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UNITED STATES DISTRICT COURT
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 REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO PART 1 AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT Date: January 30, 2014 Time: 10:00 a.m. Place: San Francisco U.S. Courthouse Judge: Hon. Maria-Elena James

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PRELIMINARY STATEMENT

Plaintiffs' Memorandum in Opposition to the Department of Justice's Motion for Summary Judgment[1] demonstrates that the parties have substantially narrowed the scope of issues to be resolved by this Court as to Part 1 of plaintiffs' Freedom of Information Act request. As the government noted in its opening brief, the U.S. Attorney's Office for the Northern District of California ("USAO-NDCA") does not maintain its records in a manner that allows for the identification and retrieval of applications for location-tracking information. Plaintiffs, however, have made clear that they are not seeking a hand-search of USAO-NDCA's files and are satisfied with the search that USAO-NDCA conducted in its Legal Information Office Network System ("LIONS") to try to identify those matters that involve location-tracking information. USAO-NDCA's Criminal Division Section Chief reviewed the spreadsheet containing the results of the LIONS search and, based on a review of those data, was able to eliminate some matters that did not appear likely to contain responsive information. Additional matters have been eliminated by a Section Chief because they pertain to open cases in that section. Plaintiffs did not dispute the elimination of any of these matters.

What is left for this Court to decide at this stage of the litigation is whether USAO-NDCA should be required to retrieve, review, and process the remaining matters (but a substantially larger number of actual files), even though the analysis that the government has conducted to date demonstrates that these matters are sealed by this Court. Plaintiffs urge this Court to evaluate the scope and effect of its sealing orders, and assert that the orders do not preclude the USAO-NDCA from disclosing the applications at issue. This Court's sealing orders, however, are quite clear: They preclude the disclosure of the applications plaintiffs seek, thus removing any discretion that USAO-NDCA may have to disclose them pursuant to a FOIA request. Alternatively, the pen register statute has been recognized as an Exemption 3 statute, which similarly precludes the disclosure of any applications filed and sealed pursuant to that statute. Thus, any further processing of this FOIA request would be a pointless waste of USAO-

[1] Plaintiffs' Opposition and Notice of Cross-Motion and Cross-Motion for Partial Summary Judgment; Memorandum in Support, ECF No. 48, 10/25/2013 ("Pl. Mem.").

NDCA's limited resources and, in light of the manner in which the records are kept, would be unduly burdensome as well.

ARGUMENT

I. DOJ Has Conducted a Reasonable Search for Responsive Records.

As set forth in the government's opening brief, USAO-NDCA does not maintain searchable, central electronic records. *See* Declaration of Patricia J. Kenney in Support of the Department of Justice's Motion for Summary Judgment as to Part 1 of Plaintiff's Freedom of Information Act Request, ECF No. 43-1, 09/23/2013 ("Kenney Decl.") ¶ 4. Instead, it maintains paper records, organized by USAO numbers, for matters, investigations, and cases that are opened by the office. Kenney Decl. ¶ 2. The government has argued that a hand-search of those records to find responsive documents would be unreasonably burdensome. Notice of Motion and Motion for Summary Judgment as to Part 1 and Memorandum in Support, ECF No. 43, 09/23/2013 ("Gov. Mem.") at 13-15. Plaintiffs agree. *See* Pl. Mem. at 12 (conceding that a "hand search [of] all files the office has opened since 2008 . . . would be unduly burdensome").

Plaintiffs nonetheless describe an alternative search methodology used in what they characterize as a "similar but far broader FOIA matter." Pl. Mem. at 12. As plaintiffs describe it, that search protocol "entailed sending an email to Assistant United States Attorneys and asking them to identify cases" with records that were responsive to the FOIA request at issue. Pl. Mem. at 12. As plaintiffs note, however, "DOJ is not bound by its decision to use that methodology in another case." Pl. Mem. at 12. And there is a good reason explaining why the Department has chosen not to repeat that type of inquiry here: As noted in the government's opening brief, a FOIA request "reasonably describes" a record "if it enable[s] a professional employee of the agency who [i]s familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978). As courts have recognized, whether an agency employee could locate a record with a reasonable amount of effort depends both on the nature of the request and the type of records system an agency has. *See, e.g., Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 276 (D.D.C. 2012) ("[A]n agency is presumably unable to determine precisely what records are being requested

when it cannot perform a reasonable search for the requested records within the limitations of how its records systems are configured."); *Freedom Watch, Inc. v. CIA*, 895 F. Supp. 2d 221, 228-29 (D.D.C. 2012) (request improper where it imposes an unreasonable burden on agency); *Assassination Archives & Research Ctr. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989) ("[A]gencies are not required to maintain their records or perform searches which are not compatible with their own document retrieval systems."). Conducting a poll of Assistant United States Attorneys to have them ascertain, based on their memory alone, whether they may have records spanning across a multi-year period of time that are responsive to a FOIA request would not be effective here. While the use of location-tracking technology is an issue in which the ACLU is keenly interested, applications for such information merely reflect a procedural mechanism that "takes the form of a search warrant or a pen register," which "have wide spread use as criminal investigative tools beyond just seeking court-ordered location tracking information." Kenney Decl. ¶ 6. Asking individual prosecutors to recall all of the circumstances in all of their investigations and prosecutions in which they may have used this procedural mechanism across a multi-year time span would not have yielded meaningful results while imposing a large burden. In light of the fact that FOIA does not require agencies to bypass their record-keeping systems by conducting a "poll," USAO-NDCA properly determined that it would be inappropriate to do so here.

II. Further Processing of Plaintiffs' FOIA Request Is Unnecessary.

In addition to conceding that a hand-search of USAO-NDCA's files would be unreasonably burdensome, plaintiffs' brief makes clear that they do not contest the search methodology used to attempt to locate responsive matters in the LIONS database; the elimination of 424 matters that were determined, based on a review of the LIONS search results, to be unlikely to have responsive records; and the elimination of 386 matters by the OCDETF/Narcotics Section Chief that are believed to be assigned to open matters. *See* Pl. Mem. at 12-13. Accordingly, and as of the filing of plaintiffs' brief, there were potentially 374 remaining matters (out of the original 1,184 matters initially identified through the LIONS search) that would need to be retrieved and reviewed. *See* Pl. Mem. at 13. Plaintiffs, however,

invited USAO-NDCA to have other section chiefs review the LIONS search results to ascertain whether any of the matters identified therein involve open, on-going matters. *See id.* USAO-NDCA has now completed that subsequent review of the LIONS search results and can identify an additional 25 matters or cases which are believed to be open. *See* Supplemental Declaration of Patricia J. Kenney in Support of the Department of Justice's Motion for Summary Judgment as to Part 1 of Plaintiff's Freedom of Information Act Request ("Supplemental Kenney Decl.") ¶ 6, attached hereto. Thus, there are now 349 remaining matters that may contain responsive records and which are not believed to be open. *Id.* [2]

As discussed in the government's opening brief and as described below, however, retrieving and processing the files associated with these 349 matters would be futile because the investigation that USAO-NDCA has conducted indicates that they would be under seal. As explained in the Kenney Declaration, a majority of the 760 matters identified as having potentially responsive information were confirmed by PACER to be under seal; in the remainder, PACER returned the message "Cannot find case," there was no docket number to check, or the relevant documents have already been disclosed to plaintiffs. Kenney Decl. ¶¶ 19, 22, 23. And for those matters that PACER could not find or for which there was no docket number to search, USAO-NDCA retrieved a random, 10 percent sample to confirm that relevant materials were, in fact, sealed. *See* Kenney Decl. ¶¶ 20, 21.

There are two independent bases for the non-disclosure of these sealed records. First, USAO-NDCA is precluded from disclosing these matters because they have been sealed by this Court. And second, many of these matters were placed under seal pursuant to the pen register statute, which is a FOIA Exemption 3 statute. Plaintiffs address both bases, but as explained below their arguments are unavailing.

[2] The government notes that the actual retrieval and review of any remaining files, if so ordered by the Court, may reveal that additional matters involve open investigations.

A. This Court's Seals Preclude the Disclosure of Applications for Location-Tracking Information.

As the government noted in its opening brief, USAO-NDCA is precluded from disclosing the existence of particular matters because they have been sealed by this Court. Plaintiffs say otherwise, arguing that the sealing orders at issue do not act as a "gag order" or otherwise prohibit USAO-NDCA from disclosing the applications. *See* Pl. Mem. at 15-20. Plaintiffs ignore both the nature of the seals and the practice of the USAO-NDCA in complying with those seals.

Agencies may not disclose information that a court has enjoined them from disclosing. *See GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980) (recognizing that a court order removes any "discretion for the agency to exercise," and that "[t]he concerns underlying the [FOIA] are inapplicable" in that event because the agency cannot be said to have "improperly" withheld records). Plaintiffs do not dispute this fundamental proposition, but instead argue that it does not apply here because they believe that the sealing orders do not preclude the USAO-NDCA from disclosing otherwise responsive records. *See* Pl. Mem. at 15-20. Plaintiffs' argument is premised almost entirely on the out-of-circuit case of *Morgan v. Department of Justice*, in which the D.C. Circuit held that agencies seeking to withhold sealed records in a FOIA action "have the burden of demonstrating that the court issued the seal with the intent to prohibit the [agency] from disclosing the [records] as long as the seal remains in effect." *Morgan v. Dep't of Justice*, 923 F.2d 195, 198 (D.C. Cir. 1991). *Morgan* is not binding on this Court. Moreover, plaintiffs' reliance on the case is either irrelevant or misplaced for several reasons.

First, there is no ambiguity as to the scope of this Court's sealing orders – they preclude disclosure of the applications plaintiffs seek. For example, this Court's local rules provide that a document may be sealed in a criminal case if "the safety of persons or a legitimate law enforcement objective would be compromised by the public disclosure of the contents of the document." Crim. L.R. 56-1(b). Sealed documents "shall be kept from public inspection, including inspection by attorneys and parties to the action." Crim. L.R. 56-1(e). Plaintiffs seek

to obtain through USAO-NDCA that which they cannot obtain from this Court – sealed documents that this Court has already determined "shall be kept from public inspection." *Id.* And plaintiffs seek to use the mechanism of FOIA to evade this Court's sealing orders and disclose these documents to the public, even though this Court has already determined that they should not be disclosed to the public. *Morgan* forbids that result. *See Morgan*, 923 F.2d at 198 (noting that "the court's general rules or procedures governing the imposition of seals" is a relevant factor to consider in determining scope of seals).

Second, courts universally hold that the pen register statute, 18 U.S.C. § 3123(d), is an Exemption 3 statute under FOIA. *See* Gov. Mem. at 17 (citing *Jennings v. FBI*, No. 03-cv-001651-JDB, slip op. at 11 (D.D.C. May 6, 2004); *Riley v. FBI*, No. 00-2378, 2002 U.S. Dist. LEXIS 2632, at *5-*6 (D.D.C. Feb. 11, 2002); *Manna v. U.S. Dep't of Justice*, 815 F. Supp. 798, 812 (D. N.J. 1993), *aff'd on other grounds*, 51 F.3d 1158 (3d Cir. 1995)); *see also Sennett v. Dep't of Justice*, ___ F. Supp. 2d ___, 2013 WL 4517177, at *8 (D.D.C. Aug. 27, 2013); *Brown v. FBI*, 873 F. Supp. 2d 388, 401 (D.D.C. 2012). *Plaintiffs have cited no authority to the contrary*. While the application of the pen register statute and Exemption 3 is discussed in more detail in Part II.B, *infra* (as it provides an independent basis for the non-disclosure of at least some of the applications at issue), the fact that courts consistently conclude the statute is covered by Exemption 3 means that all of the sealing orders at issue here act to preclude the USAO-NDCA from disclosing these records to the public. That is because Exemption 3 only applies to statutes that either "(A) require[ ] that the matters be withheld from the public in such a manner *as to leave no discretion on the issue*, or (B) establish[ ] particular criteria for withholding or refer[ ] to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3) (emphasis added). *The courts which have held that the pen register statute is an Exemption 3 statute have in effect concluded that the sealing orders "leave no discretion on the issue."* Therefore, any sealing order entered pursuant to the pen register statute leaves USAO-NDCA with no discretion: It may not disclose the applications to the public. The same analysis, though, is also true of any other relevant sealing orders entered by this Court: As *Morgan* noted, courts should consider "sealing orders of the same court *in similar cases* that explain the purpose for the imposition of

the seals." *Morgan*, 198 F.2d at 923. Any non-pen register applications for location-tracking information (such as warrants) certainly involve "similar cases" and raise the exact same law-enforcement concerns as do those applications that have been filed pursuant to the pen register statute. Thus, all of the orders at issue here remove any discretion from USAO-NDCA to disclose location-tracking applications to the public.

Third, plaintiffs' assertion that USAO-NDCA has failed to provide any evidence that the "intended scope or effect of the specific sealing orders at issue here was to impose a gag order on DOJ" is incorrect. *See* Pl. Mem. at 16. As noted in the Kenney Declaration submitted with the Department's summary judgment motion, "[t]he sealing orders bar the USAO from publicly disclosing the records." Kenney Decl. ¶ 2; *see also id.* ¶ 7 ("A sealing order prohibits the USAO from disclosing sealed documents to the public."). That testimony was not a statement made in the abstract, but was based on information "obtained from the Criminal Division Chief, the supervisors in the Criminal Division and a number of AUSAs who in their practice have obtained sealing orders for applications and orders seeking location tracking information." Supplemental Kenney Decl. ¶ 3.

Indeed, plaintiffs' own declaration demonstrates that this Court's sealing orders preclude the disclosure of the applications plaintiffs seek. According to the Third Declaration of Linda Lye (ECF No. 49, 10/25/2013) ("Third Lye Decl."), the American Civil Liberties Union of Northern California attempted to obtain access to a set of orders involving location-tracking information relating to a *pro se* criminal case pending in the United States District Court for the District of Arizona. Third Lye Decl. ¶ 2. Those orders were issued by the United States District Court for the Northern District of California. *Id.* "The ACLU-NC attempted to gain access to the orders from the Court's public docket (through PACER), but discovered that they were under seal." *Id.* Accordingly, and prior to bringing the instant lawsuit, the ACLU-NC contacted the USAO-NDCA and, "over the course of eleven months, commencing in August 2011, request[ed] that [the USAO-NDCA and the USAO for Arizona] agree to unseal the orders." *Id.* ¶ 3. Because the ACLU-NC did not receive a substantive response to its inquiries, it filed a motion in this Court to unseal the two matters and served a copy of that motion on USAO-NDCA. *Id.* ¶ 4. Shortly

thereafter, USAO-NDCA filed its own motion to unseal, which was granted. *Id.* ¶ 5. *Only then did the U.S. Attorney's Office in Arizona provide the materials to the ACLU-NC. Id.* USAO-NDCA's filing of a motion to unseal demonstrates that the sealing orders are binding; otherwise, the materials could have simply been disclosed by the U.S. Attorney's Office without first obtaining this Court's permission.[3]

Fourth, and contrary to plaintiffs' assertion, *see* Pl. Mem. at 17, the sealing orders have specific language that prohibits disclosure to the public. That language indicates that "this Order and the Application [are] SEALED until otherwise ordered by the Court." Defs. Ex. F at ACLU-PT1-ReRls-000098. USAO-NDCA understands the sealing order to "reflect[ ] the intent that the sealed application and sealed order *not* be publicly disclosed without a specific unsealing order." Supplemental Kenney Decl. ¶ 5. To that end, USAO-NDCA considers the office "to have an obligation *not* to disclose sealed documents to the public, including sealed applications and sealed orders for location tracking information, unless the Court has entered a subsequent unsealing order." Supplemental Kenney Decl. ¶ 3; *see also id.* ¶ 4 (confirming "common understanding" within USAO-NDCA "that a sealing order imposes a responsibility on them not to disclose sealed documents to the public"). As for the specific language directed to telephone providers, those third parties might not otherwise understand why they cannot disclose the sealed order.

Fifth, plaintiffs argue that the sealing orders "seal[ ] particular documents, but not entire dockets." Pl. Mem. at 18. That, however, ignores the practice of this Court, which is, in fact, to seal the entire docket. *See* Kenney Decl. ¶ 19 (describing result of docket search as "Case Under Seal"). This Court's sealing of its own dockets is dispositive and constitutes further evidence of its intent to preclude the disclosure of sealed information to the public at large. *See Morgan*, 923 F.2d at 198 (relevant factor is "the purpose for the imposition of the seals").

Finally, plaintiffs repeatedly accuse the Department of "shrouding" in secrecy its "location tracking policies," implying that the Department intentionally and without justification

[3] Moreover, and as noted in Ms. Kenney's declaration, USAO-NDCA consulted with the law enforcement agency that conducted the investigation – an "essential" step – before moving to unseal the documents. Kenney Decl. ¶ 22.

is acting to thwart the development of public policy. *See* Pl. Mem. at 1, 3, 4. To the contrary, USAO-NDCA's actions are squarely within the public interest and plaintiffs fail to appreciate that confidentiality is critical in developing criminal cases to protect the public. Further, courts place their imprimatur on this process by issuing sealing orders to preclude disclosure and protect the investigative process. And while plaintiffs assert that there is a common-law right of access to judicial proceedings, *see* Pl. Mem. at 9, that assertion puts the cart before the horse: This is a FOIA case, not a case in which plaintiffs have moved to unseal a docket.[4] The rules of FOIA therefore apply, and those rules preclude agencies from disclosing otherwise sealed records. If this Court wishes, as a prospective matter, to place limitations on its sealing orders in the interests of transparency, it is of course free to do so. If plaintiffs move to unseal particular dockets, this Court would need to evaluate any such motions in light of the authority plaintiffs may cite regarding a common-law right of access. But those issues are all premature in light of the parties' currently-pending summary judgment motions, which merely address FOIA's disclosure requirements and the limitations on those requirements. The scope of this Court's Orders is clear, and while plaintiffs might wish for a contrary result, the relevant test under FOIA concerns what the Orders require, and not what plaintiffs think they should require. This Court should therefore reject plaintiffs' invitation to second-guess, at the present time, the orders that have previously been entered by this Court.

B. The Pen Register Statute Also Precludes the Disclosure of the Applications.

Even if this Court were to determine that the sealing orders it has entered were not intended to preclude the USAO-NDCA from disclosing applications for location-tracking information, many of those applications would still be subject to FOIA Exemption 3. That is because applications were oftentimes sealed pursuant to the pen register statute, 18 U.S.C. § 3123(d), which has repeatedly been recognized as an Exemption 3 statute.[5]

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[4] Plaintiffs have alluded to filing motions to unseal dockets, but any such motions would not be part of this proceeding.

[5] The government acknowledges that not every request for location-tracking information was filed pursuant to the pen register statute. Nonetheless, and to the extent this Court agrees that the pen register statute is an Exemption 3 statute that precludes the disclosure of the applications

Plaintiffs present a two-pronged argument as to why they believe Exemption 3 is inapplicable. First, plaintiffs assert that "the pen register statute does not constitute an exempting statute under Exemption 3." Pl. Mem. at 22. Second, plaintiffs argue that the materials they seek – *applications* for location-tracking information – are not covered by the pen register statute, which they say technically refers only to the sealing of "orders." Pl. Mem. at 21 (quoting 18 U.S.C. § 3123(d)). Neither has merit.

As noted above, plaintiffs' first argument runs headlong into a consistent line of cases holding that the pen register statute is an Exemption 3 statute. Instead of citing any contrary authority, plaintiffs attempt to dismiss these cases as being "erroneously decided," as offering "no reasoning," or as resting on an "erroneous premise." Pl. Mem. at 22-23. Specifically, plaintiffs echo their previous arguments by asserting that the pen register statute "does not impose a gag order on DOJ." Pl. Mem. at 22. As noted above, however, plaintiffs are simply incorrect. *See* Part II.A, *supra*. And in any event, the court in *Jennings* considered and rejected the type of argument that plaintiffs make here. Specifically, and after describing how the wiretap statute (28 U.S.C. § 2510) "explicitly prohibits anyone from disclosing to any other person the contents of any wire, oral, or electronic communication intercepted through a wiretap," the court found

> [t]his same reasoning applies to the evidence derived from the issuance of a pen register or trap and trace device. EOUSA withheld 28 pages of pen register and conversation log sheets. According to [the] statute, an order authorizing a pen register or trap and trace device is sealed until otherwise ordered by the court and such an order prohibits disclosure of the existence of the pen register or trap and trace device. Since the log sheets would by necessity reveal the existence of these devices, they are exempt from disclosure by statute and by Exemption 3.

Jennings v. FBI, No. 03-cv-01651-JDB, slip op. at 11-12 (D.D.C. May 6, 2004) (internal citations omitted) (attached to Gov. Mem. as ECF No. 43-3, 09/23/2013).

Alternatively, plaintiffs argue that the applications they are seeking fall outside the scope of the pen register statute, which they claim covers only orders. *See* Pl. Mem.

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filed under it, USAO-NDCA would not need to retrieve those applications to the extent it can ascertain, based on the LIONS search results, which matters invoked the pen register statute.

at 21. That argument, however, ignores relevant language in the statute not only sealing the order, *see* 18 U.S.C. § 3123(d)(1), but also precluding the disclosure of "the existence of the pen register or trap and trace device or the existence of the investigation" by relevant parties, *see* 18 U.S.C. § 3123(d)(2). (The argument also ignores the orders that this Court has entered requiring that "the application be SEALED until otherwise ordered by the Court." Defs. Ex. F at ACLU-PT1-ReRls-000098.) The disclosure of the application would, by necessity, reveal "the existence of the investigation." *See Jennings*, slip op. at 11-12 ("the log sheets would by necessity reveal the existence of these devices"). The same, of course, is true of docket sheets, which would also reveal the existence of an investigation. Accordingly, any applications filed under seal pursuant to the pen register statute are exempt from disclosure pursuant to Exemption 3.

III. Further Processing of Part 1 of Plaintiffs' FOIA Request Would Be Unduly Burdensome.

Further processing of Part 1 of plaintiffs' FOIA request would be unduly burdensome. Plaintiffs respond by asserting that, "to establish undue burden, an agency must do more than cite a large number of files that would have to be searched; it must also demonstrate that the search is likely to be fruitless." Pl. Mem. at 13. For the reasons discussed above, further processing would be "fruitless" because the records plaintiffs seek have been sealed. As for the "large number of files," plaintiffs ignore most of the facts that the government already cited explaining why the unique nature of the files here makes further processing not only burdensome, but in some circumstances practically impossible.

While plaintiffs' concessions regarding responsiveness and open matters admittedly have shrunk the number of potential files that would need to be reviewed, the task of processing the remaining matters still remains monumental. Plaintiffs assert that "DOJ cannot argue that a search of at most 374 files creates an undue burden." Pl. Mem. at 13. It can so argue. Plaintiffs focus only on the number of matters (which, admittedly, is now 349), but ignore the fact that an individual "matter" may contain multiple files; while some matters consist of one folder of

information, others may contain many boxes of documents (or even fill an entire storage room). Kenney Decl. ¶ 5. Some materials are located in the USAO-NDCA; others would need to be retrieved from off-site storage. Kenney Decl. ¶ 5. Once retrieved, hand-searching through the materials would be extraordinarily time consuming, as each document identified as an application for a pen register would need to be reviewed line-by-line to determine whether the application is, in fact, responsive (many pen register applications do not seek location information). *See* Kenney Decl. ¶ 6. And once the applications are identified, ascertaining their sensitivity would be a nearly impossible task in light of the age of some of the files and turn-over of both AUSAs and agents. *See generally* Kenney Decl. ¶¶ 7-9. USAO-NDCA would nonetheless need to try to determine whether any exemptions should be claimed and, because the applications typically contain declarations from agents, USAO-NDCA would also need to consult with applicable law enforcement agencies in order to allow them to express their views on exemptions. *See, e.g.*, Kenney Decl. ¶ 22 (describing consultation with investigatory agency regarding potential unsealing of applications); Supplemental Kenney Decl. ¶ 5 (describing proper procedure of checking with law enforcement agency). As location information is regularly used in prosecuting street gangs, violent crimes, and drug trafficking, *see* Kenney Decl. ¶ 6, the premature disclosure of any of this information could literally result in violence, *see* Kenney Decl. ¶ 7.

Plaintiffs fail to address meaningfully any of these points, but instead rely almost exclusively upon the number of matters that remain to be processed. It is not merely the number of files that would need to be reviewed, but also the complexity of that review, that creates much of the burden here. FOIA was not designed to turn government agencies into research services. *See AARC*, 720 F. Supp. at 219; *see also Freedom Watch, Inc.*, 895 F. Supp. 2d at 229. That is unmistakably what would happen if USAO-NDCA were required to further process this request: The office would literally need to piece-together investigations, years after-the-fact and with incomplete information from missing sources, in order to attempt to ascertain which exemptions would need to be applied to any responsive records. Even if this Court were to find that the sealing orders do not, by themselves, preclude disclosure (an issue which the government hotly

disputes), any such processing places a logistical burden on USAO-NDCA beyond that which FOIA contemplates.

Finally, plaintiffs argue that the department should, at minimum, provide plaintiffs with the docket numbers for the sealed matters by identifying them on a *Vaughn* index. *See* Pl. Mem. at 23. As noted above, PACER does not provide the docket numbers for those cases that have been confirmed to be under seal, thus indicating that those docket numbers are sealed as well. Accordingly, USAO-NDCA cannot disclose docket numbers.

CONCLUSION

For the reasons set forth above, further processing of Part 1 of plaintiffs' FOIA request is not necessary, and summary judgment should be granted to the defendant.

DATED: December 12, 2013

Respectfully submitted,

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