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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DIANE ROARK,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No.: 6:12-CV-01354-MC

**DEFENDANT'S RESPONSE TO
PLAINTIFF'S MOTION TO UNSEAL
DOCUMENTS**

Defendant the United States of America, by S. Amanda Marshall, United States Attorney for the District of Oregon, and through James E. Cox, Jr., Assistant United States Attorney for the District of Oregon, submits this response to Plaintiff's motion to unseal documents.

Plaintiff has moved the Court to “unseal all documents and records pertaining to Plaintiff that were sealed by a Title III court since the year 2000 and have not yet been unsealed.”¹ (Motion at p. 1.) Undersigned counsel for the government is unaware of any records that fall within the scope of Plaintiff’s motion. Nevertheless, Plaintiff’s motion should be denied because the information Plaintiff seeks has no relevance to the sole claim at issue in the case, which is Plaintiff’s claim for return of property from the search conducted of her residence on July 26, 2007.

Plaintiff claims that her “argument for return of property would be strengthened by revelation of improper government searches.” (Motion at p. 9.) This argument is flawed at several levels. As an initial matter, there is no evidence that any additional search warrant affidavits or court orders exist.² Moreover, even if such documents did exist, they would not demonstrate that the July 26, 2007 search was unlawful. At best, such documents would simply show that other lawful searches were conducted.

Most importantly, though, even if such documents did bear on the lawfulness of the July 26, 2007 search, they would still not be relevant to Plaintiff’s claim for return of property from that search. Rule 41(g) provides that “[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return.” Plaintiff unquestionably has standing to sue for the return of her property because she has been “aggrieved . . . by the deprivation of her property.” Thus, the sole question to be addressed is

¹ Defendant is uncertain what Plaintiff means by the term “Title III court.” Defendant assumes that Plaintiff means an “Article III court,” i.e., a court established under Article III of the Constitution. However, Plaintiff may be referring to a court that has approved a “Title III” wiretap application, *see* 18 U.S.C. §§ 2510-2522.

² Plaintiff does not allege that she has received notice of any Title III wiretap, pursuant to 18 U.S.C. § 2518(8)(d), nor is undersigned counsel aware of one.

whether the Plaintiff is entitled to the return of her seized property. As has been briefed to this Court, the government has the right to retain classified and protected government information. The lawfulness of the search is irrelevant to Plaintiff's claim.

This is the conclusion reached by the Maryland court in the parallel proceeding, and applies equally here. *See Wiebe v. National Sec. Agency*, Civil Action No. RDB-11-3245, 2012 WL 4069746 (D. Md. Sept. 14, 2012); *recommendation aff'd* docket # 78 (D. Md. Mar. 27, 2013). Furthermore, the authority cited by Plaintiff – *United States v. Comprehensive Drug Testing* (“*CDT*”), 621 F.3d 1162 (9th Cir. 2010) – is not on point.

In *CDT*, the Ninth Circuit, sitting en banc, affirmed a district court order requiring the government to return illegally seized property pursuant to Rule 41(g). The legality of the seizure was only relevant in *CDT*, though, because it was a factor in the four part test to determine whether the court should exercise its equitable jurisdiction to address the merits of the return of property claim before an indictment is issued. *Id.* (“Under *Ramsden*, the district court is required to balance four discretionary factors to determine whether to allow the government to retain the property, order it returned or (as happened in *Ramsden*) craft a compromise solution that seeks to accommodate the interests of all parties.”). While the *CDT* decision did not plainly separate this threshold standing inquiry from the merits of the issue, the underlying panel decision and the case in which the Ninth Circuit adopted the threshold inquiry did do so. *See United States v. Comprehensive Drug Testing*, 513 F.3d 1085, 1103 (9th Cir. 2008) (“A district court may exercise equitable jurisdiction to hear such a motion only after analyzing the four factors set out in *Ramsden*, 2 F.3d 322.”); *Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993) (“To prevent the district courts from exercising their equitable jurisdiction too liberally, the circuit

courts have enumerated certain factors that must be considered before a district court can reach the merits of a preindictment Rule 41(e) motion.”).

In this case, the government does not contest Plaintiff’s standing to bring a claim for the return of property seized. Thus, the inquiry shifts to whether the government has adequately justified its retention of the property at issue. *See United States v. Fitzen*, 80 F.3d 387, 388 (9th Cir. 1996) (“Where, as here, the government no longer needs the property as evidence, the defendant is presumed to have the right to the return of his property. The government, however, may overcome this presumption by demonstrating ‘a cognizable claim of ownership or right to possession adverse to that of [the defendant].’”) (internal citations and quotations omitted). Thus, the legality of the search is irrelevant to the issues in this case.³

Finally, Plaintiff also attempts to justify the motion based on the grounds that “her rights otherwise has been violated” and the records “can inform Congress and the public about government use of its seizure power and about unpublicized or denied methods used in domestic search and surveillance performed by the FBI and intelligence agencies.” (Mot. at 3.) Neither of these grounds is a proper basis on which to grant the motion. This court appropriately denied Plaintiff’s motion for leave to amend the complaint to assert broader claims, “leaving for

³ Of course, Defendant also disputes Plaintiff’s contention that the July 26, 2007 search was illegal. Plaintiff’s argument that it was illegal seems to be based on the fact that the government seized property that fit within the description of property to be seized. The search warrant affidavit permitted the seizure of “U.S. government documents, classified documents (including classified documents missing headers and footers), national defense intelligence documents and papers, and other documents relating to the National Security Agency (NSA).” Documents authored by government agencies that contain classified or protected Government information often contain headers and footers that indicate that the document is classified or protected. However, it is not surprising that a search warrant relating to a leak of classified information would indicate that documents containing classified or protected information are to be seized, even if such a header/footer is not present on the documents. It may go without saying, but documents may still contain classified or protected information, even though the documents do not contain a headers and/or footer indicting as much.

litigation a Fed. R. Crim. P. 41(g) lawsuit for return of property.” (Dkt 35 at p. 14.) Thus, there are no other claims on which Plaintiff may base the motion. Furthermore, the general public interest in records is not an appropriate basis for granting discovery in this action.

For the foregoing reasons, Defendant respectfully requests that Plaintiff’s motion to unseal documents be denied.⁴

DATED this 6th day of April 2015.

Respectfully submitted,

S. AMANDA MARSHALL
United States Attorney
District of Oregon

/s/ James E. Cox, Jr.
JAMES E. COX, JR.
Assistant United States Attorney
Attorneys for Defendant

⁴ In addition, the motion should also be denied because Plaintiff failed to confer with counsel for Defendant prior to filing the motion, as required under Local Rule 7-1(a). *See* Local Rule 7-1(a)(3).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Defendant's Response to Plaintiff's Motion to Unseal Documents** was placed in a postage prepaid envelope and deposited in the United States Mail at Portland, Oregon on April 6, 2015, addressed to:

Diane Roark
2000 N. Scenic View Dr.
Stayton, OR 97383

And was sent via email to the following email address:

gardenofeden@wvi.com

/s/ James E. Cox, Jr.
JAMES E. COX, JR.