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08/08



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In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders

2008 U.S. Dist. LEXIS 43100 (S.D. Tex. May 30, 2008)

In an attempt to limit surveillance secrecy, a federal magistrate in Texas has ruled that gag orders compelling telephone companies and ISPs not to disclose that they have been served with an order for subscriber records cannot remain in place indefinitely.

In May, a federal magistrate in Texas ruled that gag orders compelling telephone companies and Internet Service Providers (ISPs) not to disclose that they have been served with an order for subscriber records (under the Stored Communications Act (SCA), 18 USC §§ 2701-12) or a pen register or trap/trace order (under the Pen/Trap Statute, 18 USC §§ 3121-27) cannot remain in place indefinitely. ‘Pen register’ and ‘trap/trace’ devices are used to record or decode dialing, routing, addressing, or signaling information that is transferred in the provision of telephone, internet, or other communications services. The magistrate also ruled that these same orders must not be kept permanently under seal. Citing ‘the First Amendment prohibition against prior restraint of speech and the common law right of public access to judicial records’, the magistrate ruled that the ‘sealing and non-disclosure orders should expire in 180 days, with extensions for another 180 days available if the government certifies that its investigation is still active or makes a showing of exceptional circumstances’.

The magistrate’s ruling was prompted by two government applications for pen register, trap/trace, and subscriber record information for mobile phones that were allegedly being used in drug trafficking. Both of these applications included the government’s standard request that the applications and any resultant orders ‘be sealed and not disclosed by the service provider to the user or subscriber ‘until further order of the court’. After sifting through dockets for the years, the magistrate discovered that 99.7% of the orders issued and sealed ‘until further order of the court’ during this time remained sealed. The magistrate held that this

failure to make information about completed investigations available to the public was unconstitutional and in violation of common law.

The magistrate acknowledged that section 3123(d) of the Pen/Trap Statute requires orders for pen registers and trap/trace devices to be sealed ‘until otherwise ordered by the court’ and bars the communications provider served with such an order from disclosing the existence of the investigation or the pen/trap device ‘unless or until otherwise ordered by the court’. And he noted that, under section 2705(b) of the SCA, the government may ask the court to preclude notice to the subscriber targeted by the government’s surveillance if providing such notice would jeopardise an investigation or threaten an individual’s safety. But he ultimately held that the First Amendment and the common law right of access to judicial records placed limits on how long these statutorily authorised non-disclosure requirements and seals on court records could remain in force.

The magistrate found that the gag orders in question “impose[d] a prior restraint on speech” that was “content-based,” since they “effectively preclude[d] speech on an entire topic,” i.e. “the electronic surveillance order and its underlying criminal investigation.” Accordingly, he held that orders must be “subject to rigorous scrutiny,” meaning they “must be narrowly tailored to serve a compelling governmental interest.” But the magistrate concluded that none of the government’s asserted interests - including “the integrity of an ongoing criminal investigation, the reputational interests of targets, and the sensitivity of investigative techniques” - was “sufficiently compelling to justify a permanent gag order.” Because the public’s interest in learning more about law

enforcement’s surveillance techniques outweighed any of the interests put forward by the government, the magistrate found that the non-disclosure orders could not remain in place indefinitely.

The magistrate also found that ‘there is a common law right of public access to electronic surveillance orders at the post-investigation stage’. While he noted that this right ‘may be curtailed when sealing is...essential to preserve higher values and...narrowly tailored to preserve that interest’, he also found it ‘difficult to conceive any circumstance under which permanent sealing of the entire file, including the order itself, could ever be justified’. He also cited the Supreme Court’s ruling in *Nixon v Warner Communications, Inc.*, 435 U.S. 589 (1978), which he said had acknowledged that “the common law right of public access involved judicial records.”

Based on these considerations, the magistrate ruled that the sealing and non-disclosure orders would, by default, expire after 180 days - a period “short enough to respect the fundamental values at stake, and long enough not to cause an undue burden.” However, these orders could be extended for another 180 days “based on (a) a certification that the investigation is still active, or (b) a showing of exceptional circumstances.” The magistrate also held that the government must consider redaction as an alternative to sealing and non-disclosure of surveillance orders.

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