IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 3:11cr13
	)	
PHILLIP A. HAMILTON	)	

GOVERNMENT MOTION TO ADMIT INTO EVIDENCE
ELECTRONIC MESSAGES STORED BY THE DEFENDANT AND
PREVIOUSLY EXCHANGED BETWEEN THE DEFENDANT AND HIS SPOUSE

The United States of America by undersigned counsel hereby requests the Court issue a pre-trial ruling on the admissibility of certain evidence the government intends to introduce at trial. The request is limited to a series of emails exchanged between the defendant, PHILLIP A. HAMILTON, and his spouse Kimberly Hamilton which were sent on August 16, 2006. The emails were subsequently stored on the defendants work computer and seized by agents pursuant to a federal search warrant on September 2, 2009. The United States further submits that a pretrial ruling on this issue will expedite the trial of this case which is scheduled for May 2, 2011.

Introduction

Pursuant to Fed. R. Evid. 104(a), the court may, subject to the provisions of Rule 104(b), determine whether a matter proffered may be admitted in evidence. In making a Rule 104(a) determination, the court is not bound by the rules of evidence except with respect to privileges. The government submits that ruling pretrial on the admissibility of the emails pre-trial, as well as deciding whether and what type of any limiting instructions or redactions may be necessary, will streamline the presentation of evidence at trial and help avoid lengthy bench conferences during

trial while, with the jury impaneled and otherwise ready to hear testimony, the court is forced to entertain argument as to the admissibility of each particular email.

Factual Background

The indictment charges the defendant with two counts. Count One, Federal Program Bribery, alleges that from in or about August 2006 through in or about July 2007, the defendant corruptly solicited a salaried position at the ODU Center for Teacher Quality and Educational Leadership, intending to be rewarded for sponsorship of a budget amendment in the House of Delegates funding the center. Count Two, Extortion Under Color of Official Right, alleges the defendant from August 2006 continuing through July 2007 obtained property not due him or his office, that is, salaried employment for himself from Old Dominion University.

The Federal Bureau of Investigation, the agency investigating this case, obtained a search warrant on September 1, 2009 from the United States District Court for the Eastern District of Virginia for the seizure of computer account information for Phillip A. Hamilton from the Newport News Public Schools (NNPS) in Newport News. A copy of the search warrant and attachment are filed as part of this Motion (Attachment 3). The search warrant authorized the search and seizure of contents of wire and electronic communications of Phillip A. Hamilton from January 1, 2006 continuing through the date of the warrant. Agents were authorized to seize opened and unopened email. At the time of the search Hamilton was a public employee with NNPS.

Federal agents along with computer forensic experts executed the search warrant at NNPS on September 2, 2009. Among the emails retrieved were a series of email exchanged between the defendant and his wife, Kimberly Hamilton, which occurred on August 16, 2006.

The emails were stored on the defendants NNPS public work computer in an Outlook file where the defendant had created folders organized by year. The emails had not been deleted. The United States is filing the emails in question under seal. (Attachments 1and 2). The emails directly relate to a meeting that day between the defendant, the president of ODU and other ODU officials. The emails are pertinent, relevant and probative because they clearly establish the defendants intention to seek salaried employment from Old Dominion University. They contain explicit references to the amount of money the defendant was seeking. (Attachments 1 and 2). To provide further context to the relevance of the exchanges, later that day the defendant transmitted a proposal to two of the ODU officials at the August 16 meeting discussing his funding proposals for the ODU Center For Teacher Quality and Education Leadership. (Attachments 4 and 5). The emails were sent using the defendant's NNPS work email account. Therefore, these emails are essential to establish the defendants state of mind, intent and motive and would be admissible pursuant to Rule 401 of the Federal Rules of Evidence as relevant evidence in order to establish the corrupt intent to engage in the quid pro quo for personal enrichment originated with the defendant. These email discussions are intertwined with Hamilton's efforts to simultaneously obtain employment and funding for that employment and therefore part of the res gestae of the crime.

NNPS does not appear to have had a computer workplace use policy in effect during August 2006 when the emails were sent. However, NNPS did implement subsequent Technology Acceptable Use policies. A Technology Acceptable Use Policy was implemented on June 19, 2007 (Attachment 6) and a revised Technology Acceptable Procedure superceded this policy on January 8, 2008 (Attachment 7). On or about June 6, 2008, the Acceptable Use

Policy, Frequently Asked Questions, was posted on the NNPS website. The questions explain that system users have no expectation of privacy on material sent, received, or stored on School Board owned computers. (Attachment 8). The United States submits that this policy implemented January 8, 2008 and which was in effect on the date of the search, September 2, 2009, governs the admissibility of these emails between the defendant and his spouse. The defendant acknowledged that he was explicitly aware of this policy by electronically signing acknowledgment forms on two occasions on February 1, 2008 (Attachment 9 – redacted) and on October 24, 2008 (Attachment 10 – redacted). Also during the time of execution of the search warrant the NNPS computers were equipped with a pop-up log in banner. Notice of the implementation of this banner was emailed to all NNPS employees, including Hamilton, on February 7, 2008 (Attachment 11). The log-in banner appears on every computer, regardless of whether the computer was shut down and turned back on, restarted, or logged off and back on. (Attachment 11). This banner was implemented on the NNPS system on February 25, 2008. When the banner appears, users must click on the OK button before proceeding to the next step of the log-in process. It cannot be bypassed. The banner states the following:

> This NNPS computer system including Internet and e-mail access is provided only for authorized use. All computers may be monitored to ensure that the use is authorized and to verify operational security. All data stored or transmitted over this system may be monitored. Unauthorized use may subject the user to criminal prosecution and evidence of this use may be used for administrative or other adverse action.

Legal Argument

Federal courts have recognized two distinct marital privileges under Federal Rule of Evidence 501: the "adverse testimony" privilege whereby one spouse may not be compelled to

testify against the other on any subject in a criminal proceeding and the "confidential communications" privilege whereby confidential communications between spouses are inadmissible. The United States has no intention to call the defendants spouse as a witness to these emails, therefore the issue before the court is whether the stored emails are privileged "confidential communications" between spouses.

In *Wolfle v. United States,* 291 U.S. 7 (1934), the Supreme Court recognized the privilege in confidential martial communications and noted that the basis of the privilege, the protection of confidential marital communication, was "so essential to the preservation of the marriage relationship as to outweigh the disadvantages of the administration of justice which the privilege entails." *Id*. at 14. The Court also noted that marital communications are presumed to be confidential, but if the nature and circumstances surrounding the communication show that it was not intended to be confidential, then the communication is not privileged. *Id*. Specifically, communications which are made in the presence of a third party are not confidential and thus, are not privileged. *Id*. at 14.

Likewise, the Fourth Circuit has recognized that "[i]nformation that is privately disclosed between husband and wife in the confidence of the marital relationship is privileged." *United States v. Parker*, 834 F.2d 408, 411 (4th Cir. 1987) (*citing Blau v. United States*, 340 U.S. 332, 333 (1951); *see also United States v. Acker*, 42 F.3d 509, 514 (4th Cir. 1995).

However the privilege is not absolute and a party can waive any expectation of privacy in this privilege. For example, courts have held that marital communications occurring while one of the spouses was incarcerated are not privileged because the spouses knew that prison officials could monitor the conversations. *See United States v. Griffin*, 440 F.3d 1138 (9th Cir. 2006) and

United States v. Madoch, 149 F.3d 596 (7th Cir. 1998).

The Supreme Court has held that public employees have Fourth Amendment rights in their offices, however their reasonable expectation of privacy could be "reduced by virtue of actual office practices and procedures, or by legitimate regulation". *O'Connor v. Ortega*, 480 U.S. 709, 717(1987).

In *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000), the Fourth Circuit held that a public employee has no reasonable expectation of privacy in his internet use in light of the employer's computer use policy. The policy , as here, placed employees on notice that they could not reasonably expect that their internet activity would be private.

In *United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002) the court upheld the seizure of a state-owned computer because the defendant had no reasonable expectation of privacy in the computer because of the flash-screen warning. This case involved the seizure of the office computer of a college professor on which child pornography was found.

The holding in the case of *United States v. Etkin*, 2008WL 48281 (S.D.N.Y., Feb. 20, 2008) is applicable to the facts of this case. In *Etkin*, the defendant was an employee of the New York State Police and he objected to the introduction of an email sent using his government issued email account claiming the marital communication privilege. The defendant in *Etkin*, similar to the log in screen on the NNPS computers, was notified that communications were subject to monitoring. The court held any expectation that the email to his wife would remain confidential was "entirely unreasonable" and therefore the communication was not confidential.

The case of *Sprenger v. Rector and Board of Visitors of Virginia Tech, et al.*, 2008 WL 2465236 (W.D. Va., 6/17/08) discusses the spousal privilege protection of email

communications between husband and wife using workplace computers. The court noted that the issue of whether emails sent to or from a work email account using a work computer are privileged was one of first impression in the Fourth Circuit. Cristin Sprenger, the wife, sued Virginia Tech for a violation of the Americans with Disabilities Act. The husbands employer, also a state agency, was issued a subpoena to produce Mr. Sprenger's email communications sent to or received from the wife, Cristin Speinger from Mr. Sprenger's work computer. The plaintiff wife filed a motion to quash the subpoena on the basis of the marital communication privilege. In *Sprenger*, the court noted that these cases turn on the very specific factual situations unique to each case. The Court further noted "In this case, the factual record is sparse". Noting the absence of any acknowledgment of the work computer policy such as a log-on banner, flash screen or employee handbook it was unclear whether third parties had a right of access to emails and granted the motion to quash the subpoena. Those facts are strikingly different from the current case before the court. The record will be clear here that on the date of execution of the search warrant the NNPS had an unequivocal policy that any data stored or transmitted was subject to monitoring and there was no expectation of privacy. The defendant Hamilton was aware of this fact. Based on the pop up banner on his computer screen and on the employee acceptance forms that Hamilton expressly acknowledged on two separate occasions on February 1, 2008 and again on October 24, 2008.

In conducting it's analysis in the *Sprenger* case the court cited the case of *In Re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2008) which related to the issue of attorney-client privilege (courts have recognized the two privileges are similar). In *Asia Global* factors the court considered to measure the employees expectation of privacy were:

(1) Does the corporation maintain a policy banning personal or other objectionable use

(2) Does the company monitor the use of the employee's computer or email

(3) Do third parties have a right of access to the computers or emails, and

(4) Did the corporation notify the employee, or was the employee aware of the use and monitoring policies.

In applying these criteria to the facts of this case it is obvious that the defendant had no reasonable expectation of privacy on his work place computer.

Conclusion

Based on the foregoing, the United States submits the proferred evidence is probative, relevant and not privileged which is a part of the corrupt efforts of the defendant to obtain employment. *See United States v. Cooper*, 482 F.3d 658 (4th Cir. 2007). The general policy of the Federal Rules is that all relevant material should be laid before the jury as it engages in the truth finding process. *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130, 1135 (4th Cir. 1988). Rule 404(b) prohibits the introduction of evidence of prior acts for the purpose of proving the character of a person. Fed. R. Evid. 404(b). Rule 404(b) only applies, however, to evidence relating to acts extrinsic to the conduct being prosecuted. *See United States v. Lipford*, 203 F.3d 259, 268 (4th Cir. 2000). Evidence intrinsic to the story of the crime , such as this evidence, does not fall under Rule 404(b)'s prohibition. *See id.* (evidence "served to complete the story" with respect to conspiracy charge). Even where evidence predates the time period of the indictment, the government is allowed to provide context relevant to the criminal charges. *United States v. Kennedy*, 32 F.3d 876, 885 (4th Cir. 1994). This evidence should be admitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 2011, I electronically filed the foregoing Government Motion to Admit into Evidence Electronic Messages Stored by the Defendant and Previously Exchanged Between the Defendant and His Spouse, with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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