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Search warrants involving privileged materials: Are filter teams still the answer?

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When the government executes a search warrant at corporate offices — an increasingly common tactic in white-collar criminal investigations — the search invariably seeks emails and other electronic records, meaning that it will almost inevitably result in the seizure of at least some attorney-client privileged materials.

Similarly, when the government obtains a search warrant for an individual's email account or an attorney's office, privileged communications will frequently come within the scope of the warrant.

Both prosecutors and defense counsel dealing with such searches have an interest in assuring that the privileged communications of the subjects of the search remain confidential. For defense counsel, preserving the confidentiality of a client's privileged communications is obviously crucial.

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Similarly, if prosecutors fail to institute procedures to safeguard the subject's privileges and are exposed to privileged materials, they risk suppression of evidence or even more severe sanctions. However, the law regarding how to protect privileged materials found among seized items is currently in flux.

The Justice Department typically employs a so-called "filter team" or "taint team" of prosecutors and agents who are not involved in the underlying investigation to screen seized materials for privilege and then produce the non-privileged records to the government's investigative team.

But in late 2019, the 4th U.S. Circuit Court of Appeals issued a strongly-worded opinion in *In re Search Warrant Issued June 13, 2019* flatly rejecting the concept of filter teams as improper, ruling that the practice is equivalent to placing the proverbial fox in charge of the henhouse.[1]

The 4th Circuit's decision prompted much discussion regarding whether it was a sign that the judicial tide had turned against the use of government filter teams.

A review of how courts have dealt with issues related to filter teams in the wake of the 4th's decision indicates that, while they are still a long way from extinction, courts will police the procedures used by filter teams to protect the attorney-client privilege.

HISTORICAL USE OF FILTER TEAMS

When the government executes a search warrant and seizes documents that may include privileged materials, a filter team composed of agents and prosecutors who are not involved in the underlying investigation is typically established to review the seized materials.[2]

If the filter team identifies potentially privileged material, it must resolve any privilege claims with the search subjects or litigate any disputed privilege assertions before the court.

The filter team provides only the non-privileged documents to the prosecutors conducting the underlying investigation. In this way, the prosecution team is theoretically insulated from exposure to any privileged records seized.

Even before the 4th Circuit's 2019 decision, there were several prominent court decisions rejecting the concept of filter teams.

For example, the 6th U.S. Circuit Court of Appeals, as well as district courts in the District of Columbia and the Southern District of New York had ruled that the use of filter teams was "a serious risk to holders of privilege," "troubling," and "highly questionable."[3]

These courts identified two primary criticisms of the filter team procedure. First, courts found that the use of filter teams left it up to prosecutors to identify documents potentially covered by the privileges of the subjects of the search.

For example, the 6th Circuit held in *In re Grand Jury Subpoenas* that the "obvious flaw" of a filter team was that it "may err, by neglect or malice, as well as by honest difference of opinion," and noted the risk that the filter team might take "a more restrictive view of privilege" than the subjects' counsel.[4]

Second, courts disapproving the use of filter teams found that they created an appearance of unfairness.

For example, in *In re Search Warrant for Law Offices Executed on March 19, 1992*, the Southern District of New York ruled that filter

teams "should be discouraged" because "the appearance of Justice must be served as well as the interests of Justice."[5]

Notwithstanding such criticisms, the government's use of filter teams after the execution of a search warrant involving potentially privileged materials became DOJ's standard practice. Indeed, the DOJ Manual specifically directs the use of such filter teams.[6]

Many courts approved the use of filter teams,[7] and it became common practice for the government to set forth the filter team process it proposed to follow in its search warrant application, so the magistrate's ruling issuing the search warrant also directed the government to follow the specified filter protocol.

4TH CIRCUIT DECISION

Against this background, in *In re Search Warrant Issued June 13, 2019*, the 4th Circuit considered the government's use of a filter team to review privileged materials seized during the search of a criminal defense lawyer's office.

In that case, the government was investigating the defense attorney's client and suspected that the attorney had obstructed the investigation of his client.

A magistrate granted the government's application for a search warrant for the lawyer's office and authorized the use of a filter team. The lawyer sought a preliminary injunction barring the filter team from reviewing the seized materials, which was denied by the district court.[8]

On appeal, the 4th Circuit reversed, rejecting the concept of a filter team as a matter of law. First, the court ruled that the magistrate, by authorizing the filter team, had improperly "assign[ed] judicial functions to the executive branch."

The court held that the resolution of disputed privilege claims is "a judicial function" which cannot be delegated to the executive branch, "especially when [it] is an interested party in the pending dispute."[9]

Second, the court noted that the filter team "might have a more restrictive view of privilege than the subject of the search, given their prosecutorial interests in pursuing the underlying investigation," which could result in privileged documents being "misclassified and erroneously provided" to the prosecution team.[10]

Third, the court took issue with the magistrate authorizing the filter team *ex parte* before the search was executed.

The court ruled that the magistrate should have deferred any decision on the filter team until after the return of the search warrant, at which time the magistrate could have conducted "adversarial proceedings" to address whether to authorize the proposed filter team and protocol.[11]

Fourth, the court found that filter teams created "appearances of unfairness," holding that "federal agents and prosecutors rummaging through law firm materials that are protected by attorney-client privilege … is at odds with the appearance of justice."[12]

The court ultimately concluded that the magistrate or an appointed special master must perform the privilege review of the seized materials.[13]

Thus, the 4th Circuit's decision was a direct rejection of what had been DOJ's standard procedure in such cases. To begin with, the court ruled that the very concept of a filter team was improper.

The court also criticized the *ex parte* procedure typically used by the government in seeking approval of a filter team at the time of the search warrant application.

Finally, the court found that, due to the potential for errors or honest differences of opinion, the process typically employed by government filter teams had "significant problems" that risked infringing on the attorney-client privilege.

RECENT CASES

Since the 4th Circuit's decision, several district courts have addressed the issue of filter teams and the procedures they should follow, but the results have been mixed and have not yet reached the appellate courts, leaving litigants facing an uncertain landscape on these issues.

In *In re Sealed Search Warrant and Application for a Warrant by Telephone or Other Reliable Electronic Means*,[14] a Southern District of Florida court denied a challenge to a government filter team but emphasized the importance of filter protocols assuring the subjects of the search the opportunity to review the seized materials and assert privilege.

In that case, a magistrate issued a search warrant for corporate offices and authorized a filter team to review the seized materials.

Under the approved protocol, if the filter team concluded that a document was not potentially privileged, it could provide it to the prosecution team without input or approval from the court or the subjects.[15]

Thus, if the filter team took "a more restrictive view of privilege" than the subject of the search, as the 4th and 6th Circuits had warned in earlier cases, a document could be disclosed to the prosecution team before the defense had an opportunity to assert privilege.

However, after the search, the magistrate modified the protocol to allow the subjects to review all seized documents and provide a privilege log to the filter team.

Thereafter, the documents on the privilege log would only be disclosed to the prosecution team if the parties reached agreement or the Court denied the privilege assertion.[16]

The district court rejected the subjects' challenge to the filter team, ruling that it was "well-established" that filter teams "are routinely employed to conduct privilege reviews."

The subjects also argued, similar to the criticisms raised by the 4th Circuit, that their privileged information could be improperly revealed to the prosecution team, either by inadvertence or because of the filter team's "conflicting interests."

The district court rejected these arguments, noting that the modified protocol gave the subjects an opportunity to review all seized documents before the filter team, and no documents would be released to the prosecution team until their privilege assertions had been resolved.

The court similarly dispatched the subjects' claims regarding the filter team members' allegedly "conflicting interests," ruling that it "will not presume the Government's purported lack of integrity in abiding by the Court's Order and the law."[17]

United States v. Satary[18] addressed a similar procedural question as that considered by the Florida court in *In re Sealed Search Warrant*.

Under the proposed protocol in *Satary*, a document as to which a subject had a potential privilege claim could be disclosed to the prosecution team without an opportunity for the subject to object, if the filter team, for whatever reason, did not identify the potential privilege claim.

The defendant argued that he should be permitted to review all seized materials the filter team deemed non-privileged before they were disclosed to the prosecution team.

The district court agreed that courts in the 5th U.S. Circuit Court of Appeals "require the pre-review process before [materials designated as non-privileged by the filter team] can be released to the prosecution team where the party or owner of the documents has a privilege to protect," but ultimately determined that Satary had been given the opportunity to review all the categories of documents as to which he had standing to assert a privilege and therefore denied his motion.[19]

In contrast, a district court in the Eastern District of Michigan, following binding 6th Circuit precedent, rejected a government motion for a filter team.

In *United States v. Castro*,[20] the government proposed to use a filter team to screen recordings of calls made by the defendants from prison for privileged information.

The court, relying upon the 6th Circuit's 2006 decision in *In re Grand Jury Subpoenas* (and citing the 4th Circuit's 2019 decision), denied the request to authorize a filter team and instead indicated that it would appoint a special master to conduct the privilege review.

Finally, in *United States v. Sullivan*,[21] a Hawaii district court addressed the issue of the appropriate remedy for the government's failure to follow a filter protocol.

In *Sullivan*, the government searched the defendant's Apple iCloud account and seized photographs of whiteboards revealing her legal strategy, as well as other photos stored in "HEIC" files (a file format commonly used to store photos on mobile devices).

Through the negligence of the filter team, the HEIC files, including the strategy board photos, were produced to the prosecution team, which was unable to view them due to technical problems. Sullivan moved to dismiss the indictment based on the violation of her attorney-client privilege.

The court ruled that she had suffered no prejudice since the prosecution team had not actually viewed the privileged photos, so the "extraordinary remedy" of dismissal of the indictment was not warranted.

Criticizing the government's "total disinterest in ... the rights of Defendant," the court instead ordered the suppression of all the HEIC files disclosed to the prosecution team, not only the ones reflecting privileged materials.

CONCLUSION

Although courts considering the authorization of filter teams since the 4th Circuit's decision have not followed its reasoning to categorically reject filter teams, they have demonstrated a willingness to enforce procedures to assure that privilege assertions are properly evaluated.

With the state of the law in this area unsettled, prosecutors and defense counsel in investigations involving evidence obtained by search warrant should be prepared to litigate not only the legal propriety of filter teams, but also the filter protocol procedures necessary to protect privilege, and the appropriate remedy for any failure to abide by those procedures.

Notes

[1] 942 F. 3d 159, 176-78 (4th Cir. 2019).

[2] Last year, DOJ created a Special Matters Unit within its Fraud Section dedicated to conducting filter team reviews, rather than its previous practice of forming *ad hoc* filter teams composed of prosecutors in the same office that was conducting the underlying investigation.

[3] *See In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006); *United States v. Neil*, 952 F. Supp. 834, 841, n. 14 (D.D.C. 1997); *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994). *See also United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1037 (D. Nev. 2006); *United States v. Stewart*, 2002 WL 1300059 at *6 (S.D.N.Y. June 11, 2002).

[4] 454 F.3d at 523. There have been several high-profile cases where government filter teams improperly disclosed privileged information to the government's investigative team. *See, e.g., United States v. Elbaz*, 396 F. Supp. 3d 583, 588-90 (D. Md. 2019); *United States v. Esformes*, 2018 WL 5919517, at *20-33 (S.D. Fla. Nov. 13, 2018); *United States v. DeLuca*, 663 Fed. App'x. 875, 876-78 (11th Cir. 2016); *United States v. Noriega*, 764 F. Supp. 1480, 1482-84 (S.D. Fla. 1991).

[5] 163 F.R.D. at 59.

[6] DOJ Manual § 9-13.420.

[7] *See, e.g., In re Ingram*, 915 F. Supp. 2d 761, 765 (E.D. La. 2012); *United States v. Taylor*, 2010 WL 2924414 at *1 (D. Me. July 16, 2010); *United States v. Sutton*, 2009 WL 481411 at *9 (M.D. Ga. Feb. 25, 2009); *In re Search of 5444 Westheimer Rd, Suite 1570, Houston, Texas on May 4, 2006*, 2006 WL 1881370 at *2-3 (S.D. Tex. July 6, 2006); *United States v. Grant*, 2004 WL 1171258 at *2-3 (S.D.N.Y. May 25, 2004); *United States v. Triumph Cap. Group, Inc.*, 211 F.R.D. 31, 43 (D. Conn. 2002).

[8] 942 F. 3d at 164-65, 168-69.

[9] *Id*. at 176-77.

[10] *Id*. at 177.

[11] *Id*. at 178-79 (citing Cohen v. United States, 18 Mag 3161 (S.D.N.Y.), Transcript of April 13, 2018 Conference (ECF No. 36) at 12-16, 30-31).

[12] *Id*. at 182-83.

[13] *Id*. at 181.

[14] 2020 WL 6689045 (S.D. Fla. Nov. 2, 2020).

[15] *See In re Sealed Search Warrant and Application for a Warrant by Telephone or Other Reliable Electronic Means*, Docket No. 20-MJ-03278 (S.D. Fla.), Motion for Preliminary Injunction (ECF No. 4), Exhibit 1 at p. 8.

[16] 2020 WL 6689045 at *1.

[17] *Id*. at *2-3.

[18] 2020 WL 7086045 (E.D. La. Dec. 2, 2020).

[19] *Id*. at *1-3, 8-10. *See also Heebe v. United States*, 2012 WL 3065445 at *4 (E.D. La. July 27, 2012); *In re Ingram*, 915 F. Supp. 2d at 763, 765; *United States v. Taylor*, 2010 WL 2924414 at *1; *United States v. Grant*, 2004 WL 1171258 at *2.

[20] 2020 WL 241112 at *6 (E.D. Mich. Jan. 16, 2020).

[21] 2020 WL 1815220 at *5-6, 8-10 (D. Hawaii April 9, 2020).

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