

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE APPLICATION OF USA FOR
2703(d) ORDER FOR THREE EMAIL
ACCOUNTS SERVICED BY
[REDACTED] FOR INVESTIGATION OF
VIOLATION OF 18 U.S.C. §§ 641 and 793

SC No. 20-sc-3355

ORDER

On January 5, 2021, this Court granted the government’s *ex parte* request pursuant to 18 U.S.C. § 2703(d) for the production of non-content header information relating to certain journalists’ email accounts held at provider.¹ *See* ECF No. 2. The Court further granted the government’s request that this order (the “Order”) and its related application (the “Application”) be kept under seal and that the provider be barred from giving notice to the account holders pursuant to 18 U.S.C. § 2705(b). *See id.*

On June 11, 2021, the United States submitted a Motion to Partially Unseal and Modify the Non-Disclosure and Sealing Order in this matter (the “June 11 Motion”). The June 11 Motion sought to keep the government’s Application under seal. *See* ECF No. 3. This Court refused to grant this request and instead inquired why the scope of unsealing was so narrow given that the government had “closed its criminal investigation” in this matter without any criminal charges. *See id.* at 1. This Court requested briefing from the government to justify its request to keep the Application under seal.

The government replied by asking to bifurcate the two issues at hand: lifting the non-disclosure order (about which there were no questions) and unsealing. On July 2, 2021, the

¹ The government has requested that the provider’s name be redacted.

government filed a request to modify the non-disclosure order, *see* ECF No. 4, which the Court granted, *see* ECF No. 5.²

On July 9, 2021, the government filed a Motion to Partially Unseal and Withdraw the June 11 Motion (the “July 9 Motion”). *See* ECF No. 6.

In support of its sealing and unsealing requests, the government noted that this Court “has the inherent power to seal court filings when appropriate.” ECF No. 3 (citing *Washington Post v. Robinson*, 935 F.2d 282, 287–89 (D.C. Cir. 1991)). What this failed to address was that this sealing power may not be exercised indiscriminately. The government’s Application, like this Court’s Order, is a judicial record subject to the common law presumption of public access. *See In re Leopold to Unseal Certain Elec. Surveillance Applications and Orders*, 964 F.3d 1121, 1127–29 (D.C. Cir. 2020). The Application is subject to the same standard for sealing and unsealing, *i.e.*, the *Hubbard* test, as any other record. *See id.* at 1131. Let there be no mistake: the government has a duty to “mak[e] public appropriately redacted documents” after an investigation is closed. *Matter of Leopold*, No. 13-mc-712, 2020 WL 7481037, at *4 (D.D.C. Dec. 17, 2020).

The government’s anti-redaxer stance is puzzling. “Redaction [] is a task best undertaken (or at least proposed) by the governmental entity that submitted the surveillance application in the first place.” *Leopold*, 964 F.3d at 1134 n.14. The “administrative burden” of doing its job is no escape hatch from completing this task. *Id.* at 1133.

² The government has a continuing duty to timely move to lift a non-disclosure order after the factors warranting it expire. In fact, the government conceded this in its application and promised the Court that once the “court-ordered nondisclosure under Section 2705 bec[a]me no longer needed because of the closure of the investigation or other reasons, the United States [would] make best efforts to notify the Court promptly and seek appropriate relief.” ECF No. 1 at 11.

The government did so here. Indeed, because the target account holders were journalists, the government directly notified the account holders that the government sought non-content records relating to their accounts, but none were obtained. *See* ECF No. 5.

The June 11 Motion, which sought to keep the Application and other records entirely under seal, failed to consider the public's common law right of access. After the Court's inquiry, the government remedied this error with the July 9 Motion, requesting that the Court unseal the entire docket and adopt the government's limited redactions to protect "several legitimate interests." ECF No. 6 at 1. The Court is satisfied that the government has now taken the appropriate *initial* measure to provide public access to this matter.

The July 9 Motion, however, continues to frame the government's action as extraordinary: "the government would not ordinarily take any step to publicly disclose information related to any criminal investigation." ECF No. 6 at 1. To the contrary, *Leopold* takes for granted that when a matter is "truly closed," the government *will* assist in unsealing it while considering the *Hubbard* factors. *Leopold*, 964 F.3d at 1133. "[W]henver the government files an application for an . . . SCA § 2703(d) order . . . the government *must adopt a method for unsealing* while protecting personally identifiable information." *Matter of Leopold*, 2020 WL 7481037, at *5 (emphasis added). A sealed matter is not generally, as the government persists in imagining, "nailed into a nondescript crate, stored deep in a sprawling, uncataloged warehouse." *Leopold*, 964 F. 3d at 1133 (citing RAIDERS OF THE LOST ARK (Lucasfilm Ltd. 1981)). Rather, it is merely frozen in carbonite, awaiting its eventual thawing. *Cf.* THE EMPIRE STRIKES BACK (Lucasfilm Ltd. 1980).

This Order does not suggest that further challenges to the government's proposed redactions are with or without merit. An *ex parte* proceeding such as this provides no opportunity for objection to the government's unilateral redactions. But a recent matter involving a similar request demonstrates that the path to more extensive public access to the Application is not closed. There, the New York Times Co. moved (in accordance with the Court's local rules) to unseal the government's § 2703(d) applications and related orders for journalist's records. *See* Memorandum

in Support of Mot. for Access to Certain Sealed Ct. Recs. at 1–2, *In re Application of the N.Y. Times Co. for Access to Certain Sealed Documents*, No. 21-mc-91 (D.D.C. June 8, 2021). The outcome of that litigation will dictate the scope of future unsealing requests of government surveillance applications. “The press and the public have a powerful right of access to these records” *Id* at 2.

IT IS THEREFORE ORDERED that the government’s July 9, 2021 Motion to Partially Unseal (ECF No. 6) this matter be GRANTED, and that the proposed redacted materials attached to this Order, which includes the docket and all pleadings therein, be published on the Court’s website; and

IT IS FURTHER ORDERED that the government’s Motion to Withdraw its June 11, 2021 Motion to Partially Unseal (ECF No. 3) be GRANTED.

ZIA M. FARUQUI
UNITED STATES MAGISTRATE JUDGE