record is the language of exemplar sealing orders. The language of these orders and the circumstances under which they were sought indicates that these orders were intended to limit public inspection of the records through the court's public docket for the benefit of DOJ, so that it could protect the integrity of ongoing criminal

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public access to the unredacted information through the court's docket, but obviously does not preclude the individual who obtained the sealing order from disclosing her own social security number or financial account information to financial institutions or whatever party she thereafter chooses.

investigations, but that they do not forever act as a gag order on DOJ. The sample sealing order contains an express prohibition on disclosure, *but that prohibition applies only to telephone service providers, not DOJ*: "the Target Devices' Telephone Service Providers and any other Telephone Service Provider which provides service to a telephone number that either places telephone calls to, or receives telephone calls from, the Target Devices, shall not disclose in any manner, directly or indirectly, by any action or inaction, the existence of this Order, in full or redacted form." *See* ACLU-PT1-ReRls-000098 (attached as Second Kornmeier Decl. (Doc. 43-2), Exh. F). DOJ does not explain why the language of the order that imposes a gag on disclosure should be construed to apply to DOJ when it expressly applies only to telephone service providers. Had the Court intended it to extend to DOJ, it could easily have said so. In addition, the order states that the information "*may* be redacted from any copy of the Order served on any service provider *or other person*." *Id.* (emphasis added). DOJ has the flexibility under the order to redact information, or not, and to serve it on a service provider "or other person." If the sealing order were intended to act as a protective order, it would narrowly define the class of persons that DOJ is authorized to serve and would not grant DOJ such broad discretion. Further, the order – even if it could be construed as a protective order, not merely a sealing order – applies only to "this Order and the Application." *Id.* Thus, there is no prohibition against DOJ identifying docket numbers.

DOJ also points to the fact that when the ACLU sought to unseal a particular matter, the agency brought its own motion to unseal rather than simply disclosing the documents. DOJ Reply at 7-8. Rather than constituting evidence of the legal significance of the sealing orders at issue, it merely reflects the U.S. Attorney's "common understanding" of the effect of the orders. Supp. Kenney Decl. ¶ 4. That "understanding" is not dispositive for the reasons discussed above. Like the government's motion to unseal a sealed search warrant affidavit in *Sekhon*, so that the agency could introduce the affidavit in separate immigration proceedings, it was probably also "unnecessary." 2007 WL 1752589, at *3 (denying government's motion to

unseal as "unnecessary").

Nor is the unadorned fact that the Court seals certain dockets dispositive. *See* DOJ Reply at 8. The record contains no evidence as to the rationale for this practice. Does the Court seal certain dockets because of administrative convenience, characteristics of the Court's computer system, or some other reason connected to the intended effect of the sealing orders? The record also contains no evidence as to the scope of the Court's practice of sealing dockets. Does the Court seal dockets whenever any kind of sealing order is entered? Or only when it enters sealing orders that it intends also to act as protective orders? DOJ has failed to introduce any evidence on these issues or offer any other reason why the plain language of the Court's sealing order – which nowhere seals docket numbers and imposes a gag on telephone service providers but not DOJ – should be construed as a protective order that prohibits DOJ from disclosing these documents in this FOIA action. *See Jennings v. FBI*, No. 03-cv-001651-JDB, Slip op. at 13 (D.D.C. May 6, 2004) (attached to DOJ filings as Doc. 43-3) (denying DOJ's motion for summary judgment to withhold documents based on "sealing order" "[b]ased on lack of information provided"); *Senate of Com. of Puerto Rico v. Dep't of Justice*, 1993 WL 364696, *6 (D.D.C. Aug. 24, 1993) (rejecting DOJ's argument that it was justified in withholding "sealed court records" based on lack of "information by which this Court could determine whether the documents were properly withheld").

Finally, Plaintiffs do not dispute that DOJ had a legitimate justification for seeking the sealing orders at the time of these applications – to protect the integrity of ongoing criminal investigations. And while these investigations were ongoing, the documents may well have been exempt from disclosure under Exemption 7(A). *See* 5 U.S.C. § 552(b)(7)(A). But because the only documents at issue involve investigations which have since been closed, these justifications no longer apply.

The sealing orders simply prevent the public from obtaining documents directly "from the court record" without notice to the government. *Morgan*, 923 F.2d at 198. Plaintiffs'

request, in contrast, "is a valid attempt to obtain the [documents] under the FOIA, not a collateral attack on the sealing order." *Id.* "DOJ shows no lack of respect for the judicial process or the [court that entered the sealing order] by granting [the] FOIA request." *Id.*

For the foregoing reasons, DOJ has not met its burden of demonstrating that the sealing orders justify the agency's decision to withhold the records sought in this case, let alone its failure to complete the search.

2. The Pen Register Statute Does Not Apply To The Records In This Case

Equally unavailing is DOJ's reliance on the Pen Register Statute.

First, DOJ concedes that not all of the requests for location tracking information at issue here were made pursuant to this statute. *See* DOJ Reply at 9 n.5.

Second, the information sought here is outside the scope of the statute. The statute provides that an order approving the installation of a pen register or trap and trace device "shall direct that … the *order* be sealed …." 18 U.S.C. § 3123(d)(1) (emphasis added). Plaintiffs' FOIA request seeks "requests, subpoenas, and applications." Pltfs' FOIA Request (attached as Kenney Decl., Exh. A) at 3. The materials sought thus fall entirely outside the scope of the pen register statute. *See Carlson v. United States Postal Serv.*, 504 F.3d 1123, 1130 (9th Cir. 2007) (rejecting agency's Exemption 3 claim where information about post offices was not "within the scope" of exempting statute); *Cal-Almond, Inc. v. Dep't of Agriculture*, 960 F.2d 105, 108 (9th Cir. 1992) (rejecting agency's Exemption 3 claim where list of almond growers did not fall within purported exempting statute's coverage).

DOJ argues in response that, in addition to requiring the sealing of "the order," the statute also precludes the disclosure of "the existence of the pen register or trap and trace device or the existence of the investigation." 18 U.S.C. § 3123(d)(2); DOJ Reply at 11. Plaintiffs agree that this language prohibits disclosure of an application (which would necessarily reveal the existence of the pen register device or investigation), but the language at issue actually confirms the conclusion that *DOJ* is not precluded from disclosing the information. The

prohibition on disclosure applies only to "the person owning or leasing the line or other facility to which the … device is attached, or applied, or who is obligated by the order to provide assistance to the applicant." 18 U.S.C. § 3123(d)(2). Had Congress intended DOJ to "not disclose the existence" of the device or investigation "unless or until otherwise ordered by the court," *id.*, it knew how to say so but expressly chose not to. The reason for this language is plain – to ensure that *third parties* who learn of the pen register order do not disclose information that would jeopardize the integrity of the investigation. Nowhere does the statute evince the additional purpose to prohibit *DOJ* from disclosing pen register applications.

Third, DOJ relies on various district court decisions that have found the Pen Register Statute to be an exempting statute under FOIA's Exemption 3. DOJ Reply at 6, 10. While *Jennings* emphasizes the statute's prohibition against disclosure of the existence of the device, Slip op. at 11-12; DOJ Reply at 10, it ignores the fact that the prohibition is limited only to specified entities other than DOJ. As discussed above, had Congress intended all parties, including DOJ, to be bound by this provision, it knew how to say so. With respect to the other decisions previously cited by the agency, none offers any reasoning in support of the conclusion that the Pen Register Statute, which on its face only seals pen register "order[s]," somehow also exempts from disclosure the different type of document sought here, pen register *applications*. *See* Pltfs' Opp. (Doc. 48) at 22-23. The two new cases cited by DOJ offer no additional analysis. In *Sennett v. Dep't of Justice*, _F. Supp. 2d_, 2013 WL 4517177 (D.D.C. Aug. 27, 2013), the plaintiff failed to explain, unlike Plaintiffs here, "why other district courts have erred in holding the contrary" and thus simply adopted without analysis other courts' holdings. *Id.* at *8. *Brown v. FBI*, 873 F. Supp. 2d 388 (D.D.C. 2012), held that pen trap applications and orders could be withheld under Exemption 3 and the Pen Register statute, but failed to offer any reasoning in support of its counter-linguistic conclusion that *applications* "fall[] squarely" within a statute that seals only pen trap "order[s]." *Id.* at 401 (citing 18 U.S.C. § 3123(d)(1)). Moreover, the plaintiff in *Brown*, unlike Plaintiffs here, did not object to the Exemption 3

assertion, and so the issue was uncontested. *Id.*

For these and the reasons previously set forth, DOJ has not met its burden of establishing that pen register applications are exempt from disclosure under Exemption 3 and the Pen Register Statute. *See* Pltfs' Opp. at 20-23.

B. DOJ Has Not Met Its Burden Of Proving That It Need Not Complete Its Search

Nor does the burden of processing this request alleviate DOJ of its statutory obligation to "conduct[] a search reasonably calculated to uncover all relevant documents." *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Zemansky v. United States EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (adopting *Weisberg* standard).

DOJ devotes almost two pages to explaining why it chose not to deploy in this case the search methodology it followed in another case. DOJ Reply at 2-3. This argument is a red herring. DOJ asserted in its opening brief that "there is *no method* for the USAO-NDCA to identify and locate the specific records that plaintiffs seek (absent an unduly burdensome hand-search of all files the office has opened since 2008)." DOJ Br. (Doc. 43) at 14 (emphasis added). But the search methodology commenced by DOJ in this case and the methodology it used in another, similar case demonstrate this assertion to be false.

The search procedure DOJ has undertaken to date demonstrates that a search for the records is entirely feasible. But because DOJ has not completed that search, it has not yet discharged its statutory obligation. DOJ conducted an electronic search of its case management system which identified 1,184 potentially responsive matters; various narrowing procedures reduced the potentially responsive matters to 374. *See* Kenney Decl. ¶¶ 15-17. DOJ acknowledges that further review has since reduced the potentially responsive matters even further, to 349 files. Supp. Kenney Decl. ¶ 6. While Plaintiffs do not dispute that completing this search would require some effort, *see* DOJ Reply at 12, this effort does not alleviate DOJ of its statutory obligation to continue looking.

DOJ does note event attempt to distinguish *Ruotolo v. Dep't of Justice*, 53 F.3d 4 (2d Cir.

1995), in which the Second Circuit rejected an agency's argument that a search requiring review of 803 files (more than twice the number at issue here) would be unduly burdensome and thus declined to "relieve[] [the agency] from all duty to search." *Id.* at 9. Nor does it explain why this Court should not follow the analysis in *Public Citizen, Inc. v. Dep't of Educ.*, 292 F. Supp. 2d 1 (D.D.C. 2003), in which the court found unpersuasive the defendants' claim of undue burden, where "defendants merely claim that searching these 25,000 paper files would be 'costly and take many hours to complete,' indicating that the DOE would need to send the files from Texas to California, or employees from California to Texas, to complete the search." *Id.* at 6. The effort at issue here does not appear to exceed the considerable logistical complication involved in reviewing the 25,000 paper files in *Public Citizen*. Notably, the *Public Citizen* court found it especially significant that the search was "certain to turn up responsive documents." *Id.* While DOJ contends that the records that would be found as a result of this search would be exempt from disclosure, *see* DOJ Reply at 11, it acknowledges and certainly does not dispute that this search, as in *Public Citizen*, would yield responsive records. *See* Kenney Decl. ¶¶ 20-21.

The cases DOJ cites in support of its claim that it should not have to perform "research services" (*see* DOJ Reply at 12) do not address the question before this Court – whether an agency can abandon its search efforts mid-way. *Assassination Archives and Research Center, Inc. v. CIA*, 720 F. Supp. 217 (D.D.C. 1989), turned on whether the agency's affidavits adequately addressed "which files were searched or by whom." *Id.* at 219. Plaintiffs do not dispute here that the agency has adequately described its search methodology; conversely, the *Assassination Archives* court did not address the question here, whether an agency must complete the search it has begun to undertake. *Freedom Watch, Inc. v. CIA*, 895 F. Supp. 2d 221 (D.D.C. 2012), involved a 49-part request for "[a]ny and all information" relating to various incredibly broad topics. *Id.* at 222-25. The court held that the requests were "virtually incomprehensible and are 'so broad as to impose an unreasonable burden upon the agency.'" *Id.*

at 228 (citation omitted). There is no dispute that the requests here – for requests, subpoenas, and applications for location tracking information – were phrased with "'sufficient particularity … to enable the searching agency to determine precisely what records are being requested.'" *Id.* at 229 (citation omitted). More to the point, it is almost always the case that a FOIA requester "cannot identify the [documents] in which they are interested without the government's assistance." *ACLU v. Dep't of Justice*, 655 F.3d 1, 11 (D.C. Cir. 2011); *id.* at 12 (agency required to disclose cases in which warrantless cell phone tracking led to conviction or guilty plea); *cf. also California First Amendment Coalition v. Superior Court*, 67 Cal. App. 4th 159, 165-66 (1998) ("the requirement of clarity [in a request under California's Public Records Act] must be tempered by the reality that a requester, having no access to agency files, may be unable to precisely identify the documents sought"). In this sense, an agency will often be required to conduct some research in responding to a FOIA request. But this does not mean that agencies can simply refuse to process such requests. On the contrary, requiring the agency to conduct the "research" at issue here would further FOIA's purpose. "[A]ny interest in keeping the government's own policies obscure runs directly counter to FOIA's central purpose." *ACLU v. Dep't of Justice*, 655 F.3d at 11.

III. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment. Neither the sealing orders nor the Pen Register Statute prohibits DOJ from producing the underlying documents; as a result, they do not justify withholding the requested documents under FOIA. DOJ should therefore complete the search it has already commenced and produce responsive records, *i.e.*, location tracking materials from closed investigations. If, however, the Court concludes that DOJ may withhold documents pursuant to the sealing orders or the Pen Register Statute, it should still order DOJ to complete the search and identify responsive docket numbers on a *Vaughn* index. Plaintiffs can then separately move to unseal the identified matters.

Dated: December 20, 2013

Respectfully submitted,

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