Appendix of Filings from Prior Case

Magistrate Judge Filings (E.D. Va. No. 12-sw-1002)

District Court Filings (E.D. Va. No. 17-cr-236)

Fourth Circuit Filings (4th Cir. No. 18-6132)

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF THE SEARCH OF 2122 21st Road North Arlington, Virginia; and	Case Nos. 1:12sw1002 and 1003
IN THE MATTER OF THE SEARCH OF University of Management and Technology	**UNDER SEAL**

MOTION TO SHOW CAUSE WHY SANCTIONS SHOULD NOT ISSUE

Comes now Movant, Yanping Chen Frame, by counsel, and moves this Court to issue an order setting this motion for a hearing to determine the identity of the Government official/s responsible for wrongfully disclosing to the media documents or information acquired as part of the investigation subject of the above-captioned cases and to determine appropriate sanctions and relief.

Sealing Orders

On December 3, 2012, United States Magistrate Judge John Anderson, on motion of the Government, ruled that the search warrants and applications therefore, to include affidavits in support, be sealed until Close of Business March 4, 2013. Judge Anderson's order covered the search of Movant's home (comprised in Case 1:12sw1002) and of her place of business, the University of Management & Technology ("UMT") (comprised in Case No. 1:12sw1003).

On January 14, 2014, United States District Judge Claude Hilton, on motion of the Government, ordered "partially unsealed" the affidavit in support of the application for search warrant in Case No, 1:12sw1002 (pertaining to Movant's home) for the "limited purpose" of allowing its review in redacted form by counsel for Movant.

Under the terms of Judge Anderson's December 3, 2012 order, the seal would have expired pursuant to its own terms over 10 months earlier. Nonetheless, Judge Hilton's January 14, 2014 order reflects that the matter remained under indefinite seal as of the date. No order has been entered by this Court directing that the search warrants and affidavits be unsealed and Movant has no reason to believe that the seal as to both searches does not remain undiminished. Movant does not wish to disturb the seal in any way.

Disclosure to Media

During the week of February 13th of this year, representatives of the media several times appeared unannounced at Movant's place of business, UMT, seeking access to Movant.

On February 23, 2017, Movant moved the Court for the return under Fed. R. Crim. P. 41(g), of the property seized by the Government during the searches of both locations on December, 12, 2012.

On February 24, 2017, Fox News published online a report claiming Movant, a native of the Peoples' Republic of China ("PRC") and naturalized American citizen, had lied to secure her American citizenship. The report further suggested that Movant employs UMT to pilfer personal information as to UMT's many students from within the United States military for the benefit of the PRC government.

The Fox News report (copy attached) quoted several sources, but notably included two photographs which are the personal property of Movant seized pursuant to one of the search warrants authorized by this Court. One depicts Movant as a younger woman in a uniform. The other depicts Movant more recently, holding a uniform on a hanger in front of herself while her husband salutes it in apparent jest. Upon information and belief, both photographs were seized

by the Government during the search of Movant's home pursuant to the search warrant issued by this Court in Case No. 1:12sw1002.

Argument

It is hard to surmise a scenario in which these photographs could have come into the possession of Fox News unintentionally. Presumably, the party that provided the photographs to the reporters enjoyed official access to the investigation files.

Depending on any actions by and pertaining to the Grand Jury in this case, the disclosure to the Fox News reporters constitutes a violation of Grand Jury secrecy as well as a violation of this Court's seal.

Neither Movant nor her counsel has sufficient familiarity with the investigation at bar to surmise the specific extent to which any of the information or documents disclosed to the reporters constitutes "a matter occurring before the grand jury" as per Fed. R. Crim. P. 6(e)(2)(B). It bears noting, however, that Rule 6(e)(2)(B) is read expansively.

> "[T]he phrase 'matters occurring before the grand jury' encompasses not only what has occurred and what is occurring, but also what is likely to occur, including the identity of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.

In re Cudahy, 294 F. 3d 947, 951 (7th Cir. 2002) (internal quotations and citation omitted).

Moreover, a specific purpose of Fed. R. Crim. P. 6(e) is to "protect an innocent accused who is exonerated from disclosure of the fact that he has been under investigation." *In re Grand Jury Investigation,* 903 F. 2d 180, 183 (3rd Cir. 1980) (internal citations omitted). Movant has never been charged with an offense against the United States.

Beyond concern for Grand Jury secrecy and the sanctity of the Court's seal, the disclosure to Fox News flouts this Court's authority to issue a search warrant. A court's

detached scrutiny of an application for a search warrant protects an individual's "privacy interest in being free from an unreasonable invasion and search of his home." *Steagald v. United* States, 451 U.S. 204, 214 (1981). This Court's protection of that privacy interest is undermined when a party to the search or the investigation of which it is a part, decides for his own reasons to publicize the product of the search.

Additionally, the disclosure flouted the Court's continuing authority over property seized pursuant to its warrant. Fed. R. Crim. P. 41(g) allows an owner of seized property to move its return. In the event such a motion is granted, Rule 41(g) calls for "the **court** [to] return the property" (emphasis added). The choice of words indicates that the Court, not the Government, has ongoing control over the seized property. The disclosure to Fox News deprived this Court of its authority to determine the proper disposition of the product of the searches it authorized.

Conclusion

Wherefore, Movant respectfully requests the Court issue an order setting this motion for hearing to determine:

1. the identity of the official/s responsible for the disclosure to Fox News of the documents or information acquired as part of the investigation of this matter,
2. the circumstances of such disclosure,
3. the appropriate sanctions, and
4. the appropriate relief for Movant.

Respectfully Submitted,

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By Counsel

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Certificate of Service

I hereby certify that on March 10, 2017, I caused a copy of the foregoing to be delivered to the United States Attorney's Office, 2100 Jamieson Ave., Alexandria, VA 22314.

John C. Kiyonaga

NATIONAL SECURITY

Fox News investigation: DoD-funded school at center of federal probes over suspected Chinese military ties

By Catherine Herridge, Pamela K. Browne, Cyd Upson

Published February 24, 2017

FoxNews.com

Facebook Twitter livefyre Email Print

Undated photo: UMT academic dean J. Davidson Frame, right, salutes his wife, left, UMT president Yanping Chen Frame.

EXCLUSIVE: Based just four miles from the Pentagon in northern Virginia is an innocuous-sounding online school for "management and technology" – which a Fox News investigation reveals has been at the center of multiple federal probes about its leadership's alleged ties to the Chinese military and whether thousands of records from U.S. service members were compromised.

The University of Management and Technology in Rosslyn, Va., which opened in 1998, touts a campus in Beijing and "partnerships" with universities around the world. The U.S. taxpayer-funded school claims to have had 5,000 graduates in the last five years and to be "especially proud of our students stationed in US military bases around the globe."

However, there is another side to the school's leadership that drew the attention of the FBI, the Justice Department, the Pentagon, Immigration and Customs Enforcement, and the Naval Criminal Investigative Service (NCIS) since at least 2012 -- and perhaps as early as 2009.

NOW PLAYING

Taxpayer-funded school suspected of Chinese military ties

In December 2012, the FBI made two very public raids of UMT and the northern Virginia home of university president Yanping Chen Frame and its academic dean, her husband J. Davidson Frame. Documents reviewed by Fox News show it was a counter-intelligence case, known as a "200d," one of the most highly sensitive categories for a federal probe.

Photos, exclusively obtained by Fox News, appear to show Chen as a young officer in the People's Liberation Army, the military wing of China's communist party. Another photo shows Frame saluting his wife, Chen, who is holding a uniform. Three independent experts said it was a Chinese military colonel's uniform.

Expand / Contract

This undated photo appears to show Yanping Chen Frame before she came to a U.S. graduate school.

Yet since those FBI raids, UMT has continued to collect more than $6 million from Defense Department tuition assistance programs as well as the Department of Veterans Affairs through the post-9/11 GI bill.

"It's a bad deal for the soldiers, and it's a bad deal for the taxpayer," Stephen Rhoads, a military veteran turned whistleblower who says he worked with the FBI on the case, told Fox News in an exclusive interview. "Nobody's getting what they paid for."

Rhoads said he worked at UMT recruiting vets when the FBI approached him in 2012 regarding the federal investigation. Emails and other documents reviewed by Fox News corroborate key elements of Rhoads' story.

"One of the first sentences she [Chen] ever threw out -- after she found out I was an Army officer, was, 'Well ... I was a colonel in the army,'" Rhoads explained. "During our first face-to-face encounter, absolutely ... she did not deny it."

Rhoads said he thought Chen meant the U.S. Army, and asked whether she trained in Texas. "She laughed and said, 'Oh, no, I was in the Chinese army, you know.'"

Chen, 64, came to the United States in 1987 from Beijing on a non-immigrant visa with her daughter Lele Wang. The Chinese government funded Chen's research at George Washington University where she received a Ph.D. in Public Policy in 1999, the year after UMT was created.

While Rhoads says Chen was upfront about her Chinese military experience, he claimed she hid those ties on immigration applications. Fox News reviewed Chen's immigration records where she consistently denied ties to the Chinese or any foreign military. When asked, "Have you ever been a member of, or in any way affiliated with, the communist party or any other totalitarian regime?" Chen checked "no." She would later become a naturalized U.S. citizen.

While there are no U.S. laws preventing a naturalized citizen from running a school like UMT, the Fox News investigation found that Chen's ties to the Chinese military appear to run deep.

Three outside experts consulted by Fox News confirmed the authenticity of the Chinese uniforms in the photos of Chen and Frame.

"If somebody was wearing that uniform, I would say that there's a very great likelihood that they were in the People's Liberation Army," Dennis Blasko, a leading Chinese military expert said, referring to the photo of what appears to be Chen in uniform.

Asked about the photo of Frame saluting his wife, Blasko observed, "This is a P.L.A. officer's uniform — active duty — from between 1987 and 2007 ... And from the epaulettes, we can see this -- three stars and two red stripes would be a full colonel."

Blasko emphasized that P.L.A. insignia can only be purchased with the permission of the Chinese military, and "you would have to have a certificate from your unit to buy [it.]"

Blasko, a West Point graduate who worked as a military attache in China, wrote "The Chinese Army Today: Tradition and Transformation for the 21st Century," one of the definitive books about the Chinese military.

In her George Washington University dissertation, Chen thanks her father, a P.L.A. general, who directed arms and technology development. "My father, General Chen Bin, gave me the inspiration to pursue this area of study," Chen wrote. "As former Chairman of COSTIND (1982-87), he was an important player in supporting and directing the (Chinese) space program."

In her 2012 FBI interview, Chen denied she ever was a colonel in the P.L.A., emphasizing she had worked as a doctor in the Chinese space program. Chen said it was a "civilian agency." The interview summary suggests federal agents challenged Chen's characterization. Outside experts told Fox News the Chinese civilian and military space programs are intertwined.

While Chen's immigration application is more than a decade old, and past the five-year statute of limitations, there may be a "continuation" of fraud, according to Ray Fournier who worked with the State Department's office of diplomatic security for more than 20 years. Fournier, an expert on visa and passport fraud, worked for the Joint Terrorism Task Force in San Diego, where his investigative work led to an arrest warrant for the American-born cleric Anwar Awlaki, who was later killed by the CIA.

Fournier said, "If she has marked 'no' on the petition, but if in fact, the answer is yes ... then we have a false statement. And where that comes into play, most assuredly, is in the arena of passport fraud. It is this application." With each renewal of Chen's U.S. passport, Fournier said, investigators should determine whether the falsehood was repeated. "These are issues of inadmissibility," he said.

While going through the immigration process, Chen was also launching what would become a multi-million-dollar online academy. But that academy's work would eventually attract the attention of federal investigators, who questioned whether students' records were remotely accessed from China.

Before the 2012 raid, Chen's daughter Lele Wang who also works at UMT, told the FBI that "'Contractors' in the UMT Beijing Office have [administrator] privileges" to access the student database.

Rhoads said UMT recruited service members who provided their military history when they enrolled. "It got uploaded into an O-drive, they called it ... their personal military bio, you know, where they were trained, how they were trained, how long, that could be remotely accessed."

Rhoads said Chen had a particular interest in Ohio's Wright-Patterson Air Force Base, which is a research and technology hub.

And there was more. "She wanted me to go out to these remote reserve and National Guard centers, you know ... in small-town America and start gettin' U.S. soldiers from those centers. Get their information, basically. Who's out there in the woods? How many units we got?"

Rhoads recalled to Fox News that he was instructed by the FBI to tell Chen that he was going to testify before a Virginia grand jury. "They wanted to, I guess see how ... she would react."

At the time, Rhoads said Chen had no idea he was working with the bureau.

He said, "Well, at this point, she didn't know I was working for them at all. And she's like, 'Oh, you don't tell them anything. We don't know each other. You don't ... know what you don't know,' was her buzz phrase. 'You don't -- you don't know I was a colonel in the P.L.A. They'll never have proof to say that'."

Emails obtained by Fox News show Rhoads and at least one FBI agent alerted the Defense Department, but another Memorandum of Understanding (MOU) was signed in 2014 through 2019 allowing UMT to collect millions in federal taxpayer aid.

An FBI agent in one email exchange wrote, "I let my management and the AUSAs [assistant U.S. attorneys] know about her renewal with DoD. Incredible."

Asked about the renewal, as well as whether DoD personnel were warned and additional steps were taken to vet UMT, the DoD chief for Voluntary Education Assistance, Dawn Bilodeau, referred questions to Pentagon spokesperson Laura Ochoa. In an email, Ochoa said, "In light of reports regarding University of Management and Technology (UMT), the Department is reviewing the DoD MOU signed between the institution and the DoD for compliance."

No one has been charged with any crime in connection with the investigation. Sources told Fox News that Assistant U.S. Attorney for the Eastern District of Virginia James P. Gilllis got the case, but there was a disagreement with the FBI over how to proceed, based on the case law and the extent to which sources and methods would be revealed.

Neither the FBI nor a spokesman for Gillis would comment to Fox News but separately, a spokesman for NCIS said they cannot comment on an "ongoing investigation." A FOIA request filed by Fox News Senior Executive Producer Pamela Browne confirmed an NCIS investigative file for UMT.

Fox News made repeated requests by phone and via email for interviews with Yanping Chen and J. Davidson Frame. After Chen's daughter said they were too busy to prepare and traveling out of town, Fox News went to their offices in Rosslyn, Va.

A school representative, who would not identify himself, confirmed Chen and Frame were in the office that day, but after learning Fox News was at the front desk, the couple refused to come out. Fox News' questions covered how UMT was run, Chen's suspected military ties, whether service members' records are secure, and how millions in taxpayer dollars are spent.

Fox News also sent a series of questions to the Chinese embassy in Washington, D.C., but there was no immediate response.

According to UMT, nearly 20,000 students have studied there, while 10,710 have earned degrees.

Catherine Herridge is an award-winning Chief Intelligence correspondent for FOX News Channel (FNC) based in Washington, D.C. She covers intelligence, the Justice Department and the Department of Homeland Security. Herridge joined FNC in 1996 as a London-based correspondent.

Pamela K. Browne is Senior Executive Producer at the FOX News Channel (FNC) and is Director of Long-Form Series and Specials. Her journalism has been recognized with several awards. Browne first joined FOX in 1997 to launch the news magazine "Fox Files" and later, "War Stories."

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF THE SEARCH OF 2122 21st Road North Arlington, Virginia; and IN THE MATTER OF THE SEARCH OF University of Management and Technology	Case Nos. 1:12sw1002 and 1:12sw1003 **UNDER SEAL**

ADDENDUM TO MOTION TO SHOW CAUSE WHY SANCTIONS SHOULD NOT ISSUE

Comes now Movant, Yanping Chen Frame, by counsel, and augments her Motion to Show Cause as follows:

On April 28, 2017, Fox News broadcast a second prime time feature maligning Movant and the University of Management and Technology ("UMT"). Second Fox News feature attached as Ex. A. Once again, the feature led with personal items of Movant seized in the search of her home (i.e., family photographs) and claims that UMT serves to provide a database of potential espionage recruits from among the United States military for the Peoples Republic of China.

This allegation, for which there is absolutely no corroboration, is a logical extension of an Application for Search Warrant which relies on unsubstantiated conjecture, innuendo and the affiant's personal opinion to propound that Movant has misled the United States and poses a threat to national security.

Undersigned saw the Applications for a Search Warrant pursuant to which Movant's home and UMT were searched in December 2012 for the first time on May 3, 2017. Until April

25, 2017, this Court had treated the entirety of this case as sealed.[1] On that date, the Court *sua sponte* unsealed the pleadings preceding Movant's February 23, 2017 Motion for the Return of Seized Property – but only as to search warrant 1002, pertaining to Movant's home. It bears noting that Fox News' first broadcast maligning Movant and publishing items seized in the search of her home occurred on February 24, 2017 – two months prior to the Court's unsealing of the search warrants and accompanying applications.

The first Fox News piece appears to have drawn directly from the affidavit in support of the search warrant applications.

> "Fox News reviewed Chen's immigration records… When asked 'Have you ever been a member of, or in Any way affiliated with, the communist party or any other totalitarian regime?' Chen checked 'No.'

Quoted narrative appears verbatim at paras. 20 and 21 of supporting affidavit.

> "In her 2012 FBI interview, Chen denied she was ever a colonel in the PLA…

Paraphrases pertinent portion of para. 48 of supporting affidavit.

These references belie a direct contravention of the Court's seal of the affidavit.

Additionally, the first Fox News piece comprises statements clearly drawn from documents within the internal FBI investigative file.

> "Chen's daughter… told the FBI that 'contractors' in the UMT Beijing office have [administrator] privileges to access the student database.
>
> "Emails obtained by Fox News show Rhoads and at least one FBI agent alerted the Defense Department…

[1] Undersigned conferred telephonically on February 27, 2017 with Kathy Roberts of the Clerk's Office who confirmed to him that the contents of the Court's file were being treated as sealed.

Disclosure of this information for a purpose unrelated to the investigation which created them directly contravenes the Government's obligation under the Privacy Act, 5 U.S.C. Sec. 522(a). Federal officials handling personal information are:

> "bound by the Privacy Act not to disclose any personal information and to take certain precautions to keep personal information confidential.

Big Ridge, Inc, v. Federal Mine Safety & Health Review Comm'n., 423 F. 3d 512, 517-19 (5th Cir. 2013).

The search warrant applications rely on a common affidavit from FBI Special Agent Timothy Pappa.[2]

This affidavit is a study in overstatement, innuendo and personal conjecture bereft of substantiated cognizable wrongdoing. Nearly five years later, the Government has produced no substantiation – despite custody of Movant's and UMT's computers for the entire time. Rather, Movant has been charged with nothing, the assigned prosecutor has indicated there is no plan to charge her, and the Government has returned Movant's seized property in accordance with its intent not to prosecute her. Yet now, someone within the Government has seen fit to divulge to the media the affidavit, internal FBI investigatory documents and property seized by order of this Court from Movant's home for the sole purpose of ruining her and everyone close to her.

SA Pappa's affidavit in support of the searches bears review.

The central tenet of SA Pappa's affidavit is Movant's alleged concealment of her alleged past as an officer of the People's Liberation Army ('PLA") of the People's Republic of China ("PRC"). SA Pappa claims that Movant denied her past in her immigration applications pursuant

[2] Catherine Heridge, the lead reporter on the pieces at issue here, reported in 2015 on SA Pappa's investigation for suspected espionage of a State Department translator, Xiaomig Gao. As has the United States Attorney's Office here as to Movant, the United States Attorney's Office for the District of Columbia declined to prosecute Mr. Gao. Ms. Herridge nonetheless gave a national, if not world wide, voice to SA Pappa's suspicions of Mr. Gao. Fox News piece on Mr. Gao attached as Ex. B.

to which she became first a Legal Permanent Resident and later a naturalized citizen of the United States. SA Pappa Afidavit ("Aff") paras. 15, 18, and 29. However, Movant has admitted to law enforcement her former association with the PLA by virtue of her service, without rank, as a physician with the PRC space program. Aff para. 48. SA Pappa is therefore basing his core accusation on the distinction between service as a commissioned officer as opposed to service in any other capacity. This distinction, however, is particularly nebulous in the PLA, an entity wherein status as "military" or "civilian" defies Western norms, but is instead subject to gradations as numerous as they are ambiguous.

Dennis Blasko, the PLA expert cited by Fox News in its first piece, describes two classes of uniformed civilians "analogous to US DoD civilians" serving within the PLA; "wenzhi ganbu" and "wenzhi renyuan," assigned to "research, engineering, medical, education, publishing, archives, cultural, and sports units" and "teaching, research, engineering, health, recreation and sports, library, and archive management fields," respectively. The two groups appear to overlap and would presumably include a uniformed medical doctor advising the PRC space program.

But wait, there's more. "Zhigong" perform support and custodial jobs without uniform. While "gugan" comprise the "small contingent of active duty cadre" serving in reserve units, the majority of whose personnel occupy the seemingly contradictory status of being "civilians, only some of whom have been demobilized from the army." *The Chinese Army Today, Tradition and Transformation for the 21st Century, 2nd Ed.*, Dennis Blasko, Routledge, 2012, p 73 attached as Ex. C.

The immigration forms cited by SA Pappa elicit clarity where none can be had. Any inference of fraudulent intent to be derived from them is gravely deficient. No more reliable is

SA Pappa's assertion that Movant wrongly occluded her membership in the Communist Party. Aff paras. 21 and 24.

SA Pappa offers neither Communist Party membership card, nor the inclusion of Movant's name on a roster of party members, nor even hearsay evidence of Movant's membership in the party. Instead, he offers the opinion of David Lai, Ph.D. that the PLA "is the armed branch of the PRC Communist Party." Aff Para. 25. Undersigned served as a US Army officer during the administrations of Presidents Reagan and George H. W. Bush. Does that make him a member of the Republican Party?

Thus armed, SA Pappa proceeds to offer his personal opinion as justification to conclude that Movant has committed a crime each time she has used her United States passport. "I submit" (not even "Affiant submits") that Movant's denial on her N-400 of having committed any crime for which she had not been arrested, constitutes a false statement because Movant had secured her residency by hiding her PLA military service and Communist Party membership. Aff para. 27. "I submit" that Movant's each entry into the United States constitutes a "use" of a US passport "procured by fraud." Aff para. 35.

Finally, SA Pappa relies on an apparent legion of concerned witnesses to vault a dubious allegation of immigration fraud into a risible suggestion that Movant, through UMT, is scouting on behalf of the PRC for potential espionage recruits among the US military.

> According to "a UMT employee," UMT provides training to visiting PRC officials. [The record bears no indication that the FBI's four years recourse to UMT computers and other investigative resources has revealed such.]

Aff para 6.

> According to "a UMT employee," UMT has contracts with the US Defense Acquisitions Agency, the Naval Postgradute School, and the Department of Homeland Security. [Could

not the FBI simply have confirmed these on its own?]

Aff para. 7.

> "A UMT staff member" demonstrated how SONIS (UMT's database) included each military student's official email address and unit.

Aff para. 13.

> "According to a UMT employee," UMT personnel in Beijing have access to SONIS. [Geographic location of data is relatively unimportant in the age of sophisticated hacking, but the record bears no indication that the FBI's more than four years recourse to UMT's computers and other investigative resources has revealed any encroachment by the PRC or any other foreign entity to UMT's data.]

Aff para. 14.

> "An active duty [US] military officer enrolled as a student" reported that Movant admitted to having been a PLA colonel. A "UMT employee" recorded Movant saying the same. [Movant would not be the first to exaggerate his or her past in casual conversation.]

Aff para. 15.

> "A UMT contractor" recorded Movant more than once.

Aff paras. 42-44.

Reflective of the overall reliability of SA Pappa's suspicions is the observation of a "former student" that Movant had, at one time, displayed a PRC rocket model "comparable to NASA's Saturn series" in her office. Aff para. 46.

It bears noting that the professed "whistleblower" quoted extensively by Fox News, Stephen Rhoads, has, at one time or another, met every description offered in the above litany.

Conclusion

The FBI has had over four years to parse each minute bit of data in Movant's and UMT's computers, more than four years to follow up on any lead presented in those computers, and

more than four years to pursue any other lead to be had from any of its innumerable investigative resources. The record before the Court bears absolutely no evidence that Movant has shared with the PRC any information about military students of UMT or that Movant has collaborated with the PRC to undermine national security in any way whatsoever.

To the contrary, the attached affidavit (Ex. D) of Gregory Marsh, UMT's IT Director, attests that the integrity and security of UMT's data are and always have been safeguarded by all available means. As a practical matter, the risk to the data of military students is no greater for UMT than it is for any other school educating members of our military.

From the entirety of the record before the Court, the single fact that speaks loudest is the fact that Movant, after four years of insinuations, has been charged with no crime and that the Government has no plan to do so. Meanwhile, the Government's callous campaign to assassinate her character wreaks real havoc. May 4, 2017 letter from accrediting agency to UMT attached as Ex. E.

> "Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

5 U.S.C. § 552a(i)(1)[3]

The only crime before the Court is the one committed by the Government official/s who disclosed to Fox News.

Respectfully Submitted,

YANPING CHEN FRAME
By Counsel

[3] See also, United States v. Gonzales, No. 76-132 (M.D. La. Dec. 21, 1976) (where Government official entered guilty plea).

/s/
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Counsel for Yanping Chen

Certificate of Electronic Service

I hereby certify that on May 5, 2017, I caused a copy of the foregoing to be hand delivered to the United States Attorney's Office, 2100 Jamieson Ave., Alexandria, VA 22314.

/s/
John C. Kiyonaga

Q2wIN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF THE SEARCH OF 2122 21st Road North Arlington, Virginia; and IN THE MATTER OF THE SEARCH OF University of Management and Technology	Case Nos. 1:12sw1002 and 1003

SECOND ADDENDUM TO MOTION TO SHOW CAUSE
WHY SANCTIONS SHOULD NOT ISSUE

Comes now Movant, Yanping Chen Frame, by counsel, and augments her Motion to Show Cause for the second time.

Without prejudice to her claims for violation of this Court's seal and violation of Grand Jury secrecy, Movant addresses herein her claims for violation of the Court's authority to authorize a search and seizure and for violation of the Privacy Act.

Violation of the Court's Authority to Authorize a Search and Seizure

Fox News publicized Movant in tandem television broadcasts and online articles on February 24 and April 28, 2017.

The Fox pieces included no fewer than five images copied from family photographs owned by Movant and kept as such in her home until the FBI seized them in the search authorized by this Court and executed on December 5, 2012. (See Att 1 of Affidavit of Movant attached as Exhibit 1.) To Movant's knowledge, no copies of these photographs existed outside her home at the time of the search.

Violation of the Privacy Act

There is no question that someone in the Government provided Fox News with information collected by the FBI in its investigation of Movant. The February 24 television broadcast included a portion of the FBI's report (FD-302) of an interview of Movant's daughter and portions of Movant's immigration records. (See screenshots in Att 2 of Exhibit 1.)

The proscriptions of the Privacy Act comprise "all records which are used by [an] agency in making any determination about any individual… " 5 U.S.C. Sec. 552a(e)(5). In fact, this proscription extends even to records that are not kept within a system of records. *Gerlich v. Department of Justice*, 711 F. 3d 161, 168-69 (D.C. Cir. 2013.

The Government's obligations under the Privacy Act are not relaxed for dealings with the press.

> "[P]roviding information to the media is not among the list of permissible disclosures listed in the Privacy Act. *See* 5 U.S.C. Sec. 522a(b).

Kelley v. Federal Bureau of Investigation, 67 F. Supp. 3d 240, 259-60 (D.D.C. 2014).

The FBI Bears Responsibility for Stephen Rhoads' Disclosures

The FBI's internal investigative documents and Movant's family photographs seized from her home could not have migrated to Fox News absent affirmative disclosure by an official privy to the investigation. Even without this inescapable inference, however, the comments and disclosures of Fox News' most quoted source, Stephen Rhoads, are attributable for purposes of this motion to the FBI.

Depending on the precise nature of his arrangement with the FBI, Mr. Rhoads may qualify as a "contractor" of the FBI subject to the proscriptions of the Privacy Act to the same extent as an employee. See 5 U.S.C. Sec. 552a(m)(1).

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Regardless of whether his arrangement rendered him an "employee" for Privacy Act purposes, there is no question that Mr. Rhoads acted throughout as a *de facto* "agent" of the FBI. Mr. Rhodes described himself in the Fox coverage as working with the FBI. In fact, Fox News itself disclosed the fact that the FBI kept Mr. Rhoads abreast of the progress of the investigation of Movant. (See email from an FBI address to Rhoads bemoaning Movant's "renewal with DoD" at Att 2 of Exhibit 1.) This Court has inferred an agency relationship between law enforcement and civilian interlocutors of criminal defendants based on less.

> "*Messiah, Henry* and *Moulton* clearly teach that, where the state instructs an interlocutor to obtain information from a particular defendant, the interlocutor acts on behalf of the state.

Schmitt v. True, 387 F. Supp. 2d 622, 649-50 (E.D. Va. 2005).

Conclusion

Stephen Rhoads was an agent of the FBI for purposes of attributing responsibility and accountability for his disclosures. His every word on air and online substantiates each of the violations adduced in this motion - of the Court's seal, of Grand Jury Secrecy, of the Court's authority to authorize a search, and of the Privacy Act.

Respectfully Submitted,

YANPING CHEN FRAME
By Counsel

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Certificate of Electronic Service

I hereby certify that on May 22, 2017, the foregoing was filed electronically with the Court with consequent service on all parties.

/s/
John C. Kiyonaga

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN RE SEARCH OF: 2122 21ST ROAD NORTH ARLINGTON, VIRGINIA	))))	No. 1:12sw1002
IN RE SEARCH OF: UNIVERSITY OF MANAGEMENT AND TECHNOLOGY	)))))	No. 1:12sw1003

GOVERNMENT'S RESPONSE TO
SECOND MOTION TO SHOW CAUSE

INTRODUCTION

On May 22, 2017, Yanping Chen filed a second motion to show cause[1] relating to the government's alleged disclosure of photographs that were seized during a search of Chen's residence. Chen's second motion is based upon an alleged violation of the Privacy Act, 5 U.S.C. § 552. Chen's argument on this point consists of two short paragraphs, and it neither attempts to establish that evidence obtained during a lawful search falls within the scope of the Privacy Act, nor does it address the many exceptions that are applicable to the provisions of the Act even if evidence from a search would otherwise be within its scope. As discussed below, this Court lacks jurisdiction to consider Chen's motion. For this and the other reasons that follow, Chen's second motion to show cause should be denied.

[1] Chen's pleading is styled as a "second addendum" to her original motion to show cause. As the Court made clear at the hearing, however, the Court's ruling denying the motion fully disposed of all issues that it raised. This "addendum" should therefore be treated as if it were filed as a second motion.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN THE DEFENDANT'S MOTION.

To the extent that the Privacy Act provides any remedy for the alleged violations claimed by Chen, the Act limits the remedy of any claimant to a civil action and expressly provides that "the district courts of the United States shall have jurisdiction in the matter[]." 5 U.S.C. § 552a(g)(1). *See also Id.*, § 552a(g)(5) ("An action to enforce any liability created under this section may be brought in the district court of the United States . . . ."). Because this Court does not have jurisdiction to hear the matter, Chen's second motion to show cause should be denied.

II. EVIDENCE COLLECTED DURING THE EXECUTION OF A SEARCH WARRANT DOES NOT CONSTITUTE A "SYSTEM OF RECORDS" WITHIN THE MEANING OF THE PRIVACY ACT.

Chen has made no effort to show that the photographs in question, or that evidence gathered in a search in general, are maintained as part of a "system of records" within the meaning of 5 U.S.C. § 552a(5), which provides:

> [T]he term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

Id.

Certainly the FBI keeps meticulous track of the locations from which evidence is seized during a search, and it keeps scrupulous records necessary to establish the chain of custody of any evidence seized. The evidence seized from the premises to be searched would be placed in an evidence bag, and a record would be kept of precisely where on the premises the items in the evidence bag were found. Presumably, however, a description of each and every item seized from the premises would not be routinely created and maintained in connection with each and every search that the FBI conducts. Presumably, as the evidence from a search is reviewed by

the agents and the prosecutors, relevant items would be noted for particular attention. The relevance of the items would depend, of course, upon the nature of each individual investigation. The evidence collected during a search therefore might or might not identify a given evidence bag or other container as being associated with a particular individual. Presumably, this would be even less the case with the individual items contained within the evidence bag. In an immigration fraud case, for example, a number of fraudulent passports might be found in the drawer of a bedside table in a residence, seized, and placed in an evidence bag. The evidence bag would of course note the precise location from which the passports were seized and would presumably bear a general description of the items in the bag. It might well be the case, however, that the individual names on the passports – fictitious or otherwise – would not be maintained in some searchable database of the FBI. The same could be said of evidence seized during the search of a university suspected of misappropriating and inappropriately disclosing personal and professional information collected from military personnel who took classes from the university. It might well be the case that the seizure of the computers of the university might capture the names and other information of thousands of military personnel, but whether the individual names could be found in FBI databases is another question entirely.[2]

Chen has failed to show that evidence seized during a search conducted in a criminal investigation constitutes records that are "contained in a system of records." 5 U.S.C. § 552a(b). She has failed to show that such records are "retriev[able] by the name of the individual or by

[2] When a "forensic image" of a computer is made during a search, it is not produce a "human readable" format. For agents and prosecutors to examine the electronic evidence, it first must be rendered intelligible by using a separate program, such as Forensic Toolkit. As this is done for the particular needs of a given investigation, presumably the "human readable" result would not become part of a larger, general FBI database.

some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a5). It does not matter whether the evidence seized during a search in this particular investigation might be associated with Chen's name. We are talking here about a "*system* of records," not individual instances where a particular government record might be associated with a particular individual. In the hypothetical investigations discussed above, the names of the persons on the fraudulent passports or the names of the military personnel in the electronic evidence would presumably not be "retriev[able]" by their names, while the name of the subject of the investigation presumably would be associated with the evidence. The very same evidence, however, cannot be a "system of records" for the subject and *not* a "system of records" for those appearing on the passports or in the electronic evidence. It either is a "system" or it is not. The entire structure of the Privacy Act does not permit an interpretation in which a collection of evidence is and at the same time is not a "system of records," depending upon who is asking about them.

Similarly, the strictures of the Privacy Act cannot logically apply to evidence seized during a search. By its terms, the Act provides:

> No agency shall disclose any record which is contained in a system of records . . . to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . . to another agency . . . of the United States for a . . . criminal law enforcement activity if the activity is authorized by law, and if *the head of the agency . . . has made a written request* to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

5 U.S.C. § 552a(b)(7) (emphasis added). It would be absurd to interpret the Privacy Act to require the FBI to obtain the written consent of the subject of an investigation before it could

share evidence from a search with the DEA or ATF unless the Administrator or Director specifically asked for it in writing with the particularity demanded by this provision.

Application of the requirements of the Act to evidence from search warrants would be similarly illogical. For example, the Act provides:

> Each agency that maintains a system of records shall . . . collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs [and] inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual . . . the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary; . . . the principal purpose or purposes for which the information is intended to be used; . . . the routine uses which may be made of the information . . . ; [and] the effects on him, if any, of not providing all or any part of the requested information.

Id., § 552a(e)(2) & (3). Again, it would be foolish to require the FBI to consider, before executing a search warrant, whether it could simply "collect [the] information to the greatest extent practicable directly from the subject" and then to present the subject with a form stating, among other things, "the principal purpose or purposes for which the information is intended to be used."

Another example is found in section 552a(d):

> Each agency that maintains a system of records shall . . . upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made of all or any portion thereof . . . ; permit the individual to request amendment of a record pertaining to him and . . . not later than 10 days . . . after the date of receipt of such request . . . promptly either . . . make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or . . . inform the individual of its refusal to amend the record . . . , the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official.

5 U.S.C. § 552a(d)(1) & (2) (internal punctuation omitted). Each agency that maintains a system of records must also:

> permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days . . . from the date on which the individual requests such review, complete such review and make a final determination . . . and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination . . . .

Id., § 552a(d)(3) (internal punctuation omitted). It is beyond imagination that Congress intended that in the context of a search warrant obtained in a criminal investigation, a subject of the investigation would be permitted "to gain access to his record *or to any information pertaining to him which is contained in the system*, [and] permit him . . . to review the record and have a copy made of all or any portion thereof." *Id*., § 552a(d)(1) (emphasis added). It is similarly unimaginable that Congress intended for this elaborate review process to apply to evidence obtained during the execution of a search.

Finally, Chen's reliance upon *Gerlich v. U.S. Dept. of Justice*, 711 F.3d 161 (D.C. Cir. 2013) overlooks the fact that the provision of the Privacy Act involved in that case was subsection (e)(5), which has to do with the manner in which an agency's records are to be maintained. *Gerlich*, 711 F.3d at 169. To the extent that Chen has articulated the basis for her Privacy Act argument, it appears to be premised upon the disclosure of certain records, which, if viable at all, would fall under subsection (b), which expressly applies only to a "record which is contained in a system of records." 5 U.S.C. § 552a(b).

As the movant, Chen has the burden of establishing that the photographs seized during the search of her residence are "record[s] . . . contained in a system of records" within the

meaning of 5 U.S.C. § 552a(b). This she has failed to do, and accordingly, Chen's second motion to show cause should be denied.

III. CHEN HAS OFFERED NO EVIDENCE TO SUGGEST THAT STEPHEN RHOADS WAS AN AGENT OF THE FBI.

Nothing in Chen's motion establishes that Stephen Rhoads was a "*de facto* 'agent' of the FBI," as she claims. The only case relied upon by Chen is *Schmitt v. True*, 387 F. Supp.2d 622 (E.D. Va. 2005), which, in a Sixth Amendment context, stated that "agency is created by the agreement to act on behalf of the state and pursuant to its instructions." *Id*. at 646. But there is nothing in the record (or anywhere else) to suggest that whatever may have been discussed with or disclosed to the media by Mr. Rhoads was done "on behalf of the [FBI] and pursuant to its instructions." Moreover, as the court in *Schmitt* made clear, the question of whether an individual is an agent of the government rests upon "long-standing, general principles of agency law." *Id*. These principles make clear that any putative agency relationship between the government and Mr. Rhoads – if there ever were one – ended long before any communications he may have had with the media.

The Restatement (Third) of Agency provides that "[a]n agent's actual authority terminates . . . upon the occurrence of circumstances on the basis of which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf." RESTATEMENT (THIRD) OF AGENCY § 3.09 (2006). Further, an agent's apparent authority "ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority." *Id*. § 311. Nothing in Chen's motion contains any basis to conclude that, more than four years after the execution of the search of Chen's residence, the circumstances could have led Mr. Rhoads to conclude that –

if it ever did – the FBI would assent to his taking action on its behalf. For similar reason, under no circumstance would it be reasonable for a third party to conclude that Mr. Rhoads acted with the actual authority of the FBI.

Accordingly, to the extent that Chen's motion is based upon the actions of Stephen Rhoads, her motion fails.

CONCLUSION

Because this Court lacks jurisdiction to entertain Chen's Privacy Act claim, and because her second motion is otherwise meritless, the United States respectfully requests that Chen's second motion to show cause be denied without a hearing.

Respectfully submitted,

DANA J. BOENTE
UNITED STATES ATTORNEY

By: /s/
James P. Gillis
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that on June 5, 2017, I filed the foregoing using the ECF system, which will send a copy to defense counsel of record:

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF THE SEARCH OF 2122 21st Road North Arlington, Virginia; and IN THE MATTER OF THE SEARCH OF University of Management and Technology	Case Nos. 1:12sw1002 and 1003

REPLY TO GOVERNMENT'S RESPONSE TO SECOND ADDENDUM TO MOTION TO SHOW CAUSE WHY SANCTIONS SHOULD NOT ISSUE

Comes now Movant, Yanping Chen Frame, by counsel, and replies to the Government's Response (Doc. 22) as follows:

As a preliminary matter, Movant has filed one Motion to Show Cause, not two as the Government claims. Response at 1. The Court denied relief on two of the four grounds for the motion, leaving open the possibility of relief on either or both of the two remaining grounds – violation of the Court's authority to authorize a search, and violation of the Privacy Act.

The Government suggests that the Privacy Act is irrelevant to the Court's inquiry since the exclusive remedy for a violation of the Act is a civil action before a United States District Court. Response at 2. The Court is, in fact, part of a United States District Court and the motion at issue presumably qualifies as a civil action since there is no criminal action against Movant. Regardless of how the Court would choose to resolve these two questions, however, there is absolutely no reason it should not inform with the proscriptions of the Privacy Act, its consideration as to whether the Government abused its Court conferred authority to search and seize.

The Government indulges a tortuous disquisition on the nature and treatment of investigatory records to suggest that the fruits of its search of Movant's home do not constitute a "system of records" under the Privacy Act. The fine points of "evidence bags" and "forensic images" notwithstanding (Response at 3), there simply is no credible support for the notion that the file compiled by the Government on Movant falls outside the protections of the Privacy Act.

> "Recall that a system of records is 'a group of any records… from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual.'

Overview of the Privacy Act of 1974, Introduction, Definitions, System of Records, Dept. of Justice (quoting 5 U.S.C. Sec. 522a(a)(5)).[1]

Without question, the Government's investigatory file, to include the fruits of its searches, was kept under Movant's name or an identifier attributable to her. The file itself is a system of records as is any larger system within which the file or portions thereof were kept or copied. The Department of Justice identifies no fewer than 83 discrete systems of records maintained by the Department, its Criminal Division and the FBI.[2] Is the Government seriously suggesting that neither the file nor any portion thereof is to be found anywhere among these or any other archives or databases maintained by the sundry agencies and subordinate offices that investigated Movant?

The fact that certain aspects of the Privacy Act are inapposite to criminal investigations (Response at 5-6) does not diminish the application of the Act's other requirements to the information born of such investigations. The Department of Justice describes the Privacy Act as "an **omnibus** code of fair information practices"[3] The acknowledged breadth of the Act

[1] See https://www.justice.gov/opcl/definitions#systems-records.
[2] See https://www.justice.gov/opcl/doj-systems-records.
[3] See https://www.justice.gov/opcl/introduction (emphasis added).

precludes that its every provision will apply with equal force to every archive or database kept in every office across the entire expanse of the Executive Branch.

The Government declaims that Movant has offered "no evidence' to suggest that Stephen Rhoads was an agent of the FBI. Response at 7.

Mr. Rhoads described himself to Fox News as having "worked with the FBI on the case." (Attachment to Motion.) In the same article, he discussed the contents of Movant's immigration records, highly controlled documents seized from Movant's home by the FBI. Nearly two years after the FBI's search, he was still getting updates on the case from the FBI. (Att 2 to Ex 1 of Second Addendum to Motion to Show Cause.)

The evidence before the Court provides no suggestion that Mr. Rhoades is not, to this day, still doing the FBI's bidding. Moreover, the Government offers no authority to suggest that a principal escapes responsibility for the actions of a former agent merely because the agency relationship has ceased. The information disclosed by Mr. Rhoads to Fox News could have reached him through only one source – the Government. By the Government's lights, a federal agency can insulate itself from any accountability for forbidden disclosures by a straw man as long as the agency relationship has been terminated beforehand.

Conclusion

The Government's conduct continues to wreak real havoc on Movant and everyone associated with her. Just yesterday, Senator Charles Grassley, citing Fox News almost exclusively, called upon the Department of Homeland Security to provide Movant's immigration records, criminal history [nil], and the product of any investigation of her or her University of Management and Technology ('UMT"), to the Senate Judiciary Committee. (Letter attached as Ex 1.)

The Government has had more than four years to pore over every shred of every document it seized from Movant and from UMT. After all that time and with the vast investigatory resources available to it, the Government has seen fit to charge Movant with absolutely nothing. Rather, it attempts now, through artifice, to occlude the seminal fact of this controversy – the Government disclosed to the media, for motives totally unrelated to any legitimate law enforcement objective, information of the sort it is most required to safeguard.

> "[W]here an agency – such as the FBI – is compiling information about individuals primarily for investigative purposes, Privacy Act concerns are paramount…

Henke v. U.S. Dept. of Commerce, 83 F. 3d 1453, 1461 (D.D.C. 1996).

Respectfully Submitted,

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Certificate of Electronic Service

I hereby certify that on June 15, 2017, the foregoing was filed electronically with the Court with consequent service on all parties.

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF THE SEARCH OF 2122 21st Road North Arlington, Virginia; and IN THE MATTER OF THE SEARCH OF University of Management and Technology	Case Nos. 1:12sw1002 and 1003

THIRD ADDENDUM TO MOTION TO SHOW CAUSE
WHY SANCTIONS SHOULD NOT ISSUE

Comes now Movant, Yanping Chen Frame, by counsel, and augments her Motion to Show Cause for the third time.

The Government's misdeeds, as elaborated in the Motion and subsequent pleadings, continue to wreak havoc.

For the third time, Fox News has publicized Movant. Fox's online article of June 28th[1] bore a dramatic lead:

> "The FBI is 'reopening' its probe of a taxpayer-funded online school for military servicemembers after a six-month Fox News investigation exposed its alleged Chinese military ties, according to a senior Republican lawmaker.

http://www.foxnews.com/politics/2017/06/28/fbi-reopening-probe-dod-funded-school-with-suspected-chinese-military-ties-rep-says.html.

Notably, the article attributes the "reopen[ed] probe" of Movant to Fox's own "investigation." The article quotes "whistleblower" Stephen Rhoads:

> "I want to thank Fox News for following up on a story that deeply impacts our service members, tax dollars, and national security.

Id.

[1] Article attached as Ex. 1.

Nonetheless, the article contains absolutely no substantive indication of any manner of ongoing criminal justice probe of Movant or anyone connected to her or to her school, the University of Management and Technology ("UMT"). Rather it quotes the "senior Republican lawmaker" referenced in its lead.

> " 'They've told us they're looking more seriously at it, that they're, quote unquote, reopening the investigation.' retiring Rep. Jason Chaffetz, R-Utah, told Fox News.

http://www.foxnews.com/politics/2017/06/28/fbi-reopening-probe-dod-funded-school-with-suspected-chinese-military-ties-rep-says.html.

Rep. Chaffetz did not specify the "they" to whom he referred. Nor did the article mention that he was retiring from Congress to join Fox News as a contributor as of July 1st.[2]

Notwithstanding the obvious infirmities of the Fox articles, the Government's disclosure subject of the instant motion and the actions of its agent, Stephen Rhoads, continue to impugn Movant. Indeed, the disclosures have spawned an unholy symbiosis between a derelict network and an opportunistic politician – each driven by self interest and unconcerned with the facts.

Conclusion

The Government has shown supreme indifference to its obligation to safeguard the information it collected pursuant to its authority under law and under order of this Court. Given its manifest vindictiveness, the Government would certainly have charged Movant with a crime if its four plus years poring over her seized documents and otherwise investigating her had yielded any evidence of wrongdoing. The Government's decision to see Movant pilloried instead flouts every concern undergirding the proscriptions cited by the instant motion.

[2] https://www.washingtonpost.com/news/reliable-source/wp/2017/06/28/jason-chaffetz-wont-need-a-housing-stipend-after-new-fox-news-gig/?utm_term=.35525155ca81.

The practical consequences of the Government's misdeeds have been cataclysmic for Movant and will become more so each day – unless this Court acts.

Respectfully Submitted,

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Certificate of Electronic Service

I hereby certify that on July 5, 2017, the foregoing was filed electronically with the Court with consequent service on all parties.

_____/s/_____
John C. Kiyonaga

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF THE SEARCH OF 2122 21st Road North Arlington, Virginia; and	)	Case Nos. 1:12-sw-1002 1:12-sw-1003
IN THE MATTER OF THE SEARCH OF University of Management and Technology	)	

MEMORANDUM OPINION AND ORDER

This matter is before the court on the renewed request by Yanping Chen Frame ("Dr. Frame" or "movant") for an order to show cause why sanctions should not issue. Upon consideration of Dr. Frame's addendum and second addendum to the motion to show cause why sanctions should not issue (Docket nos. 19, 21), the response in opposition (Docket no. 22), the reply (Docket no. 23), the third addendum (Docket no. 24), the arguments presented by counsel during the hearing held on Tuesday, September 5, 2017 (Docket no. 25), and for the reasons discussed below, the court will deny movant's additional request for an order to show cause why sanctions should not issue.

Factual and Procedural Background

Movant's motion stems from two search warrants issued by the court on December 3, 2012. (Docket no. 4). On the date of issue, the court sealed the search warrants and applications until March 4, 2013. (Docket no. 3). At the government's request, on January 14, 2014 the court ordered the search warrants and applications partially unsealed "to allow counsel for Yanping Chen to review a redacted version of the affidavit in the U.S. Attorney's Office for the limited purpose of pre-indictment plea discussions." (Docket nos. 6, 7). On March 10, 2017, movant filed a motion for an order to show cause why sanctions should not issue, arguing that the

government had violated grand jury secrecy (Fed. R. Crim. P. 6(e)(2)(B)) by intentionally leaking documents obtained during the government's searches to Fox News and had violated the court's sealing order. (Docket no. 9).[1] Movant noted that a Fox News report published in February 2017 included "two photographs which are the personal property of Movant seized pursuant to one of the search warrants authorized by this Court." (*Id.* at 2). On March 24, 2017, the government filed a response to the motion to show cause arguing that there was no violation of a court order since the sealing order expired by its own express terms on March 4, 2013, and there was no violation of Fed. R. Crim. P. 6(e) because nothing in the Fox News report disclosed details concerning a grand jury investigation. (Docket no. 11). On April 7, 2017, the movant filed a reply detailing the harm movant and her University sustained as a result of the Fox News report. (Docket no. 13). On April 25, 2017, the court set a hearing for May 8, 2017. On May 5, 2017, movant filed an addendum to her original motion to show cause, discussing a second Fox News report and raising for the first time an allegation that the disclosure of movant's information was a violation of the Privacy Act (5 U.S.C. § 552a). (Docket no. 19). Following the hearing on May 8, 2017, this court denied the first motion for an order to show cause, finding no violation of the court's order sealing documents and that movant had failed to establish a *prima facie* violation of Fed. R. Crim. P. 6(e). (Docket no. 18). Given that movant's argument concerning the Privacy Act was not presented until May 5, 2017, and the government did not have an opportunity to respond to that claim, the court expressly stated that the ruling did not address the alleged Privacy Act violation. (*Id.*).

[1] Movant also filed a motion to compel the return of seized property (Docket no. 8) which the government moved to dismiss as moot because the property was being returned to the movant (Docket no. 10). The court denied the motion to compel based on the representation that the property seized pursuant to the search warrants had been returned. (Docket no. 17).

On May 22, 2017, movant filed a second addendum to the motion to show cause, again alleging in more detail a Privacy Act violation. (Docket no. 21). This second addendum also included an affidavit from Dr. Frame stating that the images published by Fox News were seized pursuant to the search warrants issued by the court and that she is not aware of any other source from which Fox News could have obtained those images other than from the materials obtained by the government through the search warrants. (Docket no. 21-1). The government filed a response in opposition on June 5, 2017 (Docket no. 22) arguing that this court lacks jurisdiction to consider the movant's request and, even if the court did have jurisdiction, movant failed to show that the evidence obtained constituted a "system of records" as required by the Privacy Act and that Stephen Rhoads was an agent of the FBI. (Docket no. 22). Movant filed a reply on June 15, 2017 (Docket no. 23) and a third addendum on July 5, 2017 (Docket no. 24) alleging that Fox News is continuing to report on Dr. Frame based on fruits of the government's investigation. The court held a hearing on September 5, 2017 and took the matter under advisement. (Docket no. 25).

Legal Standard

The Privacy Act

The Privacy Act was enacted in 1974 to "regulate the collection, maintenance, use, and dissemination of information" by federal agencies "in order to protect the privacy of individuals identified in information systems maintained" by those agencies. *See Doe v. Chao*, 540 U.S. 614, 618 (2004) (citing Privacy Act of 1974, Pub. L. No. 93-579 § 2(a)(5), 88 Stat. 1896 (1974)). The Act specifies several requirements for agencies' recordkeeping, such as having "adequate safeguards" to "prevent misuse of [identifiable personal information . . . ." Privacy Act of 1974, Pub. L. No. 93-579 § 2(b)(4), 88 Stat. 1896 (1974). The Act also provides for civil relief for

individuals harmed by the government's failure to comply with the Act's requirements in the following circumstances:

> Whenever any agency
> (A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;
> (B) refuses to comply with an individual request under subsection (d)(1) of this section;
> (C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or
> (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual . . . .

5 U.S.C. § 552a(g)(1).

The civil remedies available to individuals fall into two categories: equitable relief and monetary relief. Subsections 5 U.S.C. § 552a(g)(1)(A)–(B) provide for equitable relief, allowing for the correction of any inaccurate or otherwise improper material in a record, and a right of access against any agency refusing to allow an individual to inspect a record kept on him or her. 5 U.S.C. § 552a(g)(2)–(3). Subsections 5 U.S.C. § 552a(g)(1)(C)–(D) provide for monetary relief, including actual damages sustained as a result of an agency's actions as well as attorney's fees and costs. 5 U.S.C. § 552a(g)(4). In order to recover monetary damages for the actions specified in 5 U.S.C. § 552a(g)(1)(C)–(D), the movant is required to prove that "the agency acted in a manner which was intentional or willful . . . ." 5 U.S.C. § 552a(g)(4).

Moreover, to prevail on a wrongful disclosure claim under the Privacy Act, a movant must show that the (1) disclosed information is a "record" contained within a "system of records"; (2) agency improperly disclosed information; (3) disclosure was willful or intentional;

and (4) disclosure adversely affected plaintiff. *Cloonan v. Holder*, 768 F. Supp. 2d 154, 163 (D.D.C. 2011). A "system of records" is defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual . . . ." 5 U.S.C. § 552a(a)(5).

Federal Rule of Criminal Procedure 41

Federal Rule of Criminal Procedure 41 enumerates the actions a magistrate judge may take with respect to a search warrant proceeding. Under Fed. R. Crim. P. 41(b)(1), "a magistrate judge with authority in the district . . . has authority to issue a warrant to search for and seize a person or property located within the district . . . ." Rule 41 also provides remedies for the defendant, including the return of property, and the suppression of evidence at trial. *See* Fed. R. Crim. P. 41(g)–(h). As stated by the government in its motion to dismiss as moot, the property seized by the search warrants has been returned. (Docket no. 10).

Analysis

As indicated above, the court denied movant's first request for relief finding there was no violation of the court's orders sealing documents and finding that the movant had not established a violation of grand jury secrecy under Fed. R. Crim. P. 6(e). (Docket no. 18). Movant has continued to seek relief against the government in these search warrant matters arguing a "violation of the Court's authority to authorize a search, and violation of the Privacy Act." (Docket no. 23 at 1).

The court's authority to issue search warrants is set forth in Fed. R. Crim. P. 41. Rule 41 also provides that the court may order the return of property seized pursuant to a search warrant and may suppress evidence as provide in Fed. R. Crim. P. 12. Other than receiving the return

along with the inventory, forwarding those materials to the clerk, and addressing any motion to return property, Rule 41 does not authorize the court to manage the collection, storage, or use of property obtained pursuant to search warrant. Movant has not provided the court with any authority or rulings from other courts in which the issue of improper disclosure of information obtained through a search warrant was addressed by the magistrate judge issuing the search warrant in that search warrant proceeding.

Movant's attempt to bring a claim under the Privacy Act in this criminal proceeding also appears to be unchartered territory. The cases cited by the movant and the government involve civil actions brought under the Privacy Act. None of the authorities cited by the parties involve a claim made in a search warrant proceeding. The proceedings contemplated by Rule 41 and the remedies provided by the Privacy Act are fundamentally incompatible with each other. An order to show cause is not an articulated remedy under the Privacy Act. The Privacy Act provides for several avenues for civil relief and the complaints asserted by the movant are more appropriately pursued through a civil complaint where the movant may be entitled to obtain discovery related to manner in which the information was disclosed to Fox News.

While the court finds that this search warrant proceeding is not the proper forum for the movant to seek relief, that is not to say that movant's allegations are without merit. As alleged, movant may have a claim for civil remedies under the Privacy Act under the test laid out in *Cloonan v. Holder*, 768 F. Supp. 2d 154 (D.D.C. 2011). First, movant alleges that the government maintained an investigatory file with the fruits of its searches attributable to her. (Docket no. 23, at 2). While the government disputes this characterization, movant has pled that the fruits of the investigation were maintained in a "system of records." Second, movant has pled that the alleged disclosure to Fox News was improper, as "providing information to the

media is not among the list of permissible disclosures listed in the Privacy Act." *Kelley v. Federal Bureau of Investigation*, 67 F. Supp. 3d 240, 260 (D.D.C. 2014); (Docket no. 21 at 2). Setting aside her allegations regarding Stephen Rhoads, the disclosure of the photographs as pled may constitute an impermissible disclosure under the Privacy Act. *See Kelley*, 67 F. Supp. 3d at 260. As alleged, there were no copies of the photographs outside movant's home at the time of the search. (Docket no. 21 at 1). Third, movant has pled that the disclosure was willful or intentional, as Fox News could not have received the pictures in question without an affirmative disclosure. (*Id.* at 2). Fourth, movant has alleged that the disclosure has adversely affected her, including calling into question the accreditation of her university. (Docket no. 19 at 7).

Conclusion

Movant's allegations describe a troubling and potentially improper course of conduct. However, a proceeding for the issuance of a search warrant cannot provide the relief sought by the movant under the Privacy Act. Accordingly, for the reasons stated above, it is hereby

ORDERED that movant's additional request for an order to show cause is denied (Docket nos. 19, 21).

Entered this 26th day of September, 2017.

/s/
John F. Anderson
United States Magistrate Judge

Alexandria, Virginia

John F. Anderson
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF THE SEARCH OF
2122 21st Road North
Arlington, Virginia; and

IN THE MATTER OF THE SEARCH OF
University of Management and
Technology

Case Nos. 1:12sw1002 and 1003

OBJECTIONS TO U.S. MAGISTRATE JUDGE'S DENIAL
OF MOTION TO SHOW CAUSE WHY SANCTIONS SHOULD NOT ISSUE

Comes now Appellant, Yanping Chen Frame, by counsel, and objects to the September 26, 2017 denial by Magistrate Judge John Anderson (Doc. No. 26) of Appellant's Motion to Show Cause (Doc. 9).

At issue herein is whether a United States District Court should stand mute in the face of the Government's vindictive disclosure – its "leak" – to the media of evidence gathered during an FBI investigation, including property seized pursuant to a search warrant of this Court. After an investigation spanning more than four years and searches of Appellant's home and business turned up nothing to warrant charges, at least one person with access to the investigative file disclosed parts of it to FOX News. FOX News then repeatedly used these investigative documents to publicize harmful, and wholly unsupported, allegations against Appellant.

Appellant moved for a show cause hearing seeking to particularize the Government's violation of:

a. Fed. R. Crim. P 6(e),

b. the Government's authority to search and seize pursuant to warrant of this Court, and

c. the Privacy Act.[1]

Magistrate Judge Anderson denied Appellant's motion and she objects to this order insofar as Magistrate Judge Anderson incorrectly found that (a) Appellant had failed to make a *prima facie* showing that the Government had violated Fed. R. Crim. P. 6(e); (b) he had no authority to sanction an abuse by the Government of the authority conferred by the Court to search for and seize evidence; and (c) he had no jurisdiction to pursue a violation of the Privacy Act since an order to show cause is not an articulated remedy under the Act.

Magistrate Judge Anderson never granted an evidentiary hearing as requested by Appellant, and never made any findings of fact. Rather, he denied Appellant's motion, concluding that the facts as pled by Appellant do not allow for the relief sought. While Magistrate Judge Anderson's order was not in the form of a report and recommendation, it was dispositive of Appellant's independent claims and is, thus, reviewed *de novo* under Rule 59(b)(3) and 28 U.S.C. §636(b)(1)(B).

Appellant seeks an evidentiary hearing to develop the facts underlying the Government's disclosure of evidence gathered during its investigation and seized from Appellant under this Court's authority.

Facts

Dr. Yanping Chen Frame is a naturalized United States Citizen who emigrated from the Peoples Republic of China ("PRC") in 1987. On December 3, 2012, the Government sought and received from Magistrate Judge Anderson, warrants to search the home of Appellant and the

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[1] Judge Anderson's denial of relief based on a violation of the Court's seal is not included in this appeal. Excepting the submissions pertaining to the Court's seal, this appeal comprises and incorporates by reference the allegations and arguments propounded by Appellant in her Motion to Show Cause (Doc. 9) and the pleadings and oral arguments which followed: Reply to Government's Response to Motion to Show Cause (Doc. 13), Addendum to Motion to Show Cause (Doc. 19), Second Addendum to Motion to Show Cause (Doc. 21), Reply to Government's Response to Second Addendum (Doc. 23), and Third Addendum to Motion to Show Cause (Doc. 24); as well as oral arguments presented on May 8 and September 5, 2017.

offices of the University of Management and Technology ("UMT"), a for profit institution owned by Appellant, conferring Bachelors, Masters and Doctoral degrees. (Doc. 1) The applications relied upon an affidavit by SA Timothy Pappa of the FBI, the central tenet of which is Appellant's alleged concealment on her immigration applications of past military service to the PRC. As demonstrated in Appellant's Addendum to Motion (Doc. 19), SA Pappa's affidavit is a study in overstatement, innuendo and personal conjecture bereft of substantiated cognizable wrongdoing.

Appellant has always acknowledged her past as a civilian physician in the space program of the Peoples Liberation Army ("PLA"). SA Pappa overlooks that the PLA employs no fewer than four categories of uniformed civilians in fields to include medicine. SA Pappa surmises that Appellant uses UMT to siphon information about its military students to the PRC.

Deprived of any reliable indicator of wrongdoing, SA Pappa is reduced to the flimsiest of conjecture – noting, as an example, that Appellant has a PRC rocket model "comparable to NASA's Saturn series" in her office.[2]

The searches were executed on December 5, 2017. (Doc. 5.) Notwithstanding the application and warrants were sealed, several news organizations were on hand to report the searches.

Over four years later, Appellant sought and received the return of the seized property through a motion pursuant to Fed. R. Crim. P. 41(g). (Doc. 8.)

FOX followed the next day with its first story. (Doc. 9.) FOX would pillory Appellant as a fraud and a traitor in service of the PRC in two Friday evening prime time broadcasts

[2] It bears noting that Appellant is not the first individual of Chinese origin to be investigated by SA Pappa, only to be vilified through the offices of FOX News after the Government has declined to charge a crime. See Doc. 19, Ex. B, wherein Catherine Herridge of FOX (whose byline appears also on the stories about Appellant) recounts the allegations against State Department contractor Xiaoming Gao and reports that the Department of Justice has declined to prosecute "despite an FBI probe."

accompanied by web postings. These drew heavily, if not exclusively, from the file of the investigation of Appellant. Tandem television broadcasts and online articles on February 24 and April 28, 2017 revealed no fewer than five images copied from family photographs seized in the search of Appellant's home. (Doc. 21, Att.1.) The Government has admitted that the FOX images corresponded to photographs seized in the search of Appellant's home. (May 8, 2017 Transcript, p. 17.) Appellant has sworn that the seized photographs in question were the sole copies. (Doc. 21, Ex. 1.) Additionally, FOX published portions of Appellant's immigration records, an FBI 302 of an interview of Appellant's daughter, and a document revealing the investigation as a "200d" or counter espionage matter – all sensitive matters properly accessible only to the investigators. (Doc. 13; Doc. 21, Att. 2.)

On both occasions, FOX published the comments of "whistleblower" Stephen Rhoades, a former employee of UMT described in the first broadcast as having "worked with the FBI on the case" and having learned details of Appellant's "immigration applications," presumably from investigators. (Attachment to Doc. 9.) FOX reported that Mr. Rhoades told Appellant that he had been instructed by the FBI to reveal that he would be testifying before a grand jury. (Attachment to Doc. 9.) Fox also included in its first broadcast an FBI email to Mr. Rhoades discussing the status of the investigation – some two years after the searches. (Doc. 21, Att. 2.)

Argument

a. Fed. R. Crim. P 6(e)

In her motion, Appellant alleged a Rule 6(e) violation and sought a hearing. Magistrate Judge Anderson erred by concluding that the FOX pieces failed to demonstrate a *prima facie* violation of Rule 6(e).

While neither Appellant nor her counsel has sufficient familiarity with the investigation at bar to surmise definitively the specific extent to which the information or documents disclosed to the reporters constitute "a matter occurring before the grand jury", Rule 6(e)(2)(B) is read expansively:

> "[T]he phrase 'matters occurring before the grand jury' encompasses not only what has occurred and what is occurring, but also what is likely to occur, including the identity of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.

In re Cudahy, 294 F. 3d 947, 951 (7th Cir. 2002) (internal quotations and citation omitted).

This definition readily encompasses the *known* disclosures at issue. A man who describes himself as "working with the FBI," Stephen Rhoades, has recounted to FOX his statement to Appellant that he had been called to testify before a grand jury. Taking Mr. Rhoades' representations, both to FOX and to Appellant, at their face value, i.e., their *prima facie* value, FOX has disclosed the identity of a grand jury witness. The identity of a grand jury witness lies expressly within the ambit of Rule 6(e) as a "matter occurring before the grand jury." *Cudahy*, 294 F. 3d at 951.

Finally, there is there no question in attributing the disclosure. Stephen Rhoades actions are attributable to the FBI. A man "working with" the FBI to gather evidence and who receives updates on the investigation from the FBI, is a *de facto* agent of same. This Court has inferred an agency relationship between law enforcement and civilian interlocutors of criminal defendants based on less.

> "*Messiah, Henry* and *Moulton* clearly teach that, where the state instructs an interlocutor to obtain information from a particular defendant, the interlocutor acts on behalf of the state.

Schmitt v. True, 387 F. Supp. 2d 622, 649-50 (E.D. Va. 2005).

Given the Government's absolute refusal to reveal whether a grand jury was empanelled, the only evidence available to the Court at this juncture indicates the disclosure of the name of a grand jury witness. Indeed, not only has a *prima facie* case for a violation of Rule 6(e) been made, the Court has no evidence at this point to support any other conclusion.

Magistrate Judge Anderson further erred in failing to require the Government to account, in an evidentiary hearing, for the apparent violation of Rule 6(e). Notwithstanding a grand jury is empanelled and operated by the Government, it "is not a free-floating institution, accountable to no one. It is an 'arm of the court,' and thus falls under the supervisory authority of the district court." *Carlson v. United States*, 837 F.3d 753, 761–62 (7th Cir. 2016) (citing *Levine v. U.S.*, 362 U.S. 610, 617 (1960)). The Court's supervisory authority to police the operations of a grand jury, which extends as far as dismissing an indictment, *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988), clearly encompasses the requested evidentiary hearing.

Magistrate Judge Anderson's decision not to grant one failed to assure the fair operation of a grand jury under the auspices of his court and neglected a specific purpose of Fed. R. Crim. P. 6(e) to "protect an innocent accused who is exonerated from disclosure of the fact that he has been under investigation." *In re: Grand Jury Investigation,* 903 F. 2d 180, 183 (3rd Cir. 1980) (internal citations omitted).

b. <u>The Government's authority to search and seize pursuant to warrant of this Court</u>

In her motion, Appellant sought a hearing to develop the record as to the misconduct resulting in FOX's broadcast of five images seized from the search of her home. Magistrate Judge Anderson erred in holding that Rule 41 provided no authority to examine in an evidentiary hearing, the Government's misconduct.

First, the disclosure to FOX flouts this Constitutional authority undergirding this Court's authority to issue a search warrant. A court's detached scrutiny of an application for a search warrant protects an individual's "privacy interest in being free from an unreasonable invasion and search of his home." *Steagald v. United* States, 451 U.S. 204, 214 (1981). This Court's protection of that privacy interest is undermined when a party to the search or the investigation of which it is a part, decides for his own reasons to publicize the product of the search.

Second, Magistrate Judge Anderson erred by failing to attend to the Court's inherent authority to protect the proceedings surrounding its Rule 41 responsibilities. *See Degen v. United States*, 517 U.S. 820, 823 (1996) ("Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities."). The Government was in possession of the disclosed documents solely by virtue of the Court's order. The Court defined the parameters of a search—the date of the search, the hours of the day when it may occur, the scope of the search and the extent of the items to be seized – and the Court had authority to determine whether the search had exceeded the parameters it has set. Betwixt these enumerated responsibilities lies the responsibility to protect the proceedings and "preserve the judicial process from contamination." *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting).

Additionally, the disclosure flouted the Court's continuing authority over property seized pursuant to its warrant. Fed. R. Crim. P. 41(g) allows an owner of seized property to move its return. In the event such a motion is granted, Rule 41(g) calls for "the **court** [to] return the property" (emphasis added). The choice of words indicates that the Court, not the Government, has ongoing control over the seized property. The disclosure to Fox News deprived this Court of its authority to determine the proper disposition of the product of the searches it authorized.

The Government disclosed items seized in a search for no legitimate law enforcement purpose. Beyond Rule 41(g), this conduct implicates the Court's imperative "to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the Constitution or laws) governing matters apart from the trial itself." *United States v. Williams*, 504 U.S. 36, 46 (1992) (internal citations omitted).

c. The Privacy Act.

In her motion, Appellant referenced the Privacy Act, 5 U.S.C. Sec. 552a, for two purposes: as a discrete claim for relief; and to inform the Court's consideration of the Government's abuse of its authority to search and seize. Magistrate Judge Anderson erred by finding he had no jurisdiction to pursue the Privacy Act's implications because a show cause hearing is not an enumerated remedy of the Act. The hearing, however, would not constitute a remedy. Rather, it would be simply a means – the best means - of seeking to particularize the Government's violation.

There is no question that someone in the Government provided FOX with information collected by the FBI in its investigation of Appellant. The February 24 television broadcast included a portion of the FBI's report (FD-302) of an interview of Appellant's daughter and portions of Appellant's immigration records. (Doc. 21, Att. 2 of Exhibit 1.)

The proscriptions of the Privacy Act comprise "all records which are used by [an] agency in making any determination about any individual… " 5 U.S.C. Sec. 552a(e)(5). Clearly, the investigative file compiled on Appellant meets this description.

The Government's obligations under the Privacy Act are not relaxed for dealings with the press.

> "[P]roviding information to the media is not among the list of permissible disclosures listed in the Privacy Act. *See* 5 U.S.C. Sec. 522a(b).

Kelley v. Federal Bureau of Investigation, 67 F. Supp. 3d 240, 259-60 (D.D.C. 2014).

Pertinent to the Court's consideration of the Government's abuse of its authority to search and seize, the Privacy Act makes it a crime "willfully [to] disclose" protected material in a manner not allowed under the statute. 5 U.S.C. Sec. 522a(i)(1).

However the Court chooses to apply the Privacy Act, it should remember that:

> "[W]here an agency – such as the FBI – is compiling information about individuals primarily for investigative purposes, Privacy Act concerns are paramount…

Henke v. U.S. Dept. of Commerce, 83 F. 3d 1453, 1461 (D.D.C. 1996).

Conclusion

The investigation of Appellant has devolved into precisely the result most offensive to the Constitution. More than four years of presumably exhaustive investigation have produced a decision to decline prosecution. Nonetheless, the Government has seen fit to assassinate Appellant's character, casting her as a fraud and a traitor before the entire world through the offices of a news network.

The Government's misdeed is greater than the sum of its offenses: breach of grand jury secrecy, abuse of its authority to search and seize, and wrongful disclosure of protected private information. It is an utter miscarriage of the protections embodied in every tenet of due process.

Respectfully Submitted,

YANPING CHEN FRAME
By Counsel

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Certificate of Electronic Service

I hereby certify that on September 10, 2017, the foregoing was filed electronically with the Court with consequent service on all parties.

/s/
John C. Kiyonaga

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN RE SEARCH OF:	)	No. 1:17cr236
	)	No. 1:12sw1002
2122 21ST ROAD NORTH	)	
ARLINGTON, VIRGINIA	)	
IN RE SEARCH OF:	)	No. 1:17cr237
	)	No. 1:12sw1003
UNIVERSITY OF MANAGEMENT	)	
AND TECHNOLOGY	)	
	)	

GOVERNMENT'S OPPOSITION TO YANPING CHEN'S OBJECTION TO UNITED STATES MAGISTRATE JUDGE'S DENIAL OF HER MOTION TO SHOW CAUSE

INTRODUCTION

On March 10, 2017, Yanping Chen filed a motion to show cause before United States Magistrate Judge John F. Anderson asking the court to hold a hearing relating to the government's alleged disclosure of photographs that were seized during a search of Chen's residence. Chen asked for the hearing to determine, among other things, "the identity of the official/s [supposedly] responsible for the disclosure of the documents or information acquired as part of the investigation of this matter." Chen Mot. 4. The United States does not concede any disclosure by government officials as claimed by Chen. However, as discussed below, even if the "disclosure" hypothetically involved materials obtained from a search and hypothetically originated from within the government, there was no violation of FED. R. CRIM. P. 6(e). The Magistrate Judge so found and denied Chen's motion.

On May 22, 2017, after her first motion was denied, Chen filed a second motion to show cause, which was based upon an alleged violation of the Privacy Act, 5 U.S.C. § 552. Chen's

pleading was styled a "second addendum" to her original motion to show cause, and Chen later filed a "third addendum." The Magistrate Judge found that neither the Privacy Act nor the federal rules provided jurisdiction for a Magistrate Judge to consider such a claim in the context of a proceeding relating to the issuance of a search warrant. The court therefore denied Chen's second motion to show cause.

Chen's Privacy Act argument before the Magistrate Judge consisted of two short paragraphs, and it neither attempted to establish that evidence obtained during a lawful search falls within the scope of the Privacy Act, nor did it address the many exceptions that are applicable to the provisions of the Act even if evidence from a search would otherwise be within its scope. Chen's current pleading before this Court is no better. It does not appear that *any* court has held that the alleged disclosure of an item seized during the execution of a search warrant could constitute a violation of the Privacy Act, and Chen has certainly not pointed to any.

As Judge Anderson found, there was no evidence of a violation of FED. R. CRIM. P. 6(e). As Judge Anderson further found, nothing in the Privacy Act nor the federal rules supplies jurisdiction to consider Chen's obscure request for "relief." Because the Magistrate Judge lacked jurisdiction, this Court too lacks jurisdiction to consider the matter. *If* Chen has any remedy for the alleged violation of the Privacy Act, jurisdiction is conferred *only* by that statute, which requires an original civil action filed with the district court.

For these and the other reasons that follow, Chen's objection to the Magistrate Judge's denial of her motions should be overruled.

ARGUMENT

I. THERE WAS NO VIOLATION OF FED. R. CRIM. P. 6(E).

FED. R. CRIM. P. 6(e) applies only to "matters occurring before the grand jury," and does not apply to documents and other materials obtained through other sources during the course of an investigation conducted by a law enforcement agency.

> It is important to bear in mind that law enforcement investigations typically precede, or occur simultaneously with but independently of, grand jury investigations. Leaks of information from law enforcement investigations that relate to matters under grand jury investigation do not concern "matters before the grand jury," unless, of course, they disclose secret details about proceedings inside the grand jury room.

United States v. Rosen, 471 F. Supp. 2d 651, 655 (E.D. Va. 2007) (Ellis, J.).

Here, whatever the provenance of its information, nothing in the Fox News article or any other media report "disclose[d] secret details about proceedings inside the grand jury room." *Id.* Indeed, the single reference to a grand jury came from Stephen Rhoads, a former employee of Chen's university. According to the article, Rhoads said that "he was instructed by the FBI to tell Chen that he was going to testify before a Virginia grand jury."[1] Notably, the article did *not* claim that the FBI itself said *anything* about a grand jury, and no source – no matter how obliquely mentioned in the article – said that Rhoads was, *in fact*, going to testify before a grand jury.

It is significant that, in addition to Rhoads, the article mentioned eighteen other sources for the story:

[1] Rhoads was by far the most frequently-cited source for the article and was described as "a military veteran turned whistleblower" who "said he worked at UMT." According to the article, Rhoads "sa[id] he worked with the FBI on the case."

1. "The University of Management and Technology";
2. "Documents reviewed by Fox News";
3. "Photos, exclusively obtained by Fox News";
4. "Three independent experts";
5. "Emails and other documents reviewed by Fox News";
6. "Chen's immigration records";
7. "Dennis Blasko, a leading Chinese military expert";
8. Chen's "George Washington University dissertation";
9. An "interview summary" said to be of Chen's "2012 FBI interview";
10. "Outside experts";
11. "Ray Fournier who worked with the State Department's office of diplomatic security";
12. "federal investigators, who questioned whether students' records were remotely accessed from China" – although the article was unclear about whether the source of this assertion was indeed "federal investigators" or someone who claimed to know what federal investigators "questioned";
13. "Chen's daughter . . . who also works at UMT" – here too the article was unclear about whether a statement attributed to her came directly from her or from someone else, although later in the article there was another statement specifically attributed to "Chen's daughter";
14. "Emails obtained by Fox News," including a statement that the article attributed to "[a]n FBI agent in one email exchange";

15. "DoD chief for Voluntary Education Assistance, . . . [who] referred questions to [a] Pentagon spokesperson" and an email from the spokesperson;

16. "Sources";

17. "A FOIA request filed by Fox News Senior Executive Producer Pamela Browne"; and

18. "A school representative."

In the only direct reference to someone bound by FED. R. CRIM. P. 6(e) – an attorney for the government or government personnel deemed necessary to assist the attorney for the government – the article stated that those contacted would not comment.

Assuming for argument that some of the information in the article came from the government, there still would be no violation of Rule 6(e). This is so because statements by the government concerning a *law enforcement* investigation are not the same as statements about a *grand jury* investigation, "because the latter is a Rule 6(e) violation while the former is not." *Rosen*, 471 F. Supp.2d at 655. *See also*, *In re Sealed Case No. 99-3091*, 192 F.3d 995 (D.C. Cir. 1999) ("[T]he Rule itself[] reflect[s] the need to preserve the secrecy of the *grand jury* proceedings themselves. It is therefore necessary to differentiate between statements by a prosecutor's office with respect to its own investigation, and statements by a prosecutor's office with respect to a *grand jury's* investigation, a distinction of the utmost significance upon which several circuits have already remarked.") (emphasis by the court).

Because the "disclosures" of which Chen complains – even if they were attributable to the government – did not reveal any "matters occurring before the grand jury" there was no violation of FED. R. CRIM. P. 6(e).

II. Chen Has Made No *Prima Facie* Showing Meriting a Hearing.

The Magistrate Judge properly denied Chen's motion without holding an evidentiary hearing, and this Court should as well. *Rosen* is again instructive:

> Because law enforcement investigations often parallel grand jury investigations, news reports about such investigations or its targets may emanate from either or both sources, and thus may or may not constitute disclosures violative of Rule 6(e). . . . Courts have therefore sensibly determined that a hearing on a claimed Rule 6(e) violation will not be held absent a showing of a *prima facie* Rule 6(e) violation. . . . If no *prima facie* case is shown, no hearing is warranted, and *a fortiori* the claim fails.

471 F. Supp. 2d at 656 (citation omitted).

The "threshold issue to resolve" then, *id.*, is whether Chen has made a *prima facie* showing of a Rule 6(e) violation. She has not. Indeed, *Rosen* involved similar circumstances, but involved several news articles reported over an extended period of time, which is not the case alleged here. Nonetheless, Judge Ellis found that a *prima facie* had not been made:

> Simply put, the media reports do not contain the detail and specificity necessary to reflect a disclosure of "matters occurring before the grand jury." In particular, the media reports identify no grand jury witnesses, disclose no questions that were asked or would be asked of witnesses in the grand jury, nor do the reports even describe or summarize any grand jury witness' testimony. Indeed, the reports never even mention a grand jury investigation. Instead, the reports reference only a "government investigation," which can, and in this case did, take many forms independent of a grand jury inquiry.
>
> * * *
>
> [D]efendants' cited reports here make no explicit reference to grand jury proceedings and lack the specificity and detail that would warrant an inference that the disclosures relate to "matters occurring before the grand jury."
>
> In sum, it is apparent that defendants' cited media reports fall short of establishing a *prima facie* case of disclosure of any "matters occurring before the grand jury," and hence defendants' claims in this regard must fail.

471 F. Supp. 2d at 656. *See also In re Sealed Case No. 99-3091*, 192 F.3d at 1001 ("A *prima facie* violation based on a news report is established by showing that the report discloses "matters occurring before the grand jury" and indicates that sources of the information include government attorneys.").

Because the media reports cited by Chen, which are essentially duplicative of one another, involved even less "specificity and detail" than the several articles reviewed in *Rosen* and *In re Sealed Case No. 99-3091*, she has not made the required *prima facie* showing. Accordingly, as in *Rosen*, "no hearing is warranted, and *a fortiori* the claim fails."

III. NEITHER THE MAGISTRATE JUDGE NOR THIS COURT HAS JURISDICTION TO ENTERTAIN THE DEFENDANT'S MOTION.

To the extent that the Privacy Act provides any remedy for the alleged violations claimed by Chen, the Act limits the remedy of any claimant to a civil action and expressly provides that "the district courts of the United States shall have jurisdiction in the matter[]." 5 U.S.C. § 552a(g)(1). *See also Id.*, § 552a(g)(5) ("An action to enforce any liability created under this section may be brought in the district court of the United States . . . ."). As the Magistrate Judge determined, the court did not have jurisdiction to hear Chen's motion. For the same reasons, this Court as well is without jurisdiction to entertain the matter – at least in its present procedural posture. If Chen wishes to seek relief under the Privacy Act, the only avenue is a civil action brought as an original action filed in the district court.

IV. EVIDENCE COLLECTED DURING THE EXECUTION OF A SEARCH WARRANT DOES NOT CONSTITUTE A "SYSTEM OF RECORDS" WITHIN THE MEANING OF THE PRIVACY ACT.

Chen has made no effort to show that the photographs in question, or that evidence gathered in a search in general, are maintained as part of a "system of records" within the meaning of 5 U.S.C. § 552a(5), which provides:

> [T]he term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

Id.

Certainly the FBI keeps meticulous track of the locations from which evidence is seized during a search, and it keeps scrupulous records necessary to establish the chain of custody of any evidence seized. The evidence seized from the premises to be searched would be placed in an evidence bag, and a record would be kept of precisely where on the premises the items in the evidence bag were found. Presumably, however, a description of *each and every* item seized from the premises would not be routinely created and maintained in connection with each and every search that the FBI conducts. Presumably, as the evidence from a search is reviewed by the agents and the prosecutors, relevant items might be noted for particular attention, but such work product might very well not associate the evidence with any identifiable individual. The relevance of the items and the methods for cataloging it would depend, of course, upon the nature of each individual investigation. The evidence collected during a search therefore might or might not be maintained in a given evidence bag or other container identified as being associated with a *particular* individual or any individual. Presumably, this would be even less the case with each and every item contained within the evidence bag. In an immigration fraud case, for example, a number of fraudulent passports might be found in the drawer of a bedside

table in a residence, seized, and placed in an evidence bag. The evidence bag would of course note the precise location from which the passports were seized and would presumably bear a general description of the items in the bag. It might well be the case, however, that the individual names on the passports – fictitious or otherwise – would not be maintained in some searchable database of the FBI. The same could be said of evidence seized during the search of a university suspected of misappropriating and inappropriately disclosing personal and professional information collected from military personnel who took classes from the university. It might well be the case that the seizure of the computers of the university might capture the names and other information of thousands of military personnel, but whether the individual names could be found in FBI databases is another question entirely.[2]

Chen has failed to show that evidence seized during a search conducted in a criminal investigation constitutes records that are "contained in a system of records." 5 U.S.C. § 552a(b). She has failed to show that such records are "retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a5). It does not matter whether the evidence seized during a search in this particular investigation might be associated with Chen's name. We are talking here about a "*system* of records," not individual instances where a particular government record might be associated with a particular individual. In the hypothetical investigations discussed above, the names of the persons on the fraudulent passports or the names of the military personnel in the electronic

[2] When a "forensic image" of a computer is made during a search, it is not produced in a "human readable" format. For agents and prosecutors to examine the electronic evidence, it first must be rendered intelligible by using a separate program, such as Forensic Toolkit. As this is done for the particular needs of a given investigation, presumably the "human readable" result would not become part of a larger, general FBI database.

evidence would presumably not be "retrieved" – or even retrievable – by their names, while the name of the subject of the investigation, if identified, might be associated with the evidence. The very same evidence, however, cannot be a "system of records" for the subject and *not* a "system of records" for those appearing on the passports or in the electronic evidence. It either is a "system" or it is not. The entire structure of the Privacy Act does not permit an interpretation in which a collection of evidence is and at the same time is not a "system of records," depending upon who is asking about them.

Similarly, the limitations imposed by the Privacy Act upon the dissemination of evidence obtained in a search cannot logically apply to evidence seized during a search. By its terms, the Act provides:

> No agency shall disclose any record which is contained in a system of records . . . to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . . to another agency . . . of the United States for a . . . criminal law enforcement activity if the activity is authorized by law, and if *the head of the agency . . . has made a written request* to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

5 U.S.C. § 552a(b)(7) (emphasis added). It would be absurd to interpret the Privacy Act to require the FBI to obtain the written consent of the subject of an investigation before it could share evidence from a search with the DEA or ATF unless the Administrator or Director specifically asked for it in writing with the particularity demanded by this provision.

Application of the requirements of the Act to evidence sought by a search warrant would be similarly illogical. For example, the Act provides:

> Each agency that maintains a system of records shall . . . collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs [and] inform each individual

> whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual . . . the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary; . . . the principal purpose or purposes for which the information is intended to be used; . . . the routine uses which may be made of the information . . . ; [and] the effects on him, if any, of not providing all or any part of the requested information.

Id., § 552a(e)(2) & (3). Again, it would be foolish to require the FBI to consider, before executing a search warrant, whether it could simply "collect [the] information to the greatest extent practicable directly from the subject" and then to present the subject with a form stating, among other things, "the principal purpose or purposes for which the information is intended to be used."

Another example is found in section 552a(d):

> Each agency that maintains a system of records shall . . . upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made of all or any portion thereof . . . ; permit the individual to request amendment of a record pertaining to him and . . . not later than 10 days . . . after the date of receipt of such request . . . promptly either . . . make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or . . . inform the individual of its refusal to amend the record . . . , the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official.

5 U.S.C. § 552a(d)(1) & (2) (internal punctuation omitted). Each agency that maintains a system of records must also:

> permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days . . . from the date on which the individual requests such review, complete such review and make a final determination . . . and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his

> disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination . . . .

Id., § 552a(d)(3) (internal punctuation omitted). It is beyond imagination that Congress intended that in the context of a search warrant obtained in a criminal investigation, a subject of the investigation would be permitted "to gain access to his record *or to any information pertaining to him which is contained in the system*, [and] permit him . . . to review the record and have a copy made of all or any portion thereof." *Id*., § 552a(d)(1) (emphasis added). It is similarly unimaginable that Congress intended for this elaborate review process to apply to evidence obtained during the execution of a search.

Chen's reliance upon *Henke v. U.S. Department of Commerce*, 83 F.3d 1453 (D.C. Cir. 1996) is of no help to her. Indeed, it is contrary to her argument. First, as the court in *Henke* observed, if the contents of evidence seized during any search warrant were suddenly deemed a "system of records" – which no court as yet done – the FBI might lose the ability "to invoke the exemptions in the Privacy Act which Congress intended to protect disclosure of national security information, confidential law enforcement information, or other information from confidential sources." 83 F.3d at 1461. Obviously, this was not Congress's intent in enacting the Privacy Act.

> We start with "the fundamental canon that statutory interpretation begins with the language of the statute itself." In every case, however, we must recognize that "the meaning of statutory language, plain or not, depends on context," a concern which is brought into high relief here by the fact that the determination that a system of records exists triggers virtually all of the other substantive provisions of the Privacy Act, such as an individual's right to receive copies and to request amendment of her records.

83 F.3d at 1453 (citations omitted).

Not only is it entirely implausible that Congress intended such consequences, to include evidence seized during the execution of a search within the definition of a "system of records" would be entirely at odds with the entire purpose for which the Act was written, which is "to allow individuals on whom information is being compiled and retrieved the opportunity to review the information and request that the agency correct any inaccuracies." *Id*., at 1456-57. Stated differently, the Act's "objective [is] assuring information quality by obtaining the views of persons with the interest and ability to contribute to the accuracy of agency records." *Id.*, 1457, n.2 (citation omitted).

As the movant, Chen had the burden of establishing that the photographs seized during the search of her residence were "record[s] . . . contained in a system of records" within the meaning of 5 U.S.C. § 552a(b). This she failed to do, both before the Magistrate Judge and in the Court. Accordingly, Chen's second motion to show cause was properly denied by Judge Anderson and her objection should be overruled.

V. CHEN HAS OFFERED NO EVIDENCE TO SUGGEST THAT STEPHEN RHOADS WAS AN AGENT OF THE FBI.

Nothing in Chen's motion establishes that Stephen Rhoads was a "*de facto* agent" of the FBI. Chen Obj. 5. The only case relied upon by Chen for this proposition is *Schmitt v. True*, 387 F. Supp. 2d 622 (E.D. Va. 2005), which, in a Sixth Amendment context, stated that "agency is created by the agreement to act on behalf of the state and pursuant to its instructions." *Id*. at 646. But there is nothing in the record (or anywhere else) to suggest that whatever may have been discussed with or disclosed to the media by Mr. Rhoads was done "on behalf of the [FBI] and pursuant to its instructions." Moreover, as the court in *Schmitt* made clear, the question of whether an individual is an agent of the government rests upon "long-standing, general principles

of agency law." *Id*. These principles make clear that any putative agency relationship between the government and Mr. Rhoads – if there ever were one – ended long before any communications he may have had with the media.

The Restatement (Third) of Agency provides that "[a]n agent's actual authority terminates . . . upon the occurrence of circumstances on the basis of which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf." RESTATEMENT (THIRD) OF AGENCY § 3.09 (2006). Further, an agent's apparent authority "ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority." *Id*. § 311. Nothing in Chen's motion contains any basis to conclude that, more than four years after the execution of the search of Chen's residence, the circumstances could have led Mr. Rhoads to conclude that – if it ever did – the FBI would assent to his taking action on its behalf. For similar reason, under no circumstance would it be reasonable for a third party to conclude that Mr. Rhoads acted with the actual authority of the FBI.

Accordingly, to the extent that Chen's motion was based upon the actions of Stephen Rhoads, her motion was properly denied by Judge Anderson. Accordingly, this Court should reject Chen's objection as well.

CONCLUSION

Chen's motions before the Magistrate Judge were meritless and were properly denied by the court. For the same reasons argued there, Judge Anderson's rulings should be upheld. Because Chen had a full and fair hearing before Judge Anderson on all of the very same issues she now raises, the record of which is available to the Court, there is no need for further hearings. For all of the reasons discussed above, Chen's objection should be overruled on the papers.

Respectfully submitted,

DANA J. BOENTE
UNITED STATES ATTORNEY

By: /s/
James P. Gillis
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that on November 16, 2017, I filed the foregoing using the ECF system, which will send a copy to defense counsel of record:

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN THE MATTER OF THE SEARCH OF 2122 21st Road North Arlington, Virginia; and IN THE MATTER OF THE SEARCH OF University of Management and Technology	)	Case Nos. 1:17cr236 1:17cr237

APPELLANT'S REPLY TO GOVERNMENT'S OPPOSITION TO OBJECTIONS TO DENIAL OF MOTION TO SHOW CAUSE WHY SANCTIONS SHOULD NOT ISSUE

Comes now Appellant, Yanping Chen Frame, by counsel, and replies to the Government's Opposition to her Objections to U.S. Magistrate Judge's Denial of Motion to Show Cause (Docs. 7 and 8).

Res Ipsa Loquitur – someone within the Government leaked to FOX News documents from the investigative file on Appellant. FOX News published an FBI 302 of an interview of Appellant's daughter, Appellant's immigration records, and family photographs, the sole copies of which were seized from Appellant's home pursuant to a search warrant of this Court.

Rather than acknowledge the undeniable, the Government propounds a suspension of disbelief.

Jurisdiction

The Government instructs that the Court has no jurisdiction to require an accounting of the Government because the Privacy Act provides a civil claim for relief and Appellant has not filed a discrete civil action under the Act. Government's Opposition ("Opp") at 2. The Government overlooks that the Privacy Act also provides for criminal sanctions. 5 U.S.C. Sec. 552a(i)(1). The Government's claim smacks of a criminal defendant denying the criminal

jurisdiction of this Court because the conduct of which he stands accused also creates civil liability.

Fed. R. Crim. P. 6(e)

The Government suggests that its adamant refusal to illuminate the circumstances of the investigation of Appellant and its leak of investigative files, requires the Court to conclude that no Grand Jury was ever impaneled. However, the *prima facie* evidence before the Court at this point allows only the inference that a Grand Jury was impaneled and its secrecy breached. The lack of any countervailing explanation from the Government leaves us with the face value of the FOX News disclosure – that a named FBI informant, Stephen Rhoads, was subpoenaed by the Grand Jury.

The Government reminds that no Government official would comment for FOX News, Opp at 5, suggesting that the media must identify the leaker to render a leak actionable.

Privacy Act

The Government disavows any violation of the Privacy Act with the absurd notion that the fruits of a search might not be archived in a manner that renders them attributable to the search and, consequently, retrievable as such. A search, like this one, pursuant to an investigation of an individual, perforce produces evidence retrievable by some identifier attributable to that individual. The Government resists this inescapable conclusion with implausible alternatives it repeatedly describes as "presumabl[e]." Opp at 8-9.

The Government catalogues the "absurd" results that would flow from concluding that the fruits of a search reside within a "system of records" subject to requirements of the Privacy Act. Opp at 10-12. However, the Government overlooks that JUSTICE/CRM-001, the Department of Justice record system related to persons "in potential or actual cases of concern to

the Criminal Division," Fed. Reg., V, 63, No. 34, 8663, is exempted from the provisions of the Privacy Act cited by the Government to illustrate its point. The FBI is exempted from the requirement to collect information on an individual under investigation, to the greatest extent possible, directly from that individual. 28 C.F.R. Sec. 16.91(b)(5). Similarly, the FBI is not required to allow an individual access to his or her investigative record. 28 C.F.R. Sec. 16.91(b)(3). The Privacy Act's restrictions on interagency dissemination of protected information do not apply to sharing between components of the Department of Justice. *Sussman v. Marshal's Service.*, 808 F. Supp. 2d 192, 196-204 (D.D.C. 2011).[1]

Stephen Rhoads as *De Facto* Agent of the FBI

Given the Government's absolute refusal to provide any transparency, the only evidence before the Court indicates that Mr. Rhoads was following the instructions of and being updated by the FBI for a period of years. Whether or not the agency relationship has now terminated bears not on the apportionment of responsibility for the agent's actions exclusively enabled by the FBI.

Fed. R. Crim. P. 41(g)

The Court's authority to define the parameters of a search and to dispose pursuant to Rule 41(g) of the fruits thereof, comprises as well its "power to punish for contempts [that] is inherent in all courts." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) (internal quotation and citation omitted). This inherent power certainly applies to conduct that "undermines the integrity of the process." *United States v. Shaffer Equipment*, 11 F. 3d 450, 461 (4th Cir. 1993).

[1] The Government enlists *Henke v. U.S. Department of Commerce*, 83 F. 3d 1453 (D.C. Cir. 1996), in its misbegotten effort to cast the fruits of a search as entirely outside Privacy Act protection. Opp at 12. However, *Henke*, also cited by Appellant, says absolutely nothing in support of the Government's claim. Rather, *Henke*, entailed no search and had nothing to do with criminal law enforcement.

Conclusion

This Court cannot lack the authority to protect due process when its own warrant has been used to violate that right.

Respectfully Submitted,

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Certificate of Electronic Service

I hereby certify that on December 7, 2017, the foregoing was filed electronically with the Court with consequent service on all parties.

/s/
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN THE MATTER OF THE SEARCH OF 2122 21st Road North Arlington, Virginia, *And* IN THE MATTER OF THE SEARCH OF University of Management and Technology,	Civil No. 1:17-cr-00236 Hon. Liam O'Grady

ORDER

This matter comes before the Court on Appellant Yanping Chen Frame's objection to Magistrate Judge Anderson's denial of Appellant's Motion to Show Cause. *See* Dkt. 1. On September 26, 2017, Judge Anderson denied Appellant's motion for a show cause hearing seeking to particularize the Government's alleged violation of Federal Rule of Criminal Procedure 6(e), the Government's authority to search and seize pursuant to a warrant of this Court, and the Privacy Act. *Id.* On December 8, 2017, this Court heard arguments on Appellant's objection, and took the matter under advisement. *See* Dkt. 11. Having considered the arguments and the pleadings, and for good cause shown, the Court hereby **APPROVES AND ADOPTS** Magistrate Judge Anderson's decision in full.

I. Background

Appellant, Dr. Yanping Chen Frame, is a naturalized United States citizen who emigrated from the People's Republic of China ("PRC") in 1987. On December 3, 2012, the Government sought and received from Magistrate Judge Anderson warrants to search Appellant's home and the offices of the University of Management and Technology ("UMT"), a for-profit institution owned by Appellant. The applications relied on an affidavit by Special Agent Timothy Pappa of

the Federal Bureau of Investigation which alleged that Appellant concealed her past PRC military involvement on her immigration applications. When the searches were executed, several news organizations were present. Fox News subsequently reported on the searches. Appellant claims that the reports "drew heavily, if not exclusively, from the file of the investigation of Appellant." Dkt. 1 at 4. Specifically, the television broadcasts included images which Appellant claims were "copied from family photographs seized in the search of Appellant's home." *Id.* Appellant has sworn that the seized photographs in question were the sole copies. Appellant also asserts that Fox News published portions of Appellant's immigration records, an FBI 302 of an interview with Appellant's daughter, and a document revealing the investigation as a counter-espionage matter. *Id.* Fox News also published comments from Stephen Rhoads, a former employee of UMT.

On March 10, 2017, Appellant filed a motion to show cause why sanctions should not issue, arguing that the Government had violated grand jury secrecy by intentionally leaking documents obtained during the searches, and that the Government had violated the Court's sealing order. *See* Dkt. 1-2 at 2. In May of 2017, Appellant filed a second motion to show cause, this time based on an alleged violation of the Privacy Act. Judge Anderson denied the motions, and Appellant subsequently objected on the grounds that Magistrate Judge Anderson incorrectly found (a) that Appellant had failed to make a *prima facie* showing that the Government had violated Federal Rule of Criminal Procedure 6(e); (b) that Magistrate Judge Anderson had no authority to sanction an abuse by the Government of the authority conferred by the Court to search for and seize evidence; and (c) that Magistrate Judge Anderson had no jurisdiction to pursue a violation of the Privacy Act since an order to show cause is not an articulated remedy

under the Act. The Court affirms Magistrate Judge Anderson on all three counts, for the reasons described below.

II. Analysis

a. Federal Rule of Criminal Procedure 6(e)

Federal Rule of Criminal Procedure 6(e) addresses the recording and disclosing of grand jury proceedings. It applies only to "matters occurring before the grand jury," and does not apply to documents and other materials obtained through other sources during the course of an investigation conducted by a law enforcement agency. *See United States v. Rosen*, 471 F. Supp. 2d 651, 655 (E.D. Va. 2007) (Ellis, J.). As Judge Ellis explained in *Rosen*,

> It is important to bear in mind that law enforcement investigations typically precede, or occur simultaneously with but independently of, grand jury investigations. Leaks of information from law enforcement investigations that relate to matters under grand jury investigation do not concern "matters before the grand jury," unless, of course, they disclose secret details about proceedings inside the grand jury room.

Id. Importantly, statements by the government about a law enforcement investigation are not the same as statements about a grand jury investigation. *Id.* (noting that the latter is a Rule 6(e) violation but the former is not). "Courts have therefore sensibly determined that a hearing on a claimed Rule 6(e) violation will not be held absent a showing of a *prima facie* Rule 6(e) violation." *Id.* at 656.

The Court in *Rosen* established the floor of a *prima facie* case for a Rule 6(e) violation, which requires Appellant to show, at minimum, "the detail and specificity necessary to reflect a disclosure of 'matters occurring before a grand jury.'" *Id.* The Court noted that the media reports at issue in *Rosen* did not identify grand jury witnesses, did not disclose questions that were asked or would be asked of witnesses in the grand jury, and did not describe or summarize a grand jury

investigation, and therefore held that the movant had failed to make a *prima facie* case. *Id.* Similarly, in this case, Appellant has not alleged disclosures with sufficient detail and specificity to reflect "matters occurring before a grand jury."

Appellant claims that Fox News disclosed the identity of a grand jury witness because Mr. Rhoads described himself as "working with the FBI," and stated that he had been called to testify before a grand jury. *See* Dkt. 1 at 5. Appellant argues that this constitutes a disclosure of a grand jury witness, and even asserts that because Mr. Rhoads has described himself as "working with" the FBI, he is a "*de facto* agent of same." *Id.* This is not the law. An individual's mere statement that he is "working with" the government is insufficient to establish an agency relationship. *See* 3 Am. Jur. 2d Agency § 14 ("An agency relationship results from the manifestation of consent by the principal that the agent will act on his or her behalf and subject to his or her control, with a correlative manifestation of consent by the agent to act on his or her behalf and subject to his or her control."); *see also Thomas v. Cox,* 708 F.2d 132, 136 (4th Cir. 1983) (explaining that there is no bright-line test to determine whether a citizen is acting as an agent of the state, and declining to find an agency relationship where a self-initiated informant contacted the government with information about the defendant). Nothing in the record in this case suggests that whatever may have been discussed with or disclosed to the media by Mr. Rhoads was done pursuant to FBI instructions.

Not only has Appellant failed to establish that Mr. Rhoads was a "*de facto* agent" of the FBI, Appellant has made no showing that Mr. Rhoads was the Fox News reports' sole source; one article mentioned eighteen other sources for the story. *See* Dkt. 8 at 3-5. Therefore, even assuming that Mr. Rhoads was a grand jury witness, there is no evidence that the Government (or anyone else bound by Fed. R. Crim. P. 6(e)) disclosed that fact. This, in conjunction with the

lack of detail and specificity regarding the contents of any witness questioning or testimony, lead the Court to conclude that Appellant has failed to make the *prima facie* showing for a hearing on an alleged Rule 6(e) violation.

b. Federal Rule of Criminal Procedure 41

Federal Rule of Criminal Procedure 41 enumerates the actions a magistrate judge may take with respect to search warrant proceedings. Under Fed. R. Crim. P. 41(b)(1), a "magistrate judge with authority in the district . . . has authority to issue a warrant to search for and seize a person or property located within the district . . . ." Rule 41(g) allows an owner of seized property to move for its return, and instructs that such motion should be filed in the district where the property was seized, at which point "the court must receive evidence on any factual issue necessary to decide the motion [and if] it grants the motion, the court must return the property to the movant . . . ." Fed. R. Crim. P. 41.

Appellant argues that Judge Anderson erred in holding that Rule 41 provided no authority for him to examine the Government's alleged misconduct in an evidentiary hearing. Dkt. 1 at 7. Appellant contends that "the Government was in possession of the disclosed documents solely by virtue of the Court's order" issuing the search warrant, and that because the Court defined the parameters of the search (including the date, time, and scope of the search), the Court "had authority to determine whether the search had exceeded [those] parameters." *Id.* Appellant also cites Fed. R. Crim. P. 41 for the proposition that the Court has continuing authority over property seized pursuant to its warrant. *See* Dkt. 1 at 7.

However, as noted by Magistrate Judge Anderson, Rule 41 does not authorize a court to manage the collection, storage, or use of property obtained pursuant to a search warrant, other than ordering the return of such property. *See* Fed. R. Crim. P. 41. Appellant has not provided

the Court with any case law or other authority in which a magistrate judge addressed the improper disclosure of information obtained through a search warrant he or she had issued, nor is the Court aware of any.

Appellant is correct that courts "invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities" (*Degen v. United States*, 517 U.S. 820, 823 (1996)), and it is also true that courts have inherent power to sanction to "impose order, respect, decorum, silence, and compliance with lawful mandates." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 461 (4th Cir. 1993); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 33 (1991) ("Federal courts have the inherent power to manage their own proceedings and to control the conduct of those who appear before them."). The Fourth Circuit has explained that the court's inherent power is "organic, without need of a statute or rule for its definition." *Shaffer*, 11 F.3d at 461. A court may issue orders, punish for contempt, and conduct investigations as necessary to exercise the power. *Id.* at 462.

However, Appellant has presented very little evidence to suggest that it was the Government who disclosed to the media documents seized during the execution of the search warrant; i.e., very little evidence to support her claim that the Government has flouted the authority of this Court. Under such circumstances, and given that a court's inherent power must be exercised with the "greatest restraint and caution, and then only to the extent necessary," Magistrate Judge Anderson did not err when he concluded that he had no authority to hold a show cause hearing to "develop the record" as to the alleged misconduct. *Id.; see also Degen*, 517 U.S. at 823; Dkt. 1 at 6.

c. *Privacy Act*

Finally, Appellant sought relief pursuant to the Privacy Act, 5 U.S.C. § 552a. Magistrate Judge Anderson found he had no jurisdiction to pursue the Privacy Act's implications because a show cause hearing is not an enumerated remedy of the Act.

The Privacy Act was enacted in 1974 to "regulate the collection, maintenance, use, and dissemination of information" by federal agencies "in order to protect the privacy of individuals identified in information systems maintained" by those agencies. *See Doe v. Chao*, 540 U.S. 614, 618 (2004). Under the Privacy Act, "no agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b).[1] The Act further instructs that "each agency that maintains a system of records" shall, upon request of an individual to gain access to his record or to any information pertaining to him contained in the system, permit the individual to review the record. 5 U.S.C. § 552a(d). The Privacy Act's civil remedies section, 5 U.S.C. § 552a(g), entitles an individual to bring a civil action against an agency that fails to comply with the provisions of the Act. The individual "may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection." *Id.*

To prevail on a wrongful disclosure claim under the Privacy Act, a movant must show that (1) the disclosed information is a "record" contained within a "system of records"; (2) the agency improperly disclosed information; (3) disclosure was willful or intentional; and (4) disclosure adversely affected the movant. *See Piccone v. U.S. Patent & Trademark Office*, No. 1:15-CV-536, 2015 WL 6499687, at *5 (E.D. Va. Oct. 27, 2015); *Cloonan v. Holder*, 768 F. Supp. 2d 154, 163 (D.D.C. 2011). Appellant's attempt to meet this standard with regard to her

[1] There are several exceptions to this rule that do not apply here.

complaint about the Government's alleged disclosure of items seized during the search of her home fails in multiple respects.

First, Appellant has failed to show that evidence seized during a search conducted in a criminal investigation constitutes records that are "contained in a system of records" under the Privacy Act. The Privacy Act defines the term "system of records" to mean "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). Appellant has made no showing that the information she asserts was disclosed by the Government was within such a system. *See* Dkt. 1; Dkt. 10; *see also* Dkt. 8 at 8-10.

Even if items seized during a government search warrant could be considered part of a "system of records," the Court has been unable to find any prior case in which the disclosure of an item seized during the execution of a search warrant was found to constitute a violation of the Privacy Act. As the Government notes, applying the requirements of the Privacy Act to evidence sought by a search warrant would lead to illogical results. The Act requires an agency that maintains a system of records to "upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made of all or any portion thereof." 5 U.S.C. § 552a(d). It defies logic to conclude that Congress intended the Privacy Act to require government agencies such as the FBI to permit the subject of a criminal investigation "to gain access to his record or to any information pertaining to him which is contained in the system." Indeed, Appellant seems to acknowledge this fact, admitting that a hearing before a magistrate judge would "not constitute a

remedy [but] would be simply a means . . . of seeking to particularize the Government's violation." Dkt. 1 at 8.

Finally, even if there were a violation of the Privacy Act arising from an alleged disclosure of information obtained in a search warrant, jurisdiction would arise from that statute, which requires an original civil action filed with the district court. *See* 5 U.S.C. § 552a(g). A hearing before the magistrate judge who authorized the warrant would not be an appropriate forum in which to make an original Privacy Act claim. Rather, Appellant would better pursue the avenues for civil relief provided by the Privacy Act, such as a civil complaint in which Appellant could be entitled to obtain discovery related to the manner in which the information was disclosed to Fox News.

III. Conclusion

The Court agrees with Magistrate Judge Anderson that Appellant has alleged a troubling series of events in which information seized during a Court-authorized search may have been wrongfully disclosed to news organizations. However, for the reasons described above and for the reasons stated in the December 8, 2017 hearing, Appellant has failed to establish a *prima facie* case of a Fed. R. Crim. P. 6(e) violation, has failed to show that Rule 41 authorizes Magistrate Judge Anderson to hold the show cause hearing sought, and has failed to show that the Privacy Act entitles her to the relief sought before Judge Anderson. Therefore, the Court hereby **APPROVES AND ADOPTS IN FULL** Magistrate Judge Anderson's Memorandum Opinion and Order (Dkt. 26).

IT IS SO ORDERED.

January 23, 2018
Alexandria, Virginia

Liam O'Grady
United States District Judge

RECORD NOS. 18-6132(L); 18-6133

In The

United States Court of Appeals

For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

THE MATTER OF THE SEARCH OF 2122 21ST ROAD NORTH ARLINGTON, VIRGINIA and IN THE MATTER OF THE SEARCH OF UNIVERSITY MANAGEMENT AND TECHNOLOGY,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

CORRECTED BRIEF OF APPELLANTS

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Statement of Jurisdiction

On December 3, 2012, a Magistrate Judge of the Eastern District of Virginia issued the Government warrants to search the home and the business of Appellant. The searches proceeded on December 5, 2012.

Over four years later, the Government declined prosecution and on February 23, 2017, Appellant moved the Magistrate Judge pursuant to Fed. R. Crim. P. 41(g) for the return of the property seized in the searches.

Immediately following the motion, FoxNews ("FOX") published (on February 24, 2017) particulars from the investigative file on Appellant and images of property (photographs) seized during the searches – which information perforce emanated from a participant in the investigation. The FOX broadcast also included an interview of an FBI informant who revealed that he had told Appellant -- on instruction of the FBI -- that he had been subpoenaed to appear before a grand jury.

Appellant moved for a show cause hearing as to why sanctions should not issue against the Government for the willful disclosure of documents collected in a criminal investigation of Appellant, to include documents seized in a search ordered by the court.

On September 26, 2017, the Magistrate Judge denied Appellant's Motion to show cause. On January 23, 2018, the District Court affirmed the

judgment of the Magistrate Judge denying Appellant's Motion to Show Cause. (Joint Appendix [hereinafter "JA"] 313-21) This order was a final decision within the meaning of 28 U.S.C. § 1291, in that it "end[ed] the litigation on the merits and [left]... nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

Appellant filed a timely notice of appeal on February 5, 2018. (JA 322) The Court has appellate jurisdiction under 28 U.S.C. § 1291.

Statement of Issues Presented for Review

a. Whether a District Court has inherent authority and responsibility to punish wrongful conduct undertaken by the Government in connection with a search ordered by the court.

b. Whether a *prima facie* showing of a violation of Fed. R. Crim. P. 6(e) requires proof of facts the face value of which demonstrates a violation of Rule 6(e) or, instead, proof of facts which absolutely preclude any other conclusion.

c. Whether a District Court has the authority to explore a possible violation of the Privacy Act occurring in the context of a criminal investigation or is precluded from doing so absent a Civil Complaint.

Statement of the Case

Appellant Dr. Yanping Chen Frame is a naturalized United States citizen who emigrated from the Peoples Republic of China in 1987. On December 5, 2012, the Government searched Appellant's home and business, the University of Management and Technology ("UMT"), a for

profit institution owned by Appellant, pursuant to warrants issued by a Magistrate Judge of the District Court. (JA 58-82, 87-91)

Contemporaneously, the Government moved the sealing of the warrants and attendant documents, which motion the Magistrate Judge granted. (JA 83-85)

The Government's search warrant applications relied exclusively on the "say-so" of one man. SA Timothy Pappa of the FBI provided the affidavit common to both applications. (JA 59-79) SA Pappa's central tenet is his stated belief that Appellant has concealed on her immigration applications, past military service to China. (JA 59) SA Pappa's affidavit is a study in overstatement, innuendo and personal conjecture bereft of substantiated cognizable wrongdoing. (JA. 161-64)[1]

Deprived of any reliable indicator of wrongdoing, SA Pappa is reduced to the flimsiest of conjecture – noting, as an example, that Appellant has a Chinese rocket model "comparable to NASA's Saturn series" in her office. (JA 164)

Appellant has always acknowledged her past as a civilian physician in the space program of the Peoples Liberation Army ("PLA"). SA Pappa

[1] The following references to SA Pappa's affidavit are reflected with citations to the record in a pleading of Appellant to the Magistrate Judge following her Motion to Show Cause, Appellant's Addendum to Motion. (JA 159-82)

overlooks that the PLA employs no fewer than four categories of uniformed civilians in fields to include medicine. (JA 161-62, 177) Without a single indicator of specific conduct injurious to the interests of the United States, SA Pappa baldly suggests that Appellant uses UMT to siphon information about its military students to China. (JA 60-63)[2]

Over four years later and following the Government's oral notice that it had declined prosecution, Appellant moved the return of her seized property on February 23, 2017. (JA 118-20) Following the Government's return of said property, the Magistrate Judge denied the motion as moot. (JA 157)

On February 24, 2017, the day after Appellant moved the return of her property, FOX broadcast the first of two newscasts with tandem online articles about Appellant; accusing her of procuring her citizenship through fraud and conducting espionage on behalf of China. (JA 126-31, 168-72) FOX would pillory Appellant as a fraud and a traitor in service of the Chinese government in two Friday evening prime time broadcasts

[2] It bears noting that Appellant is not the first individual of Chinese origin to be investigated by SA Pappa, only to be vilified through the offices of FOX after the Government has declined to charge a crime. See JA 174-75, wherein Catherine Herridge of FOX (whose byline appears also on the stories about Appellant) recounts the allegations against State Department contractor Xiaoming Gao and reports that the Department of Justice has declined to prosecute "despite an FBI probe."

accompanied by web postings. These drew heavily, if not exclusively, from the file of the investigation of Appellant. The two newscasts, the second running on April 28, 2017, revealed no fewer than five images copied from family photographs "exclusively obtained by FoxNews" seized in the search of Appellant's home. (JA 127, 169-71, 227-29)

The Government has admitted that at least two of the FOX images correspond to photographs seized in the search of Appellant's home. (JA 199) Appellant has sworn without controversion that all five personal photographs broadcast by FOX were seized in the search of her home and that they were sole copies. (JA 223-24)

Additionally, FOX published portions of Appellant's immigration records, portions of a report (FD 302) of an FBI interview of Appellant's daughter, a description of a 2012 interview of Appellant by the FBI, and a description of documents "reviewed by FoxNews" as revealing the investigation to be a "200d" or counter espionage matter – all sensitive matters properly accessible only to the investigators. (JA 127, 129, 230-33)

On both occasions, FOX broadcast the recorded comments of "whistleblower" Stephen Rhoades, a former employee of UMT "who says he worked with the FBI on the case" after "the FBI approached him in 2012 regarding the federal investigation." (JA 127-28) Mr. Rhoades described to

FOX details of Appellant's immigration applications and revealed to the network "that he was instructed by the FBI to tell Chen that he was going to testify before a Virginia grand jury" because "they wanted to, I guess, see how… she would react." (JA 130) Remarkably, the Government intentionally caused this breach of Grand Jury secrecy, acknowledging that it instructed Mr. Rhoades to so inform Appellant.

> **The Court:** Okay. So we have a Government investigative person…
> **Mr. Gillis:** Yes.
> **The Court:** telling someone to disclose that he is going to be testifying in front of a grand jury.
> **Mr. Gillis:** That is correct, Your Honor…

JA 202.

The Government also conceded that Fed. R. Crim. P. 6(e) proscribes as well a person subject to its restrictions who causes another to disclose grand jury information. (JA 203)

FOX also included in its first broadcast an FBI email to Mr. Rhoades discussing (and decrying) the status of the investigation – some two years after the searches. (JA 232)

On May 8, 2017, the Magistrate Judge unsealed all documents filed with the court pertaining to the searches. (JA 156) The Magistrate Judge prefaced order by stating "[t]o the extent any documents in these matters [pertaining to the two searches] are currently under seal." The preface

acknowledges that the initial sealing order expired on March 4, 2013. (JA 86) Nonetheless, the District Court had "partially unsealed' the search warrant affidavit subsequent to that date for viewing by Appellant's counsel. (JA 117) Further, the Clerk's Office of the District Court was treating the Court's file as sealed as of February 27, 2017. (JA 160, n.1)[3]

Nonetheless, FOX managed to publish seized photographs on February 24, 2018 (JA 126, 128) - while the entirety of the District Court's files on the searches were still being treated by the court as sealed. These files included SA Pappas' affidavit in support of the search warrants - from which portions of FOX's first broadcast appear to have been directly drawn. (JA 66-67, 128, 72, 129, 160)

The Magistrate Judge correctly surmised that only the Government would properly have had access to the fruits of the search or the accompanying investigative file at that point. The Government conceded the Government's responsibility for the disclosure with evident discomfort.

> **The Court:** Okay. So these photographs have now been disclosed to the public.
> **Mr. Gillis:** Yes Your Honor.
> **The Court:** So whether it was Mr. Rhoades or whether it was someone else who either gave Mr. Rhoades access without

[3] The Magistrate Judge's denial of relief based on a violation of the Court's seal was not challenged in Appellant's Objections to the Magistrate Judge's decision. Nor is it a ground of this appeal. However, the practical effects of the seal are pertinent to consideration of issues comprised in this appeal.

> appropriate restrictions or guarantees of further disclosure, or someone else within the Government had to have disclosed that information; is that right?
> **Mr. Gillis:** If the Court's finding is correct. Then I would concede for purposes of the hearing that that's true.

JA 36.

Appellant's Motion to Show Cause was augmented and responded to in multiple pleadings.[4] Appellant's motion came to comprise the following grounds:

1. Governmental abuse of its authority, conferred by the court, to conduct a search;
2. Governmental violation of grand jury secrecy; and
3. Governmental violation of Appellant's rights under the Privacy Act.

On May 8, 2018, the Magistrate Judge denied Appellant's Motion to Show Cause insofar as it pertained to the court's seal (a ground not pursued

[4] This appeal comprises and incorporates by reference the evidence and arguments propounded by Appellant in the following pleadings in EDVA 1:12sw1002 and 1003: Motion to Show Cause (JA 121), Reply to Government's Response to Motion to Show Cause (JA 144), Addendum to Motion to Show Cause (JA 159), Second Addendum to Motion to Show Cause (JA 219), Reply to Government's Response to Second Addendum (JA 243), and Third Addendum to Motion to Show Cause (JA 250). Additionally, this appeal comprises and incorporates by reference the oral arguments presented on May 8 and September 5, 2017 in EDVA 1:12sw1002 and 1003 (JA 183-218, 9-43), and the oral argument presented on December 8, 2017 in 1:17cr236 and 237 (JA 299-312). Finally, this appeal comprises and incorporates by reference Appellant's Objection to the Magistrate Judge's Order, EDVA 1:12sw1002 and 1003 (JA 267) and her Reply to the Government's Opposition, EDVA 1:17cr236 and 237 (JA 295).

here) and the Government's apparent breach of Grand Jury secrecy in violation of Fed. R. Crim. P. 6(e). (JA 158)

Following additional pleadings and arguments, the Magistrate Judge rejected the other grounds propounded by Appellant; Governmental abuse of its court conferred authority to search; and Governmental violation of Appellant's rights under the Privacy Act; denying Appellant's Motion to Show Cause on September 26, 2017. (JA 260-66)

Appellant appealed the Magistrate Judge's Decision to the District Judge in objections filed on October 10, 2017. (JA 267-76) Following additional pleadings by Appellant and the Government and argument on December 8, 2017, the District Judge affirmed the Magistrate Judge's decision on January 23, 2018. (JA 313-21) The decisions of the District Court and of the Magistrate Judge both specifically referenced the fact that no earlier court could be found to have punished the Government for leaking criminal investigatory files or the fruits of a search. (JA 265, 317-18, 320)

This appeal follows.

The consequences to Appellant of this assassination of her character and loyalty have been cataclysmic for her and all close to her. UMT has been pilloried online and besieged by adverse decisions by regulators. (JA 182, 248-49) A third FOX broadcast of June 28, 2017 reports newly

instituted probes by the Senate Judiciary Committee and the Department of Defense – both specifically attributed to FOX - into UMT and federal tuition support for its students. (JA 253-57)

The FBI had over four years to comb all of UMT's digital and paper data and over 50 boxes and bags of property (to include computers) seized from Appellant's home (JA 91, 91A) over four years to apply the vast investigatory resources of the Government to any and every lead to spring from the documents and computers it seized. The Government decided to charge Appellant with absolutely nothing.

Instead, it decided to tell FOX.

Summary of Argument

A District Court fails to discharge its responsibility to safeguard the integrity of its own proceedings and to protect against Executive Branch encroachment on judicial function when it stands silent after the Executive Branch, for no legitimate law enforcement purpose and after declining prosecution, leaks documents seized in a search ordered by the court and information gathered and/or generated pursuant to a criminal investigation.

A *prima facie* showing of a breach of grand jury secrecy in violation of Fed. R. Crim. P. 6(e) is made when an individual, acting in the capacity of

a *de facto* agent of the Government or at the behest of a Government official, discloses the identity of a grand jury witness.

A District Court is not estopped from exploring a violation of the Privacy Act as part of its inquiry into Executive Branch abuse of a search warrant issued by the court, simply because no discrete civil claim for statutory relief under the Privacy Act has been made.

A District Court is not excused from its responsibility simply because it can find no earlier case of a court's punishing an identical Executive Branch abuse.

Standard of Review

On an appeal of the denial of a motion to show cause, this Court reviews the District Court's factual findings for clear error and legal conclusions *de novo*. *See United States v. Perry*, 757 F.3d 166, 171 (4th Cir. 2014).

Argument

1. A District Court has inherent authority and responsibility to punish wrongful conduct undertaken by the Government in connection with a search ordered by the court.

The District Court recognized its "inherent power to sanction to 'impose order, respect, decorum, silence, and compliance with lawful mandates.'" District Court Order ("Order") at 6 (quoting, *United States v.*

Shaffer Equip. Co., 11 F.3d 450, 461 (4th Cir. 1993)). Nonetheless, it refused to exercise that power, noting that it had before it no "case law or other authority in which a [] judge addressed the improper disclosure of information obtained through a search warrant he or she had issued." Order at 6.

In so refusing, the District Court derogated its obligation to safeguard against Executive Branch abuses, to protect its processes from corruption, and to safeguard the Fourth Amendment rights of an individual subjected to search pursuant to its warrant.

The District Court began by misstating the evidence before it. "[T]he television broadcasts included images which Appellant **claims** were 'copied from family photographs seized in the search of Appellant's home.'" Order at 2 (emphasis added). In fact, the Government conceded that it had seized in its search of Appellant's home photographs published by FOX – which seized photographs were the sole copies at that time as per the uncontroverted affidavit of Appellant.

Ignoring the uncontroverted evidence showing that the seized property, i.e., the Government, was the origin of the broadcast images, the District Court finds "very little evidence to suggest that it was the

Government who disclosed to the media documents seized during the execution of the search warrant." Order at 6.

The photographs were published by FOX while the entirety of the District Court's files on the searches was still being treated by the Court as sealed. Who but the Government would properly have had access to the fruits of the search or the accompanying investigative file at that point? The answer is no one. As recounted above, the Government was forced to concede this discomfiting truth in the face of the Magistrate Judge's questions.

> **The Court:** So whether it was Mr. Rhoades or whether it was someone else who either gave Mr. Rhoades access without appropriate restrictions or guarantees of further disclosure, or someone else within the Government had to have disclosed that information; is that right?
> **Mr. Gillis:** If the Court's finding is correct. Then I would concede for purposes of the hearing that that's true.

JA 36.

The Magistrate Judge articulated the inescapable inference – that a party to the investigation of Appellant had to be responsible, directly or indirectly, for the conveyance of the photographs to FOX. Unfortunately, neither the Magistrate Judge not the District Court remembered the inference in deciding on Appellant's request for a hearing.

However, this Court need not rely on inference to determine the Government's responsibility for the leak to FOX. The immediate source of most of the information published by FOX was a man who described himself in his on camera interview as working with the FBI at the behest of that agency on the investigation of Appellant. Nearly two years after the searches of Appellant's home and business, Stephen Rhoades was still receiving updates on the case from the FBI investigator.

Mr. Rhoades reports being instructed by the FBI to reveal to Appellant that he would be testifying before a grand jury because "they wanted to, I guess, see how… she would react." (JA 130)

Stephen Rhoades was a *de facto* agent of the Government. This Court has inferred an agency relationship between law enforcement and civilian interlocutors of criminal defendants based on precisely the facts at bar.

> "*Messiah, Henry* and *Moulton* clearly teach that, **where the state instructs an interlocutor to obtain information from a particular defendant**, the interlocutor acts on behalf of the state."

Schmitt v. True, 387 F. Supp. 2d 622, 649-50 (E.D. Va. 2005) (emphasis added).

The District Court's inaction impugns the very point of its Constitutional authority to issue a search warrant. A court's detached scrutiny of an application for a search warrant protects an individual's

"privacy interest in being free from an unreasonable invasion and search of his home." *Steagald v. United* States, 451 U.S. 204, 214 (1981). The protection of that privacy interest is obliterated when a party to the search or the investigation of which it is a part, decides for his own reasons to publicize the product of the search.

Further, the District Court failed to attend to the Court's inherent authority to protect the proceedings surrounding its search warrant responsibilities. *See Degen v. United States*, 517 U.S. 820, 823 (1996) ("Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities."). The Government was in possession of the disclosed documents solely by virtue of the District Court's order. The District Court defined the parameters of a search—the time frame of the search, the hours of the day when it may occur, the scope of the search and the extent of the items to be seized – and the District Court had authority to determine whether the search had exceeded the parameters it had set.

Betwixt these enumerated responsibilities lies the responsibility to protect the proceedings and "preserve the judicial process from

contamination." *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting).

Finally, the District Court misconstrued its authority under Fed. R. Crim. P. 41, concluding that "Rule 41 does not authorize a court to manage the collection, storage, or use of property obtained pursuant to a search warrant, other than ordering the return of such property." Order at 5. However, the lack of responsibility for the ministerial duties attending custody of seized property does not signify a lack of authority over the manner in which those duties are discharged. Fed. R. Crim. P. 41(g) allows an owner of seized property to move its return. In the event such a motion is granted, Rule 41(g) calls for "the **court** [to] return the property" (emphasis added). The choice of words indicates that the court, not the Government, has ongoing control over the seized property. The disclosure to Fox News deprived the District Court of its authority to determine the proper disposition of the product of the searches it authorized.

The District Court could find no previous instance of a court having addressed the improper disclosure of property seized in a court ordered search, Order at 5-6, but that is no excuse. The Government disclosed items seized in a search for no legitimate law enforcement purpose. Beyond Rule 41(g), this conduct implicates the Court's imperative "to prevent parties

from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the Constitution or laws) governing matters apart from the trial itself." *United States v. Williams*, 504 U.S. 36, 46 (1992) (internal citations omitted).

The net effect of the District Court's inaction is an utter abrogation of the judiciary's responsibility pursuant to the separation of powers.

> "The doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among the three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 85 (1926) (J. Brandeis dissenting).

The separation of powers is transgressed when the Executive Branch "attempts to usurp the judiciary's traditional and constitutional role of giving prior approval to searches and seizures." *Zweibon v. Mitchell*, 516 F.2d 594, 626 (D.C. Cir. 1975).

A court's authority over a search it has ordered does not expire once the order is signed. The judiciary "must remain vigilantly prepared to fulfill its own responsibility to channel Executive action within constitutional bounds." *Id.* at 604-05.

2. A *prima facie* showing of a Fed. R. Crim. P. 6(e) violation requires proof of facts, the face value of which demonstrates a violation, not proof of facts which absolutely preclude any other conclusion.

Rule 6(e) ensures the secrecy of grand jury proceedings by forbidding covered individuals from disclosing any "matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(2)(B). The District Court entirely misconstrued the evidence before it by concluding that the FOX broadcasts failed to demonstrate a *prima facie* violation of the rule. Order at 5.

The Rule 6(e)'s ambit is read expansively:

> "[T]he phrase 'matters occurring before the grand jury' encompassesnot only what has occurred and what is occurring, but also what is likely to occur, including the identity of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.

In re Cudahy, 294 F.3d 947, 951 (7th Cir. 2002) (internal quotations and citation omitted).

This Court has clearly set out the two requirements of a *prima facie* showing of a violation of the rule.

> "In order to establish a prima facie case of a Rule 6(e) violation, the complainant must show that (1) information was knowingly disclosed about 'matters occurring before the grand jury,' and (2) the source of the information is a person subject to Rule 6(e)."

Finn v. Schiller, 72 F.3d 1182, 1189 n. 7 (4th Cir. 1996).

Cudahy specifically includes the "identity of witnesses" within the rule's reach. Stephen Rhoades met *Finn's* first requirement by disclosing the identity of a grand jury witness, himself, to both Appellant and FOX.

Despite the singular specificity of Mr. Rhoades' disclosure, the District Court contravened *Cudahy* by finding that "Appellant has not alleged disclosures with sufficient detail and specificity to reflect 'matters occurring before a grand jury.'" Order at 4.

Further, there is no question that Mr. Rhoades met *Finn's* second requirement as a person subject to Rule 6(e). Mr. Rhoades was a *de facto* agent of the FBI. As such, the Government bears the responsibility for his disclosure to FOX.

Moreover, the Magistrate Judge had already inferred, and the Government had conceded, that the Government was responsible, directly, or indirectly, for the disclosure to FOX.

Finally, Mr. Rhoades' disclosure to FOX was not the only Rule 6(e) violation revealed in the FOX broadcasts. He also earlier revealed his own identity as a grand jury witness to Appellant during the investigation – and he did so at the Government's specific instruction. The Government has conceded that Rule 6(e) proscribes as well a person subject to its restrictions who causes another to disclose grand jury information.

The District Court ignored its own inference and Government's admissions to find that "even assuming that Mr. Rhoades was a grand jury witness, there is no evidence that the Government (or anyone else bound by Fed. R. Crim. P. 6(e)) disclosed that fact." Order at 4.

The only evidence before the District Court indicates that a bona fide grand jury witness revealed his identity as such not once, but twice, and that he did so the first time, at least, at the instruction of another individual subject to Rule 6(e), an FBI official.

A *prima facie* case is such as is "sufficient to establish the fact [propounded], and if not rebutted, remains sufficient for the purpose." *Kelly v. Jackson*, 31 U.S. 6 Pet. 622, 632 (1832). Consequently, a *prima facie* showing, the trigger for a hearing, need not be dispositive. Rather, once made, it can be rebutted – which the Government might have sought to do had the District Court correctly accorded Appellant a hearing. The District Court ignored the facial sufficiency of Appellant's showing – appearing to find instead that Appellant's showing was insufficient because it conceivably might be rebuttable.

This it did without a shred of rebuttal evidence from the Government. Indeed, not only has a *prima facie* case for a violation of Rule 6(e) been

made, the Court has no evidence at this point to support any other conclusion.

The Government resolutely refused to shed any light on the investigation of Appellant or even to clarify whether a grand jury had been empaneled. It bears noting, however, that the Government's admissions strongly suggest that a grand jury was, in fact, empaneled.

> **The Court:** Okay. So we have a Government investigative person…
> **Mr. Gillis:** Yes.
> **The Court:** telling someone to **disclose** that he is going to be testifying in front of a grand jury.
> **Mr. Gillis:** That is correct, Your Honor…

JA 202 (emphasis added).

The Government did not concede that Mr. Rhoades was told to "tell" someone or to "represent to" someone that he was a grand jury witness. Rather, the Government conceded that Mr. Rhoades was told to "disclose" such. The word "disclosed" implies the authenticity of the thing disclosed.

Notwithstanding a grand jury is empaneled and operated by the Government, it "is not a free-floating institution, accountable to no one. It is an 'arm of the court,' and thus falls under the supervisory authority of the district court." *Carlson v. United States*, 837 F.3d 753, 761–62 (7th Cir. 2016) (citing *Levine v. U.S.*, 362 U.S. 610, 617 (1960)). The District Court abnegated its supervisory authority to police the operations of a grand jury.

That authority, which extends as far as dismissing an indictment, *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988), clearly encompasses the requested evidentiary hearing.

The District Court's decision not to grant one failed to assure the fair operation of a grand jury under the auspices of the court and neglected a specific purpose of Fed. R. Crim. P. 6(e) to "protect an innocent accused who is exonerated from disclosure of the fact that he has been under investigation." *In re: Grand Jury Investigation,* 903 F.2d 180, 183 (3rd Cir. 1980) (internal citations omitted).

3. A District Court has the authority to explore a possible violation of the Privacy Act occurring in the context of a criminal investigation and is not precluded from doing so absent a Civil Complaint.

The District Court erred in finding that jurisdiction to consider a violation of the Privacy Act "requires an original civil action filed within the district court. *See* 5 U.S.C. Sec. 522a(g)." Order at 9.

Appellant was not pursuing any of the remedies listed in the statute cited by the District Court; correction of records, access to same, etc. The statute's provision that the district court "shall have jurisdiction over the matters under the provisions of this subsection," 5 U.S.C. Sec. 522a(g)(1)(D), confers jurisdiction for purposes of the relief delineated in the subsection. It says nothing about precluding a court's jurisdiction to

explore a violation of the Privacy Act for a purpose other than seeking the relief enumerated in the statute. Appellant has not sought such relief and was not attempting "an original Privacy Act claim" as characterized by the District Court. Order at 9. Rather, Appellant referenced the Privacy Act to inform the Court's consideration of the Government's abuse of its court-conferred authority to search and seize.

The District Court further erred by finding it had no jurisdiction to pursue the Privacy Act's implications because a show cause hearing is not an enumerated remedy of the Act. Order at 7. The hearing would not have constituted a remedy. Rather, it would have been simply a means of further particularizing the Government's violation of the Magistrate Judge's search warrants.

There is no question that someone in the Government provided FOX with information collected by the FBI in its investigation of Appellant. The FOX broadcasts included a description of an FBI interview of Appellant, a portion of the FBI's report (FD-302) of an interview of Appellant's daughter, portions of Appellant's immigration records, and a description of a document revealing the investigation to be a "200d" or counterespionage matter. Just as unquestionably, the Government provided FOX with documents seized in its search of Appellant's home; family photographs –

one helpfully labeled with the names of Appellant's sundry family members. (JA 169)

The proscriptions of the Privacy Act comprise "all records which are used by [an] agency in making any determination about any individual…" 5 U.S.C. § 552a(e)(5). Clearly, the investigative file compiled on Appellant meets this description. Moreover, a criminal investigation to include a search perforce produces evidence retrievable "by the name of the individual [being investigated] or by some identifying number, symbol or other identifying particular assigned to the individual." § 552a(a)(5). Nonetheless, the District Court found, without elaborating, that the investigative file compiled by the FBI on Appellant and the fruits of the searches of her home and business did not reside within a "system of records" as required by the Act. Order at 8.

The District Court went on to find that "applying the requirements of the Privacy Act to evidence sought by a search warrant would lead to illogical results." Order at 8. The District Court overlooks, however, that JUSTICE/CRM-001, the Department of Justice record system related to persons "in potential or actual cases of concern to the Criminal Division," Fed Reg., V, 63, No. 34,8663, is exempted from the pertinent provisions of the Act. As an example, the FBI is not required to allow an individual

access to his or her investigative record. 28 C.F.R. Sec. 16.91(b)(3). The District Court posits this very scenario as illustrative of the Act's inapplicability to criminal investigative files. Order at 8.

The Government's obligations under the Privacy Act are not relaxed for dealings with the press.

> "[P]roviding information to the media is not among the list of permissible disclosures listed in the Privacy Act. *See* 5 U.S.C. § 522a(b)."

Kelley v. Federal Bureau of Investigation, 67 F. Supp. 3d 240, 259-60 (D.D.C. 2014).

Pertinent to the Court's consideration of the Government's abuse of its authority to search and seize, the Privacy Act makes it a crime "willfully [to] disclose" protected material in a manner not allowed under the statute. 5 U.S.C. § 522a(i)(1).

In reviewing the District Court's refusal to explore through a hearing the Government's apparent violation of the Privacy Act, this Court should remember that:

> "[W]here an agency – such as the FBI – is compiling information about individuals primarily for investigative purposes, Privacy Act concerns are paramount…"

Henke v. U.S. Dept. of Commerce, 83 F.3d 1453, 1461 (D.D.C. 1996).

All of the foregoing notwithstanding, the District Court declined a hearing on the Privacy Act violations noting that it had been "unable to find

any prior case in which the disclosure of an item seized during the execution of a search warrant was found to constitute a violation of the Privacy Act." Order at 8.

Conclusion

The District Court agreed with the Magistrate Judge that Appellant's rendition of the Government's abuse of its investigatory authority and of its court-conferred search authority depicted "a troubling series of events." Order at 9. Nonetheless, the District Court refused to grant an evidentiary hearing because it could not find an example of another court having done so before.

Imagine a fire engine that refuses to answer an alarm because it comes from an address the engine has never assisted before?

Request for Oral Argument

Counsel for Appellant respectfully requests oral argument.

Respectfully submitted,

DR. YANPING CHEN FRAME
By Counsel

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Dated: March 28, 2018

/s/ John C. Kiyonaga
Counsel for Appellants

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I hereby certify that on this 28th day of March, 2018, I caused this Corrected Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 28th day of March, 2018, I caused the required copy of the Corrected Brief of Appellants to be hand filed with the Clerk of the Court.

/s/ John C. Kiyonaga
Counsel for Appellants

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 18-6132(L) & 18-6133

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THE MATTER OF THE SEARCH OF 2122 21ST ROAD NORTH, ARLINGTON, VIRGINIA & IN THE MATTER OF THE SEARCH OF UNIVERSITY MANAGEMENT AND TECHNOLOGY

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Virginia
at Alexandria
The Honorable Liam O'Grady, District Judge

BRIEF OF THE UNITED STATES

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Introduction

The appellant, Dr. Yanping Chen Frame, has sought to use procedurally idiosyncratic and doctrinally novel means to garner information about purported government misconduct. The district court rejected these attempts. This Court should as well.

This case arises from Chen's assertion that the government leaked damaging information about her to the media. More specifically, Chen contends that the government improperly disclosed information about two search warrants executed in December 2012, as well as additional materials relating to the underlying investigation. In response, Chen filed motions before the magistrate judge who had authorized the search warrants in which she sought an evidentiary hearing and sanctions. While Chen cited several sources of law to justify such a hearing, including the Federal Rules of Criminal Procedure and the Privacy Act, she did not file a standalone claim under any of those provisions. Instead, she asked the court to invoke its supervisory powers to investigate her allegations. Concluding that her *prima facie* evidence of government wrongdoing was not persuasive, both the magistrate judge and the district court declined to do so.

In the government's view, this Court is without jurisdiction to hear an appeal from those decisions. If, alternatively, the Court were to reach the merits of this case, the district court did not abuse its discretion in denying Frame's requests.

Issues Presented

1. When a non-party to any civil or criminal proceeding asks a district court to hold an evidentiary hearing to investigate alleged government misconduct, and the district court concludes that *prima facie* evidence of such misconduct is lacking, is the district court's decision not to hold a hearing an appealable order?

2. If there is appellate jurisdiction, did the district court abuse its discretion when it determined that the evidence of purported misconduct in this case was insufficient for it to hold an evidentiary hearing?

Statement of the Case

This litigation arises from two search warrants obtained in December 2012 relating to the appellant, Dr. Yanping Chen Frame. Several years after execution of those warrants, Fox News published various stories containing details about the underlying investigation. Contending that Fox News obtained this information as a result of government misconduct, Chen filed motions before Magistrate Judge John F. Anderson, who had authorized the warrants years earlier, seeking an evidentiary hearing and sanctions against the government. After several rounds of briefing and hearings, the magistrate judge denied these requests. Chen then appealed to the district court, which fully adopted the magistrate judge's decision and wrote separately to explain why the motions were without merit.

By way of background, the first warrant obtained in December 2012

permitted the government to search Chen's home in Arlington, Virginia. The second permitted the government to search the offices of the University of Management and Technology, a for-profit institution that Chen owned and controlled.[1] In support of the applications for both warrants, the government submitted an affidavit authored by Special Agent Timothy Pappa of the Federal Bureau of Investigation. (*See* JA 59–82.) The affidavit summarized evidence indicating that Chen had concealed her past work for the Chinese military on her immigration applications. The affidavit therefore asserted that there was probable cause to believe that Chen had violated 18 U.S.C. § 1001 by making false statements and had violated 18 U.S.C. § 1546 by obtaining a U.S. passport through fraud. When Magistrate Judge Anderson authorized the search warrants, he signed orders sealing the application materials until March 4, 2013.[2]

Several years later, stories about these searches and the underlying investigation appeared in the media. FoxNews.com published a story on February 24, 2017, and a Fox News television broadcast aired on that same date.

---

[1] The application for a warrant for Chen's home was docketed in case no. 1:12-sw-1002 and appears at JA 58–82. The application for a warrant for the university was docketed in case no. 1:12-sw-1003 (ECF No. 1).

[2] *See* JA 86 (order sealing search warrant application for Chen's home); case no. 1:12-sw-1003, ECF No. 3 (order sealing search warrant application for the University of Management and Technology).

(*See* JA 126–31, 231–33.) The FoxNews.com story indicated that Stephen Rhoads, a former employee at the University of Management and Technology, claimed that "he was instructed by the FBI to tell Chen that he was going to testify before a Virginia grand jury," because, in his words, "[t]hey wanted to, I guess, see how . . . she would react." (*Id.* at 130.) Chen also contends that two photographs appearing in the Fox television broadcast had been seized during the search of her home years earlier. (*Id.* at 126, 128, 227.) Follow-up stories appeared in Fox News media on April 28 and June 28, 2017. (*Id.* at 168–72, 227–29, 253–57.)

Shortly after the first news stories appeared, Chen filed motions to show cause before Magistrate Judge Anderson. (*Id.* at 121–25.). She claimed that the government improperly leaked grand jury materials to the press and violated the spirit, if not the letter, of Federal Rule of Criminal Procedure 41 by leaking photographs obtained during the search of her home. She requested a hearing to determine "the identity of the official/s responsible for the disclosure to FoxNews of the documents or information acquired as part of the investigation of this matter," as well as sanctions and other appropriate relief. (*Id.* at 124.)

Multiple rounds of briefing and hearings followed. Chen filed an addendum on May 5, 2017, claiming for the first time that the government had violated the Privacy Act, 5 U.S.C. § 552a, by leaking information from her investigative file. (JA 159–82.) At a hearing on May 8, 2017, Magistrate Judge Anderson concluded

that Chen had failed to make a *prima facie* showing that any violation of Rule 6(e) had occurred and that, as a result, no further proceedings were appropriate. (*Id.* at 212–13.)

Chen then filed two addenda to her original motions. (*See id.* at 219–33, 250–57.) One of these supplemental filings included an affidavit, authored by her, in which she claimed that the photos published by Fox News had been taken from her home during the December 2012 search and that, "[t]o [her] knowledge, there were no copies" of those photographs anywhere else. (*Id.* at 223–24.) After a second hearing on September 5, 2017, Magistrate Judge Anderson concluded that, on Chen's limited factual showing, neither the Federal Rules of Criminal Procedure nor the Privacy Act provided a sufficient basis for the court to hold an evidentiary hearing. (*Id.* at 9–43.) He therefore once again denied her requests. (*Id.* at 260–66.)

Chen then exercised her right to appeal those rulings to the district court, which held its own hearing on December 8, 2017. (*Id.* at 299–312.) It then denied her motions and approved and adopted the magistrate judge's opinion in full. (*Id.* at 313–321). Writing separately, the district court rejected Chen's arguments under all three sources of law on which she relied—Federal Rule of Criminal Procedure 6(e), Federal Rule of Criminal Procedure 41, and the Privacy Act.

First, the district court denied Chen's request to hold an evidentiary hearing

regarding the alleged violations of Rule 6(e). (*Id.* at 315–17.) Looking to Judge Ellis's opinion in *United States v. Rosen*, 471 F. Supp. 2d 651 (E.D. Va. 2007), as persuasive authority, it determined that neither the statements of Stephen Rhoads published at FoxNews.com nor any other materials appearing in the media reports "disclose[d] a matter occurring before the grand jury" within the meaning of Rule 6(e)(2)(B). (JA 315–16.) The district court also rejected the argument that, when Rhoads made his statements to Fox News, he was acting as an agent of federal investigators. Accordingly, Chen failed to present a *prima facie* case that any Rule 6(e) violations sufficient to hold a hearing had actually occurred.

Second, the district court declined to hold an evidentiary hearing under Rule 41. (*Id.* at 317–18.) It noted that Chen "ha[d] not provided the Court with any case law or other authority in which a magistrate judge addressed the improper disclosure of information obtained through a search warrant he or she had issued, nor is the Court aware of any." (*Id.*) The district court acknowledged that it possessed supervisory investigative powers in all matters affecting its judicial functions. (*Id.* at 318.) Even so, in view of this Court's directive that such powers are to "be exercised with the greatest restraint and caution, and then only to the extent necessary," *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 461 (4th Cir. 1993), the district court declined to hold a hearing given that Chen had provided "very little evidence to support her claim that the Government has flouted

the authority of this Court." (JA 318.)

Third, the district court declined to hold an evidentiary hearing under the Privacy Act. (*Id.* at 318–21.) As an initial matter, Chen failed to show that the information appearing in the press came from a "system of records" to which the Act applied. 5 U.S.C. § 552a(a)(5). Second, even if her investigative file were part of a "system of records," the district court was "unable to find any prior case in which the disclosure of an item seized during the execution of a search warrant was found to constitute a violation" of the Act. (JA 320.) The district court also expressed concern that "applying the requirements of the Privacy Act to evidence sought by a search warrant would lead to illogical results," including imposing on the FBI a requirement to permit the targets of criminal investigations to view their files. (*Id.*) Finally, the district court noted that, to the extent that Chen believes her rights under the Act have been violated, she can always seek to vindicate those rights through an independent civil action. The district court therefore concluded that Chen's arguments under the Privacy Act were unavailing.

This appeal followed.

Statement Regarding Jurisdiction

In *Finn v. Schiller*, 72 F.3d 1182 (4th Cir. 1996), this Court held that there is no private cause of action for contempt arising from purported government violations of grand jury secrecy rules. Instead, a petitioner may bring evidence of

such misconduct to the district court's attention, which then assesses whether there is a *prima facie* case of wrongdoing sufficient to invoke its "inherent supervisory power over grand jury proceedings." *Id.* at 1190. If so, the court must convene a hearing and impose whatever sanctions it deems appropriate. *Id.* at 1189–90.

In the government's view, when a court *declines* to exercise its inherent supervisory power to hold such a hearing—which is effectively what happened in this case—there is neither a final order reviewable under 28 U.S.C. § 1291, nor a denial of injunctive relief reviewable under 28 U.S.C. § 1292(a)(1). Moreover, Chen is not a party to any pending criminal or civil action. She therefore lacks Article III standing to appeal the district court's denial of her motions because the hearing she requests would not redress any of her purported injuries. For these reasons, which the government discusses in more detail in the Argument section of this brief, appellate jurisdiction is lacking in the present case.

Summary of Argument

Chen asked the district court to invoke its supervisory investigative powers and to hold a hearing regarding purported government misconduct. The district court declined to do so. The government contends that this Court lacks jurisdiction to review that decision.

This Court's precedent makes clear that Chen has no private cause of action for contempt or for sanctions. Instead, her role is simply to inform the district

court of alleged misconduct. At that point, any decision whether to invoke the court's supervisory authority, whether to convene a hearing, or whether to impose sanctions rests exclusively with the district court. Absent extraordinary circumstances, there is no basis for appellate jurisdiction when a district court determines that a complainant's *prima facie* showing of misconduct is lacking and declines to hold a hearing to pursue those claims.

If, alternatively, the Court were to reach the merits of this appeal, then it should conclude that the district court acted appropriately by denying Chen's requests. In the court below, Chen failed to make a *prima facie* showing that the government violated grand jury secrecy rules, and she has also failed to articulate a persuasive basis for holding a hearing under either Federal Rule of Criminal Procedure 41 or the Privacy Act. The district court's denial of her motions was therefore not an abuse of discretion.

Argument

This Court lacks jurisdiction to review the district court's denial of Chen's motions. But even if the Court were to reach the merits of this appeal, it should conclude that the district court acted well within its discretion by denying her requests.

I. Standards of Review

The Court reviews questions about its own subject matter jurisdiction de novo. *Kporlor v. Holder*, 597 F.3d 222, 225 (4th Cir. 2010).

If the Court were to reach the merits of Chen's appeal, it would be necessary to determine the appropriate standard for reviewing a district court's determination that, because *prima facie* evidence of government misconduct is lacking, an evidentiary hearing is unnecessary. While there appears to be no Fourth Circuit precedent on this question, the Court likely would review such a decision for abuse of discretion. *See In re Sealed Case*, 250 F.3d 764, 770 (D.C. Cir. 2001); *Matter of Special April 1977 Grand Jury*, 587 F.2d 889, 892 (7th Cir. 1978). When applying this standard, the Court "review[s] a district court's factual findings for clear error [and] its legal conclusions de novo." *United States v. Grant*, 862 F.3d 417, 419 (4th Cir. 2017) (punctuation omitted).

II. The Court Lacks Appellate Jurisdiction

As an initial matter, it is important to conceptualize what Chen was asking the district court to do. While she invoked three different sources of law in the courts below—Federal Rule of Criminal Procedure 6(e), Federal Rule of Criminal Procedure 41, and the Privacy Act—she never claimed to have filed an independent cause of action under any of those provisions. Instead, she primarily sought two forms of relief: a hearing, so that she could garner more information

about the identity of purported leakers, and sanctions for the government's alleged misconduct.

Importantly, then, Chen never filed suit seeking compensation for her alleged injuries. Instead, she sought to create a novel discovery mechanism for herself by asking the district court to exercise its inherent authority to investigate abuse of its proceedings. Her statements throughout this litigation make this plain:

- At the May 8, 2017 hearing before the magistrate judge, Chen's counsel stated that "one of the things [he was] asking the Court is to ask the government exactly what happened." (JA 193:22–23.)
- In her objections to the magistrate judge's order denying her motions, Chen stated that a hearing under the Privacy Act "would not constitute a remedy," but would instead "be simply a means—the best means—of seeking to particularize the Government's violation." (*Id.* at 274.)
- At the December 8 hearing, Chen's counsel explained that Chen "was not asking the Court at this juncture to find that there has been a contempt," but was instead "just asking for a hearing" to further develop the record. (*Id.* at 305:24–306:4.)

Chen's brief is also explicit on this point. As she now puts it, she invoked the Privacy Act "for a purpose other than seeking the relief enumerated in the statute." (Appellant's Corrected Br. at 23.) Instead, she sought a hearing as "a means of further particularizing the Government's violation of the magistrate judge's search warrants." (*Id.*)

Against this backdrop, Chen's citations to the Rules of Criminal Procedure and the Privacy Act are, in an important sense, doctrinally unrelated to her

requested relief. Having disclaimed any attempt to seek damages under these provisions, her principal assertion is that these sources of law should "inform the Court's consideration of the Government's abuse of its court-conferred authority to search and seize." (*Id.*) Her *actual* claim, then, is that the district court erred when it declined to exercise its supervisory authority to investigate alleged government wrongdoing.

The question is whether this Court has jurisdiction to hear an appeal when a district court declines to hold such a hearing. In the government's view, the answer is "no."

A. Under Fourth Circuit Precedent, the Supervisory Investigative Powers of the Courts Do Not Give Rise to Private Claims

Few litigants, it seems, have sought to use Federal Rule of Criminal Procedure 41 or the Privacy Act as standalone vehicles to obtain an evidentiary hearing regarding alleged government wrongdoing. As to Rule 41, the district court noted that Chen "has not provided the Court with any case law or other authority in which a magistrate judge addressed the improper disclosure of information obtained through a search warrant he or she had issued, nor is the Court aware of any." (JA 317–18.) As to the Privacy Act, the district court concluded that redress "requires an original civil action filed with the district court." (*Id.* at 321.)

With respect to alleged violations of grand jury secrecy rules, however, the Federal Rules of Criminal Procedure directly address unauthorized disclosures. Rule 6(e)(2)(B) prohibits the disclosure by certain persons of "a matter occurring before the grand jury." Rule 6(e)(7) states that "[a] knowing violation of Rule 6 . . . may be punished as a contempt of court." There is a split of authority in the circuit courts as to whether a person can file a standalone action seeking to enforce the protections of Rule 6(e). Understanding this disagreement—and situating the Fourth Circuit's precedent within it—helps to illuminate the jurisdictional problems inherent in this appeal.

The key decision in this circuit regarding a district court's power to investigate alleged violations of grand jury secrecy rules is *Finn v. Schiller*, 72 F.3d 1182 (4th Cir. 1996). The plaintiff there sued an Assistant U.S. Attorney, alleging prosecutorial misconduct and seeking an injunction that would bar future disclosures of grand jury material protected by Rule 6(e). *Id.* at 1185. The district court concluded that the plaintiff failed to state a claim and dismissed the suit. *Id.* at 1186. On appeal, this Court examined Rule 6(e) and "conclude[d] that the rule provides for both civil and criminal contempt," depending on the purpose for which contempt is sought. *Id.* at 1188. The Court went on, however, to state that even though "the language of the rule provides both civil and criminal contempt, it does not follow that the rule creates a private cause of action." *Id.* Looking to the

Supreme Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975), *Finn* determined that Congress did not intend to authorize a private right of action to enforce grand jury secrecy rules. 72 F.3d at 1188–90.

Finn's conclusion that no private right of action exists under Rule 6(e) anticipated later Supreme Court precedent that has more broadly refused to recognize implied private causes of action, particularly in a context like criminal investigations. In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), for example, the Supreme Court noted that "[w]hen a party seeks to assert an implied cause of action" under either the Constitution or a federal statute, "[i]n most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* at 1857 (internal quotation marks omitted).

Even absent a private right of action, however, *Finn* held that a district court has inherent supervisory authority to enforce Rule 6(e). 72 F.3d at 1190 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991); *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 461–62 (4th Cir. 1993)). Indeed, *Finn* went further still, stating that "upon a prima facie showing to the district court of an alleged Rule 6(e) violation, the court *must* take appropriate steps to determine whether a violation has occurred." *Id.* at 1189 (emphasis in original). At that point, if a court determines that a violation did occur, it "should take appropriate action to prevent

further violations and to sanction the violator as provided by the Rule." *Id.* at 1189–90. Thus, while a "district court's inherent supervisory power over grand jury proceedings is sufficient for it, upon proper proof, to impose either civil or criminal contempt sanctions," *Finn* stated that "the court's supervisory power does not authorize a private cause of action because such power is vested in the court, and only the court may invoke it." *Id.* at 1190.

In light of *Finn*, the best way to conceptualize Chen's motions is as an attempt to "invoke" the supervisory power of the courts. The question is thus whether, when a district court *declines* to exercise that power, there is appellate jurisdiction to review that decision. For the reasons that follow, there is not.

B. Judges in Other Circuits Have Explained Why Jurisdiction Is Lacking in Circumstances Analogous to Those Here

Although the Fifth, Eleventh, and D.C. Circuits have, in certain contexts, concluded that Rule 6 does contain an implied right of action to enforce grand jury secrecy rules—an approach that is, at a minimum, in tension with the Supreme Court's current doctrine governing implied causes of action—even judges in those circuits have expressed views that undercut the argument for appellate jurisdiction here. In particular, these judges have questioned whether a complainant who informs a district court of purported wrongdoing has standing to pursue those claims further on appeal. These views are both consistent with *Finn* and are

directly relevant to the jurisdictional issue now facing this Court. They also underscore that any possible circuit split regarding the scope of Rule 6(e) should have no material relevance to the outcome of this case.

The Fifth Circuit, for example, addressed these issues in *In re Grand Jury Investigation (Lance)*, 610 F.2d 202 (5th Cir. 1980). It there concluded that when a litigant seeks sanctions under Rule 6(e), that litigant is effectively pursuing a suit for civil contempt. *Lance* stated that the denial of such a motion is reviewable under 28 U.S.C. § 1291 because violations of grand jury secrecy rules are "capable of repetition" and require an "efficacious remedy" short of completion of all criminal process. *Id.* at 212–13.

The Eleventh Circuit framed the issue slightly differently. In *Blalock v. United States*, 844 F.2d 1546 (11th Cir. 1988), it criticized *Lance*'s discussion of civil contempt under Rule 6(e). Distinguishing *Lance*'s treatment of this issue, *Blalock* stated that "there is no such thing as an independent cause of action for civil contempt" because "civil contempt is a device used to coerce compliance with an in personam order of the court which has been entered in a pending case." *Id.* at 1550. Accordingly, when a litigant seeks sanctions for a purported violation of Rule 6(e), *Blalock* concluded that what the litigant is actually doing is "bring[ing] suit for injunctive relief against the individuals subject to Rule 6(e)(2)" and seeking to "invoke the district court's contempt power to coerce compliance

with any injunctive order the court grants." *Id.* at 1551. It therefore rested appellate jurisdiction on 28 U.S.C. § 1292(a)(1), the statute conferring jurisdiction for appeals from the denial of injunctive relief. *See id.* at 1548 n.2.

The D.C. Circuit, meanwhile, addressed these issues in *Barry v. United States*, 865 F.2d 1317 (D.C. Cir. 1989). It there concluded that a proceeding under Rule 6(e) may be either criminal or civil in nature, depending on the relief sought. *Id.* at 1323–24. On the facts of that case, the court determined that the appellant was seeking two different forms of civil relief: a prospective injunction "to put an end to Government leaking of grand jury secrets," *id.* at 1324, and civil contempt sanctions that would be "remedial, and for the benefit of the complainant," *id.* (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911)). *Barry* therefore concluded that the trial court's denial of relief in that case was appealable on two different bases. The denial of civil sanctions was appealable as a final order under 28 U.S.C. § 1291, and the denial of injunctive relief was appealable under § 1292(a)(1).

The D.C. Circuit returned to these issues nearly a decade later in *In re Sealed Case No. 98-3077*, 151 F.3d 1059 (D.C. Cir. 1998). The trial court there found *prima facie* evidence of Rule 6(e) violations during independent counsel proceedings. *Id.* at 1062. It then entered an order creating procedures for a future show-cause hearing. Before that hearing could begin, however, the independent

counsel filed a petition for a writ of mandamus, which the D.C. Circuit granted. In so doing, the court explained that proceedings to investigate purported Rule 6(e) violations should not function "in all respects like a typical civil adversarial proceeding," as such a result would be disruptive to the functioning of the grand jury. *Id.* at 1072. The court also noted that "[t]he plaintiff in a Rule 6(e)(2) suit would not, of course, be entitled to seek monetary damages or attorneys' fees and costs from an errant prosecutor, even though such damages are commonly awarded in civil contempt actions." *Id.* at 1070.

Thus, in the Fifth, Eleventh, and D.C. Circuits, litigants may bring an action seeking penalties for violations of grand jury secrecy rules. Importantly, however, some judges in these courts have questioned whether treating such proceedings as private causes of action makes coherent doctrinal sense. The concerns raised by these judges speak directly to the issue of whether the orders entered in this case should be appealable at all.

In the Eleventh Circuit's *Blalock* case, for example, Judge Tjoflat, joined by Judge Roettger, specially concurred in the court's *per curiam* decision to question the correctness of the *Lance* line of precedent that was binding on the court. Surveying historical sources, he concluded that actions to punish violations of Rule 6(e) are criminal, not civil, in nature because they have as their object the punishment of past misconduct. 844 F.2d at 1555–58. For this reason, he

concluded that it was a mistake to treat such proceedings as though they depend on civil actions filed by individual litigants. Instead, when the target of an investigation believes that a secrecy violation has occurred, "[t]he target, like any other member of the public, may, and should, bring the disclosure to the district court's attention." *Id.* at 1561. At that point, either the court can "invoke its power to cite the transgressor for criminal contempt," or "the target can bring the improper disclosure to the attention of the United States Attorney," who may institute criminal proceedings. *Id.*

Critically, Judge Tjoflat concluded that if neither the trial court nor the United States Attorney chooses to take further action, "the target has no recourse in the court of appeals." *Id.* This is because "[t]he bringing of a criminal contempt proceeding is a matter committed to the sole discretion of the district court or the prosecutor, as the case may be." *Id.* In such cases, the target "is not a party to the proceeding; rather, he is simply a member of the public who has complained to the prosecutorial authority that a crime may have occurred." *Id.*

Judge Sentelle echoed these concerns in dissenting from the D.C. Circuit's opinion in *Barry*. 865 F.2d at 1326–28. As he put it, "[t]he complaining 'target' is no more a party to the proceeding than a victim witness in any other criminal case, and no more than a victim witness does he have the right to initiate a prosecution." *Id.* at 1327. Accordingly, if a target of a grand jury investigation "has a legitimate

complaint about unlawful leaking . . . then his proper course is to complain to the court or the United States Attorney about these acts of criminal contempt." *Id.* at 1328. In Judge Sentelle's view, if these entities then decline to act, the target "would not have standing to bring the action in the District Court" and would have "no standing to appeal." *Id.*

In the government's view, the legal principles articulated by Judges Tjoflat and Sentelle are entirely consonant with the Fourth Circuit's decision in *Finn*. A litigant in Chen's position seeks, at most, to petition a district court to exercise its inherent supervisory powers. Such a person has no independent stake in the outcome of such a proceeding. Put another way, when a private party seeks to harness the district court's supervisory powers to conduct an inquiry and is dissatisfied when the court concludes that no further investigation is warranted, that person has no more right to appeal that decision than the government would have to appeal a grand jury's decision to decline to return an indictment. Instead, the matter is simply at an end.

C. When a District Court Declines To Exercise Its Supervisory Investigative Powers, That Decision Is Not Appealable

The critical point is this: there is, at this point, simply nothing to appeal. Under the logic of *Finn*, Chen is not a party to any case or controversy. Instead, her role was to inform the district court of alleged misconduct. *Finn* makes clear

that any supervisory power to investigate such claims "is vested in the court, and only the court may invoke it." 72 F.3d at 1190. A district court's decision *not* to invoke those powers gives rise to neither a final order under § 1291 nor a denial of injunctive relief under § 1292. Nor does a litigant have Article III standing to challenge such a declination.

As Judge Tjoflat put it in his *Blalock* concurrence, Chen is, at this point, "not a party to the proceeding; rather, [she] is simply a member of the public who has complained" about purported violations of court rules. 844 F.2d at 1561. Or, as Judge Sentelle summarized in his dissent in *Barry*, a "complaining 'target' is no more a party to the proceeding than a victim witness in any other criminal case, and no more than a victim witness does [she] have the right to initiate a prosecution." 865 F.2d at 1327. Thus, while Chen may "have a 'right' to bring allegations of Rule 6 violations to the attention of [a district court]," she has no "'right' of action" if that court declines to pursue the matter in her preferred manner. *Matter of Grand Jury Investigation (90-3-2)*, 748 F. Supp. 1188, 1206 n.26 (E.D. Mich. 1990).

While *Blalock*, *Barry*, and *Finn* all arose in the context of Rule 6(e), the underlying logic of these decisions applies with equal force to Chen's reliance on Rule 41 and the Privacy Act. If anything, Chen is on firmer ground in raising her claims regarding grand jury secrecy than in her claims regarding abuse of the

search warrant process. Rule 6(e), after all, contains an explicit contempt mechanism, even if *Finn* concluded that only a district court, not a private plaintiff, has the power to exercise it. By contrast, Chen has cited no authority for the proposition that district courts can hold similar hearings to investigate alleged leaks relating to the execution of search warrants.

Of course, as the Supreme Court articulated in *Degen v. United States*, 517 U.S. 820 (1996), "[c]ourts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Id.* at 823. In the appropriate case, then, this Court might conclude that such authority extends to convening hearings to investigate abuse of the search warrant process. In this case, however, the district court considered Chen's allegations and concluded that she "ha[d] presented very little evidence to support her claim that the Government has flouted the authority of this Court." (JA 318.) As with her claims about grand jury secrecy, the district court's decision not to investigate Chen's allegations of wrongdoing in the search warrant process is not an appealable order.

General principles of standing doctrine further support the conclusion that jurisdiction is lacking. To establish Article III standing, a plaintiff "bears the burden of demonstrating that '(1) [she] has suffered an injury in fact, (2) the injury is fairly traceable to the defendant['s] actions, and (3) it is likely, and not merely

speculative, that the injury will be redressed by a favorable decision.'" *EQT Prod. Co. v. Wender*, 870 F.3d 322, 330 (4th Cir. 2017) (quoting *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 231 (4th Cir. 2008)). In the absence of these requirements, there is no case or controversy sufficient to invoke the power of the courts.

Here, however, Chen is not seeking redress for any alleged injuries. In reality, as she has made clear throughout this litigation, she is seeking a hearing in order to "further particulariz[e] the Government's" alleged misconduct. (Appellant's Corrected Br. at 23.) This would not provide any redress at all. It *would* provide information, perhaps as grist for a future suit for damages against the government. In light of the plausibility bar of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), Chen may feel that such information is necessary for such a claim to succeed. But it would be improper, at this point, for her to use the district court's inherent supervisory authority as a discovery mechanism when she is entirely capable of filing a civil claim and availing herself of whatever discovery tools the Federal Rules of Civil Procedure make available to her.[3]

[3] In courts like the D.C. Circuit, where plaintiffs can sue for contempt, jurisdiction rests on the plaintiff's claim to monetary or injunctive relief. *Finn* forecloses this view of jurisdiction here. Moreover, the D.C. Circuit's conception of jurisdiction continues to raise its own thicket of difficult doctrinal questions. *See, e.g.*, *In re Sealed Case No. 98-3077*, 151 F.3d at 1064 (describing "confusion

D. Chen Has Other Avenues for Seeking Review

Chen may contend that, absent consideration by this Court, she will never receive effective judicial review of her claims of government misconduct. At least one court—the Seventh Circuit—has adopted similar reasoning in circumstances at least somewhat analogous to those here. In the government's view, however, this argument is not persuasive in the present context.

In *Matter of Special April 1977 Grand Jury*, 587 F.2d 889 (7th Cir. 1978), the petitioner alleged that the government had leaked grand jury information to the media. He then petitioned the district court to terminate the grand jury proceedings. *Id.* at 890. The district court declined to do so, and the petitioner appealed. The government asserted that the Seventh Circuit lacked appellate jurisdiction, but the court disagreed. Instead, it concluded that the district court's decision was appealable under 28 U.S.C. § 1291 as a final order. *Id.* at 890–92. It reasoned that, were it to hold otherwise, it "would deprive [the petitioner] of a meaningful opportunity to air his grievance before an appellate court." *Id.* at 891. Moreover, in the event that the grand jury never returned an indictment, the petitioner "would be afforded no opportunity to remedy the harm alleged because there would be nothing to appeal." *Id.* at 892. On the merits, however, the

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in [the D.C. Circuit's] caselaw" as to whether civil contempt orders entered in the context of a Rule 6(e) proceeding would be "deemed interlocutory and thus not appealable under 28 U.S.C. § 1291").

Seventh Circuit concluded that the district court did not abuse its discretion in denying the petition. *Id.* at 892–93.

Like the petitioner in *Matter of Special April 1977 Grand Jury*, Chen may assert that jurisdiction is necessary to ensure that her claims are reviewable. Such concerns are, in fairness, often central to resolving threshold jurisdictional questions. *Cf. Rainbow Sch., Inc. v. Rainbow Early Educ. Holding LLC*, --- F.3d ---, 2018 WL 1722070, at *8 (4th Cir. 2018) (explaining that "[t]he collateral order doctrine allows a party to immediately appeal non-final orders 'because they are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from the final judgment in the underlying action.'" (quoting *Rux v. Republic of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006)). For at least two reasons, however, this argument is not convincing.

First, Chen can always secure judicial review by filing her own lawsuit. As the district court pointed out, Chen's primary goal in this litigation is to obtain information—and there are numerous avenues available for her to seek it. (JA 306–07.) She could, for example, file a claim under the Freedom of Information Act, 5 U.S.C. § 552, in order to pursue any information that the Act may make available. She could also pursue a civil claim under the Privacy Act. If a district court were to reject such claims, then it would enter final orders of dismissal giving rise to jurisdiction on appeal. Accordingly, dismissing *this appeal*

for want of jurisdiction would not close the door to judicial review.

Second, in the unlikely event that a district court were to disobey *Finn* by declining to hold an evidentiary hearing notwithstanding clear evidence of government misconduct, there are other mechanisms that would provide an avenue for appellate review. This Court has already suggested that a petition for mandamus, for example, may be appropriate in certain circumstances involving grand juries. *See, e.g.*, *In re Grand Jury Subpoenas, April, 1978, at Baltimore*, 581 F.2d 1103, 1106–07 (4th Cir. 1978) ("It is settled in this circuit that the appropriate way to challenge alleged 'errors or abuses of discretion on the part of district judges in dealing with grand jury investigations' is through a petition for a writ of mandamus." (quoting *United States v. United States District Court*, 238 F.2d 713, 719 (4th Cir. 1956)). Other courts have considered the efficacy of mandamus petitions in cases involving purported leaks of secret grand jury materials to the media. *See, e.g.*, *In re Sealed Case No. 98-3077*, 151 F.3d at 1063, 1077 (granting the "extraordinary writ of mandamus" to clarify the proper procedures in a Rule 6(e) evidentiary hearing); *Matter of Grand Jury Investigation (90-3-2)*, 748 F. Supp. at 1206 n.26 ("To the extent that the petitioners believe that this Court fails in its duty to investigate Rule 6 allegations, a writ of mandamus may lie.").

This case, however, falls far short of the unusual circumstances that would merit extraordinary appellate relief. Chen brought her claims to the attention of the

magistrate judge in March 2017. (*See* JA 121–31.) She then amended her original motion three times to elaborate on those clams before the magistrate judge rejected them. (*See id.* at 159–82, 219–33, 250–57.) After she appealed and filed two additional briefs (*id.* at 267–76, 295–98), the district court agreed with the magistrate judge. The lower court therefore did precisely what *Finn* instructs it to: it carefully considered Chen's evidence of purported misconduct, but decided that her factual showing was insufficient for it to invoke its "inherent supervisory power" to hold an evidentiary hearing and consider sanctions. 72 F.3d at 1190.

Consistent with the reasoned analyses of Judges Tjoflat and Sentelle in *Blalock* and *Barry*, there is nothing more for this Court to do. At this juncture, Chen has no more right to invoke the supervisory power of the courts than any other citizen who informs the government of purported wrongdoing. *Finn*, which carefully distinguished the inherent powers of the courts from a citizen's right to bring a private cause of action, is entirely consistent with this conclusion.

Accordingly, jurisdiction is lacking and the Court should dismiss this appeal.

III. The District Court Did Not Abuse Its Discretion

If the Court concludes that it does have jurisdiction to hear this appeal, the question then becomes whether the district court abused its discretion by denying Chen's motions. For the reasons that follow, it did not.

A. In the Absence of *Prima Facie* Evidence of a Rule 6(e) Violation, No Evidentiary Hearing Was Necessary

Chen's first assertion is that the government violated grand jury secrecy rules. To make a *prima facie* showing that the government violated Rule 6(e), "the complainant must show that (1) information was knowingly disclosed about 'matters occurring before the grand jury,' and (2) the source of the information is a person subject to Rule 6(e)." *Finn*, 72 F.3d at 1189 n.7. Chen has failed to satisfy these requirements.

As this Court has explained, "the substantive content of 'matters occurring before the grand jury' can be anything that may reveal what has transpired before the grand jury." *In re Grand Jury Subpoena*, 920 F.2d 235, 241 (4th Cir. 1990). Thus, a "matter occurring before the grand jury" is not the same thing as information relating to a law enforcement investigation that may (or may not) involve grand jury proceedings. Instead, "a disclosure of 'matters before the grand jury' must reveal some 'secret aspect of the inner workings of the grand jury.'" *Rosen*, 471 F. Supp. 2d at 654 (quoting *United States v. Dynavac*, 6 F.3d 1407, 1413 (9th Cir. 1993)). The cited basis for Chen's arguments under Rule 6(e) falls short of this standard.

Indeed, the single reference to a grand jury in the relevant media reports came from Stephen Rhoads, a former employee of Chen's university. According to the February 27 article appearing on FoxNews.com, Rhoads said that "he was

instructed by the FBI to tell Chen that he was going to testify before a Virginia grand jury." (JA 130.) Notably, the article did *not* claim that the FBI itself said anything about a grand jury, and no source mentioned in the article said that Rhoads was, *in fact*, going to testify or had testified before a grand jury. The district court concluded, correctly, that this information lacked "sufficient detail and specificity to reflect 'matters occurring before a grand jury.'" (*Id.* at 316.)

Chen has attempted to evade this conclusion by claiming that Rhoads was acting as an agent of the government and violated Rule 6(e) by disclosing his status as a witness. There are numerous problems with this argument. To begin, Rhoads's statement to Fox News did not indicate that he was, in fact, a grand jury witness. Instead, he only claimed that the FBI had asked him to *assert* that he was in conversations with Chen. More fundamentally, Chen failed to show that Rhoads ever acted as an agent of federal law enforcement. As the district court pointed out, "[a]n individual's mere statement that he is 'working with' the government is insufficient to establish an agency relationship." (*Id.* at 316 (citing 3 Am. Jur. 2d Agency § 14 (updated Feb. 2018)).) As a result, "[n]othing in the record" tended to show that Rhoads's statements to the media were fairly attributable to the government. (*Id.*)

Finally, it is worth underscoring that the February 27 article identified at least eighteen sources. (*See id.* at 282–83 (listing each purported source).) Thus,

as the district court noted, "even assuming that [Rhoads] was a grand jury witness, there is no evidence that the Government (or anyone else bound by [Rule 6(e)]) disclosed that fact." (*Id.* at 316.) In light of these weaknesses in Chen's evidence of purported wrongdoing, the district court did not err when it concluded that she "failed to make the *prima facie* showing for a hearing on an alleged Rule 6(e) violation." (*Id.* at 317.)

B. Rule 41 Does Not Require a Hearing on These Facts

The district court also did not abuse its discretion when it denied Chen's request to hold an evidentiary hearing regarding alleged abuse of the search warrant process.

Chen contends that two photographs appearing on a Fox News broadcast were seized by the government and then leaked to the media. She has provided no details about who allegedly leaked those photographs or about how the disclosure supposedly occurred. Instead, she authored an affidavit claiming that she was unaware of any copies of the photos other than those taken from her home during the 2012 searches. (*Id.* at 223–24.) On the basis of these assertions, Chen has argued that *res ipsa loquitur*—*i.e.*, the appearance of the photos on Fox News inescapably proves government misconduct. (*Id.* at 17–19, 188.) Before Magistrate Judge Anderson on September 5, 2017, the government conceded "for purposes of the hearing" that Chen's affidavit provided a sufficient basis to make a

factual finding that the only copies of the photographs were from her home, and that, if such a finding were correct, then someone who had access to those photos after they were seized either disclosed them to the press or provided them to someone who did. (*Id.* at 35:22–36:15.) Chen moved for an evidentiary hearing to further explore these issues.

In denying this request, the district court noted that Chen "ha[d] not provided the Court with any case law or other authority in which a magistrate judge addressed the improper disclosure of information obtained through a search warrant he or she had issued, nor is the Court aware of any." (*Id.* at 317–18.) Chen now asserts that the lack of any mechanism in Rule 41 to investigate purported search warrant abuses is entirely beside the point. In her view, district courts have broad supervisory authority to pursue such claims, and the district court "derogated its obligation to safeguard against Executive Branch abuses" by declining to invoke that authority here. (Appellant's Corrected Br. at 12.)

This sweeping criticism fails to grapple with the district court's careful assessment of this issue. Contrary to Chen's argument, the district court in fact recognized that it possesses supervisory power to safeguard its judicial functions. (JA 318.) Even so, because such powers are to "be exercised with the greatest restraint and caution, and then only to the extent necessary," *Shaffer Equip. Co.*, 11 F.3d at 461, it declined to hold an evidentiary hearing given that Chen had

provided "very little evidence to support her claim that the Government has flouted the authority of this Court." (JA 318.)

The district court thus addressed Chen's allegations of misconduct in the search warrant process just as it assessed her claims about purported violations of grand jury secrecy rules. It permitted her to present evidence of wrongdoing and then, consistent with *Finn*, it assessed that evidence and concluded that it fell short of establishing a *prima facie* case that any misconduct had actually occurred. Far from being an abuse of discretion, this was an entirely sensible approach to Chen's doctrinally novel assertions.

Indeed, the wisdom of the district court's decision becomes apparent as soon as one contemplates how Chen's requested hearing would actually function. Chen has offered no information about who purportedly leaked the photos taken from her home or when the alleged leak is supposed to have occurred. At a hearing, she would therefore presumably seek testimony from each federal agent who participated in the execution of the warrant who may have handled the relevant photographs, asking each one whether he or she had leaked them to the media. The questioning would presumably then move to every federal agent, employee, or contractor who had access to the photographs in the *years* between execution of the warrant and the appearance of stories about Chen in the media. Chen has pointed to no authority for the proposition that such a hearing would either be mandatory

or appropriate. *Cf. Barry v. United States*, 740 F. Supp. 888, 891 (D.D.C. 1990) (indicating that, after the D.C. Circuit's remand of the case for further fact-finding, the government presented affidavits from *82 persons* denying any unlawful disclosures).

Accordingly, the district court did not abuse its discretion when it denied Chen's request for a hearing under Rule 41.

C. The Privacy Act Is Inapposite to Any Requested Relief

Perhaps the most idiosyncratic of Chen's claims relate to the Privacy Act. That statute, codified at 5 U.S.C. § 552a, "gives agencies detailed instructions for managing their records and provides for various sorts of civil relief to individuals aggrieved by failures on the Government's part to comply with the requirements." *Doe v. Chao*, 540 U.S. 614, 618 (2004). The Act mandates that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains," subject to certain exceptions. 5 U.S.C. § 552a(b). For these purposes, a "system of records" is "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." *Id.* § 552a(a)(5).

The gravamen of Chen's argument is that unknown government agents violated the Privacy Act by disclosing information from her investigative file to the press. The Act, in turn, authorizes civil claims for wrongful disclosure. *See* 5 U.S.C. § 552a(g).[4] Importantly, however, Chen has insisted throughout this litigation that she is *not* "pursuing any of the remedies listed in the statute." (Appellant's Corrected Br. at 22.) Instead, she has pointed to the Act solely to "inform the Court's consideration of the Government's abuse of its court-conferred authority to search and seize." (*Id.* at 23.) Thus, Chen contends that the district court should have "explore[d] through a hearing the Government's apparent violation of the Privacy Act," notwithstanding that she has filed no cause of action under the Act and is not seeking any of the relief the Act contemplates. (*Id.* at 25.)

The problems with this assertion are myriad. As an initial matter, it is not at all clear that the Act's protections apply to the facts at hand. As the district court concluded, Chen has presented no evidence tending to show that the information appearing in the Fox News stories came from a "system of records" to which the

[4] To prevail on a wrongful disclosure claim under the Privacy Act, a plaintiff must establish that "(1) the information is covered by the Act as a 'record' contained in a 'system of records'; (2) the agency 'disclose[d]' the information; (3) the disclosure had an 'adverse effect' on the plaintiff (an element which separates itself into two components: (a) an adverse effect standing requirement and (b) a causal nexus between the disclosure and the adverse effect); and (4) the disclosure was 'willful or intentional.'" *Quinn v. Stone*, 978 F.2d 126, 131 (3d Cir. 1992).

Act applies. (JA 320.) In response, Chen cites *Kelley v. Federal Bureau of Investigation*, 67 F. Supp. 3d 240 (D.D.C. 2014), for the proposition that disclosures to the media by the FBI run afoul of the Act's record-keeping and disclosure rules. But *Kelley* was a civil suit in which the district court denied the government's motion to dismiss for failure to state a claim. In reaching this result, *Kelley* underscored that the plaintiff's allegations about whether the FBI's investigative files constituted a "system of records" were "all somewhat conclusory," but nonetheless sufficient to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Id.* at 265. The procedural posture here is entirely different. In this context, when Chen is asking the district court to invoke its supervisory authority, the district court did not abuse its discretion by declining to move forward on the basis of her similarly conclusory allegations.

Second, even if Chen's investigative file were a "system of records" under the Act, the district court was "unable to find any prior case in which the disclosure of an item seized during the execution of a search warrant was found to constitute a violation" of the Act. (JA 320.) Likewise, "applying the requirements of the Privacy Act to evidence sought by a search warrant would lead to illogical results," including imposing on the FBI a requirement to permit the targets of criminal investigations to view their files. (*Id.*)

Finally, and most problematically of all, a motions hearing arising from the

authorization of search warrants is simply not the appropriate vehicle for litigating the Act's scope. If Chen wishes to avail herself of the protections of the Act, or wants to establish that the Act applies to investigative disclosures like those purportedly at issue here, the proper route is for her to file a civil action. To this point, Chen cites *Henke v. U.S. Department of Commerce*, 83 F.3d 1453 (D.C. Cir. 1996), for the proposition that "where an agency—such as the FBI—is compiling information about individuals primarily for investigatory purposes, Privacy Act concerns are at their zenith." *Id.* at 1461. That case, which did not involve the FBI at all, came to the D.C. Circuit *after* the district court had granted summary judgment in favor of the plaintiff. There had thus been "limited discovery" about the "system of records" issue. *Id.* at 1459. If Chen wants to pursue such discovery here, she need only file her own suit under the Act.

Instead, Chen asserts that district courts have free-range authority to investigate alleged violations of the Privacy Act wholly untethered from the manner in which Congress provided remedies under the statute. The scope of this claim is breathtaking. It suggests that a non-party could, at any time, file a motion in federal court seeking to initiate a judicially supervised inquiry into any criminal or civil wrongdoing under any provision of the United States Code. As the government argued below, in the absence of any claim for damages, such a hearing would not constitute a "case or controversy" sufficient to confer subject matter

jurisdiction or to satisfy Article III standing requirements. (*See, e.g.*, JA 33:2–5 (contending that Chen "has no standing" because "[t]here is no remedy that the Court could provide").)

Setting aside the profound jurisdictional problems with Chen's argument, it is also entirely incompatible with modern jurisprudence about statutory rights and remedies. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.").

For these reasons, the district court did not abuse its discretion by declining to hold an evidentiary hearing under the Privacy Act.

Conclusion

Chen is not a party to any civil or criminal action in federal court. Instead, she asked the district court to invoke its supervisory authority to investigate her claims of government wrongdoing. Because the denial of such a request is not reviewable, jurisdiction is lacking and the Court should dismiss this appeal. Alternatively, if the Court determines that it does have appellate jurisdiction, it should conclude that the district court did not abuse its discretion in denying

Chen's motions and should therefore affirm the orders of the district court.

Respectfully submitted,

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Acting United States Attorney

/s/

Daniel T. Young
Assistant United States Attorney

Statement Regarding Oral Argument

The United States respectfully suggests that oral argument is not necessary in this case. The government acknowledges that the jurisdictional issues in this appeal are somewhat novel, but resolution of those issues ultimately depends on aspects of the procedural posture of this case that do not appear to be in dispute.

Certificate of Compliance

I certify that I wrote this brief using 14-point Times New Roman typeface and Microsoft Word 2016.

I further certify that this brief does not exceed 13,000 words (and is specifically 9,431 words) as counted by Microsoft Word, excluding the table of contents, table of citations, statement regarding oral argument, this certificate, the certificate of service, and any addendum.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

/s/

Daniel T. Young
Assistant United States Attorney

Certificate of Service

I certify that on April 17, 2018, I filed electronically the foregoing brief with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all counsel of record.

By: /s/

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6132

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

THE MATTER OF THE SEARCH OF 2122 21ST ROAD NORTH ARLINGTON, VIRGINIA,

Defendant - Appellant.

No. 18-6133

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

IN THE MATTER OF THE SEARCH OF UNIVERSITY MANAGEMENT AND TECHNOLOGY,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, District Judge. (1:17-cr-00236-LO-JFA-1; 1:17-cr-00237-LO-JFA-1)

Submitted: July 30, 2018 Decided: August 20, 2018

Before WYNN, THACKER, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

John C. Kiyonaga, Marcus T. Massey, LAW OFFICE OF JOHN C. KIYONAGA, Alexandria, Virginia, for Appellants. Tracy Doherty-McCormick, Acting United States Attorney, Daniel T. Young, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In these consolidated appeals, Yanping Chen Frame appeals the district court's order adopting the magistrate judge's decision finding that Frame failed to establish a prima facie case of a violation under Fed. R. Crim. P. 6(e), or that Fed. R. Crim. P. 41 or the Privacy Act, 5 U.S.C. § 552a (2012), entitles her to relief. We have reviewed the record and the district court's orders and affirm for the reasons stated by the district court. *United States v. Search of 2122 21st Road*, No. 1:17-cr-00236-LO-JFA-1 (E.D. Va. filed Jan. 23, 2018, entered Jan. 24, 2018); *United States v. Search of Univ. Mgmt. & Tech.*, No. 1:17-cr-00237-LO-JFA-1 (E.D. Va. filed Jan. 23, 2018, entered Feb. 7, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED