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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

IN RE: Request from Requesting State Pursuant to the Treaty Between the United States of America and the Requesting State on Mutual Assistance in Criminal Matters	§ § § §	CAUSE NO. SA-04-CA-676-OG

ORDER

Before the Court are the "Motion to Unseal and for Expedited Hearing" filed by the Electronic Frontier Foundation ("EFF"), the Urbana-Champaign Independent Media Center Foundation ("UCIMC"), and Jeffrey Moe (collectively, "movants"), the government's response, and the movants' reply. On July 31, 2004, this Court granted an application for the collection of evidence[1] pursuant to a treaty for mutual legal assistance in criminal matters ("MLAT") between the United States and the Requesting State. The Court also signed an order sealing the application and related documents. Movants contend that pursuant to the Court's order, Rackspace Managed Hosting was served with a Commissioner's Subpoena "to provide your hardware", described by the movants as two Indymedia servers, "to an unidentified 'requesting agency.'" Movants ask that all sealing orders regarding the Commissioner's Subpoena served on Rackspace be lifted.

I.

The government argues that the movants lack standing because they are not parties to the request. EFF describes itself as "a non-profit, member-supported civil liberties organization working to protect civil rights and free expression in the digital world." Motion at 3. EFF

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[1] The evidence requested was log files located at certain URLs during a specified period of time.

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publishes educational and advocacy materials for its 13,000 members and the public via a weekly email newsletter and a web site. Id. "UCIMC is an independent news media outlet and an autonomous portion of Indymedia, a collective of Independent Media Centers (IMCs) and thousands of journalists offering grassroots, non-corporate coverage of news events." Id. Moe is a customer of Rackspace, which provides him the use of two dedicated Internet servers to host over 20 news web sites published by IMCs, local volunteer coalitions that publish independent online newspapers. Id. at 1. This global network of local IMCs comprises the "Indymedia" news network. Id. Moe's servers were apparently the ones seized pursuant to the Commissioner's Subpoena. Id. at 1-2. Movants claim that the seizure of the servers constituted a "prior restraint of unprecedented scope" that "silenced our modern printing presses—over twenty independent news web sites and an Internet radio station." Id. at 1.

EFF and UCIMC claim a First Amendment and common law right of access to the sealed materials. There is a qualified first amendment right of access to criminal trials on behalf of the public and press. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). The right of access attaches to pretrial proceedings, if (1) "the place and the process have historically been open to the press and general public," and (2) "public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) ("Press-Enterprise II"). The right of access is not absolute; the press and public can be denied access based on findings that closure "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509-10 (1984) ("Press-Enterprise I") (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982)). The burden is upon the party seeking

closure to establish the existence of a substantial probability of prejudice. United States v. Doe, 63 F.3d 121, 130 (2d Cir. 1995).

The most analogous situation to EFF and UCIMC's request is public and media access to pre-indictment search-warrant affidavits. EFF and UCIMC's claim of a First Amendment right of access to the sealed materials in this case fails because they cannot satisfy the first prong of the Press-Enterprise II test. The Supreme Court has held that proceedings for the issuance of search warrants are not open to the public. In Franks v. Delaware, 438 U.S. 154, 169 (1978), the Court observed that the proceeding for issuing a search warrant "is necessarily *ex parte*, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove the evidence." See also United States v. United States Dist. Court, 407 U.S. 297, 321 (1972) (a "warrant application involves no public or adversary proceeding"); accord Times Mirror Co. v. United States, 873 F.2d 1210, 1211 (9th Cir. 1989); Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64 (4th Cir. 1989). But see In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 573 (8th Cir. 1988) (recognizing qualified First Amendment right of access to search warrant affidavits that can only be denied on showing of compelling government interest).

The Supreme Court has also recognized that the press and the public have a qualified common-law right of access to judicial records in general. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-99 (1978); accord, SEC v. Van Waeyenberghe, 990 F.2d 845, 848 (5th Cir. 1993). Since FED. R. CRIM. P. 41(g) requires that warrant documents be filed with the clerk of court, and since those documents become part of the court file, they are clearly judicial records. See Baltimore Sun Co., 886 F.2d at 63-64. The Court concludes that EFF and UCIMC

have standing to request the unsealing of the file due to their qualified common-law right of access to those documents.

Moe claims that the seizure of the servers directly injured his First and Fourth Amendment rights.[2] The Fifth Circuit has held that the Fourth Amendment does not provide a pre-indictment right of access to sealed search-warrant affidavits. In re Grand Jury Proceedings, 115 F.3d 1240, 1246 (5th Cir. 1997) (citing In re Eyecare Physicians of America, 100 F.3d 514, 517 (7th Cir. 1996)). But see In the Matter of the Search of Up North Plastics, Inc., 940 F.Supp. 229, 232 (D. Minn.1996) (person whose property has been seized pursuant to a search warrant has a right under the Warrant Clause of the Fourth Amendment to inspect and copy the affidavit upon which the warrant was issued); In re Search Warrants Issued August 29, 1994, 889 F.Supp. 296, 298-99 (S.D. Ohio 1995) (same). Even if the right does exist, all authorities agree that it is not absolute. See Up North Plastics, Inc., 940 F.Supp. at 232-33 (to seal, government must demonstrate a compelling need and that there is no less restrictive alternative to sealing); In re Search Warrants Issued August 29, 1994, 889 F.Supp. 296, 299 (same).

Moe argues in passing that the seizure of the servers violated his statutory privacy rights. See "Privacy Protection Act", §§ 42 U.S.C. 2000aa *et seq.*; and Electronic Communications and Transactional Records Access" Act, 18 U.S.C. §§ 2701, et seq. Even if the seizure violated these

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[2] Moe's First Amendment claims are more difficult to decipher, but apparently he argues that because the seizure of the servers silenced Internet publication, the possibility of prior restraint of expressive materials requires even more rigorous Fourth Amendment procedural safeguards. See Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 62-63 (1989) (allegedly obscene materials cannot be taken completely out of circulation without rigorous procedural safeguards, including obscenity determination following an adversarial proceeding). Even assuming Moe's First Amendment rights were violated by the seizure, movants do not explain how this fact gives them access to the sealed materials.

statutes, movants do not indicate how the violation would provide them access to the sealed materials they seek.

In summary, it appears that Moe has no Fourth Amendment right to access the sealed documents. EFF and UCIMC have, at best, a qualified common-law right to the sealed materials.

II.

The government next argues that the treaty itself requires that the documents remain sealed. The Court does not agree. The treaty provision the government quotes is clearly discretionary. The treaty provides that "the Requesting State may *request* that the application for assistance, the contents of the request and its supporting documents, and the granting of such assistance be kept confidential." MLAT, art. 8(2) (emphasis added). The fact that the Requesting State may "request" confidentiality implies that the Requested State's judicial officer must exercise discretion in deciding whether to honor the request.

III.

The government's final argument is that the documents must remain sealed because they pertain to an ongoing criminal terrorism investigation, and that unsealing will seriously jeopardize the investigation. The government offers no facts to support this conclusory assertion. The movants reply that despite the reference to "terrorism", the government "fails to assert a national security interest in non-disclosure." In addition, the movants already have deduced from information provided in the government's response that the request in question came from Italy. The movants have attached to their reply an Associated Press article that contains a statement by Italian prosecutor Marina Plazzi that Italy made the request as part of its investigation into an anarchist group that has made bomb threats against European Commission President Romano

Prodi. Plazzi stated in the article that her request did not seek the seizure of servers or hard disks. In addition, whatever information the servers contained has been seized, so there is no possibility that the evidence can be destroyed or tampered with by the suspects. Thus, with most of the cats out of the bag, there seems little reason to continue the seal.

Yet this request for evidence was generated by what is apparently an ongoing criminal investigation seeking the identity of suspects involved in serious threats of harm to certain individuals. Despite the presumption of access to judicial records, the Court hesitates to lift the seal if to do so would aid the suspects in avoiding identification or otherwise compromise the criminal investigation. The government has so far, however, provided nothing more than a conclusory assertion that lifting the seal will compromise the investigation.

Under the common-law right of access to judicial records, the decision to grant or deny access is "left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." Baltimore Sun Co., 886 F.2d at 64 (quoting Nixon, 435 U.S. at 599). "Although the common law right of access to judicial records is not absolute, 'the district court's discretion to seal the record of judicial proceedings is to be exercised charily.'" Van Waeyenberghe, 990 F.2d at 848 (quoting Federal Savings & Loan Ins. Corp. v. Blain, 808 F.2d 395, 399 (5th Cir. 1987)).

> In exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring nondisclosure. See Nixon, 435 U.S. at 599, 602, 98 S.Ct. at 1312, 1314 (court must consider "relevant facts and circumstances of the particular case"); Belo [Broadcasting Corp. v. Clark, 654 F.2d 423] at 434 [(5th Cir.1981)]; see also Bank of America Nat'l Trust v. Hotel Rittenhouse, 800 F.2d 339, 344 (3d Cir.1986) (court had duty to "balance the factors favoring secrecy against the common law presumption of access"); Newman v. Graddick, 696 F.2d 796, 803 (11th Cir.1983) ("The historic presumption of access to judicial records must be considered in the balance of

competing interests." (citing Belo)).

Van Waeyenberghe, 990 F.2d at 848. The presumption lies in favor of public access. Id. The government, therefore, must demonstrate that the factors supporting secrecy in this case outweigh the presumption of access.

Therefore, it is ORDERED that the Court will lift the seal on this file fourteen days from the date this order is signed ***unless*** the government can produce significant evidence, which may be presented *in camera*, that convinces the Court that (1) the presumption of access to the sealed documents is outweighed by the necessity for secrecy in this case, and (2) there is no less restrictive means, such as redaction, available to preserve the necessary secrecy. The government must make a specific factual showing of how the investigation will be compromised by the unsealing of this file; conclusory allegations will not suffice. The Court would, if possible, like to hear from Italian prosecuting officials to determine their reasons, if any, for continuing to seal this file.

SIGNED this 9 day of December, 2004.

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE