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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

PLAINTIFF'S REPLY BRIEF TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO UNSEAL DOCUMENTS

Plaintiff Diane Roark, pro se, submits this reply to Defendant's response to her motion to unseal. Plaintiff certifies that she attempted repeatedly in good faith throughout this 41(g) case to elicit government answers regarding the four issues critical to Defendant's motion for summary judgment moved by Defendant and covered in her motion to compel. Defendant ignored the issues, and any answers were incomplete or evasive.

It also is unlikely that the lead attorney has high-level security clearances, and thus lacks the ability to get complete answers from clients. There was no delay in Court proceedings to allow time for an AUSA background investigation, as there was in the related Maryland case. The local AUSA sometimes seems at pains to distinguish his own knowledge from that of his clients. For example, a statement that "undersigned counsel" is unaware of any records falling within the scope of this motion

to unseal (Defendant Response, p. 1) explicitly does not account for the knowledge of at least six participating client lawyers and their agencies. Not granting appropriate clearances may be useful to clients because it allows the AUSA to make personally truthful but potentially misleading or inaccurate replies. It has appeared that the AUSA often could not be responsive even should he so desire.

In a February 11, 2015 teleconference with the Court and Defendant, Plaintiff observed that Defendant would neither confirm nor deny specific key issues, and Plaintiff ultimately mentioned the possibility of a motion. It then appeared that this case would be decided by summary judgment rather than going through discovery, although Plaintiff had stated in her cross-motion for partial summary judgment that she believed discovery might be needed for some issues, notably illegal search. Plaintiff therefore soon submitted a motion to compel production of documents and answers pertaining to the four critical issues, which would not be difficult to answer or require lengthy and formal discovery.

Plaintiff followed up with a motion to unseal all searches targeting her over the past 15 years, to support one of the four items in her prior motion, and to ascertain other apparent violations of her rights. Plaintiff's experience since 2012 indicates the government will withhold information embarrassing to the government unless there is a motion to unseal.

Because Rule 41(g) establishes the relevance of illegal search to return of documents, and due to proven monitoring and apparent obstruction of Plaintiff's court preparations, Plaintiff has standing within this case to request unsealing of search documents. A move to unseal at this point is justified, timely, appropriate, and in the interest of both justice and judicial economy.

Comparing the Maryland case. In responding to the motion to unseal, Defendant has once again cited the related Maryland 41(g) case of *Wiebe et al. v. NSA et al.* as the prescribed model for settling this case. In *Wiebe,* the four Plaintiffs submitted three separate motions to unseal the affidavits justifying warrants to search their homes. Although the affidavits had no bearing on the outcome of the

41(g) property case, the motions were granted.[1] Plaintiff's case for unsealing is stronger because suspected searches are tied directly to the instant case, including lengthy electronic monitoring and brazen interference with computer operations and legal work.

With respect to return of property, factual evidence presented in Plaintiff's case far exceeds that which was available during the *Wiebe* case. Therefore, it would be inappropriate to impose a similar decision.

- *Unnotified surreptitious search*. The government finally admitted that it possesses papers from Plaintiff's home that can meet the search warrant description of "documents with headers and footers removed," and three such papers were returned to Plaintiff. This further verified that there had been a prior unnotified search of her home, that is illegal under multiple Ninth Circuit rulings. Everything that followed therefrom is "fruit of the poisonous tree," including seizure of Plaintiff's property, raids of Plaintiff correspondents and spurious indictment of Thomas Drake.
- *Two searches violating warrant particularity.* Maryland plaintiffs objected fruitlessly to additional searches of their paper and electronic documents after the criminal case ended, but did not protest that it violated the Fourth Amendment requirement for particularity. In the instant case, NSA conducted not one but two additional searches using key words different from the criminal search. This was for the sole purpose of finding paper and electronic documents that it might wish to retain. NSA also conducted another and different key word search when requested to do so by the House Intelligence Committee, to find documents that the Committee might wish to retain. These searches could not have been executed legally at Plaintiff's residence, and were done simply to take advantage of the fact that Plaintiff's property was in NSA's possession due to a misguided criminal investigation. Both searches clearly violate the

1 Response to Thomas Drake's motion revealed that his affidavit had been previously unsealed but had not been given to him by the prosecutor.

Fourth Amendment requirement for particularity and the limitations set forth in the warrant. On this basis alone, Defendants should not be allowed to review computer search results and should return all of Plaintiff's property except that which she voluntarily offered them.

- *Plaintiff's right to possess unclassified documents*. Unclassified documents comprise all but a few of the total papers seized in the Maryland case and of those likely to be claimed by NSA and HPSCI in this case. Plaintiff has amassed considerable evidence beyond that found by Maryland litigants, showing that most government's claims of authority to seize unclassified papers are false.

1. Copious, mutually supporting and unrefuted evidence from the original legislative record proved that under the *NSA, Act of 1959* only employee information deemed sensitive was covered by the law, not other unclassified information.
2. The Maryland court's decision that the government maintained a *"continuing interest"* in unclassified information of its choosing, *despite any illegal search*, was based on NSA's improper representation of this law. NSA thus maintains no statutory continuing interest in unclassified material other than personnel information deemed sensitive. Further, the legal precedent for the "continuing interest" theory is thin, based on a single Sixth Circuit decision that neither the Maryland Fourth Circuit courts nor this Ninth Circuit need follow. With the argument for "continuing interest" in shreds, illegal search becomes central to this case and justifies the motion to compel production of documents and the motion to unseal.
3. Unlike for plaintiffs in *Wiebe*, this Plaintiff's last and controlling *Nondisclosure Agreement* did not restrict publication or possession of unclassified materials. HPSCI finally stated in answering Plaintiff's motion to compel that it does not have the copy that Plaintiff signed [this may have been provided to federal investigators], but still avoids addressing whether it

has identical agreements that were signed by the rest of the staff.

4. In any case, a more restrictive *NDL* might permit censoring *publication* of unclassified material, but does not restrict its *possession*. HPSCI's contention otherwise was unsupported by evidence, and Plaintiff proved that there were no governing regulations for FOUO material.

5. Plaintiff also proved that NSA is untruthful in denying that its security policy since at least 2000 has permitted employees and former officials such as Plaintiff to take employee and retiree identity and other *NSA FOUO information to their homes*. Previously footnoted evidence in this respect is partially reproduced at Attachments A and B. The NSA Newsletter at Attachment A was published on the NSA website pursuant to a Freedom of Information Act submission – although NSA has claimed to the Court that it is not subject to FOIA. The Newsletter was *never stamped as For Official Use Only*. A small box on the lower left hand corner of the original page 4 contains NSA's security policy and other pages contain much information on NSA employees/retirees. Attachment B, printed from the website of an NSA retiree organization with which the Agency cooperates, reveals that the names and contact information for NSA retirees are freely exchanged electronically among enrolled retiree members. The now-electronic newsletter from this organization also names both current employees and retirees. NSA stated within this case that its security policies protecting retiree and employee names are identical.

- *Redaction* was not addressed in the Maryland opinion. When challenged in this case, the Defendant presented no evidence that it is authorized to withhold entire documents rather than minimally redacting the supposedly classified information or employee names, as required under the Freedom of Information Act (FOIA). Absent contrary evidence produced by the

Motion to compel, the presumption should be that NSA is subject to FOIA.

- *Unreliable NSA classifications.* Plaintiff has proven, and has offered to produce additional evidence, that in the related Maryland case, NSA twice released as Unclassified a document on Plaintiff's computer that NSA now claims is TS/SCI, an alleged classification that NSA then cited to argue that it need not return Plaintiff's hard drive. NSA has replied that it is unable to confirm or refute this evidence. This wide disparity in classifications of the same paper and the agency's failure to describe and document its classification and declassification decisions to promote consistency again (as in the Drake case) throw into disrepute the probity, reliability and motivation of NSA's classifications. In this Drake-related case, the Court likewise has particular reason to scrutinize closely any claims of national security interest. "The District Court cannot abdicate its responsibility to ...determine whether filings should be made available to the public. It certainly should not turn this function over to the parties." *Proctor & Gamble Co. v. Banker's Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). [W]e are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present." *In re Washington Post Co.,* 807 F.2d 383, 391 (4th Cir. 1986) (vacating sealing order).

These important facts did not pertain or were unavailable to the Maryland court deciding *Wiebe*. All of them favor the Plaintiff, and many might have changed the Maryland decision. The motions to compel and unseal would provide more information if such is desired, and the motion to unseal is amply justified on additional grounds. Given the wealth of supplemental evidence in this case, it would be unjust simply to apply the Maryland decision because the present case is historically related to that case, particularly since this circuit is not obliged to do so in any event.

Unsealing Electronic Interceptions. In *Katz v. U. S. (*389 U.S. 347 (1967), p. 353), Fourth

Amendment protections against seizure of tangible items and physical trespass without warrant were applied also to recording of oral statements without any technical trespass. The 7-1 ruling extended Fourth Amendment protection to all areas where a person has a "reasonable expectation of privacy." "Search" was defined as including immaterial intrusion with technology. Regardless of location, a conversation is protected from "unreasonable" search and seizure under the Fourth Amendment if it is made with a "reasonable expectation of privacy." A "right to privacy" was discussed.

Berger v. New York (388 U.S. 41 (1967)) invalidated a New York Law on its face because it did not provide for notice to the person surveilled, justification for secrecy, particularity in communications sought or a return on the warrant providing accountability to a judge for the evidence gathered. The Court held that conversations are protected by the Fourth Amendment and that use of electronic devices to capture conversations thus constitutes a "search."

In the "Keith" case, the Supreme Court upheld, 8-0, lower courts' decisions that the Fourth Amendment requires a warrant to conduct domestic electronic surveillance, and that there is no exception when targeting a domestic security threat. *U.S. v. U.S. District Court* 407 U.S. 297 (1972). As in *Berger v New York*, the Court also required the government to disclose its surveillance to the defense. The opinion addresses issues prominent in Plaintiff's case:

These seminal Supreme Court cases provide ample legal basis for Plaintiff's motion to unseal. All electronic searches, including those in domestic security cases, require a warrant and related Fourth Amendment protections. Any electronic searches lacking a warrant are illegal. Electronic searches must be disclosed to the person surveilled.

There is no issue that such disclosures would reveal sensitive law enforcement methods, except illegal or embarrassing activities. The Department of Justice has published online its 228-page manual for prosecutors that reveals the techniques used, the circumstances in which they can

be used, and even the application forms.[2] The methods were also revealed in legal cases such as widely publicized operations targeting Wall Street insider traders and the constitutional lawsuit brought by Brandon Mayfield, who was wrongly jailed in Oregon for suspected terrorism.

U.S. v. Wen Ho Lee, C.R., No. 990-1417 JP (D. New Mex., October 04, 2001), *Memorandum Opinion and Order Unsealing Documents*, a case with striking similarities to those of Plaintiff and her Maryland associates, notably Thomas Drake.[3] The Lee court agreed to unseal 19 documents wholly or with redactions. Only two remained sealed because they were irrelevant to ethnic targeting and for other reasons. Neither side objected to unsealing an Order Authorizing Interception of Wire Communications.

In this Drake-related case, the Court likewise has particular reason to scrutinize closely any claims of national security interest. "The District Court cannot abdicate its responsibility to ...determine whether filings should be made available to the public. It certainly should not turn this function over to the parties." *Proctor & Gamble Co. v. Banker's Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996). [W]e are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present." *In re Washington Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986) (vacating sealing order).

Other Arguments in Defendant's Response. The government's argument that its "continuing interest" in some of Plaintiff's property is the "sole" issue in this case is addressed above under "Comparing the Maryland case."

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2 *Electronic Surveillance Manual: Procedures and Case Law, Forms,* Electronic Surveillance Unit, Office of Enforcement, Operations, Criminal Division, Department of Justice, Revised June 2005.

3 Wen Ho Lee was wrongly accused of spying for China while Plaintiff and associates were wrongly accused of leaking information on domestic surveillance. Lee was wrongly targeted mostly because he was ethnic Chinese, while Plaintiff and associates were wrongly targeted and also retaliated against because they were internal whistleblowers. A multitude of charges against Lee and Drake were dropped under suspicious circumstances, angering both judges.

The government also incorrectly believes that Plaintiff is arguing that the overt July 26, 2007 was illegal and that there is no evidence of this, although Plaintiff repeatedly stated that she is contesting an unnotified surreptitious search conducted prior to July 26.

The primary evidence of such a search was identification in the July 26 warrant of distinctive papers with headers and footers removed that were located in plain view on her office bookcase shelf; the government has finally admitted that such papers were seized and that all but three remain in its possession. The warrant also stated, incorrectly as the government now admits, that these papers were "classified," indicating that the papers were perused by an intruder with some acquaintance with national security issues, and probably that originals, copies or photos were taken to NSA for review. As also stated previously, the documents missing headers and footers were emails, with dates and correspondents' identities removed to protect associates and the date of printing at the bottom removed. Defendant has confused this with removal of classification markings, of which there were none, with the government now admitting that none were merited. Secondarily, the government had identified Plaintiff's correspondents on the domestic surveillance topic before July 26, and so was able to raid those it selected simultaneous with the raid on Plaintiff, probably by copying her hard drive during the surreptitious search and likely previously through illegal NSA's collection of email metadata and perhaps content. In sum, it can hardly be claimed that there is no evidence of unnotified and thus illegal search conducted before July 26, 2007.

Contrary to Defendant's assertion, Plaintiff has also presented evidence that, in addition to two illegal NSA searches of her computer that violate warrant particularity requirements, other wire/electronic searches and tampering that target Plaintiff, whether legal or illegal, have spanned many years. Definitive evidence that this continued was presented to the Court after a repair firm found a sophisticated Trojan Horse and keylogger on her computer in November 2014. Plaintiff has

a right to know who conducted these searches and details about them. Given that some of these activities are unlikely to be approved by warrant, federal intelligence and investigative agencies should also be required to provide information to the Court on activities with or without a warrant that target Plaintiff.[4] Warrantless searches are far more threatening to civil liberties than misguided searches using a defective warrant. Judge Powell's warning above about "subjection to an unchecked surveillance power" applies in Plaintiff's case.

Defendant alleges that the *Comprehensive Drug Testing* (CDT) decision (*U.S. v. Comprehensive Drug* Testing, 513 F.3d 1085 (9th Cir. 2008), to return property seized in an illegal search "was only relevant in CDT" because it applied to a four-part test for return of property before an indictment is issued. An indictment has not been issued in Plaintiff's case, either. Further, the Circuit at length discussed its intent to establish CDT as a governing precedent updating for the electronic storage age "our venerable precedent, United States v. Tamura, 694 F.2d 591 (9th Cir., 1982)." "*Just as Tamura has served as a guidepost* for decades, we trust that the procedures we have outlined above will prova a useful tool for the future constitutional freedoms of our citizens..." "Throughout, we take the opportunity to guide our district and magistrate judges in the proper administration of search warrants and grand jury subpoenas for electronically stored information."

The CDT case is quite similar to NSA's even more egregious and deliberate two additional searches of Plaintiff's papers and computer, in violation of warrant particularity. The court insisted on third party "segregation and redaction" of information not covered in the warrant, that would not be made available to investigators. In reviewing computer material the agents exploited the "plain view" doctrine to scoop up information on many targets other than those in the warrant and then to seek criminal cases against them at various courts. The Court's guidelines for return of property in

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4 Precedent for this includes, e.g., *In re: National Security Letter, Under Seal v. Holder, 13-15957 & 13-16731 (consolidated), 13-16732* at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000715.

the face of such deliberate violations were quite expansive:

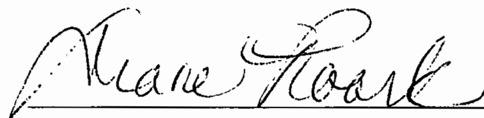
> When, as here, the government comes into possession of evidence by circumventing or willfully disregarding limitations in a search warrant, it must not be allowed to benefit from its own wrongdoing by retaining the wrongfully obtained evidence or any fruits thereof....it should then order the return of the property without the need for balancing that is applicable in the more ordinary case."

Having been subject to two illegal searches in this respect and apparently many others as well, all of Plaintiff's property should be returned without regard to "balancing" considerations such as "continuing interest."

Conclusion. Plaintiff prays that the Court agree that she has persuasive evidence of illegal searches, both pertinent to the instant case and otherwise, that for years have denied her a right to privacy. The government's insistence that, nevertheless, she is not entitled to the facts, is unworthy of this country, contrary to the Bill of Rights, and elevates suspicion that it has much to hide.

DATED this 20th day of April 2015.

Respectfully submitted,



Diane Roark, pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Plaintiff's Reply Brief to Defendant's Response to Plaintiff's Motion to Unseal Documents** was delivered to the District Court of Oregon in Eugene on April 20, 2015. A copy was emailed the same day and sent by United States Mailon April 21, 2015y from Stayton, Oregon to:

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