IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES AUTHORIZING THE USE OF A PEN REGISTER/TRAP AND TRACE DEVICE ON AN ELECTRONIC MAIL ACCOUNT	**FILED UNDER SEAL**
	No. 1:13EC297
IN THE MATTER OF THE SEARCH AND SEIZURE OF INFORMATION ASSOCIATED WITH [redacted] THAT IS STORED AND CONTROLLED AT PREMISES CONTROLLED BY LAVABIT LLC	No. 1:13SW522
In re Grand Jury	No. 13-1

MOTION FOR UNSEALING OF SEALED COURT RECORDS AND REMOVAL OF NON-DISCLOSURE ORDER AND MEMORANDUM OF LAW IN SUPPORT OF MOTION

Lavabit, LLC ("Lavabit") and Mr. Ladar Levinson ("Mr. Levinson") (collectively "Movants") move this Court to unseal the court records concerning the United States government's attempt to obtain certain encryption keys and lift the non-disclosure order issued to Mr. Levinson. Specifically, Movants request the unsealing of all orders and documents filed in this matter before the Court's issuance of the July 16, 2013 Sealing Order ("Sealing Order"); (2) all orders and documents filed in this matter after the issuance of the Sealing Order; (3) all grand jury subpoenas and search and seizure warrants issued before or after issuance of the Sealing Order; and (4) all documents filed in

connection with such orders or requests for such orders (collectively, the "sealed documents"). The Sealing Order is attached as Exhibit A. Movants request that all of the sealed documents be unsealed and made public as quickly as possible, with only those redactions necessary to secure information that the Court deems, after review, to be properly withheld.

BACKGROUND

Lavabit was formed in 2004 as a secure and encrypted email service provider. To ensure security, Lavabit employs multiple encryption schemes using complex access keys. Today, it provides email service to roughly 400,000 users worldwide. Lavabit's corporate philosophy is user anonymity and privacy. Lavabit employs secure socket layers ("SSL") to ensure the privacy of Lavabit's subscribers through encryption. Lavabit possesses a master encryption key to facilitate the private communications of its users.

On July 16, 2013, this Court entered an Order pursuant to 18 U.S.C. 2705(b), directing Movants to disclose all information necessary to decrypt communications sent to or from and data stored or otherwise associated with the Lavabit e-mail account [redacted], including SSL keys (the "Lavabit Order"). The Lavabit Order is attached as Exhibit B. The Lavabit Order precludes the Movants from notifying any person of the search and seizure warrant, or the Court's Order in issuance thereof, except that Lavabit was permitted to disclose the search warrant to an attorney for legal advice.

ARGUMENT

In criminal trials there is a common law presumption of access to judicial records, like the sealed documents in the present case. Despite the government's legitimate interests, it cannot meet its burden and overcome this presumption because it has not explored reasonable alternatives. Furthermore, the government's notice preclusion order constitutes a content-based restriction on free speech by prohibiting public discussion of an entire topic based on its subject matter.

I. THE FIRST AMENDMENT AND NON-DISCLOSURE ORDERS

The Stored Communications Act ("SCA") authorizes notice preclusion to any person of a § 2705(b) order's existence, but only if the Court has reason to believe that notification will result in (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction or tampering with evidence; (4) intimidating of potential witnesses; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. § 2705(b)(1)-(5). Despite this statutory authority, the § 2705(b) gag order infringes upon freedom of speech under the First Amendment, and should be subjected to constitutional case law.

The most searching form of review, "strict scrutiny", is implicated when there is a content-based restriction on free speech. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 403 (1992). Such a restriction must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Id.* The Lavabit Order's non-disclosure provision is a content-based restriction that is not narrowly tailored to achieve a compelling state interest.

a. The Lavabit Order Regulates Mr. Levinson's Free Speech

The notice preclusion order at issue here limits Mr. Levinson's speech in that he is not allowed to disclose the existence of the § 2705(b) order, or the underlying investigation to any other person including any other Lavabit subscriber. This naked prohibition against disclosure can fairly be characterized as a regulation of pure speech. *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001). A regulation that limits the time, place, or manner of speech is permissible if it serves a significant governmental interest and provides ample alternative channels for communication. *See Cox v. New Hampshire*, 312 U.S. 569, 578 (1941) (explaining that requiring a permit for parades was aimed at policing the streets rather than restraining peaceful picketing). However, a valid time, place, and manner restriction cannot be based on the content or subject matter of the speech. *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980).

The gag order in the present case is content-based because it precludes speech on an entire topic, namely the search and seizure warrant and the underlying criminal investigation. *See id.* at 537 ("The First Amendment's hostility to content-based regulation extends...to prohibition of public discussion of an entire topic"). While the nondisclosure provision may be viewpoint neutral on its face, it nevertheless functions as a content-based restriction because it closes off an "entire topic" from public discourse.

It is true that the government has a compelling interest in maintaining the integrity of its criminal investigation [redacted]. However, Mr.

Levinson has been unjustly restrained from contacting Lavabit subscribers who could be subjected to government surveillance if Mr. Levinson were forced to comply the Lavabit Order. Lavabit's value is embodied in its complex encryption keys, which provide its subscribers with privacy and security. Mr. Levinson has been unwilling to turn over these valuable keys because they grant access to his entire network. In order to protect Lavabit, which caters to thousands of international clients, Mr. Levinson needs some ability to voice his concerns, garner support for his cause, and take precautionary steps to ensure that Lavabit remains a truly secure network.

b. The Lavabit Order Constitutes A Prior Restraint On Speech

Besides restricting content, the § 2705(b) non-disclosure order forces a prior restraint on speech. It is well settled that an ordinance, which makes the enjoyment of Constitutional guarantees contingent upon the uncontrolled will of an official, is a prior restraint of those freedoms. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). By definition, a prior restraint is an immediate and irreversible sanction because it "freezes" speech. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). In the present case, the Lavabit Order, enjoins Mr. Levinson from discussing these proceedings with any other person. The effect is an immediate freeze on speech.

The Supreme Court of the United States has interpreted the First Amendment as providing greater protection from prior restraints. *Alexander v. United States*, 509 U.S. 544 (1993). Prior restraints carry a heavy burden for

justification, with a presumption against constitutional validity. *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1305 (1983); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Here, the government and the Court believe that notification of the search warrant's existence will seriously jeopardize the investigation, by giving targets an opportunity to flee or continue flight from prosecution, will destroy or tamper with evidence, change patterns of behavior, or notify confederates. *See* Lavabit Order. However, the government's interest in the integrity of its investigation does not automatically supersede First Amendment rights. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (holding the confidentiality of judicial review insufficient to justify encroachment on the freedom of speech).

In the present case, the government has a legitimate interest in tracking the account [redacted]. However, if Lavabit were forced to surrender its master encryption key, the government would have access not only to this account, but also every Lavabit account. Without the ability to disclose government access to users' encrypted data, public debate about the scope and justification for this secret investigatory tool will be stifled. Moreover, innocent Lavabit subscribers will not know that Lavabit's security devices have been compromised. Therefore the § 2705(b) non-disclosure order should be lifted to provide Mr. Levinson the ability to ensure the value and integrity of Lavabit for his other subscribers.

II. THE LAW SUPPORTS THE RIGHT OF PUBLIC ACCESS TO THE SEALED DOCUMENTS

Despite any statutory authority, the Lavabit Order and all related documents were filed under seal. The sealing of judicial records imposes a limit on the public's right of access, which derives from two sources, the First Amendment and the common law. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004); *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (press and public have a First Amendment right of attend a criminal trial); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 2 (1986) (right of access to preliminary hearing and transcript).

a. The Common Law Right Of Access Attaches To The Lavabit Order

For a right of access to a document to exist under either the First Amendment or the common law, the document must be a "judicial record." *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 63–64 (4th Cir. 1989). Although the Fourth Circuit Court of Appeals has never formally defined "judicial record", it held that § 2703(d) orders and subsequent orders issued by the court are judicial records because they are judicially created. *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d)*, 707 F.3d 283, 290 (4th Cir. 2013) ("*Twitter*"). The § 2705(b) order in the present case was issued pursuant to § 2703(d) and can properly be defined as a judicial record. Although the Fourth Circuit has held there is no First Amendment right to access § 2703(d) orders, it held that the common law presumption of access attaches to such documents. *Twitter*, 707 F.3d at 291.

The underlying investigation in *Twitter*, involved a § 2703(d) order, which directed Twitter to provide personal information, account information, records, financial data, direct messages to and from email addresses, and Internet Protocol addresses for eight of its subscribers. *In re: § 2703(d) Order*, 787 F. Supp. 2d 430, 435 (E.D. Va. 2011). Citing the importance of investigatory secrecy and integrity, the court in that case denied the petitioners Motion to Unseal, finding no First Amendment or common law right to access. *Id.* at 443.

Unlike Twitter, whose users publish comments on a public forum, subscribers use Lavabit for its encrypted features, which ensure security and privacy. In *Twitter* there was no threat that any user would be subject to surveillance other than the eight users of interest to the government. However, a primary concern in this case is that the Lavabit Order provides the government with access to every Lavabit account.

Although the secrecy of SCA investigations is a compelling government interest, the hundreds of thousands of Lavabit subscribers that would be compromised by the Lavabit Order are not the subjects of any justified government investigation. Therefore access to these private accounts should not be treated as a simple corollary to an order requesting information on one criminal subject. The public should have access to these orders because their effect constitutes a seriously concerning expansion of grand jury subpoena power.

To overcome the common law presumption of access, a court must find that there is a "significant countervailing interest" in support of sealing that

outweighs the public's interest in openness. *Twitter*, 707 F.3d at 293. Under the common law, the decision to seal or grant access to warrant papers is within the discretion of the judicial officer who issued the warrant. *Media General Operations, Inc. v. Buchanan*, 417 F.3d 424, 429 (4th Cir. 2005). If a judicial officer determines that full public access is not appropriate, she must consider alternatives to sealing, which may include granting some public access or releasing a redacted version of the documents. *Id.*

In *Twitter* the court explained that because the magistrate judge individually considered the documents, and redacted and unsealed certain documents, he satisfied the procedural requirements for sealing. *Twitter*, 707 F.3d at 294. However, in the present case, there is no evidence that alternatives were considered, that documents were redacted, or that any documents were unsealed. Once the presumption or access attaches, a court cannot seal documents or records indefinitely unless the government demonstrates that some significant interest heavily outweighs the public interest in openness. *Wash. Post*, 386 F.3d at 575. Despite the government's concerns, there are reasonable alternatives to an absolute seal that must be explored in order to ensure the integrity of this investigation.

b. There Is No Statutory Authority To Seal The § 2705(d) Documents

There are no provisions in the SCA that mention the sealing of orders or other documents. In contrast, the Pen/Trap Statute authorizes electronic surveillance and directs that pen/trap orders be sealed "until otherwise

ordered by the court". 18 U.S.C. §§ 3121-27. Similarly, the Wiretap Act, another surveillance statute, expressly directs that applications and orders granted under its provisions be sealed. 18 U.S.C. § 2518(8)(b). The SCA's failure to provide for sealing is not a congressional oversight. Rather, Congress has specifically provided for sealing provisions when it desired. Where Congress includes particular language in one section of a statute but omits it in another, it is generally assumed that Congress acts intentionally. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Therefore, there is no statutory basis for sealing an application or order under the SCA that would overcome the common law right to access.

c. Privacy Concerns Demand A Common Law Public Right Of Access To The Sealed Documents

The leaking of classified government practices by Edward Snowden and the ensuing mass surveillance scandal have sparked an intense national and international debate about government surveillance, privacy rights and other traditional freedoms. It is concerning that suppressing Mr. Levinson's speech and pushing its subpoena power to the limits, the government's actions may be viewed as accomplishing another unfounded secret infringement on personal privacy. A major concern is that this could cause people worldwide to abandon American service providers in favor of foreign businesses because the United States cannot be trusted to regard privacy.[1] It is in the best interests of the Movant's and the government that the documents in this matter not be

[1] *See* Dan Roberts, *NSA Snooping: Obama Under Pressure as Senator Denounces 'Act of Treason'*, The Guardian, June 10, 2013, http://www.guardian.co.uk/world/2013/jun/10/obama-pressured-explain-nsa-surveillance.

shrouded in secrecy and used to further unjustified surveillance activities and to suppress public debate.

CONCLUSION

For the foregoing reasons, Lavabit respectfully moves this Court to unseal the court records concerning the United States government's attempt to obtain certain encryption keys and lift the non-disclosure order issued on Mr. Levinson. Alternatively, Lavabit requests that all of the sealed documents be redacted to secure only the information that the Court deems, after review, to be properly withheld.

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Certificate of Service

I certify that on this 25th day of July, 2013, this Motion For Unsealing Of Sealed Court Records And Removal Of Non-Disclosure Order And Memorandum Of Law In Support was hand delivered to the person at the addresses listed below:

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Jesse R. Binnall