UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER PURSUANT TO 18 U.S.C. § 2703(d)	Misc. No. 10GJ3793 No. 1:11DM3 No. 1:11EC3

OBJECTIONS OF REAL PARTIES IN INTEREST TO MAGISTRATE'S MAY 4, 2011 ORDER ON PUBLIC DOCKETING

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INTRODUCTION

Real parties in interest Jacob Appelbaum, Rop Gonggrijp, and Birgitta Jonsdottir ("Parties") respectfully bring these Objections to the Magistrate's May 4, 2011 Order concerning their motion for public docketing of the judicial records at issue in this action.

Well-established Fourth Circuit caselaw requires courts to create a public docket identifying all sealed judicial records with information sufficient to provide the public with notice of each sealed item and an opportunity to challenge its sealing. The Magistrate's May 4, 2011 Order regarding Parties' motion for public docketing violates this fundamental principle.

Parties filed a motion to unseal and for public docketing of each of the § 2703-related documents that had been filed in this case, originally docketed under case number 10-gj-3793. Although the Magistrate's May 4 Order correctly requires docketing of the previously undocketed records relating to the unsealed December 14, 2010 Order to Twitter, the Magistrate's Order fails to address Parties' request for public docketing of the other 10-gj-3793 judicial records at issue—specifically, the sealed documents relating to any other similar orders to entities other than Twitter. In doing so, the Magistrate constructively denied Parties' motion for public docketing in part. As a result, following issuance of the May 4 Order, the Clerk's Office has not provided any docketing information about any of these other orders or associated documents.

This continued failure to maintain a public docket identifying the name and date of each specific document which has been filed with the Court, including motions, orders, and other documents, is erroneous and in violation of clear Fourth Circuit caselaw. This Court should overturn the Magistrate's constructive denial of Parties' motion and issue an Order requiring the Clerk's Office to provide a public docket with individual docket entries identifying the name and date of all judicial records related to any electronic communications orders in this matter,

including any sealed documents, such as any judicial orders to companies other than Twitter.

BACKGROUND

Parties are three individuals whose private and constitutionally protected information about their communications has been swept up in a criminal investigation being conducted by the government. A detailed summary of the factual background of this case is provided in Parties' separate Objections to the Magistrate's March 11, 2011 Order denying Parties' Motion to Vacate and Motion to Unseal, and will not be repeated here. *See* Objections of Real Parties in Interest to March 11, 2011 Order (corrected), Mar. 28, 2011, Dkt. No. 45. Instead, this brief will focus on the procedural background underlying the public docketing issue.

A. Pre-May 4 Order Proceedings.

In response to an *ex parte* Application by the United States, the Magistrate issued an Order on December 14, 2010 that requires Twitter to disclose detailed information concerning the communications conducted by Parties through their Twitter accounts. *See* Declaration of Stuart A. Sears, Ex. 1, Jan. 26, 2011, Dkt. No. 2 ("Twitter Order").[1] The Twitter Order and all related documents were filed under seal, and the Order prohibited Twitter from disclosing it. The government subsequently moved to unseal the Order.[2] In a January 5, 2011 Order, the Magistrate granted the motion, holding that unsealing was "in the best interest of the investigation." *Id.* Ex. 2 ("Unsealing Order"). The January 5 Order unsealed the Twitter Order, but it did not unseal the underlying Application or any other related documents. *See id.* Both the Twitter Order and the January 5 Unsealing Order were issued under case number 10-gj-3793.

[1] Although the accompanying Application remains under seal, given the information disclosed in the Twitter Order, Parties can only surmise that the investigation relates to the WikiLeaks website.

[2] The government's motion to unseal the Twitter Order is still under seal, despite Parties' motion to unseal it and the government's subsequent agreement that the motion no longer needs to remain sealed. That issue is part of Parties' separate Objections to the Magistrate's March 11 Order.

Twitter informed Parties of the now-unsealed Twitter Order on January 7, 2011, advising them that Twitter would be forced to comply with it unless they took appropriate legal actions. *Id.* Ex. 3. The disclosure of the Twitter Order was front-page news around the world.[3] Widespread interest has focused on whether similar orders have been issued to other companies concerning Parties.[4] Other companies believed to have received similar orders have refused to comment.[5]

On January 26, 2011, Parties filed a Motion to Vacate the Twitter Order and a Motion for Unsealing of Sealed Court Records. Motion of Real Parties in Interest to Vacate, Jan. 26, 2011, Dkt. No. 1; Motion of Real Parties in Interest For Unsealing, Jan. 26, 2011, Dkt. No. 3. The motion to unseal requested that the Court unseal and publicly docket all § 2703-related documents on the 10-gj-3793 docket, including documents associated with the Twitter Order plus those related to any other orders to companies other than Twitter. Parties filed their motions on the 10-gj-3793 docket used on the Court's Twitter Order and the Unsealing Order.

Following the filing of their motions, a new docket number, 1:11-dm-00003, was created by the Court to handle the litigation documents regarding Parties' motions. None of the documents existing prior to the filing of Parties' motions, including the Twitter Order and the government's Application, were filed or docketed in this new 1:11-dm-00003 docket; they all remained on the original 10-gj-3793 docket. A subsequent search of the Court's public docket

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[3] *See, e.g.*, Scott Shane & John F. Burns, *U.S. Subpoenas Twitter Over WikiLeaks Supporters*, N.Y. Times, Jan. 9, 2011, at A1, *available at* http://www.nytimes.com/2011/01/09/world/09wiki.html; David Batty, *US Orders Twitter To Hand Over WikiLeaks Members' Private Details*, The Guardian, Jan. 8, 2011.

[4] *See, e.g.*, Barton Gellman, *Twitter, Wikileaks and the Broken Market for Consumer Privacy*, Time Magazine: Techland, Jan. 14, 2011, http://techland.time.com/2011/01/14/twitter-wikileaks-and-the-broken-market-for-consumer-privacy/.

[5] *See, e.g.*, Gellman, *supra;* Miguel Helft & Claire Cain Miller, *1986 Privacy Law Is Outrun by the Web*, N.Y. Times, Jan. 10, 2011, at A1, *available at* http://www.nytimes.com/2011/01/10/technology/10privacy.html.

revealed that three other DM docket numbers were created at the same time, right after the filing of Parties' motions: 1:11-dm-00001, 1:11-dm-00002, and 1:11-dm-00004. A short time later, a new DM case, 1:11-dm-00005, was also created. There are no publicly available docket entries for any of these other DM matters, which are apparently sealed in their entirety. Parties reasonably believe that these dockets were created in connection with the other orders to companies other than Twitter, with each order assigned to a different "DM" docket number.

Following briefing and oral argument, on March 11, 2011, the Magistrate issued an Order denying Parties' Motion to Vacate, and denying in part Parties' Motion for Unsealing. Mem. Op., Dkt. No. 38.[6] The Magistrate did not rule on the request for public docketing in that Order, stating that "petitioners' request for public docketing of 10-gj-3793 . . . requires further review and will be taken under consideration." Mem. Op. at 19.[7]

On May 4, 2011, the Magistrate issued an Order regarding Parties' request for public docketing (the "May 4 Order" or "Magistrate's Order").[8] That one-page Order does not state that Parties' request was either "granted" or "denied." Instead, it states, in its entirety, that:

> THIS MATTER remained under consideration as to the issue of docketing the material in case number 10-gj-3793.
>
> UPON REVIEW of the pleadings and upon further review and consideration of the Clerk's Office procedures, it is hereby
>
> ORDERED that case 10-gj-3793 is hereby transferred to new case 1:11-ec-3, which shall remain under seal except as to the previously unsealed §2703(d) Order of December 14, 2010 ("Twitter Order"), and docketed on the running list in the usual manner.

[6] Parties filed Objections to that decision. Objections of Real Parties in Interest to March 11, 2011 Order (corrected), Mar. 28, 2011, Dkt. No. 45.

[7] As part of that Order, the Magistrate held that all of the litigation documents concerning Parties' motions, now filed on the 1:11-dm-00003 docket, should be unsealed, with one minor redaction to one document. Previously, almost everything had been placed under seal by the Clerk's Office, and there had been no public docketing of any of the litigation materials.

[8] The Order was entered by the Clerk's Office and served on Parties and the government on May 5, 2011.

May 4 Order, Dkt. No. 57.

B. Post-May 4 Order Proceedings.

Parties were served with the May 4 Order on May 5, 2011. The very next day, on May 6, 2011, counsel for Parties attempted to view the "running list" referenced in the May 4 Order, at the Clerk's Office. The Clerk's Office initially told counsel that there was nothing for the public to see regarding this matter. Declaration of Stuart A. Sears, ¶ 3, May 18, 2011, filed herewith ("Sears May 18 Decl."). After speaking with a supervisor, counsel was told that all that existed regarding this matter was a one-page computer entry listing four "EC" cases—1:11-ec-00001, 1:11-ec-00002, 1:11-ec-00003, and 1:11-ec-00004—which counsel was permitted to view. *Id.* There was no information on these pages other than these docket numbers, the fact that they were all assigned to Magistrate Buchanan, and that the dockets had been created in early May, on the days immediately before and after issuance of the May 4 Order. *Id.* Counsel was informed by the supervisor that there was no further information to be viewed regarding this case. *Id.* ¶ 4.

Counsel for Parties subsequently contacted the supervisor again by telephone on May 11, 2011 to confirm that there was no other running list or any other document docketing this matter. *Id.* ¶ 5. The supervisor confirmed that there was no other running list, that there was no physical book, notebook, or ledger docketing the materials filed in this case, and that it was the understanding of the Clerk's Office that it had complied with the May 4 Order. *Id.*

Parties, through counsel, then contacted the Magistrate's chambers on May 12, 2011 in an attempt to ascertain whether the Clerk's Office had in fact done what the May 4 Order required.[9] *Id.* ¶ 6. Later that day, the Magistrate's chambers informed Parties that the matter had

[9] Before doing so, Parties discussed the matter with counsel for the government. Counsel for the government indicated that they had separately contacted the Clerk's Office in an attempt to understand how the Clerk's Office would be implementing the May 4 Order, and that they did

been straightened out at the Clerk's Office, and that by Monday, May 16, additional information requested by Parties regarding the judicial documents at issue here would be publicly docketed on the "running list." *Id.* ¶ 7.

On May 16, counsel for Parties went back to the Clerk's Office to view the public docketing. Counsel spoke with the same supervisor again, who provided access again to the newly-created running list for "EC" matters, which is captioned "Case Assignment History Report." Sears May 18 Decl. ¶¶ 3, 8. That list is virtually identical to the one-page computer entry Parties had previously seen, except that two new notations had been added regarding documents associated with the ec-3 (Twitter) docket, and the list now included ec-5, ec-6, ec-7, ec-8, and ec-9 dockets. *Id.* Ex. B ("EC running list"). This EC running list does not provide any information regarding the other four EC dockets assigned to Magistrate Buchanan (ec-1, ec-2, ec-4, and ec-5), which were created in the immediate days preceding and after issuance of the May 4 Order. Unlike with the ec-3 docket, there are no docket entries or any other information indicating what documents have been filed under these other EC docket numbers. All that appears for them is a case name, "USA v. Under Seal," and that Magistrate Buchanan has been assigned to the matters, along with miscellaneous case assignment information. As with the parallel dm-1, dm-2, dm-4, and dm-5 docket numbers created following the filing of Parties' original motions, Parties reasonably believe that these other four EC dockets concern the other § 2703 orders to companies other than Twitter that were the subject of Parties' motion for unsealing and public docketing.[10]

Because this running list does not contain all of the information that Parties had requested

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not need to be included in Parties' contact to Chambers.

[10] The EC running list reveals that on May 11, May 12, and May 13, four additional EC matters (EC 6-9) were created, all of which have been assigned to Magistrate Jones. As with ec-1, ec-2, ec-4, and ec-5, there is no information about the documents filed in these additional EC dockets.

in their motion, Parties contacted the Magistrate's Chambers and the Clerk's Office the very next day, on May 17, 2011, to determine if anything else would be added to the public docket in response to their motion for public docketing. Sears Decl. ¶ 10. Parties were informed that the Clerk's Office had now provided the information required by the May 4 Order. *Id.*

Parties therefore now file these Objections to the Magistrate's May 4 Order, and request that this Court issue an Order requiring public docketing of all of the requested judicial records, including any sealed documents, such as the other § 2703 applications and orders to companies other than Twitter, which either remain in 10-gj-3793 or which have been segregated off into the other DM or EC dockets.

ARGUMENT

In their Motion to Unseal, Parties requested that the Court unseal and publicly docket all documents associated with the Twitter Order *and* all documents related to any other orders to companies other than Twitter. Although the Magistrate correctly granted Parties' request for public docketing with regard to documents filed on the 10-gj-3793 docket that were associated with the Twitter Order, the Magistrate failed to order public docketing of all documents from 10-gj-3793 related to any orders to companies other than Twitter. Because the presumption of access to judicial records includes the requirement that even sealed judicial records must be publicly docketed, the failure to order public docketing for all of these documents was error. This Court should therefore issue a clear ruling and instructions to the Clerk's Office to create a public docket identifying all § 2703 applications, orders, and related filings that originated in 10-gj-3793.

I. A *DE NOVO* STANDARD OF REVIEW APPLIES TO THESE OBJECTIONS.

A *de novo* standard of review governs the Court's review of the May 4 Order. *De novo* review applies because the Fourth Circuit has explained that "the decision to grant or deny access is 'left to the sound discretion of the *trial court*,'" and that "trial court" means the district court, not a Magistrate, even where the Magistrate has the initial power to make a sealing decision. *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 326 n.2 (4th Cir. 1991) (quoting *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989)); *see also Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004) (holding that denials of the First Amendment right of access receive *de novo* review).

Moreover, objections to a Magistrate's order that dispose of the entire underlying matter are considered "dispositive" and must be reviewed *de novo*. *See ALCOA v. EPA*, 663 F.2d 499, 501-02 (4th Cir. 1981); Fed. R. Civ. P. 72(b); Fed. R. Crim. P. 59(b). Because the Magistrate's Order resolves Parties' entire request for public docketing, it is "dispositive" and is subject to *de novo* review. *See, e.g.*, *ALCOA*, 663 F.2d at 501-02 (holding that a Magistrate's order is dispositive where the motion before the Magistrate set forth all of the relief requested in the proceeding); *NLRB v. Frazier*, 966 F.2d 812, 815, 817 (3d Cir. 1992) (holding that a Magistrate's order is dispositive where the proceeding was instituted for the sole purpose of determining a motion to quash a subpoena).

Finally, even if a "contrary to law" standard is applied, *see* Fed. R. Civ. P. 72(a); Fed. R. Crim. P. 59(a), the issues before this Court are pure questions of law. When courts review pure questions of law using a contrary to law standard, courts conduct a *de novo* review of such legal questions. *See Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002) (reviewing a Magistrate's order under the "contrary to law" standard and noting that questions of law are

reviewed *de novo* under this standard); *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 91 (3d Cir. 1992) (same); *see also United States v. Curtis*, 237 F.3d 598, 607 (6th Cir. 2001) (for review of a Magistrate's orders, mixed questions of fact and law are treated as questions of law and reviewed *de novo*).

II. THE MAGISTRATE ERRED IN FAILING TO ORDER PUBLIC DOCKETING OF THE SEALED DOCUMENTS RELATING TO ANY ORDERS TO COMPANIES OTHER THAN TWITTER.

Both the common law and the Constitution create a strong presumption of access to judicial records and documents. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Va. Dep't of State Police*, 386 F.3d at 575. The law's recognition of the importance of judicial transparency serves "the citizen's desire to keep a watchful eye on the workings of public agencies . . . [and] the operation of government." *Nixon*, 435 U.S. at 598. The Fourth Circuit has specifically noted that the public's interest in access "may be magnified" "[i]n the context of the criminal justice system" because "[s]ociety has an understandable interest not only in the administration of criminal trials, but also in law enforcement systems and how well they work." *In re Application & Affidavit for a Search Warrant*, 923 F.2d at 330-31. "Regardless of whether the right of access arises from the First Amendment or the common law, it 'may be abrogated only in unusual circumstances.'" *Va. Dep't of State Police*, 386 F.3d at 576 (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 182 (4th Cir. 1988)).

Because of this strong presumption of access, the Fourth Circuit has repeatedly made clear that courts must publicly docket sealed judicial records in a manner sufficient to provide the public with notice of each document and an opportunity to seek to unseal them. *See, e.g.*, *Baltimore Sun*, 886 F.2d at 65; *Stone*, 855 F.2d at 181; *United States v. Soussoudis* (*In re Wash.*

Post Co.), 807 F.2d 383, 390 (4th Cir. 1986).[11] This right to public docketing of all judicial matters, including sealed matters, is an essential component of the right of access. It is fundamental both in its own right and as a means to facilitate the right of access to judicial documents.

Generally, before a motion to seal may be granted, notice must be provided to the public, and this notice must ordinarily be docketed "reasonably in advance of deciding the issue" to give the public an opportunity to object. *Stone*, 855 F.2d at 181. In the case of search warrants, where the requirement to conduct proceedings "with dispatch to prevent destruction or removal of the evidence" may necessitate moving quickly before the public can be given an opportunity to raise objections, the Fourth Circuit has nevertheless adhered to the requirement of public docketing to provide the public with notice and "an opportunity . . . to voice objections to the denial of access," holding that such notice "can be given by docketing the order sealing the documents." *Baltimore Sun*, 886 F.2d at 65. There is no reason—let alone legal justification—why § 2703 orders should be treated worse than search warrants for public docketing purposes. At a minimum, therefore, even if the government's request to seal an application for a § 2703 order does not need to be publicly docketed before a court can order such sealing or grant the § 2703 order, those orders must be publicly docketed after they are issued.

Despite these clear requirements, with respect to the sealed documents relating to any § 2703 orders to companies other than Twitter, there is still no publicly available docket with individual docket entries that gives the public notice that any applications or orders granting or denying those applications, or any challenges to such applications or orders, have been filed

[11] *See also* Fed. R. Crim. P. 55 (stating that "every court order or judgment," along with the "date of entry," must be entered by the clerk in the records of the district court's criminal proceedings); E.D. Va. Local Crim. R. 49 (stating that a sealing request must be docketed "in a way that discloses its nature as a motion to seal").

under seal. The docket entries for any such documents remain entirely sealed, despite the shift from docketing in 10-gj-3793 to 1:11-ec-00001, 1:11-ec-00002, 1:11-ec-00004, and/or 1:11-ec-00005. That is also the case with respect to any documents that remain docketed under 1:11-dm-00001, 1:11-dm-00002, 1:11-dm-00004, and/or 1:11-dm-00005. Regardless of whether it is appropriate to maintain certain *documents* under seal, the absence of a public *docket*—somewhere—containing docket entries identifying any other applications, orders, motions, or other documents is simply not permissible. *See, e.g.*, *Baltimore Sun*, 886 F.2d at 65; *Stone*, 855 F.2d at 181; *In re Wash. Post Co.*, 807 F.2d at 390.

That the Magistrate did not expressly deny Parties' request for such public docketing is of no moment. The May 4 Order has constructively denied the request, as the effect of it is that there is now no public docketing of these other orders or related documents. *See, e.g.*, *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 666 (5th Cir. Unit A July 1981) ("The denial of a motion by the district court, although not formally expressed, may be implied by . . . an order inconsistent with the granting of the relief sought by the motion."); *Wimberly v. Clark Controller Co.*, 364 F.2d 225, 227 (6th Cir. 1966) ("[T]he determination of a motion need not always be expressed but may be implied by an entry of an order inconsistent with granting the relief sought.").

The Magistrate's failure to address Parties' complete motion for public docketing of all of the § 2703-related documents arising from the 10-gj-3793 case was erroneous, as was its failure to provide any findings or analysis in support of that constructive denial. *See In re Wash. Post Co.*, 807 F.2d at 390-91 (holding that if a court decides that sealing is warranted, it must issue findings "specific enough to enable the reviewing court to determine" whether the sealing was proper (citing *In re Knight Publ'g Co.*, 743 F.2d 231, 234-35 (4th Cir. 1984))).

Before the Magistrate, the government attempted to overcome this clear Fourth Circuit caselaw requiring public docketing by asserting that "there is no right to notice of process issued to third parties." Govt's Resp. in Opp'n to the Real Parties' In Interest Mot. for Unsealing of Sealed Court Records at 11-12, Feb. 7, 2011, Dkt. No. 22. That argument is misplaced, at best. Although there may not be a right to *personal* notice of all judicial processes, there is a right to *public* notice of all requests to seal material. That is accomplished by, at a minimum, publicly docketing each sealed document so that anyone watching the docket can move to unseal it. *Baltimore Sun*, 886 F.2d at 65; *Stone*, 855 F.2d at 181; *In re Wash. Post Co.*, 807 F.2d at 390.[12]

By declining to rule on Parties' request for public docketing of the documents relating to the other orders, the Magistrate appears to have implicitly accepted the government's argument that the Court should not address the motion for unsealing or public docketing of these documents relating to the other orders because even entertaining such a request would confirm the existence of these other orders. *See, e.g.*, Govt's Resp. to Objections at 30, April 8, 2011, Dkt. No. 55. That circular argument cannot prevail; it would mean that sealed dockets could never be challenged, because ruling on a motion to unseal a "secret" docket—where the existence of the matter has not officially been confirmed—would reveal the docket's existence. That is not the law. Secret dockets are not permitted. *See, e.g., Hartford Courant Co. v.*

[12] The government also previously asserted that public docketing was not necessary here because grand jury documents are not publicly docketed. That argument is not relevant here. The government has acknowledged that the sealed documents were not sealed pursuant to Fed. R. Crim. P. 6(e), the grand jury secrecy rule. Govt's Resp. in Opp'n to the Real Parties' In Interest Mot. for Immediate Unsealing of Mots. and Upcoming Hearing at 1, Feb. 4, 2011, Dkt. No. 19. The creation of a "DM" proceeding separate from any grand jury proceeding to house Parties' challenges is further evidence that the § 2703-related documents at issue here are distinct from any separate grand jury proceeding. In addition, the May 4 Order itself makes clear that, at least with respect to the Twitter documents, public docketing on the running list is required, even for those documents which are still sealed, such as the government's Application for the Twitter Order. The Order, thus, implicitly recognizes that § 2703 proceedings are not grand jury proceedings exempt from the public docketing requirements. Therefore, the propriety of docketing grand jury proceedings is irrelevant here.

Pellegrino, 380 F.3d 83, 93 (2d Cir. 2004) (striking down Connecticut's secret-docket system, holding that, "the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible," and remarking that "docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment"); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (invalidating use of a parallel sealed criminal docketing procedure, and explaining that the "maintenance of a public and a sealed docket is inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings"); *In re Search Warrant for Secretarial Area Outside the Office of Thomas Gunn*, 855 F.2d 569, 575 (8th Cir. 1988) (holding that sealing of district court docket sheets was "improper" and requiring that entry of closure or sealing order be noted on the public docket "absent extraordinary circumstances"). Instead, dockets must be publicly maintained for all judicial records, for the express purpose of providing the public with an opportunity to bring a challenge to any sealing request. *Stone*, 855 F.2d at 181; *In re Wash. Post Co.*, 807 F.2d at 390.

The Fourth Circuit has made clear that courts must publicly docket all sealed judicial records, regardless of how that docketing might allegedly affect important government interests. In *In re Washington Post Co.*, a case that involved sensitive national security concerns and classified information, the government argued that the ordinary principle of providing public notice of a motion to seal documents should not be required "where national security interests are at stake," in part because, much as the government argues here, "notice of a closure motion alone could lead the news media to guess at the nature of the covert operations involved." 807 F.2d at 391 & n.8. The Fourth Circuit rejected that argument, holding that the ordinary

"procedural requirements . . . are fully applicable." *Id.* at 392. As the Fourth Circuit explained, where sealing is at issue, a court does not have "discretion to adapt its procedures to the specific circumstances." *Id.* at 391.

It is erroneous, therefore, to decline to address the issue of public docketing of documents related to any other orders on the ground that doing so would reveal the existence of other applications and orders. The whole point of public docketing is to provide the public with notice of each request to seal judicial documents and the opportunity to challenge such requests. *See, e.g.*, *Stone*, 855 F.2d at 181; *In re Wash. Post Co.*, 807 F.2d at 390. In failing to rule on Parties' request, the Magistrate has denied the public this very notice and opportunity.

The Magistrate's failure to rule on the public docketing of the documents related to the other orders similarly cannot be justified on the ground that those documents are not part of the 1:11-dm-00003 or corresponding 1:11-ec-00003 dockets newly created by the Court. At the time Parties filed their motion, all the sealed documents at issue in this motion were housed in one case, 10-gj-3793. Parties moved for unsealing and public docketing of documents related to any § 2703 orders filed on the 10-gj-3793 docket. As described in more detail above, it was only after Parties filed their motion that new "DM" case numbers were created to handle challenges, and, eventually, that new "EC" numbers were created, apparently to house the underlying § 2703 orders and applications. As past cases demonstrate, it is proper to file a single motion to unseal to address multiple sealed documents within a single case. *See, e.g.*, *Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 427 (4th Cir. 2005); *Va. Dep't of State Police*, 386 F.3d at 577-81. Thus, just because the various orders and applications may now have been split up and segregated into different docket numbers by the Court does not justify the Magistrate's failure to order public docketing of each of the documents. Regardless of where they are currently housed,

public docketing is required.

In response to the May 4 Order, the Clerk's Office has apparently created a new running list of "EC" numbers to track "electronic communications" orders. Sears Decl. ¶ 10 and Ex. B.[13] Except with respect to the Twitter Order documents on the 1:11-ec-00003 docket, whose existence had already been publicly revealed, however, this new "EC" list does not satisfy the requirement that every document filed with the Court, including sealed documents, must be publicly docketed, with docket entries identifying each document and the date of filing. This EC list does not, for example, indicate essential information that must be included on the public docket, such as which documents were filed in each matter, whether the Court granted or denied any request for an order or the sealing request, or whether any motions have been filed challenging the requests or orders. Indeed, other than with respect to the Twitter Order documents, this list contains no information other than the docket number, the date the docket number was assigned by the Clerk's Office, and the name of the assigned judge. This list does not, therefore, even contain the information included on the running list in the *Media General* case. 417 F.3d at 427; *see supra* note 13. A list of docket numbers with no information about the documents on it is not a substitute for a public docket.

Parties do not seek the adoption of any particular procedure or administrative mechanism for public docketing. Parties are not, in other words, challenging the use of the EC "running list" mechanism, instead of the use of a normal case docket. Instead, Parties request an order requiring the Clerk's Office to provide sufficient information—through whatever administrative

[13] The term "running list" originally referred to a publicly available hard copy, "permanent docket book," in which a tracking number for search warrants was assigned by the Clerk's Office. *See Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 427 (4th Cir. 2005). Next to the tracking number, the deputy clerk would record entries for each document, such as "Search Warrant" and "Affidavit Under Seal," identifying the documents associated with that tracking number. *Id.*

vehicle the Clerk's Office adopts—to give adequate notice to the public of the filing under seal of each motion, order, and other documents, sufficient to provide the public with an opportunity to challenge their sealing. That is what well-established Fourth Circuit caselaw requires, and it is what the First Amendment and common law principles of the right of access mandate. The current "EC" list available to the public, in the absence of additional entries, does not provide this necessary information or opportunity.

CONCLUSION

For the foregoing reasons, Parties respectfully request that the Court issue an Order directing the Clerk's Office to provide public docket entries for each of the sealed materials, identifying the name and date of each document filed with the Court, so that the public will have adequate notice of each of them and an opportunity to challenge their sealing.

Dated: May 19, 2011

By: /s/ Rebecca K. Glenberg

Rebecca K. Glenberg, VSB No. 44099
AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA FOUNDATION, INC.
530 E. Main Street, Suite 310
Richmond, VA 23219
Telephone: 804.644.8080
Facsimile: 804.649.2733
Email: rglenberg@acluva.org

Aden J. Fine (admitted *pro hac vice*)
Benjamin Siracusa Hillman (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212.549.2500
Facsimile: 212.549.2651
Email: afine@aclu.org
Email: bsiracusahillman@aclu.org

Cindy A. Cohn (admitted *pro hac vice*)
Lee Tien (admitted *pro hac vice*)

Kevin S. Bankston (admitted *pro hac vice*)
Marcia Hofmann (admitted *pro hac vice*)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: 415.436.9333 x108
Facsimile: 415 436.9993
Email: cindy@eff.org
Email: tien@eff.org
Email: bankston@eff.org
Email: marcia@eff.org

Jonathan Shapiro
GREENSPUN, SHAPIRO, DAVIS
& LEARY, P.C.
3955 Chain Bridge Road
Second Floor
Fairfax, VA 22030
Telephone: 703.352.0100
Facsimile: 703.591.7268
Email: js@greenspunlaw.com

Attorneys for BIRGITTA JONSDOTTIR

Dated: May 19, 2011

By: /s/ John K. Zwerling_____

John K. Zwerling, VSB No. 8201
Stuart Sears, VSB No. 71436
ZWERLING, LEIBIG & MOSELEY, P.C.
108 North Alfred Street
Alexandria, VA 22314
Telephone: 703.684.8000
Facsimile: 703.684.9700
Email: JZ@Zwerling.com
Email: Chris@Zwerling.com
Email: Andrea@Zwerling.com
Email: Stuart@Zwerling.com

John W. Keker (admitted *pro hac vice*)
Rachael E. Meny (admitted *pro hac vice*)
Steven P. Ragland (admitted *pro hac vice*)
KEKER & VAN NEST LLP
710 Sansome Street
San Francisco, CA 94111-1704
Telephone: 415.391.5400
Facsimile: 415.397.7188
Email: jkeker@kvn.com
Email: rmeny@kvn.com
Email: sragland@kvn.com

Attorneys for JACOB APPELBAUM

Dated: May 19, 2011

By: /s/ Nina J. Ginsberg_____

Nina J. Ginsberg, VSB No. 19472
DIMUROGINSBERG, P.C.
908 King Street, Suite 200
Alexandria, VA 22314
Telephone: 703.684.4333
Facsimile: 703.548.3181
Email: nginsberg@dimuro.com

John D. Cline (admitted *pro hac vice*)
LAW OFFICE OF JOHN D. CLINE
115 Sansome Street, Suite 1204
San Francisco, CA 94104
Telephone: 415.322.8319
Facsimile: 415.524.8265
Email: cline@johndclinelaw.com

K.C. Maxwell (admitted *pro hac vice*)
LAW OFFICE OF K.C. MAXWELL
115 Sansome Street, Suite 1204
San Francisco, CA 94104
Telephone: 415.322.8817
Facsimile: 415.888.2372
Email: kcm@kcmaxlaw.com

Attorneys for ROP GONGGRIJP

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

Tracy D. McCormick
Andrew Peterson
U.S. Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314
Telephone: 703-299-3175
Email: tracy.mccormick@usdoj.gov

John K. Zwerling, VSB No. 8201
Stuart Sears, VSB No. 71436
ZWERLING, LEIBIG & MOSELEY, P.C.
108 North Alfred Street
Alexandria, VA 22314
Telephone: (703) 684-8000
Facsimile: (703) 684-9700
Email: JZ@Zwerling.com
Email: Stuart@Zwerling.com

Jonathan Shapiro
GREENSPUN, SHAPIRO, DAVIS
& LEARY, P.C.
3955 Chain Bridge Road
Second Floor
Fairfax, VA 22030
Telephone: (703) 352-0100
Facsimile: (703) 591-7268
Email: js@greenspunlaw.com

Nina J. Ginsberg, VSB No. 19472
DIMUROGINSBERG, P.C.
908 King Street, Suite 200
Alexandria, VA 22314
Telephone: 703.684.4333
Facsimile: 703.548.3181
Email: nginsberg@dimuro.com

John K. Roche
PERKINS COIE, LLP
700 13th Street, N.W., Suite 600
Washington, DC 20005
Telephone: 202-654-6200
Facsimile: 202-654-6211
Email: jroche@perkinscoie.com

Marvin David Miller
1203 Duke Street
The Gorham House
Alexandria, VA 22314
Telephone: (703) 548-5000
Email: katherine@marvinmilleratlaw.com

I also certify that on this 19th day of May, 2011, I caused the following party to be served by first-class United States mail:

Christopher Soghoian (*pro se)*
Graduate Fellow, Center for Applied Cybersecurity Research
Indiana University
P.O. Box 2266
Washington, DC 20013
Telephone: 617-308-6368

By: /s/ Rebecca K. Glenberg
Rebecca K. Glenberg, VSB No. 44099
AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA FOUNDATION, INC.
530 E. Main Street, Suite 310
Richmond, VA 23219
Telephone: 804.644.8080
Facsimile: 804.649.2733
Email: rglenberg@acluva.org