

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").<sup>1</sup> 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.<sup>2</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup>

Widespread interest has focused on whether similar orders have been issued to other companies concerning Parties.<sup>4</sup> Other companies believed to have received similar orders have refused to comment.<sup>5</sup>

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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<sup>3</sup> 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.

<sup>4</sup> 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/>.

<sup>5</sup> See, e.g., Gellman, *supra*; Miguel Helft & Claire Cain Miller, *1986 Privacy Law Is Outrun by*

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.<sup>6</sup> 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.<sup>7</sup>

On May 4, 2011, the Magistrate issued an Order regarding Parties' request for public docketing (the "May 4 Order" or "Magistrate's Order").<sup>8</sup> 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.

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

<sup>7</sup> 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.

<sup>8</sup> 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

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,

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.**



*Post Co.*), 807 F.2d 383, 390 (4th Cir. 1986).<sup>11</sup> 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.

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,





*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, an

“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 not

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.<sup>13</sup> 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

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

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