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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY
INFORMATION CENTER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

Case No.: 18cv1814-TNM

**DAVID LESHNER
DECLARATION**

I, David Leshner, declare as follows:

1. I am the Chief of the Criminal Division and an Assistant U.S. Attorney for the U.S. Attorney’s Office for the Southern District of California.

2. In making this declaration, I have relied on my personal knowledge, or where my personal knowledge was lacking or incomplete, I have relied on my review of records routinely maintained in the ordinary course of business or information provided by employees of the U.S. Attorney’s Office for the Southern District of California.

3. I am informed and believe that the Electronic Privacy Information Center (“EPIC”) has submitted a request pursuant to the Freedom of Information Act for “the first page of all 2703(d) orders for production of cell site location information” during the years 2016, 2017, 2018 and 2019. The United States

1 Attorney's Office for the Southern District of California ("USAO-SDCA") cannot
2 comply with this request for the reasons set forth below.

3 **§ 2703(d) Application Process**

4 4. Where an Assistant U.S. Attorney ("AUSA") in the USAO-SDCA
5 elects to file an application for court authorization to obtain information under 18
6 U.S.C. § 2703(d), that AUSA (or a designated legal assistant or paralegal) prepares
7 an application and order. After the AUSA signs the application, the application and
8 proposed order are submitted to a U.S. Magistrate Judge. If the Magistrate Judge
9 issues the submitted order, the AUSA (or other USAO-SDCA personnel) files a
10 paper copy of the application and signed order with the court clerk's office. The
11 application and order may be filed under seal if the application relates to an ongoing,
12 covert investigation. A paper copy of the application and order should be maintained
13 in the USAO-SDCA case file, and an electronic version of the application and order
14 should exist in the network folder of the individual who created the documents
15 (either the AUSA or a designated legal assistant or paralegal).

16 **Manual Case File Search for § 2703(d) Orders**

17 5. The USAO-SDCA does not centrally track or file § 2703(d)
18 applications and orders. To locate § 2703(d) orders as requested by EPIC would
19 require USAO-SDCA personnel to conduct a manual review of every open criminal
20 case file during the years 2016-2018. (The USAO-SDCA ceased seeking cell site
21 information under § 2703(d) in June 2018 following the U.S. Supreme Court's
22 decision in *Carpenter v. United States*, 585 U.S. ____ (2018)). A manual search for
23 § 2703(d) orders would require identification of all criminal cases and matters open
24 during 2016-2018; identification of the AUSAs who worked on those matters during
25 that time; and locating and searching physical case files.

26 6. I am informed that the number of criminal cases and investigations filed
27 or opened in the USAO-SDCA in each of the requested years is as follows: 2016

1 (4652 cases/investigations); 2017 (5753 cases/investigations); and 2018 (12839
2 cases/investigations). With respect to the review of those 23,244 physical files, I
3 estimate that once the physical case file is located, it would take approximately 5
4 minutes to review each physical case file to determine if it contains one or more
5 § 2703(d) orders and whether any § 2703(d) order is sealed or not. (The estimate of
6 5 minutes per case file takes into account the fact that certain USAO-SDCA criminal
7 case files likely could be reviewed in under 1 minute (e.g., prosecutions for
8 misdemeanor illegal entry under 8 U.S.C. § 1325) while other criminal case files
9 include multiple boxes of documents that could take 1 hour or more to review.)
10 Based on this estimate, conducting a manual review of physical case files would take
11 approximately 1,937 hours. For these reasons, conducting manual searches of
12 physical case files for § 2703(d) orders would place a virtually insurmountable
13 burden on the USAO-SDCA.

14 **Computer Network Search for § 2703(d) Orders**

15 7. As described above, an electronic version of each § 2703(d) application
16 and order during the years 2016, 2017 and 2018 should exist on the network drive
17 of the individual who created the documents (either the AUSA or a designated legal
18 assistant or paralegal). Each AUSA, legal assistant and paralegal has a designated
19 folder within the USAO-SDCA network. The USAO-SDCA currently employs
20 approximately 126 criminal division AUSAs, approximately 21 criminal division
21 legal assistants and approximately 15 criminal division paralegals who might
22 possibly prepare such applications. (Not all of these individuals have been employed
23 by the USAO-SDCA during the entire 2016-2018 time period, and other USAO-
24 SDCA personnel have left the USAO-SDCA during this time period.)

25 8. USAO-SDCA computer network files are not kept in a document
26 management system that automatically indexes documents as they are created and
27 allows for easy key-word or other advanced searches. Instead files are stored in what

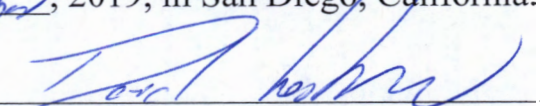
1 may be analogized to a folder/subfolder tree structure. The files are not indexed. The
2 files are stored in the “cloud” where large quantities of data can be archived but
3 where the rate of transfer of files to the user is slow. For example, some file transfers
4 in individual cases are set to run overnight or longer. I am informed that the USAO-
5 SDCA computer network currently holds approximately 111 TB of data, which
6 includes over 190 million files. Searching for electronic files containing § 2703(d)
7 orders across the computer network is not feasible because it will crash the system
8 doing the search. Any effort to access even just the file names to do a filename
9 search would also crash. Even if a file search were limited to files created during a
10 single year, the properties of all files would still have to be read to determine which
11 were created in that year. This is not a search that USAO-SDCA IT Services could
12 run with our current system and file configuration.

13 **Sealing of § 2703(d) orders**

14 9. Between 2016 and 2018, USAO-SDCA AUSAs routinely sought
15 § 2703(d) orders for cell site information in ongoing, covert investigations. The
16 common practice was for AUSAs to request that applications and orders pursuant to
17 § 2703(d) be sealed to protect the covert investigation. As a result, many of
18 responsive orders would be subject to a court sealing order and thus exempt from
19 disclosure in any event.

20 I declare under penalty of perjury under the laws of the United States of
21 America that the foregoing is true and correct.

22 Executed this 13th day of November, 2019, in San Diego, California.

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24 
25 David Leshner
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