

**Memorandum of Understanding for a Pilot Program to Make
Information about Certain Sealed Applications and Orders for
Electronic Evidence in Criminal Investigations Publicly Available**

This Memorandum of Understanding is entered into by the Clerk of the United States District Court for the Western District of Washington (“the “Clerk” or “the Court,” as appropriate) and the United States Attorney’s Office for the Western District of Washington (“USAO”).

In the Pen Register Act, 18 U.S.C. § 3121 et seq., and the Stored Communications Act, 18 U.S.C. § 2701 et seq., Congress provided courts with authority to authorize investigative processes to obtain certain types of electronic evidence and also provided that these investigative processes can be sealed from public view under certain circumstances. These statutes balance many interests, including transparency, public safety, privacy, and the effective enforcement of our criminal laws.

Under certain circumstances where those Acts and/or other laws allow sealing, the Clerk and the USAO nevertheless each have an interest in operating as transparently as practicable consistent with other obligations while providing some information to the public about the use of those processes beyond what is required by law.

In order to balance these goals, the Clerk and the USAO enter into this Memorandum of Understanding for a two-year pilot program to make publicly available information about certain sealed applications and orders for electronic evidence in criminal investigations, defined below.

Subject Applications and Orders

The USAO submits applications for orders under the Pen Register Act, 18 U.S.C. §§ 3123, 3124, authorizing the installation and use of a pen register or a trap and trace device and requiring a third party to assist with a pen register or a trap and trace device to obtain prospective dialing/signaling information for a mobile device, email and/or social media account (“PR/TT orders”), and for orders under the Stored Communications Act, 18 U.S.C. § 2703(b), 2705, requiring service providers to provide law enforcement with subscriber information and other non-content information or records pertaining to the subscriber or customer for one or more of these accounts, and prohibiting the provider from disclosing such order to the customer for a period of time (“2703(d) orders”).

This memorandum governs the way the USAO will submit applications for PR/TT, 2703(d), and combined PR/TT and 2703(d) orders—which are hereinafter referred to collectively as “PT Applications and Orders”—and how the Clerk will file

them, including by creating a new case type for these matters. The memorandum also sets out a new process through which the Clerk will make information about PT Applications and Orders available to the public.

Process

Effective January 1, 2019, the USAO will begin using standardized captions on its PT applications. The USAO will separately identify in the caption each of the orders sought in the application, so that when an application concerns multiple devices or different types of orders, that information will be reflected in the caption.

The standardized captions will also include a legal citation to at least one of the principal crimes under investigation. Because PT Applications and Orders are often sought in the early stages of an investigation, the principal crime under investigation may necessarily be inexact, and the USAO expects that for matters that result in charges, the crime identified in the application will sometimes not be the only crime ultimately charged and may not even be among the ultimate charges. Additionally, disclosure of the principal crime or crimes under investigation will sometimes pose a risk of compromising an ongoing investigation. When the USAO concludes that identifying the principal crime under investigation presents that risk for a particular PT Application and Order, the USAO may omit the principal crime under investigation from the caption.

Effective January 1, 2019, the Clerk will initiate the use of a new case type in the CM/ECF system for this district entitled PT. After that date, when the USAO submits a new PT Application and Order, the Clerk will assign a case number in the Court's filing system in the new PT case type. Like matters in the GJ case type, matters in the PT case type will be sealed and will not be available at the public terminals in the Clerk's Office or through the Court's CM/ECF electronic case filing system. For this case type, the Clerk will use the information in the standardized caption as the name of the case.

Public Disclosure

The Clerk will generate semi-annual reports via CM/ECF reflecting the docket numbers and case captions associated with PT Applications and Orders. Beginning on January 1, 2020, these reports for sealed applications will be made publicly available on July 1 and January 1 of each year in electronic form on the Court's website in a PT docket report. The PT docket report will contain docket numbers and case captions for PT Applications and Orders for these types of orders filed during the six-month period ending six months before the issuance of the report. For example, a PT docket report filed in January 2019 would be included in the semi-annual report issued on January 1, 2020.


One month before these reports are made available, the Clerk will provide the USAO with a list of all matters that will be on the list. The USAO will identify any matter for which inclusion on the public list poses a risk of compromising an ongoing investigation, and the public list will then omit information about that matter but include an indication that it has been omitted.

The principal statute under investigation will be included in the semi-annual PT docket reports, except where a citation to the statute is omitted from the caption of an application to protect an investigation.

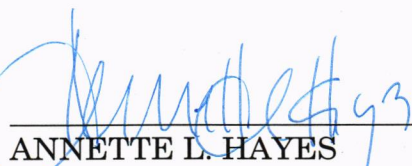
In January 2021, after the pilot program has been in use for two years and the Clerk has produced three six-month reports, the Clerk and the USAO will consider whether to extend the pilot program and whether any changes should be made to it.

The Court agrees to post this MOU on its website while it remains in effect. To the extent either the Clerk or the USAO concludes it can no longer comply with any aspect of this MOU, it will attempt in good faith to address the issue by making agreed changes to this MOU. To the extent either the Clerk or the USAO determines that despite its best efforts it can no longer comply with the MOU's terms and conditions, it will provide 30 days notice of its intent to withdraw. In the event that the MOU is revised before January 1, 2021, or that either side withdraws, an updated agreement or notice that the pilot program has ended will be posted on the Court's website.

Signed and agreed on December 19, 2018



WILLIAM MCCOOL
Clerk of the Court
Western District of Washington



ANNETTE L. HAYES
United States Attorney
Western District of Washington