UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE:	CASE NO: 2:10-MC-00022
	MISCELLANEOUS
SEALED MATTER, ET AL.,	Corpus Christi, Texas
	Thursday, June 4, 2015
	(1:28 p.m. to 2:25 p.m.)

STATUS CONFEENCES

BEFORE THE HONORABLE NELVA GONZALES RAMOS,
UNITED STATES DISTRICT JUDGE

ALL CALENDERED CASES:	See page 2
APPEARANCES:	See page 2
Court Recorder:	Genay Rogan
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CALENDARED CASES

2:10-MC-0022	SEALED MATTER
2:10-MC-0023	SEALED MATTER
2:10-MJ-1000	SEALED PEN REGISTER
2:10-MJ-1002	PEN REGISTER
2:10-MJ-1005	PEN REGISTER
2:10-MJ-1031	PEN REGISTER
2:10-MJ-1235	PEN REGISTER
2:12-MJ-0534	SEALED PEN REGISTER
2:12-MJ-0670	APPLICATION FOR AN ORDER UNDER 18 USC 2703(d)
2:12-MJ-0671	APPLICATION FOR AN ORDER UNDER 18 USC 2703(d)
2:12-MJ-0672	APPLICATION FOR AN ORDER UNDER 18 USC 2703(d)
2:12-MJ-0673	APPLICATION FOR AN ORDER UNDER 18 USC 2703(d)
2:13-MJ-0497	APPLICATION FOR AN ORDER UNDER 18 USC 2703(d)
2:13-MJ-0523	SEALED SEARCH WARRANT

APPEARANCES:

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Corpus Christi, Texas; Thursday, June 4, 2015; 1:28 p.m.

(Call to order)

THE COURT: Good afternoon. The Court calls Cause Numbers 2:10-mc-22, 23; 2:10-mj-1000, 1002, 1005, 1031, 1235; 2:12-mj-534, 670, 671, 672, 673; 2:13-mj-497 and 523. And this is regarding the sealed cases. If the government will announce?

MR. NEUROCK: Good afternoon, your Honor, Mitch Neurock for the United States.

THE COURT: How do you say your last name?

MR. NEUROCK: Neurock.

THE COURT: Neurock, okay.

MR. CUSICK: Kenneth Cusick.

MR. MARTINEZ: Hugo Martinez, good afternoon, your Honor.

THE COURT: Good afternoon.

MR. FULLER: Marc Fuller for Dow Jones.

MR. LEATHERBURY: Tom Leatherbury for Dow Jones as well, your Honor.

THE COURT: Okay. This matter has been pending for some time so let me just get a little review; and then if you all don't agree with my analysis so far in terms of where we are, let me know. But the motion to intervene by Dow Jones and to unseal court records was filed a year ago, June 2nd, 2014. I think Judge Head was handling it. This case early on had a

hearing, gave the government some time to respond. Government responded and provided a sealed appendix with some matters regarding the cases at issue here, maybe outlining where those cases were. There was an agreement to unseal one of the matters, which was 207-mc-127, so I've not made that a part of this hearing anymore. And I believe at that point, Dow Jones kind of agreed to the continued sealing of cases that were under active investigation but was skeptical of the government just saying they're ongoing because of the age of the case or not was --

MR. FULLER: Well, your Honor, Dow Jones has --

THE COURT: And not forever. I'm just -- for that -- it seemed like when I read your reply, it was kind of we agree right now maybe ongoing, but that doesn't mean forever, and we are a little skeptical of ongoing on these old cases.

MR. FULLER: I think our position is that ongoing is perhaps the wrong word choice in order to determine where the common law right of access and the First Amendment right of access applies. What we would say is that there is significant authority for the government's argument that pre-indictment investigations and the warrants and the applications and the orders that are contained in the context of pre-indictment investigations are not subject to the common law right of access.

THE COURT: Okay. And I'll --

MR. FULLER: Here --

THE COURT: -- give you all some time to argue. I was just saying, you know, this sat around for a while and I'm kind of thinking that was why, because there was, okay, they agreed to unseal this one, the other ones were under, you know, investigation still or -- and I knew Dow Jones was somewhat, as I said, skeptical of just saying ongoing, you need to show more. But I was just trying to go through -- then it just sat there until the Dow Jones filed its motion for an updated status, and then the government kind of came on strong, no, you don't -- we're not doing an updated status. We don't need to do anything at all because X, Y, and Z, came on a little bit stronger it seemed like.

MR. FULLER: Yes, your Honor. Our position has been that we believe that all of these -- based on the information that we've seen, all of these materials should come out from under seal. Again, we think that the legal analysis is different in the pre-indictment stage, but we have no reason to believe that these are actually ongoing matters. That's a position that the government has taken.

THE COURT: Right, and you all weren't given that information --

MR. FULLER: Yes, your Honor.

THE COURT: -- you know, given to the Court and I know that was one of the issues. But in terms of where we are

just --

MR. FULLER: Sure.

THE COURT: -- chronology. And then so Dow Jones then filed earlier this year the motion for an updated status report requesting various things: the government to update the report regarding the status of the investigations, and then making public certain versions of the status report, and the sealed appendix. I believe then the government responded as I said, basically saying no updating is necessary here because there is no common presumption of access or First Amendment right. So before we get into the merits here -- and I'm going to let you argue fully even though I'm talking a lot right now -- but there -- you know, Court has jurisdiction, for the record. The case regards federal questions. And I think on the standing issue, the government agrees that Dow Jones has standing to bring the actions a member of the press to obtain access to court records, that I think the objection from the government was that they couldn't come -- claim standing trying to vindicate the rights of the public at large; is that right?

MR. NEUROCK: That's right, your Honor, yes.

THE COURT: Okay, so I don't think I need to address that. Standing is -- or Court holds Dow Jones has established specific standing as a member of the press to obtain access to Court records. And I'm not going to address the other issue.

So then we go to the intervention and I know the

government was objecting that the intervention was not proper. Are you going to proceed on that argument?

MR. NEUROCK: Your Honor --

THE COURT: I'm inclined to say yes, so I'm just letting you know where you can make your argument.

MR. NEUROCK: Your Honor, the --

THE COURT: Not on the merits yet, just the -- whether the intervention is appropriate.

MR. NEUROCK: Right, your Honor. The long and the short of it is that we agree that we're all supposed to be here today so that --

THE COURT: Okay.

MR. NEUROCK: -- the point that we made, it's because this is a criminal matter that intervention, the term itself, is not the correct term but rather a request for access. But if it's termed as a request for access, Dow Jones definitely has standing to request access to these documents --

THE COURT: Okay.

MR. NEUROCK: -- on behalf of -- as a member of the press.

THE COURT: So -- and I guess it's just kind of a play on words, I guess. Maybe "intervention" is not the right word, but that's what's before the Court. The Court's going to grant -- or holds that Dow Jones can intervene for the limited purpose of having its right to access the documents

adjudicated. So motion to intervene is granted. Maybe another name would have been better, but it's the same, we're here.

But what exactly is Dow Jones requesting? Everything, who, what, statistical information, I'm not real clear what the purpose of the information is.

MR. FULLER: Sure, your Honor. Just some background, these are 13 cases that were essentially sampled by Dow Jones. We don't really know --

THE COURT: And you all may have told that to Judge Head, it's just I'm not seeing any -- I didn't go back and listen to that hearing. I just --

MR. FULLER: Sure.

THE COURT: -- got little blurbs from it, so --

MR. FULLER: I understand. And so this was essentially a sampling exercise. The public has a right to an understanding of how the judicial process works, and specifically with regard to these types of applications which tend generally to blend requests under the pen register and trap and trace provisions, as well as Stored Communications Act provisions, Section 2703(d) orders as well as subpoenas and statutory warrants under the SCA. Dow Jones has asked for the Court to unseal all documents that have been --

THE COURT: Everything --

MR. FULLER: -- sealed in --

THE COURT: -- all the information.

MR. FULLER: And as we -- we do that on the basis of two separate legal authorities. One is the common law right of access that was recognized by the Supreme Court in the *Nixon* case in 1978; and then separately the First Amendment right of access. We think that the Court need only -- in order to grant the relief that Dow Jones seek -- consider the common law issue. We think that under Magistrate Judge Smith's analysis, when he considered the public's right of access to these documents and whether these types of documents ought to be sealed forever or whether or not the sealing should only be temporary in order to preserve legitimate, you know, pre-indictment investigative purposes, as well as any personal privacy purposes, he found that the common law right of access applied and that as a result, he did not address the First Amendment argument.

THE COURT: But I think the First Amendment argument is more narrow yet stricter on the backend, on the narrowly tailored. So just because common law, maybe it applies, the balancing interest -- or when you do the balancing test on the competing interests may not go, I don't know. I'll let you all argue in Dow Jones's favor. But I think the First Amendment is kind of different. It wouldn't apply to all the documents and yet the government would have to meet a higher standard. So it may not matter, but I think it's separate.

MR. FULLER: That's exactly --

THE COURT: Yeah, okay.

MR. FULLER: -- correct, your Honor. The common law right applies more broadly but perhaps less strongly. And so the amount of kind of overcoming evidence that needs to be established by the government is -- it's a lower threshold. First Amendment applies more narrowly; but then, of course, where it does apply, it's essentially strict scrutiny and so it's very, very difficult to get over that. Here, though, based on the evidence we have seen from the government -- and, again, we really haven't see what they've put before the Court -- there's no reason for us to believe that the government can even meet its murder to overcome the common law right of access. Based on the age of these cases, the fact that these are investigations and matters that are reflected as being closed on PACER docket, and from the little window that we've been able to obtain into what these cases and what the applications and orders might involve, which is from the 2007 case that your Honor unsealed in the middle of last year, and then also from one of the sealed orders in one of the 2012 cases, that despite the fact that it's sealed on the Court's docket, was publically reported and is available in the reports, as well as on Westlaw, these are not --

THE COURT: Which one is that one?

MR. FULLER: Sure. This one is -- okay, so Docket Number 2:12-mj-534 is one of the cases that's at issue and

which we filed a motion to unseal. It appears that Document Number 2 in that case is the Court's order. And the Court's order is separately at 890 F.Supp.2d 747, and so has --

THE COURT: Yes.

MR. FULLER: -- been publically available for years. Based on that opinion and the 2007 case that was uncovered, there's no sense that these are really active, ongoing investigations. These are not pre-indictment matters; and so, as a result, we do not think that the government can overcome its burden to establish -- or to overcome the common law right of access.

THE COURT: Okay. And government's saying it doesn't even apply at all, so you want to summarize that?

MR. NEUROCK: Thank you, your Honor, yes. First of all, just touching briefly on the First Amendment argument that your Honor raised, we believe that there is no First Amendment right of access, that it is a narrower concept than the common law presumption, but that even -- based on the two tests that need to be applied -- and both of them do need to be applied, the experience test and the logic test, that Dow Jones can't meet either of those and that the First Amendment right of access doesn't come into play in this case.

In making that conclusion, that conclusion also takes with it the docket sheet request that Dow Jones has made, that the docket sheet be amended to reflect the items that are on

there. That is a First Amendment concept; and if there's no First Amendment right of access, there is no right to have a docket to a matter to which the public has no First Amendment right to know, which in this case they don't.

With regard to the common law presumption of access, I agree with Dow Jones that it is a -- something that sweeps more broadly but also is something that's more easily, for lack of a better term, overcomeable by the government based on a showing of countervailing interest. Our position is that there are a couple of reasons why the common law presumption doesn't apply. First of all, because Congress occupied the field and abrogated the common law presumption all together, so we don't address it. The second one being that by creating this specific statutory scheme, Congress placed the Section 2703(d) process outside of the common law presumption in the sense that it put it in the same class of documents that are traditionally not accessible by the common law presumption, like Grand Jury materials.

And then in addition to that, in addition to what we've got in our brief, we can talk about the countervailing interests that we believe do favor continued secrecy for the documents in this case.

THE COURT: Is the government still saying then you're taking the position they're not judicial records? As well as it -- that common law was abrogated. But you're still

taking all the positions set --

MR. NEUROCK: I still take all the positions that --

THE COURT: -- forth in your response.

MR. NEUROCK: -- are in the brief, yes, your Honor.

THE COURT: Okay.

MR. FULLER: Your Honor, if I could respond briefly to that. The background from the common law perspective that was in place when Congress legislated the SCA was one that recognized that search warrant applications and orders post-indictment were subject to the common law presumption of access. They were judicial documents and they were subject to the common law presumption of access. The government's argument, therefore, is an ambitious one, which is essentially that Congress knowing that -- and, again, the Court has to presume that Congress was aware of that common law background -- intentionally abrogated it in passing the SCA. And if you look at the government's arguments as to why they draw that conclusion from SCA, there is no citation to any legislative history of the SCA that reflects any attempt to abrogate the common law presumption of access. The specific types of orders and applications that are made under the SCA in the statute don't have any provision for sealing. There is specific non-disclosure to the target of the investigation provisions where, you know, if they seek certain cell phone records, they don't have to tell the subscriber about the search, and they prohibit

the cell phone company from informing the subscriber of the search, but there's no separate sealing provision. You would think that if Congress intended to abrogate that common law presumption of access, they would do so expressly.

Second of all, there's no way to glean from the structure of the SCA any intent to abrogate the common law right of access. Essentially what you have here is a statute that provides various processes by which the government can obtain different types of communications information. It provides certain processes that are essentially subpoenas. It provides some that are essentially warrants, where the government has to comply with Rule 41 of Federal Rules of Criminal Procedure. And then in the middle, it has provisions for what's called a "D" order, the 2703(d) orders, that essentially are Fourth Amendment-like processes by which the government has to go in front of a detached magistrate, make a factual showing that would support the standard, a lesser standard than probable cause, but it still interposes a judiciary between the government and the records at issue. And we think that that's the defining characteristic for why the common law presumption of access applies here, because that is what the focus is of the public's right of access. It's the transparency of the judicial process. All of the government's arguments about personal privacy don't apply here because we're not after what the records that were produced by the cell phone

company actually showed. What we're looking for are the application materials, the application and the supporting affidavit, that were provided to the Court in connection with the request to obtain the materials, as well as the Court's order. And it's our understanding although the docket is not always clear as to what's all in there, that that's essentially what's being sealed. And that's the subject of the request. And we don't see any argument from the structure or from the legislative history of the SCA that would abrogate the common law right of access.

THE COURT: I agree. I mean, I don't think -- I think the common law -- or the Court's going to hold common law presumption of access applies here. These are -- the Court holds they're judicial records. And so then I think the question becomes the balancing test and the competing interest to be analyzed or reviewed by the Court.

MR. NEUROCK: Your Honor, if I could be heard briefly on the abrogation point.

THE COURT: Yes.

MR. NEUROCK: The privacy arguments absolutely do apply, contrary to what Dow Jones is stating here. Although the contents of the records themselves might not be something that are at issue if the what the government is looking for is cell site data, the fact of the investigation is something that does indicate privacy interest, and that's one of the things

that Congress is seeking to protect by the 2703(d) process. And what has been done in this case is to set something aside that makes it look a lot like The Right to Financial Privacy Act, which if you look at the legislative history, is what this act was based on. It's something that's designed to take a process and keep it out of the public eye in order to protect ongoing investigations, among other reasons, but also to protect the interest of individual subscribers, not just from the United States or from an investigating law enforcement agency, but also from anyone else. Those are privacy interests that Congress took into account. And if Congress had wanted us to follow the search warrant process, it could very well have done exactly that. And yet it set out a very specific set of steps that need to be followed that were very different from search warrants. And it's for that reason that we made the abrogation argument that by speaking in this field, Congress didn't need to encamp magic words in order to engage in abrogation; all it needs to do is to set out a comprehensive scheme. And that's what we believe it did in this case and, hence, the argument on our part that the common law process, to the extent that it might apply to search warrants -- that's in some sense an open question also -- does not apply to 2703(d) actions.

THE COURT: Yeah, you didn't change my mind. I don't think it was abrogated, and there is a common law right of

access or that presumption. And the Court also, as I stated, holds these are judicial records. I think your argument I guess next focuses on the competing interests. Either one can proceed.

MR. NEUROCK: Well, we'll start because we're trying to keep the documents sealed. The -- and it's a little unusual the posture that we're in here because I'm not the movant, and yet we're the ones seeking to keep the documents sealed. So going first in this case, we do believe that the most important aspect, the most important countervailing interest, is that the criminal investigations in each of these matters are still ongoing. We've discussed that in more detail in the sealed appendices. This is the strongest factor that's to be considered by a court. These proceedings are very much akin to Grand Jury proceedings, and the Court in the *Applebaum* (phonetic) case, the Fourth Circuit case that we cited, says that perhaps 2703(d) cases are even more sacrosanct than Grand Jury proceedings. It's very, very important to keep intact the integrity of these investigations for a variety of reasons, and those reasons can change from case to case. In some situations it's to protect the safety of victims or witnesses or those who were just otherwise innocent, to preserve evidence, to prevent individuals from changing their behavior in order to alter the course of an investigation or thwart an investigation. And each of these things can serve as a countervailing interest.

Plus, the subject matter -- and this is something that's discussed in the brief -- the subject matter of these investigations is something that's traditionally considered private, and that's people's communications. So in addition to the integrity of the investigations themselves, the subject matter is something that has been traditionally considered private. That's one of the factors that has been weighed as a countervailing factor against a presumption of access, is there is no presumption of access when the subject matter to which the access would be granted is something that's traditionally considered private, and that's people's communications, just as *The Right to Financial Privacy Act* did, and just as Congress did with the SCA.

We've set out some additional discussion of this in our brief, but I have just a couple of other countervailing factors that I want to raise with the Court. One of them is the effect on law enforcement's legitimate interest in general, potential effective disclosure of law enforcement's interests in a broader sense. We rely -- as we discussed in the brief, we rely on cooperation by individuals very extensively. Those people in virtually every case want or they need confidentiality, whether it's for their own economic purposes or their reputational interest and, in some cases, their personal safety. Just knowing that this type of material might become public, we're concerned that it could chill the

cooperation of these individuals and hamper law enforcement interests that way.

There are, in addition to that, privacy and reputational interests to be considered by the subjects of these orders or people who are named in the applications. These could include witnesses, they could be victims, just anyone who has a legitimate interest. And I suggest that there are a lot of people who have a legitimate interest in not be associated with criminal cases in which they themselves are not charged.

And, finally, a couple of others. We have the protection of law enforcement's tactical decision-making processes. That is a factor that should bear on whether access should be granted. Why we have to seek 2703(d) orders in some situations but not others; what is -- or at what point in an investigation we decide to seek a 2703(d) order.

And finally the individuals who are the subject of these orders are covered by the *Stored Communications Act*. And one of the reasons for the existence of this act is to protect their privacy interests. And it interplays with the public's confidence in the court system. It could potentially be damaging to the public's confidence in the court system if the government and the courts, as officers of the court, that we don't take appropriate steps to safeguard the private information of those people who are the owners and subjects of

that information. So those are just several of the countervailing interests. And, again, we've discussed that in greater detail in writing.

THE COURT: All right.

MR. FULLER: Thank you, your Honor. Listening to Mr. Neurock, I think there are kind of two different categories that these interests can come into, one of which I think we probably have some agreement as to. And then the other one which I think we disagree as to.

I think there is a category of interest that are just in general conceptual interests. You know, we need to make sure law enforcement functions well, we need to protect individual privacy. At a certain level of generality, those are really arguments about abrogation. And once the Court determines that the SCA did not abrogate the common law presumption of access, then these generalized arguments about well, this is really like a Grand Jury process or, you know, we can't allow the public to be privy to, you know, what the judicial system is doing with regard to these applications and orders, that all falls away.

And so you move to a much more specific analysis where I think we probably have some agreement. To the extent that there's calls -- there's call information in here in these materials, to the extent that there are individual names in here, to the extent that there's any kind of information to

which individuals have legitimate expectation of privacy that needs to be protected on an ongoing basis, then Dow Jones agrees that redactions should be made. In fact, your Honor, whenever you unsealed the 2007 case, said we need to make sure we make the redactions that are required by this Court's standing order, as well as any others. And when those materials were unsealed, names are in there, significant descriptions of the processes of the investigation, the bases for the applications, the content of the Court's order, all of that is in there. And, you know, the government is certainly not put forward any evidence that that being available for the last several months has hampered any law enforcement investigation. So I think that the only real, legitimate inquiry here is given that there's a presumption of access under the common law, what limited redactions need to be made? And I think that that's something that, you know, the government could have done long ago. I think if they're going to be given a chance to make those redactions, I hope that they do so quickly because these are documents that under the case law that has been issued on 2703(d), as well as the analogous case law in the search warrant context, it takes a lot to overcome the presumption of access. And the times when it actually is overcome, it's specific information. And, again, we have no basis to believe that that's what's going on here.

THE COURT: All right. Talking about redactions, I

mean, at some point -- and, I don't know, you're right, maybe that's something we need to visit about further as to what all -- if we were to go there, what all needs to be redacted; because at some point, then you kind of do away with, okay, we're producing these documents but we're redacting a lot, you know.

MR. FULLER: Well, your Honor, if I may, again, we -- it's sealed and we were not privy to the -- you know, the in-camera submission that the government made with regard to the status of the investigations and, you know, what might be, you know, worthy of redaction in this -- these circumstances. But, again, from what we've seen, the information that was unsealed in the 2007 proceeding, from the order that, although it's sealed, is publically available in the 2012 case, you know, this is not a class of materials that's going to require extensive redaction. I think the redactions would be extremely minimal as they have been in the 2007 case. Again, you know, we have cases here that are from 2010 where the docket shows that there was an application that day or the next day, there was an order, and then a few weeks later the proceeding was closed. Sometimes on PACER it looks like that proceeding was folded into a criminal proceeding that closed years ago. So we're not talking about applications and orders that are 30, 60, 90-days old. These are five years old. And so I think that the government faces, you know, a lot of healthy

skepticism in asserting that this is really so sensitive that we can't let the public see what's going on.

THE COURT: I agree, and I'm just going to give a little anecdotal thing here. You know, I came from state -- I was a state court judge forever when I first got here -- well, not forever but, you know, for about ten years. So when I got here and I see these long-term investigations, you know, and I'd hear these cases, I'm like, but it really -- the feds kind of do take a long time sometimes. I'm not saying it's always appropriate or right or that it -- I'm not necessarily speaking about the cases here. I'm just saying sometimes they do take a -- the feds take a long time. And sometimes when they do decide to do it, you know, it's a lot more solid than what I -- we used to see in state court on shorter timeframes.

MR. NEUROCK: Well, and a lot of these cases are very complicated cases that have many different aspects to them. One thing that I want to stress to the Court is that, although you may have a 2703(d) case that may be opened and closed administratively in its own sense in a very short period of time, that doesn't mean that the investigation itself that it's a part of has progressed to any particular point, whether it's an indictment or what. This is one corner of an investigation that may be joined by other corners of investigations. And as you've seen in some of the sealed appendices, there are a number of cases that could potentially be grouped into single

investigations. But the point that I want to try to make, your Honor, is that one of the reasons that there's so much that's visible in that 2007 order -- in fact, I'm kind of glad Dow Jones chose that as one of the cases they wanted to litigate -- there -- she notes that there are no redactions in there and that's because the case is completely over. It's completely closed and there are no interests left that were not already made a matter of public record during the course of the criminal case that ensued from it. Every one of these other cases is something that is ongoing to a various stage of degree. For all Dow Jones knows, with all these things being separate, these remaining cases could all be part of the same investigation. And 2703(d) orders lend themselves to that. There could be multiple 2703(d) orders that come from the same criminal investigation. Now, your Honor, has seen the sealed appendices but -- and I won't go into it any farther, other than to say that all of those cases are still ongoing. And that's the most important consideration for the Court to remember, is that if a case is completely ongoing, it's very important to us to keep those documents completely closed off until we have the opportunity to get all the way through the investigation and take care of all those countervailing interests such as reputational interests and safety interests of witnesses and victims and allow the law enforcement investigative people the freedom to pursue the investigation as

they see fit, without having to look over their shoulder to engage -- to have public scrutiny over the choices of investigative tactics that they've made under seal with the Court in order to get these orders under 2703(d). We think it's a perfectly legitimate interest on the part of law enforcement to want to have these things under seal while a criminal investigation is ongoing. When it's over, that changes things a little bit in our mind. And just as we saw with the 2007 order, there can be situations where documents can be released completely without redaction; or, in certain situations, if the facts call for it, then appropriate redactions to protect personally identifiable information or victim names or other things that are sensitive that we believe shouldn't come out at that point. But there is a very wide range of activities that law enforcement is engaged in. Even though a 2703(d) order itself, that particular action might be closed, that says nothing about the course of a criminal action which, as your Honor said, can often take a considerably longer period of time, even years before we get to a resolution.

MR. FULLER: And, your Honor, just one small point. I think at the level of, you know, conceptual analysis, there's probably a lot of agreement here. And I think the devil is going to be in the details. And I think that with regard to, you know, these 2010 cases, you know, we -- this is a sampling and it looks like it was a very unlucky sampling. We -- every

case that we picked happens to involve an ongoing investigation and so that, you know, rises our levels of skepticism about what ongoing investigation means. You know, is it specific to these individuals or to a very, you know, small circle of individuals that are related to them? Or is ongoing investigation being used so broadly that we're talking about, you know, Mexican drug cartels or the drug war in general? And so that's the concern that we have, but I think it's a concern that can be addressed through proposed redactions and, if necessary, you know, additional motions for access to material that has been redacted that doesn't appear to be properly redacted. And I would say I think from the purpose of the public and the press, I don't think there's so much interest in, you know, has Joe Smith been convicted now and is he the only one in the investigation, but more general interest. You know, did the U. S. Attorneys that are, you know, filing these orders, are they understanding the technologies? What types of technologies are they using? Is the Court granting them in every case or are there denials? And I think it's process transparency that is at issue, and I think that --

THE COURT: But process, kind of like analysis or stats, can probably be done with different information. Or you could be -- you know, there's all these stats the federal courts do and the AO does or -- that's kind of I guess up front I was asking, what exactly do you want? What is it, you know?

MR. FULLER: Right. And I think that stats certainly help. But, you know, in the 2007 case and in this 2012 opinion, we get a sense that, you know, there might be certain aspects of this technology that the government doesn't fully understand. And, I mean, I think that there is a real back-story here about magistrate judges and their role in this type of process that is used over and over again. And I think that the public has a clear interest in having some level of transparency. And I think that there could be considerable transparency into the process that does not jeopardize the legitimate, ongoing investigative interest and the personal privacy interest that the government is concerned about. So, again, I think, you know, as a matter of, you know, conceptual analysis, we may be on the same page. I think the next step most logically is to go through the redactions and kind of see what type of redactions the government would propose and whether or not those redactions would also allow the type of transparency that we believe is required under the common law.

MR. NEUROCK: I have to disagree that the next logical step is redactions because I think the next logical step is --

THE COURT: Balancing.

MR. NEUROCK: -- to keep the documents sealed, especially if it's with regard to an ongoing criminal investigation, so that there would be no redactions necessary.

One of the things we put into our brief is something that deals with a possible way forward. When the courts -- not just this court, but other courts in this district -- are confronted with motions like this by Dow Jones with its sampling and talking about unlucky sampling, all of them also happen to be before the same magistrate judge in this division. But the -- and we take -- we definitely disagree with the idea that we don't know enough about the technology to make appropriate arguments and seek 2703(d) --

THE COURT: Well, that's a case-by-case basis.

MR. NEUROCK: -- but I understand. But in the brief, we do talk about possible ways forward for the Court to analyze this, and I think that's probably the better next step for the Court to engage in. And the first step as we stated in our brief is to look at the status of the investigation. And if it's something that's ongoing, the Court should find that protecting the integrity of that investigation is going to outweigh any interest in public access. And it is just an outweigh, not a heavily outweigh standard, as we put -- as we mentioned in the brief. And if the matter is ongoing, the matter really -- of access ought to end there. If it's not ongoing, that's where the Court's analysis really kicks in, though. Does any other factor other than whether the matter is ongoing, does any other factor outweigh the interest in public access? And if the factors counseling secrecy don't outweigh

that presumption, the Court would properly then grant access to those materials. But, again, we definitely would seek the opportunity to take appropriate redactions, and that would be tailored to each case. This is not something that admits a particular system like certain things are redacted in every situation. There may be a greater or lesser extent, a greater or lesser number and type of things that would need to be redacted in order to facilitate the protection of legitimate privacy interests, to protect the innocent, to safeguard our legitimate interest in the secrecy of our techniques. And then after taking that into account, if the Court decides to grant access, it should still keep in mind the important privacy interests of deciding whether or not access is appropriate. So our belief is that the status of a criminal matter as being ongoing as we've written is what carries primary importance. And if the matters are ongoing, we shouldn't get to redactions. And in that matter where it was not ongoing, something where we determined where it was completely closed, we thought that that was something that was appropriate to take up. And we don't view this as something where we're looking for untrammeled government secrecy here. We've taken what we think is a reasonable approach and agree that the document in that 2007 case was appropriately made public.

THE COURT: So -- and I know in this district -- maybe I guess different judges, different magistrates have

handled it differently -- historically here there has never been an end to the ceiling. And I know there -- that has been looked at to see what may be some rules can be adopted that can kind of affect everyone. But what is the government's position on that? I mean do you -- on that issue?

MR. NEUROCK: Well, our position all along has been that there is no presumption of access and so it's never --

THE COURT: Okay, well --

MR. NEUROCK: -- disturbed us that there has been a continued ceiling.

THE COURT: -- we're going to move beyond that.

MR. NEUROCK: So if we move beyond that, then our thought is that at such point as the underlying criminal investigation is closed, that would be the first appropriate time to consider whether or not (indiscernible) --

THE COURT: But you all aren't doing anything in that regard right now.

MR. NEUROCK: Well, there's --

THE COURT: And I'm talking beyond what's here before the Court.

MR. NEUROCK: Beyond what's here before the Court, that's correct, your Honor. I mean, we do have a magistrate judge in another division of this district who has specific time limits that he imposes for orders such as these, but that's not a district wide process and it's not something we're

suggesting be a district wide process. What we would prefer to see is a situation where documents will either remain sealed; or if there's a request that there be access to those documents, that appropriate redactions be made, but only if there is a concluded criminal investigation at that point, and not until.

THE COURT: All right, anything else on the common law balancing of interests?

MR. NEUROCK: No, your Honor.

MR. FULLER: No, your Honor.

THE COURT: Okay. After reviewing the briefing, the documents submitted to the Court, the case is fully before the Court. The Court concludes that the government's interest in preserving the records under seal outweigh the interest served by public access, at least regarding these cases that are before the Court. And the Court is, you know, to make some specific findings, the particular interest of the government considered by the Court are that the open investigations can be jeopardized by the disclosure of the information, and there are danger or safety issues to individuals involved in and particularly, or specifically, regarding the information that was provided to the Court under seal regarding these cases or these matters. The Court has specifically considered the state of the investigation, whether the targets have been indicted or prosecuted, the specifics of the information, the reliability

of the information presented to support maintaining the matter sealed, as I've already said, protecting the safety of crime victims, as well as witnesses, from intimidation, harassment, or threats to their safety, as well as informants, protecting their identity and their safety or protecting them from retaliation or threats, and preventing suspected perpetrators from interfering with the investigations or fleeing the jurisdiction. I think this was mentioned by the government earlier, but the effect that access to these records now or in the future can have on the ability of law enforcement to obtain cooperation of other witnesses or other individuals. And then a big one, too, is -- this is speaking more -- well, not necessarily. Let me think. Well, I'll skip that one. But -- and also I think this was alluded to by the government, which the Court's also considering the relationship of an investigation before the Court that may have on other investigations that are pending. And then, of course, the privacy rights and expectations of people who end up not being charged or indicted. So the Court's considering that in relation to what was given to the Court regarding these cases, the Court has considered that in deciding that the Court is not going to grant access to the records under the common law presumption; although the Court has found that it applies, it was not abrogated. But the Court finds the balancing test favors the government here.

So shall we move to the First Amendment argument? Now, that being said, I do think in terms of the updating of the report, the Court is going to grant that. I think the government needs to provide the Court an update regarding what's going on now. And I'm inclined -- you know, if you need ten days, 14 days, whatever that may be, and then probably six -- every six months because I think that's a changing circumstance, a changing matter, regarding what's going on with those cases.

MR. NEUROCK: Yes, your Honor.

THE COURT: I don't know, any comments on that?

(No audible response)

THE COURT: Okay, if you all want to argue the First Amendment issue? Or not.

MR. FULLER: Your Honor, obviously the second legal basis that we think requires the unsealing of these records is the First Amendment. As your Honor has recognized, it is a narrower test but, on the backend, a more stringent burden that is placed on the government. There's very little case law on this issue, and the cases that have addressed this issue directly, and most notably the Fourth Circuit case in *Applebaum*, involved an ongoing investigation. They involved Section 2703(d) orders that were recently issued. And as we have seen in the search warrant context, that is an entirely different set of legal concerns than the post-indictment

context.

With regard to the experience prong of the First Amendment test, I think that if you look at these types of records, not from the position of what substantive areas do they involve, but what are they, and you look at things like orders, judicial orders, on allegations (phonetic) under the *Stored Communications Act* or under the pen register and trap trace provisions, then those judicial orders are clearly the types of documents that have been available to the public and, of course, the logic behind that openness is clear. It's to preserve public transparency in the judicial process. And we think that because the judicial orders are these top drawer documents, as Magistrate Judge Smith referred to them, that in order for the public to fully understand them, it also requires access to the applications themselves. And so that would be our argument on the First Amendment --

THE COURT: So going more on the logic than the experience, I guess, or --

MR. FULLER: Well, I think that I would pitch the experience argument at the level of, you know, what are these documents specifically? Are they judicial orders, are they applications as opposed to did they originate --

THE COURT: Okay, now you're going general, right?

MR. FULLER: -- *under the Stored Communications Act*. And judicial orders have a history of openness and so,

therefore, you do move to the logic prong, and we think the case is compelling --

THE COURT: Okay.

MR. FULLER: -- on that prong.

THE COURT: Okay, but these are not really general orders. So I think there's a -- probably an issue on the experience side of it for Dow Jones but, anyway, I'll let the government argue.

MR. NEUROCK: Your Honor, I agree that there is definitely an issue on the experience test, but also the logic test. And they are required to meet both tests. It's not a one or the other, it is both. And we cited in our supplemental citation for you, the Fifth Circuit decision in *Sullo And Bobbitt* (phonetic), that touches on that. What we're looking at is not so much is this a judicial order, but has the place and the process with regard to the experience test typically or historically been open to the press and the public, and the answer to that is just simply no, it hasn't. There is no history of openness in Section 2703(d) proceedings. This is a recent creature of statute and we -- in deciding whether or not there is a tradition or history of openness, we looked to nationwide practice, and there is no other jurisdiction that we've been able to find, and Dow Jones hasn't pointed us to any, that provides openness in this process. And there is no real history of openness in *The Right to Financial Privacy Act*

either, which is what the *Stored Communications Act* is based on, so I think that's something that the Court can permissibly look to in deciding whether or not we meet the experience test. These things are -- these requests -- 2703(d) requests are done ex parte, they're done under seal, and they're looked at by the Court in-camera. This is not something that's historically been open to the press. It's historically been closed. And so the experience test I think Dow Jones is not able to meet, nor can they meet the logic test which asks whether public access plays a significant, positive role in the function of this particular process; not the process of whether or not Section 2703(d) orders are effective or whether they're useful in obtaining successful conclusions of law enforcement investigations, but the particularly process of deciding whether or not to grant them and the orders that follow, public access doesn't really play any role at all in that. These things, as I mentioned, are done ex parte, they're done in-camera, they're done without public participation, so there's not a significant role. And it wouldn't be a positive role even if there is one because the whole idea of these applications is that they be done during the course of an ongoing criminal investigation. And so secrecy is of the utmost importance. Privacy and secrecy in this sense are the norm. And openness would completely frustrate the purpose of having these orders made available to law enforcement in order

to conduct those investigations.

Those things that we viewed as countervailing interests with regard to the common law presumption we believe are also compelling interests with regard to the First Amendment right of access. And so the importance of an ongoing criminal investigation we believe is a compelling interest that not only would justify defeating a First Amendment right of access, but also I think goes to the application of the logic test itself. The importance and sensitivity of an ongoing criminal investigation is of such paramount import that it is -- I think would defeat the purpose of that investigation if public access were to play a role in the process of applying for and issuing one of these orders. It's not enough to argue -- what Dow Jones has said is that judicial orders are -- it's good that judicial orders are generally available. And that's certainly true. But it's not enough to say that openness just benefits every governmental process. What we need to show in this case, in order to satisfy the logic test, Dow Jones needs to show that public access plays a significant, positive role in this particular process. And they just can't meet that test, and so we believe that the logic test just isn't satisfied here.

THE COURT: All right, anything else?

MR. FULLER: Excuse me? Sorry.

THE COURT: Anything else? I'm sorry.

MR. FULLER: Yes, your Honor. And it's not just judicial materials. We refer the Court to *In Re Application of New York Times*, which we've cited. It's at 585 F.Supp.2d 83. It involves the analogous situation of warrants. And, again, not pre-indictment warrants but post-indictments warrants, so where there's not an active, ongoing investigation that has not reached the arrest at the trial stage. And it essentially finds that there has been a history of openness with regard to these post-indictment warrant proceedings and for the same reasons that we just argued, that the logic prong of the First Amendment test also supports access. And so we would, based on that strong analogy between search warrants and 2703(d) applications and orders, particularly as it regards the judicial process and the judicial participation in that process, we think that that is a compelling precedent for extending the First Amendment right of access to 2703(d) orders as well.

THE COURT: All right. The Court finds that the materials here or at issue here fail both prongs of the First Amendment experience and log tests, so they're not subject to the First Amendment right of access. And, I mean, this is a 1986 statute. I didn't see where it was -- I think it's clearly not a widespread history of disclosing these type of orders to the general public. And as the government stated, they are presented ex parte -- or they're considered in-camera.

And regarding the logic issue, the Court doesn't find the public access to be significant. I mean these, just by the nature of what they are, pre-indictment, investigatory process, to be effective must generally be confidential. And the Court doesn't find that the tests are satisfied regarding these matters.

I talked about the update status report. I probably need a little more input on the docket sheets because docket sheet is there to give the public information as to what's there, what has been done. And, you know, I'm open to some changes in that regard. I'm not quite sure yet. I'm having a little -- not having -- I have -- I'm having little issues as to what should be there, I guess, but probably those need to be changed.

MR. LEATHERBURY: Yes, your Honor, particularly under that Second Circuit case holding that there is a qualified -- or First Amendment right of access to docket sheets. You know, again, as Mr. Fuller said, I think the devil is in the details about how much is too much from the government's perspective versus how much is not enough from our perspective. And --

THE COURT: But what --

MR. LEATHERBURY: -- it's clear there can be a more specific description than what's on the docket sheets now which just say "sealed event," "sealed order," "sealed event," those sorts of things.

THE COURT: I agree. Does the government have any comments on that?

MR. NEUROCK: I do, your Honor. First of all, the -- I want to make it clear that the discussion we're having here is not something that's required by the First Amendment. If the Court's found that the First Amendment right of access doesn't apply, then it's not bound to change the docket sheet. But --

THE COURT: Well, I just think -- I mean, the docket sheets are there, they index judicial proceedings. You know, whatever it is going to be sealed, the public won't have access to that. But as to what it is and maybe how the Court acted on it, it's probably proper.

MR. NEUROCK: We're fine with a change like that, your Honor. If it were to say something like, "Application for Section 2703(d) order filed," and then "Order granting Section 2703(d) order," or "Order denying Section 2703(d) order," we'd be okay with that.

THE COURT: Any --

MR. FULLER: And Dow Jones would be okay with that. I would just make the one small addition that, you know, a lot of these applications have a bunch of different requests kind of all pulled together. We've got pen register, trap and trace, we've got D orders, we've got subpoenas, we've got statutory search warrants. And so I would think that an entry

ought to reflect that, particularly as it relates to ongoing access issues. You know, one -- some of these cases in which we've sought access are called *In Re Sealed Application*, some are called *In Re Pen Register*. The last one -- the most recent one is *In Re Search Warrant*. Well, if it's In Re Search Warrant, then the government's argument that these aren't search warrants looks a lot different. And so I think that the more specificity with regard to the basis of the application would help guide the Court as well as anyone who is seeking access to these to try and determine exactly what types of access might apply.

THE COURT: Any comments?

MR. NEUROCK: Not really, your --

THE COURT: And we --

MR. NEUROCK: -- Honor. I agree with that. I --

THE COURT: I'm sorry?

MR. NEUROCK: Not really, your Honor. I agree with that --

THE COURT: Okay.

MR. NEUROCK: -- that it's something that -- for efficiency purposes, we've tended to bring a lot of these actions under one single document so that we don't have to keep coming back to the judge to get separate authorizations for different types of investigatory techniques in the same investigation, so we've just found it expedient to do that at

one time.

THE COURT: Right. And I'll visit with the deputy clerk a little bit more about it. If I have any more questions, maybe we can get back on the phone or something. But, I mean, it's an issue for me, not even talking about this case in particular, when things are just -- it'll just say "sealed." Well, you have to open every single thing up, even from the Court's perspective to, you know, figure out what you need to read to prepare. So, Brandy, we'll visit with Maryann about that and see what's best. And maybe before we make a decision we'll let you all know what we're doing.

MR. NEUROCK: If -- your Honor, if I could suggest that the -- whatever changes the Court decides to make, if it decides to make any changes, should be prospective for new cases that are filed.

THE COURT: I agree. It would create a ton of work. But -- and I may be stepping out of line here because I don't know if this has to be, you know, run through the Chief Judge and done as a district as a whole, but I will check into it and we can get back, if there's some issues, to you. Is there anything else?

MR. NEUROCK: Not from the government, your Honor.

THE COURT: So I -- then the Court will await the government's update.

MR. NEUROCK: Yes, your Honor.

MR. LEATHERBURY: And what was the date for that, your Honor? Was it --

THE COURT: I said -- is ten days sufficient?

MR. NEUROCK: If I could --

THE COURT: I said ten or 14 I'd be fine with.

MR. NEUROCK: If I could have a moment? If we could have two weeks, please, your Honor, that would be great.

THE COURT: That's fine. And then every six months after that --

MR. NEUROCK: Yes, your Honor.

THE COURT: -- we will docket that. Anything else from Dow Jones?

MR. FULLER: No, your Honor, thank you very much.

THE COURT: From the government?

MR. NEUROCK: No, your Honor, thank you.

THE COURT: All right, thank you, you're excused.

MR. LEATHERBURY: Thank you, your Honor.

(This proceeding was adjourned at 2:25 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

July 25, 2015

Signed **Dated**

TONI HUDSON, TRANSCRIBER