

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN THE MATTER OF THE
APPLICATION OF THE UNITED
STATES AUTHORIZING THE USE
OF A PEN REGISTER/TRAP AND
TRACE DEVICE ON AN
ELECTRONIC MAIL ACCOUNT

) NO. 1:13 EC 297

COPY

IN THE MATTER OF THE SEARCH
AND SEIZURE OF INFORMATION
ASSOCIATED WITH

) NO. 1:13 SW 522

[REDACTED] THAT
IS STORED AND CONTROLLED AT
PREMISES CONTROLLED BY
LAVABIT, LLC

IN RE GRAND JURY SUBPOENA

) NO. 13-1

) UNDER SEAL

) Alexandria, Virginia

) August 1, 2013

) 10:00 a.m.

TRANSCRIPT OF HEARING

BEFORE THE HONORABLE CLAUDE M. HILTON

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States: James Trump, Esq.
Michael Ben'Ary, Esq.
Josh Goldfoot, Esq.

For the Respondent: Jesse R. Binnall, Esq.

Court Reporter: Tracy L. Westfall, RPR, CMRS, CCR
Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

1 P R O C E E D I N G S

2 THE CLERK: In re: Case Nos. 1:13 EC 297, 1:13 SW 522,
3 and Grand Jury No. 13-1.

4 MR. TRUMP: Good morning. Jim Trump on behalf of the
5 United States.

6 THE COURT: Good morning.

7 MR. BINNALL: Good morning, Your Honor. Jesse Binnall
8 on behalf of Lavabit and Mr. Levison.

9 THE COURT: All right.

10 MR. BINNALL: May it please the Court. We're before
11 the Court today on two separate motions, a motion to quash the
12 requirement of Lavabit to produce its encryption keys and the
13 motion to unseal and lift the nondisclosure requirements of
14 Mr. Levison.

15 Your Honor, the motion to quash in this arises because
16 the privacy of users is at -- of Lavabit's users are at stake.
17 We're not simply speaking of the target of this investigation.
18 We're talking about over 400,000 individuals and entities that
19 are users of Lavabit who use this service because they believe
20 their communications are secure.

21 By handing over the keys, the encryption keys in this
22 case, they necessarily become less secure. In this case it is
23 true that the face of the warrant itself does limit the
24 documents or -- and communications to be viewed and the specific
25 metadata to be viewed to the target of the case, [REDACTED]

1 However, there is a lack of any sort of check or
2 balance in order to ensure that the -- that the encrypted data
3 of other Lavabit users remain secure. The encryption in this
4 case doesn't protect only content. It protects login data and
5 the other -- some of the other metadata involved in this case.

6 We believe that this is not the least restrictive means
7 in order to provide the government the data that they are
8 looking for. Specifically --

9 THE COURT: You have two different encryption codes,
10 one for the logins and the messages that are transmitted. You
11 have another code that encrypts the content of the messages,
12 right?

13 MR. BINNALL: Your Honor, I believe that that is true.

14 From my understanding of the way that this works is
15 that there is one SSL key. That SSL key is what is issue in
16 this case, and that SSL key specifically protects the
17 communication, the over -- the breadth of the communication
18 itself from the user's actual computer to the server to make
19 sure that the user is communicating with exactly who the user
20 intends to be communicating with, the server.

21 And that's one of the things that SSL does. It ensures
22 that you're talking to the right person via e-mail and there's
23 not a so-called man in the middle who's there to take that
24 message away.

25 THE COURT: Does that key also contain the code of the

1 message and interpret the message as well?

2 MR. BINNALL: My understanding is that it does, Your
3 Honor, but because that's not my technical expertise, I'm not
4 going to represent to the Court anything on that one way or
5 another. But my understanding is there is one general key here
6 that is at issue.

7 THE COURT: Well, why would you set up such? I mean, a
8 telephone, you've got telephone numbers and --

9 MR. BINNALL: Correct.

10 THE COURT: -- those can be traced very easily without
11 any look at the content of the message that's there. You-all
12 could have set up something the same way.

13 MR. BINNALL: We could have, Your Honor. Actually, if
14 you're to --

15 THE COURT: So if anybody's -- you're blaming the
16 government for something that's overbroad, but it seems to me
17 that your client is the one that set up the system that's
18 designed not to protect that information, because you know that
19 there needs to be access to calls that go back and forth to one
20 person or another. And to say you can't do that just because
21 you've set up a system that everybody has to -- has to be
22 unencrypted, if there's such a word, that doesn't seem to me to
23 be a very persuasive argument.

24 MR. BINNALL: I understand the Court's point, and this
25 is the way that I understand why it's done that way.

1 There's different security aspects involved for people
2 who want to protect their privacy, and there certainly is the
3 actual content of the message themselves. That's certainly what
4 I would concede is the highest security interest.

5 But there's also the security interest to make sure
6 that they're communicating with who you want to be communicating
7 with. That is equally of a concern for privacy issues because
8 that is, at the end of the day, one of the things that secures
9 the content of the message.

10 In this case it is true that most Internet service
11 providers do log, is what they call it, a lot of the metadata
12 that the government wants in this case without that necessarily
13 being encrypted, things such as who something is going to, who
14 it's going from, the time it's being sent, the IP address from
15 which it is being sent.

16 Lavabit code is not something that you buy off the
17 shelf. It is code that was custom made. It was custom made in
18 order to secure privacy to the largest extent possible and to be
19 the most secure way possible for multiple people to communicate,
20 and so it has chosen specifically not to log that information.

21 Now, that is actually information that my client has
22 offered to start logging with the particular user in this case.
23 It is, however, something that is quite burdensome on him. It
24 is something that would be custom code that would take between
25 20 to 40 hours for him to be able to produce. We believe that

1 is a better alternative than turning over the encryption key
2 which can be used to get the data for all Lavabit users.

3 I hope that addresses the Court's concern kind of with
4 regard to the metadata and why it is not more -- why Lavabit
5 hasn't created an encryption system that may honestly be more
6 within the mainstream, but this is a provider that specifically
7 was started in order to have to protect privacy interests more
8 than the average Internet service provider.

9 THE COURT: I can understand why the system was set up,
10 but I think the government is -- government's clearly entitled
11 to the information that they're seeking, and just because
12 you-all have set up a system that makes that difficult, that
13 doesn't in any way lessen the government's right to receive that
14 information just as they would from any telephone company or any
15 other e-mail source that could provide it easily. Whether
16 it's -- in other words, the difficulty or the ease in obtaining
17 the information doesn't have anything to do with whether or not
18 the government's lawfully entitled to the information.

19 MR. BINNALL: It is -- and we don't disagree that the
20 government is entitled to the information. We actually --

21 THE COURT: Well, how are we going to get it? I'm
22 going to have to deny your motion to quash. It's just not
23 overbroad. The government's asking for a very narrow, specific
24 bit of information, and it's information that they're entitled
25 to.

1 Now, how are we going to work out that they get it?

2 MR. BINNALL: Your Honor, what I would still say is the
3 best method for them to get it is, first of all, there be some
4 way for there to be some sort of accountability other than just
5 relying on the government to say we're not going to go outside
6 the scope of the warrant.

7 This is nothing that is, of course, personal against
8 the government and the, you know, very professional law
9 enforcement officers involved in this case. But quite simply,
10 the way the Constitution is set up, it's set up in a way to
11 ensure that there's some sort of checks and balances and
12 accountability.

13 THE COURT: What checks and balances need to be set up?

14 MR. BINNALL: Well --

15 THE COURT: Suggest something to me.

16 MR. BINNALL: I think that the least restrictive means
17 possible here is that the government essentially pay the
18 reasonable expenses, meaning in this case my client's extensive
19 labor costs to be capped at a reasonable amount.

20 THE COURT: Has the government ever done that in one of
21 these pen register cases?

22 MR. BINNALL: Not that I've found, Your Honor.

23 THE COURT: I don't think so. I've never known of one.

24 MR. BINNALL: And Your Honor's certainly seen more of
25 these than I have.

1 THE COURT: So would it be reasonable to start now with
2 your client?

3 MR. BINNALL: I think everyone would agree that this is
4 an unusual case. And that this case, in order to protect the
5 privacy of 400,000-plus other users, some sort of relatively
6 small manner in which to create a log system for this one user
7 to give the government the metadata that they're looking for is
8 the least restrictive mean here, and we can do that in a way
9 that doesn't compromise the security keys.

10 This is actually a way that my client --

11 THE COURT: You want to do it in a way that the
12 government has to trust you --

13 MR. BINNALL: Yes, Your Honor.

14 THE COURT: -- to come up with the right data.

15 MR. BINNALL: That's correct, Your Honor.

16 THE COURT: And you won't trust the government. So why
17 would the government trust you?

18 MR. BINNALL: Your Honor, because that's what the basis
19 of Fourth Amendment law says is more acceptable, is that the
20 government is the entity that you really need the checks and
21 balances on.

22 Now, my --

23 THE COURT: I don't know that the Fourth Amendment says
24 that. This is a criminal investigation.

25 MR. BINNALL: That is absolutely correct.

1 THE COURT: A criminal investigation, and I don't know
2 that the Fourth Amendment says that the person being
3 investigated here is entitled to more leeway and more rights
4 than the government is. I don't know.

5 MR. BINNALL: There certainly is a balance of power
6 there. I, of course, am not here to represent the interest of
7 [REDACTED] I'm here specifically looking over my client who
8 has sensitive data --

9 THE COURT: I understand. I'm trying to think of
10 working out something. I'm not sure you're suggesting anything
11 to me other than either you do it and the government has to
12 trust you to give them whatever you want to give them or you
13 have to trust the government that they're not going to go into
14 your other files.

15 Is there some other route?

16 MR. BINNALL: I would suggest that the government --
17 I'm sorry -- that the Court can craft an order to say that we
18 can -- that we should work in concert with each other in order
19 to come up with this coding system that gives the government all
20 of the metadata that we can give them through this logging
21 procedure that we can install in the code, and then using that
22 as a least restrictive means to see if that can get the
23 government the information that they're looking for on the
24 specific account.

25 THE COURT: How long does it take to install that?

1 MR. BINNALL: I mean, 20, 40 hours. So I would suggest
2 that would probably be a week to a week and a half, Your Honor,
3 although I would be willing to talk to my client to see if we
4 can get that expedited.

5 THE COURT: To install it?

6 MR. BINNALL: Well, to write the code.

7 THE COURT: You don't have a code right at the moment.
8 You would have to write something?

9 MR. BINNALL: That's correct. And the portion of the
10 government's brief that talks about the money that he was
11 looking for is that reasonable expense for him basically to do
12 nothing for that period of time but write code to install in
13 order to take the data from [REDACTED] and put it in a way that
14 the government will see the logged metadata involved.

15 THE COURT: All right. I think I understand your
16 position. I don't think you need to argue this motion to
17 unseal. This is a grand jury matter and part of an ongoing
18 criminal investigation, and any motion to unseal will be denied.

19 MR. BINNALL: If I could have the Court's attention
20 just on one issue of the nondisclosure provision of this. And I
21 understand the Court's position on this, but there is other
22 privileged communications if the Court would be so generous as
23 to allow me very briefly to address that issue?

24 There's other First Amendment considerations at issue
25 with not necessarily just the sealing of this, but what

1 Mr. Levison can disclose and to whom he may disclose it.

2 The First Amendment, of course, doesn't just cover
3 speech and assembly, but the right to petition for a redress of
4 grievances. We're talking about a statute here, and, honestly,
5 a statute that is very much in the public eye and involving
6 issues that are currently pending before Congress.

7 I think the way that the order currently is written,
8 besides being --

9 THE COURT: You're talking about the sealing order?

10 MR. BINNALL: I'm talking about the sealing order and
11 the order that prohibits Mr. Levison from disclosing any
12 information.

13 Now, we don't want to disclose -- we have no intention
14 of disclosing the target, but we would like to be able to, for
15 instance, talk to members of the legislature and their staffs
16 about rewriting this in a way that's --

17 THE COURT: No. This is an ongoing criminal
18 investigation, and there's no leeway to disclose any information
19 about it.

20 MR. BINNALL: And so at that point it will remain with
21 only Mr. Levison and his lawyers, and we'll keep it at that.

22 THE COURT: Let me hear from Mr. Trump.

23 Is there some way we can work this out or something
24 that I can do with an order that will help this or what?

25 MR. TRUMP: I don't believe so, Your Honor, because

1 you've already articulated the reason why is that anything done
2 by Mr. Levison in terms of writing code or whatever, we have to
3 trust Mr. Levison that we have gotten the information that we
4 were entitled to get since June 28th. He's had every
5 opportunity to propose solutions to come up with ways to address
6 his concerns and he simply hasn't.

7 We can assure the Court that the way that this would
8 operate, while the metadata stream would be captured by a
9 device, the device does not download, does not store, no one
10 looks at it. It filters everything, and at the back end of the
11 filter, we get what we're required to get under the order.

12 So there's no agents looking through the 400,000 other
13 bits of information, customers, whatever. No one looks at that,
14 no one stores it, no one has access to it. All we're going to
15 look at and all we're going to keep is what is called for under
16 the pen register order, and that's all we're asking this Court
17 to do.

18 THE COURT: All right. Well, I think that's
19 reasonable. So what is this before me for this morning other
20 than this motion to quash and unseal which I've ruled on?

21 MR. TRUMP: The only thing is to order the production
22 of the encryption keys, which just --

23 THE COURT: Hasn't that already been done? There's a
24 subpoena for that.

25 MR. TRUMP: There's a search warrant for it, the motion

1 to quash.

2 THE COURT: Search warrant.

3 MR. TRUMP: Excuse me?

4 THE COURT: I said subpoena, but I meant search
5 warrant.

6 MR. TRUMP: We issued both, Your Honor, but Your Honor
7 authorized the seizure of that information. And we would ask
8 the Court to enforce that by directing Mr. Levison to turn over
9 the encryption keys.

10 If counsel represents that that will occur, we can not
11 waste any more of the Court's time. If he represents that
12 Mr. Levison will not turn over the encryption keys, then we have
13 to discuss what remedial action this Court can take to require
14 compliance with that order.

15 THE COURT: Well, I will order the production of
16 those -- of those keys.

17 Is that simply Mr. Levison or is that the corporation
18 as well?

19 MR. TRUMP: That's one and the same, Your Honor.

20 Just so the record is clear. We understand from
21 Mr. Levison that the encryption keys were purchased
22 commercially. They're not somehow custom crafted by
23 Mr. Levison. He buys them from a vendor and then they're
24 installed.

25 THE COURT: Well, I will order that. If you will

1 present an order to me, I'll enter it later on.

2 MR. TRUMP: Thank you.

3 MR. BINNALL: Thank you, Your Honor.

4 As far as time frame goes, my client did ask me if the
5 Court did order this if the Court could give him approximately
6 five days in order to actually physically get the encryption
7 keys here. And so it will be -- or just some sort of reasonable
8 time frame to get the encryption keys here and in the
9 government's hands. He did ask me to ask exactly the manner
10 that those are to be turned over.

11 MR. TRUMP: Your Honor, we understand that this can be
12 done almost instantaneously, as soon as Mr. Levison makes
13 contact with an agent in Dallas, and we would ask that he be
14 given 24 hours or less to comply. This has been going on for a
15 month.

16 THE COURT: Yeah, I don't think 24 -- 24 hours would be
17 reasonable. Doesn't have to do it in the next few minutes, but
18 I would think something like this, it's not anything he has to
19 amass or get together. It's just a matter of sending something.
20 So I think 24 hours would be reasonable.

21 MR. BINNALL: Yes. Thank you, Your Honor.

22 THE COURT: All right. And you'll present me an order?

23 MR. TRUMP: We will, Your Honor. Thank you.

24 THE COURT: All right. Thank you-all, and we'll
25 adjourn until -- or stand in recess till 3 o'clock. Well,

1 recess till 9 o'clock tomorrow morning.

2 * * *

3 (Proceedings concluded at 10:25 a.m.)

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CERTIFICATION

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I certify, this 19th day of August 2013, that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter to the best of my ability.

/s/



Tracy Westfall, RPR, CMRS, CCR