

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

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IN THE MATTER OF: : Case Number:  
: :  
DREAMHOST, INC. : 2017 CSW 3438  
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Washington, D.C.  
Wednesday, September 20, 2017

The above-entitled action came on for a hearing  
before the Honorable ROBERT MORIN, Associate Judge, in  
Courtroom Number 315, commencing at approximately 2:19 p.m.

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TESTIMONY AND RECORDS OF TESTIMONY AND  
PROCEEDINGS IN THE CASE.

APPEARANCES:

On Behalf of the Government:

John W. Borchet, Esquire  
Assistant United States Attorney

On Behalf of the Intervenors:

Paul Alan Levy, Esquire  
Washington, D.C.

Via Telephone  
Raymond Aghaian, Esquire

Maura Johnson,  
Official Court Reporter

Telephone: 202-879-1048

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MR. BORCHERT: Good afternoon, Your Honor, John Borchert for the government.

MR LEVY: This is Paul Levy for the proposed intervenors.

MR. AGHAIAN: Good afternoon, Your Honor, this is Raymond Aghaian on behalf of DreamHost.

MR. AGHAIAN: I'm sorry. Can you hear me better now?

THE DEPUTY CLERK: Can we try it this way?

THE DEPUTY CLERK: Better?

THE COURT: Yeah, a little. Could it be a little louder?

THE DEPUTY CLERK: It's all the way up. I can take it back to them and broadcast it again and see if they can fix it.

THE DEPUTY CLERK: Do you want me to broadcast

1 again and see if I can fix it.

2 THE COURT: Yeah, see if you can broadcast  
3 again.

4 (Pause.)

5 THE COURT: Well, let's proceed. Okay. Thank  
6 you.

7 I received the government's proposed -- new  
8 proposed order.

9 Why don't you set forth the government's  
10 position at this point?

11 MR. BORCHERT: Yes, Your Honor. I think that --  
12 first, let me say we appreciated the Court's order from  
13 last week. I think it provided a lot of clarity to us on  
14 the Court's expectations. And I think we've tried to  
15 address that in our -- in our proposed order that we filed  
16 yesterday.

17 As I see it between the various orders that are  
18 before the Court, there are really only probably --  
19 depending on how you count, either four or five issues on  
20 which we -- there's still maybe some disconnect between  
21 the parties.

22 But let me just highlight for the Court. I know  
23 one of the Court's concerns was how we would be minimizing  
24 with respect to innocent third parties.

25 What I would say about these -- the proposed

1 order that the Court has now and also with the previous  
2 Court orders, we have completely eliminated the request or  
3 the obligation on DreamHost to produce visitor logs or  
4 HTTP error logs that would identify people who had tried  
5 to innocently access the website. So those are now  
6 excluded from the proposed order.

7 We have also adopted the full protocol that --  
8 that I think the Court now -- I now understand the Court  
9 talked about it at the last hearing and it was in its  
10 order last week, that would involve a general review, a  
11 proposed detailed review and before the government would  
12 actually begin its review substantively of the actual  
13 materials that are provided by DreamHost.

14 THE COURT: So just to be clear. It's the  
15 Court's intent that you not know the identity of writers  
16 of communication until the Court has determined that the  
17 communication falls within the warrant. Do you understand  
18 that to be the case?

19 MR. BORCHERT: It is our --

20 THE COURT: So --

21 MR. BORCHERT: -- intention -- I think our  
22 -- when the Court says the writer of information,

23 THE COURT: Right.

24 MR. BORCHERT: I'll be -- maybe I'll just  
25 explain it the way I understand the way we will proceed.

1           It's our expectation that DreamHost is going to  
2 give us some mass of information.

3           THE COURT: Correct.

4           MR. BORCHERT: We will then very likely,  
5 assuming that it's provided in the format we think it will  
6 be, we will likely run key word searches against that  
7 information which, of course, the Court would have the  
8 ability to approve or disprove.

9           THE COURT: No, let's be clear. I would have to  
10 approve --

11          MR. BORCHERT: Right.

12          THE COURT: -- your protocols before you began  
13 the search.

14          MR. BORCHERT: Correct.

15          THE COURT: Okay.

16          MR. BORCHERT: Well, DreamHost will provide us  
17 the information. We'll conduct a general review and then  
18 advise the Court of how we plan to proceed.

19          THE COURT: Right. And just to be clear, the  
20 general review is not a review of the identity or contents  
21 of communication. It's just the meta data.

22          MR. BORCHERT: Yes, Your Honor.

23          THE COURT: Do you understand that?

24          MR. BORCHERT: I understand that, yes, Your  
25 Honor.

1           THE COURT: Okay. And your proposed order is  
2 intended to implement that.

3           MR. BORCHERT: It is. I think we could be more  
4 specific in saying -- now, that I see the Court's point on  
5 the identity of a sender of a communication. I think we  
6 could add that into the order more precisely. I think the  
7 way it's ordered -- we have it worded right now, we say  
8 that the general review would be limited to -- I'm looking  
9 at -- the government -- this is on page 4. We say that  
10 our general review would be limited only to meta data such  
11 as document dates, custodians, file names, logs and other  
12 non-content information.

13          THE COURT: Okay. So I understand that's  
14 technical language.

15          MR. BORCHERT: Right.

16          THE COURT: And so I'm not branding you --

17          MR. BORCHERT: Okay.

18          THE COURT: -- with technical knowledge. But I  
19 am branding you with the Court's intent.

20          MR. BORCHERT: I see.

21          THE COURT: And that is -- and you may have to  
22 talk to your technical people to get the language that you  
23 think implements the Court's intent. But there's going to  
24 be a general review just so that you can know the nature  
25 of the data.

1 MR. BORCHERT: Correct.

2 THE COURT: Okay. Then you're going to submit,  
3 as I understand it, or at least, the Court was suggesting,  
4 it wasn't binding. You could make other proposals. And  
5 then you were going to suggest to the Court what your  
6 proposed protocol for review would be.

7 MR. BORCHERT: Yes, Your Honor.

8 THE COURT: And that would include search terms

9 --

10 MR. BORCHERT: Probably search terms.

11 THE COURT: Whatever.

12 MR. BORCHERT: Correct.

13 THE COURT: If, in fact, that produces hits, for

14 --

15 MR. BORCHERT: Right.

16 THE COURT: -- lack of a better word, you would  
17 have to explain on each hit why you think that hit is  
18 covered by the warrant before you got to the identity of  
19 the sender. Do you understand?

20 MR. BORCHERT: I see. I see.

21 THE COURT: So, in other words, you're not going  
22 to be able to -- look, because I do think there's  
23 important First Amendment considerations here. And the  
24 Court's intent is you don't get to dive into the identity  
25 of writers or account holders, et cetera, until the Court

1 has ruled that individual communications are subject to  
2 the warrant or individuals posting are.

3 MR. BORCHERT: I see. I see, Your Honor. I see  
4 Your Honor.

5 THE COURT: Is there something -- is there  
6 misunderstanding at this point?

7 MR. BORCHERT: No. I understand the Court  
8 pretty clearly. I'm not -- I would want to confer with my  
9 office on what's technically possible on that point. But  
10 the way --

11 THE COURT: The point is people's identities are  
12 going to be protected. List of names, identities of write  
13 -- of email accounts, et cetera, until the Court rules  
14 that your, for lack of a better word, search --

15 MR. BORCHERT: Right.

16 THE COURT: -- has come up with documents that  
17 fall within the warrant. Then when the Court is satisfied  
18 that each individual document is covered by the warrant,  
19 then the Court will allow you to investigate --

20 MR. BORCHERT: I see.

21 THE COURT: -- the sender of the communication.

22 MR. BORCHERT: I see. So is that a protocol the  
23 Court would envision being in the general review or in the  
24 proposed protocol that we come back to the Court with?

25 THE COURT: It may be that the general review



1 doesn't give you any more additional information that  
2 you -- than you already have. I was just proposing that  
3 because there maybe something you need from a technical  
4 point of view.

5 MR. BORCHERT: I see.

6 THE COURT: It may be that you want to forego a  
7 general review because you've been in discussion with  
8 DreamHost and you know the nature of the data and you just  
9 want to do your proposed search protocol.

10 MR. BORCHERT: Very well, Your Honor.

11 THE COURT: I'll leave that to you. I'm not  
12 mandating you --

13 MR. BORCHERT: Okay,

14 THE COURT: -- do any of this. I am mandating,  
15 though, that the identity of posters and writers of  
16 communication be maintained, be anonymous, be maintained  
17 until the Court is satisfied that the communications you  
18 seek to obtain the identity of falls within the warrant.  
19 Do you understand?

20 MR. BORCHERT: Very well, Your Honor. I see the  
21 Court's point.

22 So I guess what the Court would envision at some  
23 point is that we would presumably ex-parte and under seal,  
24 provide to the Court whatever data we believe is subject  
25 to the search that, you know, whatever, maybe it's emails

1 or communications.

2 THE COURT: And reasons why --

3 MR. BORCHERT: And -- yes.

4 THE COURT: The reasons why you believe each  
5 individual --

6 MR. BORCHERT: Communication, correct.

7 THE COURT: -- falls within the warrant.

8 MR. BORCHERT: Correct, Your Honor.

9 THE COURT: The Court will then rule on each  
10 piece of information about whether it falls within the  
11 warrant. Only then do you get --

12 MR. BORCHERT: The identity of the sender.

13 THE COURT: -- the identity of the poster, the  
14 sender, the email account. Do you understand what I'm  
15 saying?

16 MR. BORCHERT: Very well, Your Honor. Yes.  
17 What I understand the Court's intent to be is to have some  
18 sort of, for lack of a better word, filter such that the  
19 only sender's identities that the government would see or  
20 identify would be ones that the Court for which the Court  
21 has already determined --

22 THE COURT: Correct.

23 MR. BORCHERT: -- there must be -- that it is  
24 properly seized pursuant to --

25 THE COURT: And you're not to investigate or

1 explore the identities of senders until the Court has made  
2 that determination. That's the Court's --

3 MR. BORCHERT: Very well.

4 THE COURT: That was its intent. And again, I  
5 understand you're not --

6 MR. BORCHERT: Right.

7 THE COURT: -- necessarily a forensic expert in  
8 computer analysis and you do have technical people.

9 MR. BORCHERT: Right.

10 THE COURT: I just want to make sure there isn't  
11 anything you're not understanding?

12 MR. BORCHERT: No, I think I understand that. I  
13 mean, and I guess the -- the question on my mind is  
14 whether, you know, I think we're at the point where you  
15 know, getting the data will sort of move this dialogue  
16 forward.

17 THE COURT: I agree.

18 MR. BORCHERT: And maybe -- maybe this is  
19 something that I now know is important to the Court and we  
20 certainly build into, you know, a protocol that we would  
21 submit to the Court before actually doing search terms --

22 THE COURT: Correct.

23 MR. BORCHERT: -- against any of the data.

24 THE COURT: And so the concept is if people have  
25 engaged in communication that does not fall within the

1 warrant and they are anonymous or they are identified,  
2 they will not be identified to the government if the  
3 information is not covered by the warrant.

4 MR. BORCHERT: I understand.

5 THE COURT: So they will remain anonymous and  
6 their communications will not be subject to government  
7 inspection.

8 MR. BORCHERT: We'll find a way to do that.

9 THE COURT: Well, I hope you do, because that's  
10 --

11 MR. BORCHERT: Yes, yes, we'll have to find a  
12 way to do it. Yes, Your Honor.

13 THE COURT: Yes, that's The Court's order and  
14 that's why I was trying to be as detailed as possible in  
15 --

16 MR. BORCHERT: I see the Court's point.

17 THE COURT: -- my further order to the Court --  
18 and to the parties.

19 MR. BORCHERT: Okay. Very well, Your Honor. I  
20 think that maybe the way that we could address that in the  
21 proposed order then would be to include that, you know, a  
22 paragraph about that or a subparagraph in the -- in the  
23 paragraph where we describe the proposed detail review  
24 that the government is to submit to the Court.

25 THE COURT: Yes. And I also wanted to make

1 clear that people are concerned that -- who maybe have  
2 visited, wrote to, communicated within this website that  
3 were not engaged in criminal activity, the Court is not  
4 allowing the government to expect -- inspect either their  
5 identity or their communications. They're to remain not  
6 subject to governmental review.

7 MR. BORCHERT: Understood, Your Honor. Yes,  
8 sir.

9 THE COURT: Could I have --

10 MR. AGHAIN: Your Honor --

11 THE COURT: Mr. -- counsel, did you hear our  
12 discussion? Were you able to hear our discussion?

13 MR. AGHAIAN: I did, Your Honor, and if I may  
14 interject on that as well.

15 THE COURT: Yeah.

16 MR. AGHAIAN: So in further review of the  
17 Court's clarification, a potential solution to this that  
18 may make things somewhat easier is that DreamHost can  
19 provide the initial set of data. I mean, you know,  
20 there's no reason that the entire production should be  
21 done in one and go. We could break it up into steps, as  
22 the Court is envisioning the minimization progress. And  
23 what I mean by that, Your Honor, is that DreamHost in the  
24 initial phase can provide just the meta data, which is  
25 what the Court is inclined to order that includes only the

1 meta data and not the substantive contents, because the  
2 government is not -- is precluded from reviewing them  
3 anyway in the initial phase.

4           So initially, the government would only receive  
5 the meta data, there would be no content. And, in fact,  
6 we could further as an intermediary here, we could further  
7 limit the meta data of the records that we're providing.  
8 We could limit that to not include the custodian, I guess,  
9 in my interpretation of that means maybe who the author  
10 is. And we would obviously exclude that information.

11           If upon reviewing the meta data that's being  
12 provided to the government, the government reviews that  
13 and says, okay, we think that the following records are  
14 responsive and we want to review these records and it goes  
15 through the initial general review protocols and  
16 parameters, we could then provide to the Court and to the  
17 government a breakdown of a log so to speak of what those  
18 records are. The government can further confirm that,  
19 yes, this is, in fact, what they need and the Court can  
20 approve that before we actually provide those records to  
21 them.

22           Once we provide those records to them, Your  
23 Honor, we could actually redact the identities, any  
24 identifying information of the individuals until the Court  
25 and the government have reviewed it and they have been

1 confirmed that, yes, this is, in fact, responsive and they  
2 could then have the Court ask us to unredact the  
3 identities of the individuals for whom these records are  
4 responsive to the warrant.

5           A part of this issue as we previously pointed  
6 out is the -- given the breath of the warrant and the  
7 probable cause in the affidavit is so limited in tying it  
8 to the various emails accounts and the meta lists or the  
9 email lists. And so if the scope of the warrant is  
10 limited to the probable cause on which the warrant is  
11 based upon and here we only see six connections for all  
12 the background information in the affidavit about what the  
13 rioters did on the day of the riot. If we strip that and  
14 we look at this, there's only six points of connection  
15 between all of that conduct, if any, to the actual  
16 website. Not the other social media sites that the  
17 government goes on about in the warrant such as Face Book  
18 account and Twitter account that use the DisruptJ20.

19           But the website itself, which is what is at  
20 issue here, there's only six points of connection and  
21 those are very tenuous. And even then only one email  
22 account is referenced in that affidavit and that email  
23 account is the info@disruptJ20 dot org. And so none of  
24 the other email accounts are even referenced in the  
25 affidavit. And so if the --

1 THE COURT: Okay. Well, I --  
2 MR. AGHAIAN: -- government's review --  
3 THE COURT: Counsel, counsel. I know you're --  
4 MR. AGHAIAN: -- of the initial set --  
5 THE COURT: Counsel. Counsel.  
6 MR. AGHAIAN: -- of information provides the  
7 government with an additional basis to --  
8 THE COURT: Counsel, can you hear me?  
9 MR. AGHAIAN: Yes, Your Honor.  
10 THE COURT: I don't mean to interrupt you. I --  
11 the warrant has been signed by another judge. And I'm not  
12 going to reargue the warrant here.  
13 I will say to the government the proposal by  
14 DreamHost of you reviewing the content of communications  
15 and then redacting the identifying information of those  
16 communications until the Court has ruled on the  
17 communications that are covered by the warrant, makes  
18 sense to me. And would be certainly consistent with the  
19 Court's intent that people's identities not be revealed  
20 until the Court has determined that the communications or  
21 postings are covered by the warrant.  
22 I don't -- I'm going to allow you to engage in  
23 technical discussions with DreamHost to make sure that  
24 this is doable. But I appreciate the suggestion by  
25 DreamHost. I'm going to ask the government to consider it



1 in terms of putting together its protocol search -- its  
2 search protocol to be submitted by the Court.

3 MR. BORCHERT: And, Your Honor, there's a lot of  
4 what Mr. Aghaian said that resonated as sensible to -- in  
5 light of what the Court has said.

6 The one thing that I think I heard that gave me  
7 some pause was the idea that they would only provide  
8 certain materials to the government at first.

9 THE COURT: Okay. But again that seems to be  
10 technical in nature.

11 MR. BORCHERT: Okay.

12 THE COURT: The Court's intent is what it is.  
13 You have the right to have the warrant executed.

14 MR. BORCHERT: Yes, Your Honor.

15 THE COURT: It's --

16 MR. BORCHERT: And --

17 THE COURT: And the materials that are covered  
18 by the warrant appear to be intermingled with other  
19 communications and postings, anonymous or otherwise, that  
20 are in the Court's view, protected by the First  
21 Amendment. I'm allowing you to engage in a process to  
22 segregate that information subject to Court supervision  
23 and approval.

24 MR. BORCHERT: And is the -- sorry to interrupt,  
25 Your Honor. Is the Court going to order DreamHost to

1 engage in that dialogue with us, because to date --

2 THE COURT: I -- have they not been engaging.

3 MR. BORCHERT: To date what Mr. Aghaian has told  
4 me is that we would need separate legal process for him to  
5 answer questions, for example, about the date range that  
6 might be at issue or --

7 THE COURT: Well, that's up to them.

8 MR. BORCHERT: Okay.

9 THE COURT: I'm going to be signing an order  
10 consistent with my intent. You can propose it, DreamHost  
11 can propose whatever redacted -- changes it wishes, but at  
12 some point if they don't want to engage in conversations  
13 with you, that's fine. At some point, they'll be a Court  
14 order.

15 MR. BORCHERT: I think we're at -- I mean, if  
16 Mr. Aghaian is open to a conversation, I can call him this  
17 afternoon, but my impression is that we're at an impasse.

18 THE COURT: Well, that's -- that is not unusual  
19 in litigation.

20 MR. BORCHERT: All right. Very well, Your  
21 Honor.

22 MR. AGHAIAN: And, Your Honor, just to make sure  
23 that the Court has the complete information, despite what  
24 Mr. Borchert has just represented to the Court, we have  
25 continually sought to engage with the government. We did

1 so after the hearing and we did that in terms of trying to  
2 revise the government's proposed order and we provided  
3 redactions and red lines to that. We, in fact, did that  
4 before the government filed its motion to compel wherein  
5 we suggested a special master be appointed and the  
6 government's response was to file a motion to compel. So  
7 we have been more than willing to engage the government.  
8 But I think it's more like the other way around where the  
9 government says unless you see it our way, there's no  
10 point in us having a discussion.

11 THE COURT: Okay. Well, I appreciate everybody  
12 has had time to put their positions on the record. It  
13 appears everybody wishes to talk to one another or at  
14 least that's what they're representing to the Court.

15 I just -- I don't want to have to issue another  
16 supplemental clarification. I want to make sure the  
17 government understands the Court's intent.

18 MR. BORCHERT: Very well, Your Honor.

19 THE COURT: Protecting the identity, but  
20 allowing you to execute the warrant, only on that  
21 information that is covered by the warrant.

22 MR. BORCHERT: Very well, Your Honor, and I'll  
23 make another try at sending a proposed order to Mr.  
24 Aghaian for --

25 THE COURT: And I'm not saying you haven't

1     tried. I just think some of this is technical.

2             MR. BORCHERT: I will try to vet our proposed  
3     order with Mr. Aghaian before submitting it to the Court.

4             THE COURT: Thank you. Uh-huh. Do you --

5             MR. LEVY: Much of what the Court said addresses  
6     things that I wanted to say. We've sought -- in our --

7             THE COURT: I've satisfied somebody at least --

8             MR. LEVY: Somebody.

9             THE COURT: -- in part. Okay.

10            MR. LEVY: Somebody to some extent. We sought  
11     leave to intervene only to protect the rights of the  
12     anonymous users of the site. We have no interest in the  
13     creators of the website.

14            And we think the innocent user shouldn't have  
15     their anonymity or even the contents -- access to the  
16     contents taken away without probable cause and without  
17     weighing their interest. And we very much appreciate the  
18     process that the Court is --

19            THE COURT: Oh, you do. Okay.

20            MR. LEVY: -- initiating. The Court's September  
21     15 order recognized, at page 5, that not all of  
22     DreamHost's files regarding its protest site were part of  
23     the probable cause showing.

24            THE COURT: Correct.

25            MR. LEVY: I think the government's proposed

1 order ignores this part of the order. I think the first  
2 element of the government's minimization process should be  
3 to take those files for which they have not yet shown  
4 probable cause out of the search.

5 Now, our brief on September 7th argued that the  
6 government had not shown probable cause to believe that  
7 emails to accounts on the DisruptJ20 dot org domain  
8 contained evidence of crimes.

9 And similarly, we've been talking only about the  
10 senders of emails. But there are also the email lists,  
11 the list serves no probable cause, we submit, has been  
12 shown to believe that the list of email addresses of  
13 people who only signed up to join these list serves to get  
14 notice about legal support or medical support or  
15 communication with reporters or digital advertising or for  
16 the email addresses of these list serves apparently. That  
17 none of -- there's no probable cause to believe that these  
18 contained any evidence of crimes.

19 So our primary argument is that no search should  
20 apply to those documents. Now, I think the Court is moved  
21 beyond me and maybe rejecting that approach. But that's  
22 our first argument.

23 Even if the Court rejects that argument, our  
24 second argument would be for a two step process much like  
25 what the Court has laid out.

1           The Court -- the government should not get  
2 access to identifying information absent reason to believe  
3 that a particular email contains evidence of a crime. So  
4 to the extent that an email is responsive to a key word  
5 search, it should be revealed without identifying  
6 information. I think that's the technical process that  
7 counsel are now ready to discuss with each other.

8           THE COURT: Well, that's --

9           MR. LEVY: Not getting to who didn't talk to  
10 each other beforehand. Nobody has been willing to talk to  
11 me.

12          THE COURT: Wait. That's the Court's order.

13          MR. LEVY: Right.

14          THE COURT: So they probably should talk about  
15 it.

16          MR. LEVY: Right. So -- but it is not only, we  
17 would submit, that the government has to show that the --  
18 a particular email contains evidence of a crime. The  
19 government should also have to show that it needs to  
20 obtain the identifying information for the legitimate  
21 purposes of its investigation. And that will not always  
22 be true even if the email might contain evidence of a  
23 crime.

24               Third, now, I'm getting much more into the weeds  
25 of language of the order. I think the government has done

1 a reasonable job in defining the scope of the search in  
2 that long paragraph that runs -- I work with the page  
3 numbers in the red line copy, on the third page of the red  
4 line copy.

5 But we have a problem with one part of  
6 subparagraph D of the scope of seizure.

7 The government claims a right to obtain emails  
8 and identifying information about individuals, who knowing  
9 of potential violence, declined to participate.

10 Now, these are individuals who did nothing  
11 wrong. They are, in fact, individuals who did what we as  
12 a society would expect them to do and they should not be  
13 swept into the --

14 THE COURT: I'm sorry. Can you show me that  
15 language?

16 MR. LEVY: Yes. So in the long paragraph --

17 THE COURT: Yeah, I have that.

18 MR. LEVY: So we're looking at -- and this is  
19 not underlined, because it's not part of the red lined  
20 material.

21 THE COURT: Oh, I see that. I see what you're  
22 saying, yes. I got it.

23 MR. LEVY: Right. So our proposal would be to  
24 strike the parenthetical, the parenthetical or knowing  
25 about planned violence refused to participate. Because

1 these individuals, we submit, are people who did the right  
2 thing.

3 THE COURT: I got your point. You'll have to.

4 MR. LEVY: Okay. And, third --

5 THE COURT: Hold on a second.

6 MR. BORCHERT: Your Honor, if I may?

7 THE COURT: Yes.

8 MR. BORCHERT: Our concern here is that that's  
9 potentially exculpatory to people who are presently  
10 indicted and awaiting trial. And if we can't identify  
11 those people, we feel we would be walking into a potential  
12 Brady problem down the road.

13 THE COURT: Yeah, but you don't get to -- oh, I  
14 see what you're saying.

15 MR. BORCHERT: It's for the benefit of the  
16 defendant who is already indicted.

17 THE COURT: Right. Okay. But that -- yeah. I  
18 have a problem with that language to tell you the truth,  
19 because that's -- that's not evidence of a crime. That's  
20 evidence of not participating in a crime.

21 MR. BORCHERT: Very well. I mean, if the  
22 Court -- if the Court's order will give us protection  
23 against, you know, potential --

24 THE COURT: Well, actually if you don't -- if I  
25 strike that, you would be in -- have custody and control



1 of that information, so you would not be subject to --

2 MR. BORCHERT: We'll have -- we'll have -- by

3 that time, we would have run a key word search say, for

4 example, for the word riot.

5 THE COURT: Right.

6 MR. BORCHERT: Someone in our office would have

7 reviewed that email that said --

8 THE COURT: I see.

9 MR. BORCHERT: I'm not going to this riot.

10 That -- I'm hard pressed for that now to be --

11 THE COURT: That's not the only *Brady*. By

12 *Brady*, you would mean exculpatory information for the

13 defendants. That wouldn't be the only *Brady* information

14 you might run across.

15 MR. BORCHERT: Oh, certainly, Your Honor.

16 THE COURT: Why are parenthetically describing

17 those?

18 MR. BORCHERT: Or knowing about planned violence

19 refused to participate. But that is certainly one type of

20 *Brady* that would come across. If the Court would like me

21 to give thought to other types --

22 THE COURT: Yeah, I want you to give thought to

23 removing that parenthetical. It might be a general *Brady*

24 paragraph that --

25 MR. BORCHERT: All right.

1 THE COURT: -- you could --  
2 MR. BORCHERT: Very well. We could do that.  
3 THE COURT: I think Mr. Levy's point on that  
4 parenthetical --  
5 MR. LEVY: And, Your Honor, this actually plays  
6 into a procedural point that I want to make later about  
7 notice to the anonymous individuals to the -- I understand  
8 -- I don't practice in this area of the law, I confess.  
9 THE COURT: Uh-huh.  
10 MR. LEVY: But it may well be that it's the  
11 individuals involved who should know -- have notice and  
12 does have an opportunity to participate in the process.  
13 THE COURT: Yeah, but then I got to get their  
14 identity. Mr. Levy, I mean, I'm trying to prevent --  
15 MR. LEVY: Let me get -- I will get to that.  
16 THE COURT: I don't want to.  
17 MR. LEVY: No, I understand the -- I don't --  
18 you have DreamHost give notice to the Does and then they  
19 decide -- all right. Never mind.  
20 THE COURT: That's a --  
21 MR. LEVY: So final substantive point is a very  
22 small wordsmithing issue. We appreciate, as I said, the  
23 care with which the scope of procedure has been drafted.  
24 But another part of the order may be significantly broader  
25 on the fifth page of the red lined order.

1 THE COURT: Can you number these pages next  
2 time.

3 MR. BORCHERT: Very well, Your Honor.

4 THE COURT: Thank you.

5 MR. LEVY: Thank you, Your Honor. The fifth  
6 page of that. So in subparagraph F, yes, at the top of  
7 the fifth page it's underlined subparagraph F. The  
8 government indicates that it will limit review of the  
9 information associated, quote, with individuals who did  
10 not have a criminal purpose in visiting or communicating  
11 with the website.

12 Now, it seems to me the compelling nature, and I  
13 think it is a very compelling argument on the government's  
14 part if its interest, is based on the repeated assurance  
15 that it's prosecuting a riot. But this clause sounds  
16 broader and so my suggestion is to replace the word  
17 criminal with the word riotous. So that it would read,  
18 quote, information associated with individuals who did not  
19 have a riotous purpose in visiting or communicating on the  
20 website.

21 THE COURT: No, because it's a conspiracy  
22 charge. It's malicious destruction, property charges.  
23 There are other charges in these indictments.

24 MR. LEVY: Right.

25 THE COURT: It's not just riotous. There's

1 destruction of property. There is assault on police  
2 officers. There is --

3 MR. LEVY: But criminal goes well beyond that.

4 THE COURT: Well, I'll entertain a different  
5 word than criminal, but it's not just -- the indictment  
6 has charged --

7 MR. LEVY: Okay. Let me to try to come with up  
8 with a word that meets the concern.

9 THE COURT: Okay.

10 MR. LEVY: Three procedural points about the  
11 order and then I'm done.

12 Now, I represent three proposed intervenors, but  
13 they are, we suspect, many other innocent users of the  
14 site. DreamHost has not -- still, although we've been  
15 urging them to do so, notified the users.

16 They have the email addresses. They could  
17 notify the users and we think that runs counter to what  
18 the D.C. Court of Appeals said in Sellers vs. Doe  
19 (phonetic), admittedly in the civil context.

20 THE COURT: Uh-huh.

21 MR. LEVY: But we urge you to order DreamHost to  
22 provide notice, without involving the Court, that's the  
23 way it happens in these online anonymity cases. They have  
24 the email addresses. They can easily notify the users of  
25 this process. Then the users can decide whether they want

1 to retain counsel.

2 THE COURT: In general, when execution --  
3 executing search warrants, you don't notify the individual  
4 or --

5 MR. LEVY: That issue actually came up in the  
6 Face Book context and the government objected to notifying  
7 the users. Now, this search warrant doesn't forbid  
8 notifying the users.

9 THE COURT: Right.

10 MR. LEVY: And the government said we can't  
11 allow the users to be notified until the day before the  
12 issue is to be argued in the D.C. Court of Appeals. So --

13 THE COURT: Yeah, I'm familiar with that case,  
14 but that wasn't a -- okay.

15 MR. LEVY: The alternative, because I only  
16 represent three, and I fully recognize the limits of my  
17 standing here would be to appoint counsel ad litem to  
18 represent the Doe's interest. EFF has suggested a special  
19 master. I gather that came up earlier.

20 Second -- you're skeptical. I'm going to move  
21 on.

22 Second procedural point, your September 15 order  
23 said the government is allowed to request permission to  
24 file certain information under seal, but only to the  
25 extent that the government has provided sufficient facts

1 to justify the request.

2           Clearly implicit in that, I think, was a  
3 requirement that everything else be filed openly, subject  
4 to the adversary process. The government's proposed order  
5 ignores this requirement. The adversarial process plays a  
6 key role in keeping the government honest and accountable.  
7 So the Court should require them to the extent that they  
8 say they need to file particular parts of their  
9 submissions to the Court under seal to justify those  
10 requirements.

11           THE COURT: Right.

12           MR. LEVY: Rather than having -- their order is  
13 not written that way.

14           Third procedural point and I'm done.

15           THE COURT: Well, just to back up a little.

16           MR. LEVY: Yeah.

17           THE COURT: Requests to seal are not uncommon in  
18 grand jury investigations and in other contexts. And so  
19 there is specific case law the government has to follow.  
20 That's the only thing I was referencing. The fact that  
21 they filed it under seal, it --

22           MR. LEVY: Their order --

23           THE COURT: -- didn't mean the Court was going  
24 to allow them to file it under seal unless they made a  
25 showing. That was --

1 MR. LEVY: Their order provides that it will be  
2 filed ex-parte and under seal and that's what we object  
3 to.

4 THE COURT: Provided they make a showing.

5 MR. LEVY: Okay.

6 THE COURT: That's the whole point.

7 MR. LEVY: We urge that that be added to the  
8 order.

9 Final procedural point, government refuses to  
10 include counsel for intervenors in service of documents,  
11 even in sending scheduling communications. I was left off  
12 the reply. I would urge -- either we ask Your Honor to  
13 rule on our motion for leave to intervene -- if this were  
14 an electrically filed case, we would continue to get  
15 notice until you ruled.

16 THE COURT: Uh-huh.

17 MR. LEVY: And we would ask that the government  
18 be told to let us -- keep us in the loop.

19 Indeed, final point, and this relates to some of  
20 the folks in the room here. The Court has decided to  
21 treat this as an open case. And there has been broad  
22 public interest. And yet the only way members of the  
23 public can find out what's happening is to go down to the  
24 courthouse and review the file. The press has asked me  
25 about public access to these documents and I think it

1 should be technically possible to make an exception to the  
2 general rule about CSW cases to provide for electronic  
3 filing in this case, so people can get access to it.

4 THE COURT: I -- I don't want to sort of provide  
5 excuses, but that's a technology issue that we're working  
6 on in the Court. So we're starting to put documents  
7 online in certain Divisions. We're rolling them out  
8 Division by Division and it hasn't come to the Criminal  
9 Division yet. We don't have the technology yet.

10 MR. LEVY: The United States vs. Jaffey  
11 (phonetic) case, which is a criminal case, was an  
12 electronic filing case.

13 THE COURT: Where was that, in District Court?

14 MR. LEVY: In this case. That was --

15 MR. BORCHERT: No. That's the -- that's the  
16 criminal case before Judge Leibovitz.

17 MR. LEVY: Right.

18 THE COURT: Yes -- no. There's a difference  
19 between electronic filing and then having documents  
20 available for -- electronically. That's a two step  
21 process. We have electronic filing in the Criminal  
22 Division. Documents are not yet posted on the Internet.

23 MR. LEVY: If there -- if there were electric  
24 filing, I would get notice of them.

25 THE COURT: There's electronic filing.



1 MR. BORCHERT: There is electronic -- I'm sorry,  
2 Your Honor. There is electronic filing in the *Jaffey*  
3 case. That's through case file express. I'm not sure  
4 what --

5 THE COURT: Okay. So we're going --

6 MR. BORCHERT: -- the Division --

7 THE COURT: So we're going to cure all of  
8 that by -- I'm going to order the parties to serve Mr.  
9 Levy until I rule on his motion to intervene.

10 MR. LEVY: Thank you, Your Honor.

11 MR. BORCHERT: Very well, Your Honor.

12 MR. LEVY: Thank you.

13 MR. BORCHERT: We'll do that.

14 THE COURT: And, I guess, I want the parties  
15 also to file their proposed orders in the jacket as well,  
16 because we're talking about it. People should have a  
17 reference document.

18 MR. BORCHERT: Yes, Your Honor.

19 THE COURT: Unless again, you make a request to  
20 seal and you make a sufficient showing to seal. Okay. Do  
21 we have to have another court hearing?

22 Do you think -- do you have any misunderstanding  
23 about what the Court's intent is?

24 MR. BORCHERT: No, Your Honor. I think we  
25 understand the Court's intent. I would ask that, to the

1 extent that Mr. Aghaian has any other objections to the  
2 government's proposed order other than the ones that were  
3 discussed here today, that he provide those to us by close  
4 of business today, so that we can, you know, begin  
5 drafting something to get to the Court expeditiously.

6 THE COURT: Do you have any --

7 MR. AGHAIAN: Your Honor, if I may.

8 THE COURT: Yes.

9 MR. AGHAIAN: I think the better way to proceed,  
10 Your Honor, would be to have the government submit what  
11 its new version of the proposed order is and we could  
12 submit our changes to that in a red line fashion so the  
13 government could see what it is that we're proposing.  
14 There are still a number of other issues in relation to  
15 government's proposed order which they have failed to  
16 adopt despite what the Court ruled last time. Including  
17 the stay issue, they have completely eliminated.

18 So there are a number of other issues and we're  
19 happy to--

20 THE COURT: I didn't rule on the stay issues.

21 MR. AGHAIAN: And maybe the best way to do it is  
22 to review the government's proposed order. We could  
23 provide the government with our red line changes in a  
24 proposed order or version of the order and we could  
25 proceed in that fashion. And I do think that that's --

1 unless the Court wants to rule based on those proposals,  
2 we would be happy to have another hearing to address those  
3 proposals.

4 THE COURT: This is the way we're going to  
5 proceed. The government is going to submit its proposed  
6 orders, parties have 24 hours in which to submit red line  
7 suggestions. After which the Court will take into account  
8 all the suggestions.

9 MR. BORCHERT: Very well.

10 THE COURT: Unless I need another court hearing,  
11 the Court will be intending to draft its order and sign  
12 it.

13 MR. LEVY: Right.

14 MR. BORCHERT: Very well, Your Honor. We'll  
15 file something as expeditiously as possible.

16 THE COURT: Well, their response time is  
17 triggered by your filing.

18 MR. BORCHERT: Very well.

19 THE COURT: So whatever day you file it, the  
20 parties have until the close of business the next day to  
21 make its red line proposed changes.

22 MR. BORCHERT: Very well, Your Honor.

23 THE COURT: Again, filed in open court, filed in  
24 the docket.

25 MR. BORCHERT: Yes, Your Honor.

1           MR. AGHAIAN: Your Honor, if we can ask that the  
2 government -- if we're going to the close of business,  
3 that at least the government file whatever it is filing by  
4 close of business, so we don't get something very late  
5 that day by email and then --

6           THE COURT: Yeah, I'm operating under business  
7 days. So if you file something at midnight or eleven  
8 o'clock, that's filed the next business day.

9           MR. BORCHERT: Very well.

10          THE COURT: Okay.

11          MR. LEVY: Thank you, Your Honor.

12          THE COURT: Thank you, counsel.

13          MR. BORCHERT: Thank you, Your Honor.

14          MR. AGHAIAN: Thank you, Your Honor.

15                 (Thereupon, the proceedings were concluded at  
16 approximately 3:00 p.m.)

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