

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

IN RE: Request from Requesting State Pursuant to)
the Treaty Between the United States of America) No. SA-04CA0676-OG
and the Requesting State on Mutual Assistance in)
Criminal Matters)

MOVANTS' REPLY TO GOVERNMENT'S RESPONSE TO MOTION TO UNSEAL

Movants the Electronic Frontier Foundation (“EFF”), Urbana-Champaign Independent Media Center Foundation (“UCIMC”), and Jeffrey Moe (“Moe”) reply herein to the Government’s opposition to their motion to unseal all documents previously filed in the above entitled cause, and reassert their constitutional and common-law rights of access to the Order and documents underlying seizure of the Indymedia servers.¹

I. Movants have standing to file the Motion to Unseal.

It is well-settled in the Fifth Circuit that “members of the news media” such as Movants EFF and UCIMC, “although not parties to litigation, have standing to challenge the closure of judicial proceedings or confidentiality orders.” *Davis v. East Baton Rouge Parish School Bd.*, 78 F.3d 920, 926 (5th Cir. 1996) (news agencies had standing to challenge orders prohibiting school board from commenting on draft desegregation plan and requiring that the board meet in private); *see also Ford v. City of Huntsville*, 242 F.3d 235, 240 (5th Cir. 2001) (nonparty local newspaper had standing to challenge confidentiality order regarding settlement of employment discrimination claim against the city) and *United States v. Chagra*, 701 F.2d 354, 359-60 (5th Cir. 1983) (newspapers and reporter, although nonparties to criminal case, had standing to appeal an order closing pretrial bail reduction hearing).

The Government argues that “*Chagra*...was unique situation [sic] and the Fifth Circuit has limited its’ [sic] applicability.” Government’s Response at 1-2, *citing Walker v. City of*

¹ See the Motion to Unseal with appended factual summary and affidavits for additional details on Indymedia, the seized servers and the Order that resulted in their taking.

Mesquite, 858 F.2d 1071, 1074 n.1 (5th Cir. 1988). However, the Government’s sole cited authority directly contradicts its position:

In *Chagra*...the Court was addressing the specific question of whether or not the media could appeal the granting of a criminal defendant's motion to close his bail hearing. Therefore, in *Chagra*, the policy considerations present in class action litigation were not at issue; thus, the unique situation in *Chagra* cannot serve as precedent in the instant case to allow individual, nonnamed class members to appeal a final judgment in a class action.

Walker, 858 F.2d at 1071, n.1. *Walker* was distinguishable from *Chagra* because *Walker* concerned nonnamed class members’ standing, while *Chagra* addressed the media’s standing to demand access to closed proceedings—clearly analogous to this case. The “unique situation” in *Chagra* is the same one faced here, and the Government’s reliance on *Walker* is therefore puzzling and wholly unpersuasive.

The Government also contests Movant Moe’s standing, arguing that he did not suffer an injury in fact because he “was offered his servers back but refused,” and “[s]ubsequently he demanded and was given new servers by Rackspace.” Government’s Response at 2. Yet Moe’s lack of access to the physical hardware owned by Rackspace, which Moe had contracted to use for his publishing efforts, is only a part of his injury. Moe’s primary interest lies in the informational and expressive data on the servers when they were seized. Rackspace did not provide Moe with a copy of the seized data when it was taken, therefore Rackspace’s offer to provide the use of new, empty servers to publish data that had already been turned over to the Government did not address Moe’s injuries.² Moe has standing to challenge the seal and discover the basis of this warrantless deprivation of his property and injury to his speech rights.

II. The confidentiality provision of the applicable treaty does not bar unsealing.

The Government admits that the Order resulting in seizure of the Indymedia servers was issued at the request of a foreign government (“the Requesting State”) under a Mutual Legal Assistance Treaty (“MLAT”). The Government fails to identify the Requesting State, but

² In addition, the eventual return of the servers did not redress claims under the Privacy Protection Act, 42 U.S.C § 2000aa et seq., or the Electronic Communications Privacy Act, 18 U.S.C. § 2701 et seq.

nevertheless asserts that Article 8 of the relevant MLAT contains the following provision:

2. If deemed necessary, the Requesting State may **request** that the application for assistance, the contents of the request and its supporting documents, and the granting of such assistance be kept confidential.

Government's Response at 2 (emphasis added).

So far as Movants can determine, the quoted treaty is in fact *The Treaty Between the United States of America and the Italian Republic on Mutual Assistance in Criminal Matters* ("the Treaty"), 24 I.L.M. 1539, Art. 8(2) (1985).³ The Government claims that the Treaty's confidentiality provision forbids unsealing here, in consideration of an alleged request for confidentiality by the Requesting State. However, comparison of that provision to an adjacent one demonstrates otherwise:

1. When necessary, the Requested State may **require** that evidence and information provided, and information derived therefrom, be kept confidential in accordance with stated conditions.

Id. at Art. 8(1) (emphasis added). The Treaty's plain language makes clear that the Requested State (the United States) may **require** confidentiality while the Requesting State (Italy) may only **request** it. The provision cited by the Government is permissive rather than compulsory, and as this Court had the discretion to decline Italy's confidentiality request, it has the power to unseal the documents after the fact.

Even if the confidentiality provision were compulsory, however, the Treaty repeatedly affirms that the United States may avoid any obligation inconsistent with its laws⁴ or the interests of the American public.⁵ As argued in the Motion, Movants' lack of access to the sealed documents is inconsistent with their rights under common law and the First and Fourth Amendments, and prejudices the essential public interest in government accountability.

Furthermore, Italy's request for confidentiality could not overcome Movants'

³ The US-Italian MLAT is the only MLAT with an Article 8(2) that matches the language quoted by the Government.

⁴ The Treaty enumerates seven specific types of assistance that the parties are obliged to render; maintaining confidentiality is not listed. *Id.* at Art. 1(2). The Treaty then states that "[o]ther types of assistance shall also be granted to the extent such assistance is not inconsistent with the laws of the Requested State." *Id.*

⁵ The Treaty further provides that "[t]he Requested State may deny assistance to the extent that...execution of a request would prejudice the security or other essential public interests of the Requested State...." *Id.* at Art. 5(1).

constitutional rights of access even absent the Treaty's explicit deference to United States law. The Supreme Court "has regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Reid v. Covert*, 354 U.S. 1, 17 (1957). The Fifth Circuit has similarly recognized that "the treaty-making power does not extend so far as to authorize what the constitution forbids." *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 556 (5th Cir. 1947), quoting *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); see also *Hanson v. Town of Flower Mound*, 679 F.2d 497, 503 n.11 (5th Cir. 1982), quoting *Reid*, 354 U.S. at 18 ("It would be completely anomalous to say that a treaty need not comply with the Constitution..."). No treaty obligation to a foreign government can trump the Bill of Rights, which forbids continued secrecy here.

III. The Government's claim of an ongoing investigation does not justify continued secrecy in this matter.

The Government finally argues that there is a "compelling government interest" in non-disclosure because there is "an ongoing criminal terrorism investigation" that would be "seriously jeopardize[d]" otherwise. Government's Response at 3. Despite the reference to "terrorism," the Government notably fails to assert a national security interest in non-disclosure. Furthermore, even if the Government did so assert, it is well established that "important First Amendment values" cannot be overcome by "a mere assertion of 'national security.'" *United States v. Pelton*, 696 F. Supp. 156, 159 (D. Md. 1986); accord *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, H., concurring) ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.").

Moreover, it is clear that the investigation in question is not the Government's, but Italy's: the Government's Response indirectly admitted that the Order resulted from an Italian request for assistance in an Italian criminal matter, as per the Treaty; the FBI publicly stated that the Order was unrelated to any federal investigation, see Opsahl Dec., Exh. A; and Italian public prosecutor Marina Plazzi confirmed that Italy made the request as part of its investigation into an anarchist group. See Opsahl Dec., Exh. A.

The United States therefore has no direct law enforcement or national security interest here. At most, it has a diplomatic interest in pleasing its treaty partner, yet Italy itself does not appear to believe that secrecy is necessary. Certainly, no jeopardy could come from granting the Motion that has not already resulted from the Government and Italy's own disclosures. Furthermore, whatever evidence may have resided on the Indymedia servers has already been seized and is therefore not at risk of being destroyed by the suspects, even if unsealed documents were to specifically identify the evidence that was sought. In short, the Government has not demonstrated a compelling government interest.

IV. Conclusion

For all the foregoing reasons, Movants respectfully request that the Court grant the Motion to Unseal.

Respectfully submitted by,

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