

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ELECTRONIC PRIVACY)	
INFORMATION CENTER,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 18-1814 (TNM)
)	
UNITED STATES DEPARTMENT)	
OF JUSTICE,)	
)	
Defendant.)	
_____)	

DECLARATION OF T. PATRICK MARTIN

I, T. Patrick Martin, declare as follows:

1. I am the Chief of the Criminal Division and an Assistant United States Attorney for the U.S. Attorney’s Office for the District of Columbia (USAO-DC). 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 USAO-DC.
2. It is my understanding that EPIC has submitted a FOIA request for **the first page of all 2703(d) orders for production of cell site location information during 2016, 2017, 2018, and 2019.** It is unreasonably burdensome, if not impossible, for USAO-DC to comply with this request for the following reasons:
3. **No Tracking or Central Filing.** USAO-DC does not have a universal system in place to track or centrally file 2703(d) orders in either paper or electronic form. USAO-DC has two Divisions that seek and obtain 2703(d) orders in furtherance of their criminal investigations—the Criminal Division and the Superior Court Division. The approximate number of AUSAs in the Criminal and Superior Court Divisions is 78 and 160, respectively. Each AUSA, regardless of which Division to which he or she belongs, is responsible for managing his or her own orders as required by the courts. *Some* USAO-DC AUSAs within some Sections of the Criminal Division, beginning sometime in 2016, began to enter 2703(d) orders (of all sorts, not just for cell-site location information) by logging the case number for the 2703(d) order in an electronic document log maintained within the Section as a means of tracking deadlines for renewing non-disclosure orders that accompany some 2703(d) orders. That practice, however, was not uniform across the Criminal Division Sections, of which there are four, so an electronic search of each of the independent Section 2703(d) order logs would be under-inclusive of 2703(d) orders obtained by all AUSAs across the Criminal Division. In addition, USAO-DC

AUSAs within the Superior Court do not enter 2703(d) Orders into a universal Division or Section electronic document log maintained within either the Division or its various Sections.

4. **Manual Search.** To endeavor to do a manual search of all 2703(d) orders would require a very labor-intensive multi-step process. USAO-DC would need to identify all criminal cases and matters handled during each year from 2016 through 2019 in both the Criminal and Superior Court Divisions. In the Criminal Division, for 2016, 2017, and from January 1, 2018 through June 22, 2018, there were 1,639, 2,036, and 968 cases/matters handled, respectively. In the Superior Court Division, more than 20,000 cases/matters were handled each year from 2016 to 2018. To conduct a manual search of each of these cases/matters, USAO-DC would need to locate and retrieve each physical case file, whose size can range from a case jacket to dozens of bankers boxes of material. Some of the files are on-site. Most files, however, are in storage with a vendor at an off-site location. To physically search each physical file for paper copies of signed 2703(d) orders would take many hundreds person hours.
5. **System-Wide Digital Search.** USAO-DC network files are not kept in a document management system that would automatically index documents as they are created and allow for easy key-word or other advanced searches across the entire USAO-DC or the Criminal or Superior Court Divisions. Instead, files are stored in what may be analogized to a folder/subfolder tree structure. The files' contents are not indexed. USAO-DC currently has about 500 TB of data and any effort by USAO-DC IT Services to access and index that content data would render the system largely unusable for ordinary business purposes. Our file organization manifests as folders identified by case identifiers, not by subject matter, and within our folders we do not have standard file structures in the Superior Court or Criminal Divisions, as each Division Section and case being handled within it is unique. Both of these characteristics indicate a search of the entire volume of 500TB, rather than a subset, would be necessary, with all the difficulties indicated above. We do not have an exact count of the number of digital files but believe the order of magnitude is in the 100,000,000 range. This is not a search that USAO-DC IT Services could run with our current system and file configuration.

Moreover, a digital search of all AUSA (and SAUSA) and professional staff digital files, even if it could be conducted, would not necessarily be conclusive. While AUSAs typically save a Word copy of their documents electronically, neither they nor their paralegals have methodically scanned and electronically saved signed copies of the 2703(d) Orders since 2016. Beginning in 2016, AUSAs or their paralegals worked to more consistently digitally scan and electronically save signed copies of the 2703(d) Orders; however, the digital records are necessarily incomplete. As such, a physical search of each physical case/matter file would still be necessary to confirm if the 2703(d) application that was *prepared* by each AUSA or his or her paralegal was actually presented to a judge and signed.

Previously, in a similar context, the Chief Judge of the U.S. District Court for the District of Columbia has recognized the significant extent of the burden (both for the government and the Court) of searching for and compiling this kind of information retrospectively as to broad categories of matters. *See Matter of Leopold to Unseal Certain Elec. Surveillance Applications & Orders*, 300 F. Supp. 3d 61, 98-100 (D.D.C. 2018).

6. **Sealing.** Finally, it is USAO-DC's consistent practice to seek and obtain the sealing of 2703(d) orders to protect the integrity of criminal investigations. Historically, it was not USAO-DC's consistent practice to later seek or obtain unsealing orders. Beginning on or around October 2, 2018, the Chief Judge of the United States District Court for the District of Columbia ordered that docket numbers and limited associated information for applications for 2703(d) Orders, filed on or after October 1, 2017, be periodically unsealed and set out in an attachment to the Court's related unsealing orders and posted on the Court's public Internet site at <https://www.dcd.uscourts.gov/news/standing-orders-regarding-unsealing-limited-docket-information-sealed-applications>. Accordingly, while not as fulsome as the information contained on the first page of a 2703(d) Order, the docket numbers and some associated information for applications for 2703(d) Orders filed by the USAO-DC's Criminal Division from on or around October 1, 2017, through September 30, 2018, is currently available to the public via the Court's website. Similar information concerning applications for 2703(d) Orders filed after September 30, 2018, will be made available to the public via the Court's periodic unsealing orders. The District of Columbia Superior Court does not, however, have a similar standardized practice of periodically unsealing some information associated with 2703(d) applications or orders for access by the public. As a result, most if not all responsive information concerning 2703(d) orders obtained by the Criminal Division before October 1, 2017, and most if not all responsive information concerning 2703(d) orders obtained by the Superior Court Division since 2016, would be subject to a court sealing order and thus exempt from disclosure.

7. **Post-Carpenter Practice in USAO-DC.** On June 22, 2018, the Department's Computer Crime and Intellectual Property Section issued post-*Carpenter* interim guidance directing Department prosecutors to use search warrants, not 2703(d) orders, for cell site location information. On Monday, June 25, 2018, that guidance was circulated to all staff at USAO-DC. On October 25, 2018, the Department issued formal guidance to the same effect. USAO-DC therefore no longer used 2703(d) Orders for cell-site location information after on or about June 22, 2018.

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

Executed this 13th day of November, 2019, in Washington, D.C.



T. Patrick Martin