UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FORBES MEDIA LLC, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 21-mc-80017-PJH

ORDER RULING ON MOTION FOR DE NOVO DETERMINATION AND DENYING PETITION

Re: Dkt. No. 20

On June 24, 2021, the court held a hearing on the motion of petitioners Forbes Media, LLC, and Thomas Brewster ("Petitioners") for de novo determination of dispositive matter referred to magistrate judge, pursuant to Civil L.R. 72-3, and objections to the April 26, 2021, report and recommendation ("R&R") of the magistrate judge to deny their petition to unseal court records ("Petition"). Dkt. 17. For the reasons set forth below, the motion for de novo determination is **GRANTED**; the objections to the R&R are **OVERRULED**; the R&R is fully adopted as correct, well-reasoned and thorough; and the disposition on the Petition recommended by the R&R is accepted by the court. Accordingly, the Petition is **DENIED**.

I. Background

A. Fact Summary

Forbes Media, LLC, ("Forbes") is a news media company and publisher. Thomas Brewster is an associate editor for Forbes, covering security, surveillance, and privacy issues. On March 10, 2020, Brewster obtained an All Writs Act ("AWA") application from the public docket of the Southern District of California ("S.D. Cal. Application"). This

application had been unsealed on February 14, 2020, according to the clerk's stamp. The S.D. Cal. Application requested an order compelling Sabre, a travel technology firm, "to provide representatives of the FBI complete and contemporaneous 'real time' account activity" for an individual subject to an arrest warrant—what the government refers to as a "hot watch" order. Dkt 1-1 at 2, 4.

In support of the S.D. Cal. Application, the government identified several other instances in which it had asked for and obtained technical assistance orders under the AWA imposing similar surveillance obligations on Sabre. The S.D. Cal. Application refers to the following cases within the Ninth Circuit in which Sabre complied with AWA orders to assist with government hot watches: (1) Western District of Washington, AWA Order GJ10-097, signed 2019; (2) Western District of Washington, AWA Order GJ17-432, signed 2017; and (3) Northern District of California, AWA Order CR-16-90391 MISC EDL, signed 2016. Dkt. 1-1 at 4. The S.D. Cal. Application more generally cites to the following cases in which other district courts have issued AWA orders: Western District of Pennsylvania, case number 15-880; and Eastern District of Virginia, case number 1:15-CR-245.

In July 2020, petitioners published an article about the contents of the S.D. Cal. Application along with a copy of the document. See Thomas Brewster, The FBI Is Secretly Using a $2 Billion Travel Company as a Global Surveillance Tool, FORBES, July 16, 2020.[1]

The government initially neither confirms nor denies that the AWA applications and orders Petitioners seek even exist. The government avers that, if any responsive documents exist, they relate to ongoing investigations. However, in its opposition papers, the government explicitly asserts that the AWA materials at issue relate to an ongoing criminal investigation that is itself sealed. See, e.g., Dkt. 12 at 5.[2]

[1] Available at: https://www.forbes.com/sites/thomasbrewster/2020/07/16/the-fbi-is-secretly-using-a-2-billion-company-for-global-travel-surveillance--the-us-could-do-the-same-to-track-covid-19/?sh=32c729fb57eb (last visited June 30, 2021).

[2] The court is unwilling to engage in the intellectual gymnastics necessary to decide on

B. Procedural Posture

In January 2021, petitioners filed applications in three of the courts referenced above to unseal the identified AWA applications and orders, and this miscellaneous matter comprises the application for the documents sought in this district (CR-16-90391 MISC EDL). See Dkt. 1 at 1; In re Application of Forbes Media LLC and Thomas Brewster to Unseal Court Records, No. 2:21-mc-52 (W.D. Pa. Jan. 25, 2021); In re Application of Forbes Media LLC and Thomas Brewster to Unseal Court Records, No. 2:21-mc-0007 (W.D. Wash. Jan. 25, 2021). As in this case, the applications submitted in the other courts requested access to the court orders themselves; the government's applications and supporting documents; and any other related judicial records, including motions and orders to seal, docket sheets, and any docket entries. See Dkt. 1 at 1.

Petitioners named the U.S. Attorney's Office for the Northern District of California as an interested party in this case. Dkt. 2. The government filed its opposition to the application on February 16, 2021. Dkt. 12. The government additionally submitted directly to the magistrate judge an ex parte, confidential fact supplement on the same day. Petitioners filed their reply in support of the application on February 23 (Dkt. 13), along with a motion to unseal the ex parte, confidential fact supplement (Dkt. 14). The government filed an opposition to this motion to unseal the fact supplement on April 22. Dkt. 16. Judge Hixson issued the R&R now at issue on April 26. Dkt. 17. The case was reassigned to this court.

Petitioners filed their motion for de novo determination in accordance with Civil L.R. 72-3, including their objections to the report, on May 10. Dkt. 20. The motion was fully briefed, and the court held a hearing on the motion on June 24.

C. Issues to be Decided

Centrally, petitioners' original request is for the court to unseal (1) the AWA Order that required Sabre, a travel technology firm, to assist the United States government in

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the continued sealing of documents that may not exist. The documents exist, they relate to an ongoing criminal investigation, and the court's decision rests on those bases.

effectuating an arrest warrant in case number CR-16-90391 MISC EDL. Petitioners additionally request that the court unseal (2) the government's application for the AWA Order and any supporting documents, including affidavits; (3) any other court records relating to the AWA Order, including, but not limited to, any motions to seal, the docket in case number CR-16-90391 MISC EDL, and all docket entries. Dkt. 1.

In addition to its opposition to the Petition, the government requests that the court seal or strike the S.D. Cal. Application (Dkt. 1-1) because the Southern District of California did not intend for that document to become unsealed and because the document contains personal identifying information of a foreign national. Dkt. 24 at 4.

The government submitted to the magistrate judge an ex parte, highly sensitive statement of facts in addition to its original opposition to the application to unseal. That statement of facts is not entered on the docket. Applicants separately request that the court unseal this document. Dkt. 14.

Regarding the report and recommendations now at issue (Dkt. 17), petitioners ask the court to reject as incorrect the report's conclusions that (1) the common law right of access does not attach to the documents here sought; (2) the common law right of access was overcome with respect to the entirety of each document sought; (3) the First Amendment right of access does not attach to the documents here sought; and (4) the First Amendment right of access was overcome with respect to the entirety of each document sought.

II. Standard of Review

When a party has timely filed written objections to the proposed findings and recommendations of a magistrate judge, a district judge shall make "a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge," and "may also receive further evidence or recommit the matter to the magistrate judge with instructions." Id.

III. Discussion

There are two public rights of access to the work of the judiciary, one under the First Amendment and the other under the common law. Each is analyzed separately and in turn.

A. First Amendment Public Right of Access

1. Legal Standard

Under Ninth Circuit authority, "the public has no right of access to a particular proceeding without first establishing that the benefits of opening the proceedings outweigh the costs to the public." Times Mirror Co. v. United States, 873 F.2d 1210, 1213 (9th Cir. 1989). To determine whether the public has a First Amendment right of access to a judicial proceeding or documents generated from the proceeding, "[c]ourts are required to examine whether 1) historical experience counsels in favor of recognizing a qualified First Amendment right of access to the proceeding and 2) whether public access would play a 'significant positive role in the functioning of the particular process in question.'" Id. (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) ("Press-Enterprise II")).

While courts must consider both "historical experience" and "logic" to determine whether the public has a First Amendment right to access to a particular proceeding, Ninth Circuit authority recognizes that "logic alone, even without experience, may be enough to establish the right." In re Copley Press, Inc., 518 F.3d 1022, 1026 (9th Cir. 2008) (citation omitted). As construed by the panel in Copley Press, the "experience and logic" tests "are not separate inquiries. Where access has traditionally been granted to the public without serious adverse consequences, logic necessarily follows. It is only where access has traditionally not been granted that we look to logic. If logic favors disclosure in such circumstances, it is necessarily dispositive." Copley Press, 518 F.3d at 1026 n.2.

However, "[e]ven when the public enjoys a First Amendment right of access to a particular proceeding, the public still can be denied access if closure 'is necessitated by a

compelling governmental interest, and is narrowly tailored to serve that interest.'" Id. at 1211 n.1 (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509-10 (1984) ("Press-Enterprise I")).

2. Analysis

Petitioners argue that the public's First Amendment right of access attaches to the documents they seek to unseal. Petitioners assert that the report failed to separately assess each category of documents (All Writs Act orders, All Writs Act applications, sealing motions, sealing orders, and docket sheets) under the First Amendment framework.

The government, in opposition, identifies that there is no history of public access for proceedings relating to an AWA order that requires third-party assistance in the execution of a federal arrest warrant. The government resists petitioners' argument that the court should consider whether the type of each document at issue is one traditionally kept secret. While petitioners focus on the categories of documents in which they are interested (court orders, government applications, and docket sheets), the cases they cite in support of their historical accessibility do not consider the type of document at issue in isolation, "untethered to the treatment of the proceeding in which the document appears," says the government. Dkt. 24 at 7 (citing United States v. Index Newspapers, LLC, 766 F.3d 1072, 1084 (9th Cir. 2014) (explaining that the experience and logic test is used "to determine whether the First Amendment right of access applies to a particular proceeding and documents generated as part of" it); and Copley Press, 518 F.3d at 1027-28).

Here, the First Amendment right of access does not attach to the materials at issue. The experience test is not met where, traditionally, there has been no public access to proceedings involving third party assistance in the execution of a sealed arrest warrant. As identified by this court in the matter of In re Granick, 388 F. Supp. 3d 1107, 1129 (N.D. Cal. 2019), "There is no Ninth Circuit authority recognizing a First Amendment right to access technical assistance orders under the [AWA]." In contrast to the post-investigation materials at issue in Granick, the documents petitioners seek to have

unsealed here are related to *ongoing* criminal matters, which have historically remained shielded from public view. Times Mirror Co., 873 F.2d at 1214; Copley Press, 518 F.3d at 1027-28.

Under the logic prong of the test, too, the AWA materials at issue, requiring third party assistance in furtherance of an underlying sealed warrant, are not the type that would benefit from public scrutiny. This court previously determined that the public has no First Amendment right of access to AWA orders that require a third party to provide assistance "in furtherance of an underlying [search] warrant or surveillance order." Granick, 388 F. Supp. 3d at 1129-30. The court explained that applications for AWA orders are typically issued during the "covert stages of the investigation," and they "may discuss confidential informants, cooperating witnesses, wiretap investigations, grand jury matters, and sensitive law enforcement techniques." Id. at 1129. The materials at issue discuss just those matters. These documents, regardless of their classification (court orders, government applications, and docket sheets), contain information that identifies the subject of the sealed arrest warrant and reveals the existence of the underlying grand jury proceedings, information worthy of sealing. Public access would not play a "significant positive role" in an ongoing, sealed criminal investigation. Press-Enterprise II, 478 U.S. at 8.

Moreover, because these AWA proceedings may identify persons charged and at large and others uncharged or exonerated, there exist compelling reasons to avoid their public disclosure. Despite the journalists' persuasive calls for transparency, openness here would "frustrate criminal investigations and thereby jeopardize the integrity of the search for truth that is so critical to the fair administration of justice." Times Mirror Co., 873 F.2d at 1213.

Therefore, the court concludes that the First Amendment right of access does not attach to the documents sought by petitioners. The experience prong of the test fails where there is no historical access to warrant materials during the pendency of an investigation, and the logic test fails where ongoing law enforcement efforts greatly

outweigh the potential benefit of public scrutiny. Even if the qualified First Amendment right of access attached to these documents, compelling governmental interests necessitate their continued non-disclosure while the investigation remains ongoing and sealed.

B. Common Law Public Right of Access

1. Legal Standard

The public has a common law right "to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Communications Inc., 435 U.S. 589, 598 (1978). The Ninth Circuit has recognized that while the Supreme Court "has not precisely delineated the contours of that right, it has made clear that 'the right to inspect and copy judicial records is not absolute.'" Times Mirror, 873 F.2d at 1218 (quoting Nixon, 435 U.S. at 598).

The Ninth Circuit has adopted a strong presumption in support of the common law right to inspect and copy judicial records and a balancing test "that accommodates both the presumption to which the common law right of access is entitled and the limitations that may properly be placed upon it." Valley Broadcasting Co. v. U.S. Dist. Court for Dist. of Nevada, 798 F.2d 1289, 1294 (9th Cir. 1986). The court in Valley Broadcasting stressed the importance of a clear statement of the basis of a denial of access "so as to permit appellate review of whether relevant factors were considered and given appropriate weight." Id. at 1294. Factors weighing in favor of public access include promoting the public's understanding of the judicial process and of significant public events. Weighing against public access "would be the likelihood of an improper use, 'including publication of scandalous, libelous, pornographic, or trade secret materials; infringement of fair trial rights of the defendants or third persons; and residual privacy rights.'" Id. (quoting United States v. Criden (In re National Broadcasting Co.), 648 F.2d 814, 830 (3d Cir. 1981) (Weis, J., concurring)).

2. Analysis

The assessment framework for the common law right of access, as petitioners

frame it, begins by determining whether the materials under consideration for sealing from public view fall into a limited scope of documents "traditionally kept secret." See Dousa v. U.S. Dep't of Homeland Security, No. 19-cv-1255, 2020 WL 4784763, at *2 (S.D. Cal. Aug. 18, 2020). The class of documents "traditionally kept secret," a classification not readily broadened, includes (1) grand jury transcripts, (2) warrant materials during the pre-indictment phase of an investigation, and (3) attorney-client privileged materials. Id. at *2 (citing Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1185 (9th Cir. 2006) (grand jury transcripts and warrant materials); Lambright v. Ryan, 698 F.3d 808, 820 (9th Cir. 2012) (attorney-client privileged materials)). In particular, the petitioners charge, the R&R erred by broadening the class of documents "traditionally kept secret" to include the documents at issue here: filings in an AWA matter ancillary to a sealed arrest warrant. Petitioners argue that because AWA orders are injunctions and the common law right of access attaches to injunctions, the common law right of access attaches to the AWA materials here. See Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1100 (9th Cir. 2016). And petitioners argue that the R&R's analysis of the common law right of access, similar to the R&R's analysis of the First Amendment analysis discussed above, erred by failing to assess separately whether each type of document requested falls into the "traditionally kept secret" classification.

The government counters that petitioners are not entitled to unsealing under the common law analysis. The government identifies that, while there is a common law right of access to judicial records, it is not absolute, allowing courts supervisory power over their own records and files. Nixon, 435 U.S. at 587. Even if the AWA materials involved here were documents to which a common law right of access would attach, the government argues that the compelling interests outweigh the presumption of public access.

Here, petitioners cannot prevail under the common law right of access either. First, no common-law right of access attaches to AWA materials during an ongoing investigation because they are "documents which have traditionally been kept secret for

important policy reasons." Times Mirror, 873 F.2d at 1219. The materials sought here are "warrant materials in the midst of a pre-indictment investigation," which the Ninth Circuit has said are not subject to a common-law right of access. Kamakana, 447 F.3d at 1185. Though the petitioners broadly distinguish AWA materials from warrant materials, asking the court to consider first the type of document based on its place in the underlying proceeding (e.g., AWA applications, AWA orders, or sealing orders), the court concludes that such a tunnel-visioned parsing is unnecessary and inappropriate. The AWA materials involved here, specifically giving effect to a warrant from this district, are specifically related to an ongoing criminal investigation. They therefore fall within the class of materials traditionally kept secret, a class the Ninth Circuit has said is not subject to a common law right of access.

Second, and in addition, the AWA materials at issue should remain under seal because compelling interests require continued sealing. As noted above, unsealing the documents sought here would "frustrate criminal investigations and thereby jeopardize the integrity of the search for truth that is so critical to the fair administration of justice." Times Mirror, 873 F.2d at 1213. Unsealing the materials in this case would jeopardize ongoing investigations by revealing the government's targets and investigatory techniques. The government's interest in protecting its sources and methods of gathering information is both substantial and compelling because granting the public access to these documents would provide criminal wrongdoers insight into the investigation and a roadmap to avoid apprehension.

C. Redaction and Sunshine Provision

The court concludes that, while the petition must be denied, it raises important issues related to public access and government transparency. In their original application to unseal documents, petitioners posit that "[t]he government's use of the AWA to obtain judicial orders requiring private technology firms in general, and Sabre in particular, to provide technical assistance to the government is a matter of intense public interest." Dkt. 1 at ¶ 4. Recognizing the realities of our ever-more technology-focused lives,

petitioners also emphasize that the public and the press "have a particularly strong interest in access to court records that would shed light on the government's collection of location records, which 'hold for many Americans the privacies of life,'" and that "[t]he disclosure of such information to the government implicates a range of weighty constitutional and policy interests." Dkt 1 at ¶ 5. Petitioners conclude that "the public and press have a keen interest in understanding the government's basis for seeking an AWA order directing Sabre to provide it with contemporaneous travel information about a targeted individual, as well as the district court's basis for issuing such an order." Dkt 1 at ¶ 5.

As additionally noted by petitioners, the public has an interest in understanding judicial reasoning and authorization of criminal investigations. Dkt 1 at ¶ 3. AWA proceedings, which provide an entity compelled to provide technical assistance only limited opportunity to object to the order sought and might not later be suppressed by a defendant (see United States v. Baker, 868 F.3d 960, 969-70 & n.4 (11th Cir. 2010)), are distinct from warrant proceedings, where a post-execution suppression hearing provides an opportunity for public access and more thorough opposition. Some transparency is thus necessary to ensure that AWA proceedings are not forever sealed off from public review.

As a practical solution, petitioners request the court to order redaction and release, even if the court does not grant unsealing of all materials at issue. Petitioners specifically seek disclosure of investigatory techniques, as the sealing of all technical assistance applications and AWA orders would transform such judicial decisions into a secret body of law. Petitioners charge that precluding all access to AWA proceedings is inconsistent with the practice of federal courts, citing to a recent amicus curiae brief from former magistrate judges explaining that judges routinely "publish[] their reasoning when answering novel questions regarding surveillance requests . . . while simultaneously accommodating compelling governmental interests" by using tools like redaction. Brief of Former United States Magistrate Judges as Amici Curiae in Support of Petitioner at 4,

American Civil Liberties Union v. United States, No. 20-1499 (U.S. May 27, 2021).

The government protests against redaction, contending that redaction would still make it possible to infer information about the underlying case(s) that would potentially frustrate the investigations, and it would still make it possible to infer non-public information about law enforcement sources and methods. Redaction that would make public any part of law enforcement's technique is thus infeasible according to the government.

As described above, the court concludes that the government's interests in preserving the confidentiality of its materials related to an *ongoing* criminal investigation outweigh both presumptions of public access. However, a different court may come to a different conclusion in a post-investigation context.

Petitioners currently have no access to the sealed criminal docket in this case, and they have no way of knowing when the investigation concludes so that they may again apply for unsealing. The government is uniquely positioned to know the status of the investigation, and it is the party seeking an exemption to the presumptions of access. At the hearing, petitioners proposed that the court issue a "sunshine date," frequently understood to be a date upon which sealed documents would be made public absent timely renewal of a court's sealing order. A sunshine date is practically unworkable in this case given the status of the government's investigation. Instead, the court **ORDERS** the government to give notice when its investigation has closed or has become public. Petitioners may file a new application to unseal court records upon the government's certification that the investigation is finally closed. Such application should be filed as a separate case and need not be assigned to the undersigned.

To ensure some ongoing accountability, the government must annually file on the public docket in this matter a certification that both (1) the investigation remains ongoing and (2) the underlying materials remain sealed. This certification should not itself include any confidential information or even any legal argument. The first certification is due on July 1, 2022, and any subsequent certifications are due on the first business day in July

every year until the investigation is closed. The court will take no further action in this case unless specifically requested by one or both of the parties.

IV. Petitioner's motion to unseal government's ex parte statement of facts

As noted by the magistrate judge, "the concerns regarding potential compromise of an ongoing investigation, as detailed above, are sufficient grounds to deny Petitioners' Motion to Unseal the Government's Statement of Facts." Dkt. 17 at 22. The court agrees and finds that the government has a compelling interest in maintaining the confidentiality of its ex parte statement of facts. Thus, the court **DENIES** the petitioners' request to unseal the fact supplement.

V. Sealing the unsealed S.D. Cal. Application

The government requests that the court strike the S.D. Cal. Application, Exhibit 1 to the petitioners' original petition. This request was denied in the R&R. Petitioners correctly note that the government failed to file its own objection to the report, and the government's footnoted attempt to achieve sealing of another court's documents is procedurally defective. In addition, as petitioners say, the cat's out of the bag: "Secrecy is a one-way street: Once information is published, it cannot be made secret again." Copley Press, 518 F.3d at 1025. The court therefore **DENIES** the government's request for this court to seal the S.D. Cal. Application.

VI. Conclusion

For the reasons set forth above, the motion for de novo determination is **GRANTED**; the objections to the R&R are **OVERRULED**; the R&R is fully adopted; and the Petition is **DENIED**.

The court hereby **ORDERS** the government to file on the public docket in this case an annual certification that the criminal investigation underlying Petitioners' request remains ongoing, as detailed in section III(C), above.

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IT IS SO ORDERED.

Dated: July 13, 2021

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

United States District Court
Northern District of California