

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

3)	
4	The Reporters Committee for Freedom of the Press,)	File No. 20-mc-00082 (PJS/TNL)
5	Petitioner,)	
6	v.)	Minneapolis, Minnesota February 24, 2021 9:00 a.m.
7	United States of America,)	
8	Respondent.)	

BEFORE THE HONORABLE PATRICK J. SCHILTZ
UNITED STATES DISTRICT COURT JUDGE
(VIDEO STATUS CONFERENCE)

APPEARANCES

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P R O C E E D I N G S

I N O P E N C O U R T

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2
3 THE LAW CLERK: United States District Court for
4 the District of Minnesota is now in session, the Honorable
5 Patrick J. Schiltz presiding.

6 THE COURT: Good morning, everyone. We're here
7 for a status conference in the matter of the application of
8 the Reporters Committee for Freedom of the Press to unseal
9 certain search warrant materials. The case is number
10 20-mc-00082.

11 If I could have everybody make their appearances,
12 please, beginning with the attorneys for the applicants.

13 MS. CRUMP: Good morning, Your Honor. My name is
14 Catherine Crump on behalf of the Committee.

15 THE COURT: Good morning.

16 MS. WALKER: Good morning, Judge. This is Leita
17 Walker, local counsel for the Reporters Committee.

18 THE COURT: Good morning, Ms. Walker.

19 MS. GRAHAM: Good morning, Your Honor. Megan
20 Graham for the Reporters Committee.

21 THE COURT: Good morning.

22 MS. DEVRIES: Good morning, Your Honor. Juliana
23 DeVries for the Reporters Committee.

24 THE COURT: And good morning to you as well.

25 And for the government.

1 MR. FULLER: Good morning, Your Honor --

2 MR. RANK: Good morning, Your Honor. Tim Rank
3 from the United States Attorney's Office preempting
4 Mr. Fuller.

5 MR. FULLER: Exactly. And this is David Fuller,
6 also from the U.S. Attorney's Office. Good morning, Your
7 Honor.

8 THE COURT: Okay. Good morning to all of you.

9 Let's see. I think, Mr. Fuller, you asked -- or
10 Mr. Rank -- the government asked for this status conference.
11 Do you want to take the lead here?

12 Is it Ms. Crump or Professor Crump?

13 MS. CRUMP: Ms. Crump is fine.

14 THE COURT: All right. So whoever wants to take
15 the lead.

16 MR. RANK: You know, I think it makes sense, Your
17 Honor, since we asked for it. I think we can frame the
18 issues fairly quickly. I don't think we're going to need a
19 lot of the Court's time today.

20 As we noted in our motion for a status conference,
21 we're seeking guidance from the Court on a couple of
22 matters. As the Court can figure out, this is an unusual
23 case, at least in the district, and I'm going to very
24 briefly discuss how we got here to make it clear why we're
25 asking for some guidance from the Court to go forward.

1 As you know, the Reporters Committee filed their
2 action, which they characterized as an "application" to the
3 Court, and the Court thereafter recaptioned the case naming
4 the United States as a party and issued a briefing order
5 directing the United States to respond to the application.

6 Initially, the matter was sent to our civil
7 division to respond, which is how AUSA David Fuller was
8 assigned to the case. As he dug into the case, because of
9 the subject matter of the application, which are search
10 warrants issued pursuant to the Stored Communications Act,
11 which are criminal matters generally, I was asked to join
12 the litigation on behalf of the United States as a person in
13 our office with the most knowledge about the issue. And I'm
14 coming in from the Criminal Division, as you know.

15 On February 2nd, we, the parties, had our first
16 direct contact. We had a phone call in which we had some
17 very generalized discussions about the case. And one of the
18 things that we learned during that call was that there was
19 similar litigation going on in at least one other district
20 that we were unaware of.

21 We knew about the Washington, D.C. case. We knew
22 about the Seattle case. We knew about the San Francisco
23 case. But we were unaware of litigation in SDNY. And we've
24 listed all of those cases in our motion for the status
25 conference.

1 So as we were digging into this on the
2 government's side and reviewing the litigation in the other
3 districts -- and in some cases talking to the AUSAs in those
4 districts who handled the litigation -- we noted that all of
5 them had slightly different postures, but all of them also
6 involved some level of discussion with the Clerk's Office,
7 in some cases working sort of connected with the Clerk's
8 Office. So we also noted as part of that that the Reporters
9 Committee application is directed, at least in part, to the
10 Clerk's Office.

11 So we had a subsequent call with the lawyers from
12 the Reporters Committee on February 10th in which we
13 discussed how we would deal with communications with the
14 Clerk's Office. During that call, it occurred to us that we
15 were not certain whether the United States Attorney's Office
16 was representing the Clerk's Office in this matter.

17 I'd note that civil lawyers from the U.S.
18 Attorney's Office frequently represent the courts in
19 litigation, and so I wanted to make sure before going
20 forward that we addressed the issue.

21 We also concluded that if we were going to be
22 representing the Clerk's Office in this matter, we would
23 likely need to ask some lawyers from a different U.S.
24 Attorney's Office -- a U.S. Attorney's Office in another
25 district -- to handle the matter because the Criminal

1 Division of the U.S. Attorney's Office in Minnesota has an
2 independent interest in this case. The interests are not
3 necessarily adverse, but they're not the same. So the first
4 thing we wanted to raise with the Court today is that
5 representation issue.

6 To be clear, Your Honor, in none of the cases
7 around the country does the U.S. Attorney's Office represent
8 the Clerk's Office. We've looked at all of the cases that
9 we listed in our motion. But at least in SDNY, they
10 appeared to be working very closely with the Clerk's Office
11 in connection with that litigation.

12 And, again, to be clear, we think it's unlikely
13 that this was the court's intention, to have us represent
14 the Clerk's Office, but because the Reporters Committee
15 seeks relief from a clerk's office, they are at least
16 arguably a party to the litigation and we didn't want to
17 start talking to them without that clarification on the
18 substance of the case.

19 THE COURT: So you're not going to represent the
20 Clerk's Office.

21 MR. RANK: Okay.

22 THE COURT: The Clerk's Office is not going to
23 have an attorney. So I think we're all going to be headed
24 to the same spot here. You folks, obviously, need to have a
25 lot of discussions with our Clerk's Office.

1 I spent the last hour on the phone with our
2 Clerk's Office just trying to figure out how we do this,
3 what's available, what's not available, what our dockets
4 look like, how we file things, and it became apparent to me
5 that we -- I mean, we already do a ton of what's already
6 being asked for in the motion. A lot of the relief that's
7 being sought in this case, it's already there. There is no
8 reason to grant it because we already do it.

9 There's also a lot of technical issues about how
10 we would be able to flag things going forward. Could we
11 create a code so it would be easy for the Reporters
12 Committee and others to distinguish an SCA application from
13 a non-SCA application. So you folks need to have a lot of
14 discussions with our Clerk's Office. So I don't think they
15 need to be represented by counsel.

16 Tricia Pepin, our Deputy Clerk, is an attorney.
17 What I suggest is that -- as far as I'm concerned, you can
18 talk -- both sides can talk as much as you want to our clerk
19 personnel. Your contact in the Clerk's Office will be Lou
20 Jean Gleason. She will get her contact information to you.
21 And then she will -- whenever you talk -- the only thing I
22 ask is two things: one is you don't have ex parte
23 communications. So set up conferences with her where you're
24 both on the line. I don't think our Clerk's Office should
25 have ex parte communications with anybody on the case. And,

1 second, that Tricia Pepin, our Deputy Clerk, also be part of
2 the call as she is an attorney and also knowledgeable about
3 these issues.

4 You're seeking relief from the Clerk's Office, but
5 we really don't have a dog in this fight. The concerns here
6 are the Reporters Committee's and the U.S. Attorney's.

7 I would suggest, Mr. Rank, that the best thing to
8 do would be maybe if you could move to intervene and then
9 the U.S. would be a party as an intervenor and then you
10 could represent the U.S., and Ms. Crump can represent the
11 Reporters Committee, and our Clerk's Office will be a
12 resource available to both of you in the way I've described.

13 MS. CRUMP: Thank you, Your Honor. This is quite
14 helpful because the Reporters Committee has represented --
15 or has been involved in two of the five ongoing cases and if
16 this is how it works in some of the other cases, I think
17 that would be helpful.

18 We've been fortunate to have Ms. Graham on our
19 team which is helpful, so we have some impression that your
20 district is ahead of the game in terms of what its docketing
21 procedures already look like. It's heartening to know that
22 some of this actually may not be needed because it's already
23 --

24 THE COURT: Yeah, I don't know how much it was
25 conscious. A lot of times things just happen and nobody

1 knows how they happened or who made the decision.

2 For example, I was going through some of our
3 dockets with Lou Jean this morning and all of our magistrate
4 judge orders that order sealing, they all have six-month
5 expirations on them. Unless the U.S. comes in and shows a
6 good reason -- now, I don't know whether they're making this
7 compelling need narrowly tailored. I doubt that it's that
8 specific. But we don't seal these more than six months
9 unless the U.S. comes back and gives us a reason to do so.
10 So we already have sort of a 180-day expiration on them. It
11 may not be crafted quite the way you want, but we're at
12 least part of the way there.

13 We do have public dockets. Every one of the
14 search warrant applications results in a public docket.
15 Now, they're useless to you. They say "USA v. Search
16 Warrant." They tell you the date the search warrant was
17 applied for. You can't tell if it's a Stored Communication
18 Act application or not. You can tell the date, the
19 prosecutor, the magistrate judge to whom it was assigned,
20 and you can see a bunch of docket entries that are basically
21 numbers with nothing that follows them. So it doesn't give
22 you much information. But we have a public placeholder at
23 least for every single warrant application.

24 And part of what you can talk to Lou Jean about is
25 -- I talked to her about this this morning -- it sounds like

1 they think they can run, basically, a search through all
2 those documents to identify which are Stored Communication
3 Act cases and which aren't. And from that we would be able
4 to tell which have already been unsealed.

5 We expect the vast majority of them have already
6 been unsealed for the period of January 1, 2018 to date. So
7 we would be talking about a pretty small number that you
8 would even have to have a discussion with the U.S. Attorneys
9 about.

10 These are just examples, but I think -- I think
11 the way I'd like to proceed is I would like to deny your
12 pending application without prejudice just because it's
13 basically aimed at a bunch of stuff that doesn't exist; have
14 you and the U.S. Attorney's Office talk as much as you need
15 to, talk to our Clerk's Office as much as you need to. All
16 of you can figure out what the current status is. You, the
17 Reporters Committee, can figure out what you still might
18 have some objection to. The U.S. Attorney's Office can
19 figure out if they resist your objection. And you can
20 narrow down -- I suspect when you need my help it will be on
21 some really narrow things. I'm guessing. I don't know. I
22 could turn out to be wrong.

23 Part of this is -- you're almost asking more for
24 something in the way of rulemaking than you are for -- it's
25 kind of a hybrid proceeding, and so I'll help. Some of the

1 stuff I may have to take to the bench. Like if you want us
2 to change our local rule, I can't do that. The bench has to
3 do that.

4 I don't think there's going to be a lot of dispute
5 that there is at least a common law right of access to the
6 stuff you're seeking. I don't think there's going to be a
7 lot of resistance -- our U.S. Attorney's Office is a pretty
8 sunshiny office. I mean, they're pretty good about
9 disclosing stuff in my experience.

10 I noticed, for example, today when I was going
11 through the dockets, Mr. Rank, like at least those six
12 months we seal or I should say we keep from the public --
13 it's available only to the U.S. Attorney's Office -- all
14 kinds of text and docket entries. Ninety percent of those
15 don't say anything. They literally say application for
16 warrant filed; no names, no nothing. I mean, there's
17 nothing you would know from it. I don't quite know why we
18 seal that.

19 There's generally one or two entries that mention
20 the Apple iPhone with the number of the phone or something.
21 I understand why that would be sealed. But right now, even
22 though six months we're keeping it sealed, we seem to be
23 keeping a lot of docket text sealed that I can't understand
24 why we keep that stuff sealed. It doesn't disclose
25 anything. But that's all stuff you can explore with Lou

1 Jean. She'll give you some examples of we can do mock-ups
2 of what the internal docket looks like during the six
3 months, and we'll give you whatever information you need.

4 MR. RANK: That's right, Your Honor. I think the
5 difference is there are some of the captions in the docket
6 entries that do have the address of a Rule 41 warrant on it.
7 It may have a gmail account. It may have something like
8 that that would be a piece of identification. And in those
9 cases, obviously, at least that portion of it, if the
10 underlying search warrant is sealed, we would want to have
11 that sealed.

12 THE COURT: Yeah. Of course.

13 MR. RANK: We can have those discussions going
14 forward.

15 THE COURT: The last one I looked at this morning
16 before I got on with you folks, it's a search warrant
17 application filed yesterday. Okay? So it's really new.
18 You can tell -- there's a public docket on this right now.
19 It's 21-mj-149 is the public docket. You can tell that
20 Angela Munoz filed this and that it was assigned to Judge
21 Wright, Magistrate Judge Wright, and it was filed yesterday
22 and there is a public docket. Now, there's a whole bunch of
23 entries here that are not public.

24 I will be so bold as to read the first one:
25 "Petition of the USA for sealing a search warrant

1 affidavit." So what. It tells you nothing. Number two:
2 "Order granting petition for sealing search warrant
3 application." You know, doesn't tell you anything. And, by
4 the way, the order is: "Document to be unsealed on
5 8-19-2021." So the six-month unsealing is already built in.

6 The third has actual information. It identifies
7 what it is that's going to be searched.

8 Fourth is application to order the provider not to
9 disclose the search warrant. There are seven entries here
10 of which two give some information. The other five say
11 basically nothing.

12 So maybe we can be a little more disclosive even
13 during the six months, Mr. Rank, and we can actually seal
14 the entries that actually reveal something. At least then a
15 member of the public could follow the case, could see that
16 the government did come back and did ask for an extension
17 and the extension was granted. I could see how, at least in
18 bulk, that could be valuable information for someone like
19 the Reporters Committee.

20 MS. CRUMP: Thank you. We agree with that. And I
21 think when it comes to personally-identifiable information
22 that we agree that there are times when that definitely
23 ought to be sealed, particularly for ongoing investigations.
24 But I think your instinct is correct.

25 A lot of the information that you've recited that

1 is innocuous nonetheless is of use to our clients who don't
2 know much about the government's practice regarding --

3 THE COURT: Yeah. I can see in bulk how it would
4 be helpful. You could say there was 300 applications filed
5 and 300 were granted. That tells you something.

6 So, Mr. Rank, I cut you off. I took you down this
7 path. You started asking about the representation. I think
8 I've answered that. Was there another discrete -- so my
9 suggestion is we don't do any briefing, we don't do any
10 litigating right now, that you folks do a lot of talking
11 with each other and the Clerk's Office. You just figure out
12 the lay of the land. You figure out what you disagree about
13 and can't come to a negotiated solution for. And at that
14 point, let's have another status conference and figure out
15 how best to address whatever issues that are arising. If we
16 need to then have the Reporters Committee file another
17 motion or application, have you file a response, we can do
18 that. But let's work it through this way before we actually
19 start litigating. Litigating should be our last resort
20 after we've narrowed the dispute as much as we can.

21 MR. RANK: I agree with that, Your Honor. The
22 second portion of this was going to be the way we
23 communicate with the Clerk's Office, which Your Honor has
24 addressed entirely.

25 THE COURT: Yeah. So Lou Jean will be your

1 contact person. As I said, you are free to contact her.
2 You don't need to tell me. You don't need my permission.
3 Just contact her. But when you actually exchange
4 information, just don't do it ex parte. Make sure there is
5 a representative of both sides on the line with Lou Jean.

6 MS. CRUMP: Thank you, Your Honor. That all
7 sounds very promising to us.

8 THE COURT: Okay. Anything else I can help you
9 with this morning?

10 MR. FULLER: You know, can I just ask one
11 clarifying question about the ex parte communications? To
12 the extent that anything relating to matters still under
13 seal comes up, obviously the Reporters Committee could not
14 be involved in that and so --

15 THE COURT: Yeah.

16 MR. FULLER: -- table that aspect of all of this?

17 THE COURT: Yeah, I can't imagine you will be
18 talking about specific cases, more the practices and the
19 policies of the Clerk's Office. So if there is some need
20 where you feel like you need to have an ex parte
21 communication, just email me or ask for a status conference.
22 I can deal with it. But I suspect mostly what you're going
23 to be talking about is our policies, our practices, and what
24 capabilities we have to change those in terms of the
25 technology.

1 MR. FULLER: Thank you.

2 THE COURT: Okay?

3 MS. CRUMP: Thank you, Your Honor.

4 MR. RANK: Thanks, Judge.

5 THE COURT: Okay. Thanks, everybody. So I will
6 enter a short order. It will deny your application without
7 prejudice pursuant to our discussion. It's just to get it
8 off the board and so I don't have this aging motion there.
9 And then you folks come back to me when I can help you
10 again.

11 MS. CRUMP: Thank you. Sounds good.

12 THE COURT: Okay. Thanks, everyone. Have a good
13 day.

14 (Court adjourned at 9:20 a.m.)

15 * * *

16 I, Debra Beauvais, certify that the foregoing is a
17 correct transcript from the record of proceedings in the
18 above-entitled matter.

19 Certified by: s/Debra Beauvais
20 Debra Beauvais, RPR-CRR
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