UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

v.

AARON SWARTZ,

Defendant.

Crim. No. 11-CR-10260-NMG

DEFENDANT'S MOTION TO MODIFY PROTECTIVE ORDER

Now comes the estate of defendant Aaron Swartz and respectfully moves that this Honorable Court modify the Protective Order in this case, Dkt. 28, to allow disclosure of the discovery materials to Congress and to the public, subject to narrow limitations and redactions. Defendant's estate further requests that the Court order that the names and official titles of all law enforcement personnel and MIT and JSTOR employees that appear in the discovery materials remain unredacted in the disclosed discovery materials. As reason therefor, defendant's estate states that the public interest in access to these materials in an intelligible form outweighs the limited privacy interest in the names and official titles of the individuals named therein.

MEMORANDUM OF LAW

I. INTRODUCTION

The Government's prosecution of Aaron Swartz has taken on a significance far beyond what the parties could have imagined at the time the Court entered a protective order, over Mr. Swartz's objection, more than a year ago. Among other developments, Congress has commenced an investigation of the prosecution and, in connection with that investigation, requested production of documents relating to the case. Various media organizations have done the same. Accordingly, defense counsel, on behalf of Mr. Swartz's estate, hereby move the

Court to modify the Protective Order to allow disclosure to Congress and the general public of the discovery materials provided by the Government to the defense, subject to certain limitations and redactions discussed below.

II. FACTUAL BACKGROUND

On November 30, 2011, Magistrate Judge Dein entered a blanket Protective Order in this case, Dkt. 28, generally barring defense disclosure of any documents, files, or records discoverable under Fed. R. Crim. P. 16 and Local Rule 116.1-116.2 to anyone other than the defense team or potential defense witnesses. *See* Dkt. 28 at 4-5. Mr. Swartz had opposed entry of the Protective Order for many of the same reasons now at issue on this motion. *See* Dkt. 21.

Of course, since the Protective Order was entered, circumstances have radically changed. Tragically, on January 11, 2013, Mr. Swartz committed suicide. In the weeks since Mr. Swartz's death,[1] his case has become a matter of substantial public interest. There has been a great deal of national and international press coverage regarding the details of the investigation and prosecution, as well as the fairness of the underlying statutory scheme under which Mr. Swartz was charged.[2] The Los Angeles Times, among other media organizations, has filed a Freedom of Information Act request for the United States Secret Service's file on the investigation; that

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[1] In light of Mr. Swartz's death, the undersigned counsel now represents Mr. Swartz's estate in seeking the relief requested by this Motion. Counsel are also filing concurrently with this Motion the Declaration of Alec Resnick, the executor of Mr. Swartz's estate, who confirms that counsel are filing this Motion on the estate's behalf.

[2] *See, e.g.*, Glenn Greenwald, *The inspiring heroism of Aaron Swartz*, The Guardian (Jan. 12, 2013, 4:25 PM), http://www.guardian.co.uk/commentisfree/2013/jan/12/aaron-swartz-heroism-suicide1; John Naughton, *Aaron Swartz: cannon fodder in the war against internet freedom*, The Observer, Jan. 19, 2013, *available at* http://www.guardian.co.uk/technology/2013/jan/20/aaron-swartz-cannon-fodder-internet-freedom; Justin Peters, *The Idealist*, Slate (Feb. 7, 2013, 9:47 PM), http://www.slate.com/articles/technology/technology/2013/02/aaron_swartz_he_wanted_to_save_the_world_why_couldn_t_he_save_himself.html; Wesley Yang, *The Life and Afterlife of Aaron Swartz*, N.Y. Magazine, Feb. 8, 2013, *available at* http://nymag.com/news/features/aaron-swartz-2013-2/; Quinn Norton, *Life Inside the Aaron Swartz Investigation*, The Atlantic (Mar. 3, 2013, 9:24 PM), http://www.theatlantic.com/technology/archive/2013/03/life-inside-the-aaron-swartz-investigation/273654/?single_page=true; Larissa MacFarquhar, *Requiem for a Dream*, The New Yorker, March 11, 2013, available at http://www.newyorker.com/reporting/2013/03/11/130311fa_fact_macfarquhar.

request was denied on February 21, 2013. *See* Matt Pearce, *Aaron Swartz is gone, but his story refuses to go away. Why?*, L.A. Times (Mar. 6, 2013, 8:00 AM) (available for review at http://www.latimes.com/news/nation/nationnow/la-na-nn-aaron-swartz-suicide-20130305,0,6187992.story?page=1).

Later in January 2013, following Mr. Swartz's death, the U.S. House of Representatives Committee on Oversight and Government Reform ("the House Committee") began an investigation into the circumstances surrounding the investigation and prosecution of Mr. Swartz and the proper scope of the statute under which Mr. Swartz had been charged, the Computer Fraud and Abuse Act ("CFAA"). *See* Declaration of Michael Pineault in Support of Motion to Modify Protective Order ("Pineault Decl.") Ex. A (House Committee letter to defense counsel). On January 28, 2013, Committee Chairman Darrell Issa and Ranking Member Elijah Cummings sent a letter to Attorney General Eric Holder, requesting a briefing from Department of Justice officials about Mr. Swartz's case. *See* Letter from House Committee to Eric Holder (Jan. 28, 2013), *available at* http://oversight.house.gov/wp-content/uploads/2013/01/2013-01-28-DEI-EEC-to-Holder-re-Aaron-Schwartz-prosecution.pdf. The letter specifically requested further information on the factors influencing the Government's decisions to prosecute Mr. Swartz and regarding plea offers made to Mr. Swartz. *See id.*

On February 4, 2013, undersigned counsel received a letter from the House Committee, requesting copies of the discovery provided by the Government to Mr. Swartz, in order to assist the House Committee's investigation of Mr. Swartz's prosecution. *See* Pineault Decl. Ex. A. In late February, Steven Reich, an associate deputy attorney general, officially briefed the House Committee regarding Mr. Swartz's prosecution. *See* Ryan J. Reilly, *Aaron Swartz Prosecutors Weighed "Guerilla" Manifesto, Justice Official Tells Congressional Committee*, The Huffington Post (Feb. 22, 2013, 1:28 PM), http://www.huffingtonpost.com/2013/02/22/aaron-swartz-prosecutors_n_2735675.html.

The circumstances surrounding the investigation and prosecution of Mr. Swartz, and the extent to which certain acts can or should be prosecuted as federal computer-crime felonies, are

plainly of serious public interest. As the Congressional investigation into the prosecution shows, the public has a real stake in information about the manner in which the investigation and prosecution were conducted and the factual predicate for the charges that ultimately were filed. In addition, the public has a substantial interest in assessing the propriety and scope of the criminal prohibitions laid out in the CFAA. Both Congress and the public at large have an important role to play in determining what conduct is considered criminal, particularly in the relatively new and rapidly evolving context of so-called "computer crimes."

Given the House Committee's request for discovery documents and the continuing public interest in and issues implicated by Mr. Swartz's case, defense counsel has engaged in extensive meet and confer discussions with the United States Attorney's office in Boston regarding potential modifications to the Protective Order. Pineault Decl. ¶ 4. The parties have reached agreement on several issues relating to the Protective Order. Specifically, with the exception of grand jury transcripts, immunity orders, criminal history information, the downloaded JSTOR articles, and associated computer code, the Government has expressed its willingness to assent to modification of the Protective Order to permit production of the discovery materials to Congress and the public, subject to certain redactions. *Id.* ¶¶ 5-7.[3] Those include redaction of the email prefixes, telephone numbers, home addresses, conference call numbers, Social Security numbers, and birthdates of individuals named in the discovery materials. *Id.* ¶ 6. Defense counsel agrees that redaction of this specific personal information is appropriate. Further, the Government also seeks the redaction of the names of four private individuals who were questioned during the investigation, including an MIT student. *Id.* ¶ 6(c). Since these four individuals are private citizens who were not actively involved in either the Government's or any institution's

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[3] The Government has indicated that it reserves the right to reassess its position on release of the discovery materials to the public. Pineault Decl. ¶ 7. Should the Government's position change, or should MIT or JSTOR indicate in response to this Motion that they oppose release of the documents to members of the public, defense counsel will seek leave of Court to address those new arguments in a reply brief, in order set forth in greater detail the ample case authority favoring broad public disclosure.

investigation into Mr. Swartz's conduct, defense counsel does not object to the Government's request to redact those individuals' names.[4]

But the parties disagree about the scope of other redactions. With the exception of two prosecutors, three agents/officers and one expert, the Government is seeking the redaction of the names of all other law enforcement personnel involved in the investigation of Mr. Swartz's case. *Id.* ¶ 6. The Government additionally seeks redaction of all identifying information regarding current or former MIT and JSTOR personnel, including not only names, but also job titles or other information that might allow a reader to ascertain someone's identity, absent express consent allowing non-redaction from those individuals. *Id.* ¶ 6(c). The Government's primary rationale is that revealing the names of any of these individuals, even to Congress, might lead to some form of retaliation.

III. ARGUMENT

Criminal proceedings in our nation's courts are presumptively public. *See, e.g.*, *Globe Newspaper Co. v. Super. Ct. of Norfolk Cnty.*, 457 U.S. 596, 604 (1982). Accordingly, Federal Rule of Criminal Procedure 16(d) requires good cause to enter a protective order, even where the parties agreed to that order's terms. *United States v. Bulger*, 283 F.R.D. 46, 52 (D. Mass. 2012). This Court has discretion to modify the Protective Order under Rule 16(d) and its inherent power to control the discovery process. *Id*. at 53. The Court must consider a number of factors in determining whether good cause to maintain the protective order exists, including any changed circumstances, the reliance interest of the Government, and the privacy interests of third parties. *Id*. at 53-55; *see also United States v. Wecht*, 484 F.3d 194, 211 (3d Cir. 2007) ("The good cause determination must also balance the public's interest in the information against the injuries that disclosure would cause."). The party seeking to prevent disclosure bears the burden of demonstrating good cause. *Id*. at 212; see also *Bulger*, 283 F.R.D. at 58 (requiring the

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[4] Defense counsel also agrees with the Government's position regarding grand jury transcripts, immunity orders, criminal history information, downloaded JSTOR articles, and associated computer code, Pineault Decl. ¶ 5, and is not seeking disclosure of any such materials.

Government to make "an adequate showing that all of the documents the government produced . . . should remain subject to the terms of the protective order").

As described above, the circumstances in this case have changed dramatically. Perhaps most obviously, with Mr. Swartz's death, there is no longer a case to prosecute and thus no danger that disclosure will impede a fair trial. Mr. Swartz's tragic death has also led to an increase in public interest in both the details of the investigation and prosecution and the reasonableness of prosecutions under the CFAA generally. In its discussions with Mr. Swartz's counsel about modifying the Protective Order, the Government has not, to date, asserted any reliance interest based on the Protective Order. Even if it were to assert such an interest, any Government reliance on the Protective Order's terms is tempered by the fact that it is a blanket order and therefore inherently overinclusive. As this District explained in *Bulger,* modification of such a blanket order is not unusual. *Id.* at 54. As a result, the only interest left to be balanced against the significant public interest in access to unredacted documents is the alleged privacy interest of the government employees and third party individuals named in the discovery materials. For the reasons discussed below, those interests are minimal and are overcome by the public interest in the disclosure of these documents.

In its current form, the Protective Order hinders the public's access to vital information about Mr. Swartz's case without any substantial justification. As noted above, the parties are in broad agreement that the Protective Order should be modified to allow disclosure of the Rule 16 documents in some form.[5] Accordingly, the Court must resolve only one narrow question: to what extent the discovery materials should be redacted. Defense counsel respectfully submits that, in order for the disclosure to be meaningful and of use to Congress or any other audience, names and official positions identified in the documents should not be redacted, especially given the minimal privacy interest in that basic information.[6]

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[5] To reiterate, this motion does not seek production of any of the materials downloaded from the JSTOR system or transcripts of any testimony given to the grand jury. *See* note 2, *infra*.

[6] In the parties' meet-and-confer discussions, the government indicated that it does not speak for

Defense counsel agrees that truly personal information—such as social security numbers, email prefixes (though not domains), and phone numbers—should properly be redacted from the Rule 16 discovery materials prior to disclosure. But the Government seeks much more than the redaction of genuinely private details—it seeks the blanket redaction of the names and job titles of ***all*** of the private individuals and even some of the law enforcement personnel involved in investigating Mr. Swartz's activities at MIT in 2010 and 2011. This broad redaction is inappropriate for a number of reasons.

First, overbroad redactions of all identifying information would render the documents at issue materially less intelligible and thus far less useful to Congress or whoever else might review them. The central and stated goal of the Congressional inquiry into Mr. Swartz's case is to understand how the investigation and prosecution of Mr. Swartz proceeded, including how the evidence against Mr. Swartz was gathered and then presented to this Court. Most of the contested Rule 16 documents are emails and, in order to understand those emails and their importance to the prosecution, one must know who is speaking and his or her employer and role with that entity. For example, the same email might have a different meaning depending on whether it is identified as being from the General Counsel of MIT as opposed to a junior level employee. Likewise, an email explaining the workings of an entity's computer network would be significantly more meaningful if it came from a director of network security with technical knowledge, as opposed to a police officer or other layperson.

Second, the email chains at issue were produced in unredacted form by MIT and JSTOR to the Government without any reasonable expectation that they would not be disclosed in the future. First, at the time MIT and JSTOR decided to cooperate with the Government and produce their documents, no protective order had been requested, much less entered.[7] So MIT

MIT or JSTOR. Defense counsel accordingly has agreed to serve MIT and JSTOR with this motion, to permit those parties an opportunity to seek leave to intervene and be heard.

[7] The Government did not move for a protective order until September 27, 2011. Dkt. 18. As a result, it is not clear whether the documents produced by the Government on August 12, 2011, are subject to the Protective Order's prohibitions. The language of the Protective Order is not

and JSTOR could not have relied on the Protective Order at the time they provided their documents. Second, MIT and JSTOR produced to the Government with the understanding that the documents would be used by the Government and the defense in a ***public*** trial. Many, if not all, of the individuals named in the documents were potential trial witnesses. Not only would the unredacted documents have been made public if the case had gone to trial, the individuals would have been called to testify in open court about the contents of those communications. Consequently, MIT and JSTOR cannot now claim any reliance interest on behalf of their employees in the continued privacy of their emails at the time they produced the emails at issue to the Government.

Third, most of the names and titles that the Government seeks to redact are ***already*** publicly known. The motions filed in this case are available to the public via PACER. MIT's student newspaper, The Tech, has posted Mr. Swartz's second motion to suppress (Dkt. 60) online in PDF form. *See* http://tech.mit.edu/V132/N46/swartz/swartz-suppress2.pdf. That motion quoted extensively from the emails at issue, without objection from the Government, MIT, or JSTOR. The motion names MIT employees Dave Newman, Paul Acosta, Ellen Duranceau, Ann Wolpert, Mike Halsall, and Mark Sillis and JSTOR employee Brian Larsen, identifies their positions, and quotes their email communications. The Government's (and MIT's and JSTOR's) professed concerns about the privacy of these individuals seem misplaced, when the individuals have already been widely identified in court documents and in press reports covering Mr. Swartz's case. *See, e.g.*, Noam Cohen, *How M.I.T. Ensnared a Hacker, Bucking a Freewheeling Culture*, N.Y. Times, Jan. 20, 2013, *available at* http://www.nytimes.com/2013/01/21/technology/how-mit-ensnared-a-hacker-bucking-a-freewheeling-culture.html?pagewanted=all&_r=0 (quoting Mike Halsall and Ann Wolpert from

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explicit as to whether it covers only future discovery materials or whether it also encompasses discovery that took place before the Order's entry. In an abundance of caution, Mr. Swartz and his defense team have always treated the August 12, 2011 production as though it were subject to the later-entered Protective Order.

"internal M.I.T. documents"). Redaction of these individuals' names would merely add a layer of confusion and opacity to the documents without any additional privacy benefit.

Fourth*,** although it has briefly mentioned some e-mails directed to the U.S. Attorney, the Government has not presented any specific evidence of threats to MIT and JSTOR personnel, regardless of their roles in the investigation, that would warrant the sweeping redaction of ***all MIT and JSTOR names. For example, the Government has not provided defense counsel with a narrow list of MIT or JSTOR personnel whose identities or roles in the investigation were such that special protection is warranted. In addition, despite the fact that the names of many involved individuals have been public for months, the Government has not pointed to any specific instances of threats of retaliation against any of them. In order to find good cause for continuation of a protective order, there must be a particularized, specific showing of harm. *See Anderson v. Cryovac*, 805 F.2d 1, 7 (1st Cir. 1986) ("A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements."); *Wecht*, 484 F.3d at 211 (observing that good cause is established "on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure") (citation and internal quotation marks omitted). The Government's broad-brush invocation of a potential "threat" to the individuals named in the email exchanges is not specific or credible enough to justify redaction of these individuals' names.

Finally, all of the above justifications apply with even greater force to law enforcement personnel, who were directly involved in the investigation of Mr. Swartz's case in their official capacities as public employees. The Government has offered no justification for disclosing the names of some law enforcement personnel in the discovery materials but not others. Any such distinction makes little sense, because all of these individuals are identically situated as publicly employed investigative officers and potential witnesses at a public trial of Mr. Swartz.

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Because the public interest in meaningful disclosure of the discovery materials is great, and no privacy interests will be significantly compromised, if at all, by disclosure, the Court

should order the documents disclosed without the redaction of names and titles. The public has a vital interest in learning the details of the investigation into Mr. Swartz's conduct, so as to assess the prosecutorial conduct in the case and the propriety of the charges brought against Mr. Swartz. *See Wecht,* 484 F.3d at 210 ("[T]he process by which the government investigates and prosecutes its citizens is an important matter of public concern."). This interest is not merely speculative; there is no dispute that broad-based press interest in the case continues to this day, with new articles published about Mr. Swartz's case on a daily basis. It is equally clear that the press interest involves matters of public, not just personal, concern—the propriety of the prosecution and the proper scope of criminal statutes like the CFAA.

Moreover, to the extent that any of the discovery materials have been cited as evidence in the parties' briefing on the motions to suppress and dismiss, those discovery materials are now a part of the judicial record. There is a strong presumption of public access to such judicial records. *United States v. Salemme*, 985 F. Supp. 193, 195 (D. Mass. 1997) (noting that "public monitoring of the courts is an essential feature of democratic control and accountability"); *Wecht*, 484 F.3d at 209 ("[D]ocuments filed with the court are generally subject to the common law right of access, unless attached to a discovery motion."). These documents therefore can only remain protected from disclosure if the public interest in access is outweighed by legitimate countervailing considerations, such as prejudicial pretrial publicity, the danger of impairing law enforcement or judicial efficiency, or the privacy interests of third parties. *Id.* Because this case is closed and the investigation complete, no concerns about pretrial publicity, law enforcement, or judicial efficiency apply. For the reasons laid out above, the privacy interests of the individuals named in the documents have been greatly overstated by the Government. Accordingly, at the very least, the public should be granted access to those emails already cited in documents filed before the Court.

IV. CONCLUSION

The public has an important and clearly established interest in receiving the information necessary to understand the events that led to Aaron Swartz's arrest and indictment. With the limited exceptions and redactions summarized above, defense counsel therefore requests that the Court modify the Protective Order to allow disclosure of the discovery documents to Congress and to the public generally.

Dated: March 15, 2013

Respectfully submitted,

/s/ Elliot R. Peters

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Attorneys for Defendant AARON SWARTZ

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the NEF (NEF), that paper copies will be sent to those indicated as non -registered participants, and that copies simultaneously will be served by overnight mail on the following attorneys:

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/s/ *Elliot R. Peters*
Elliot R. Peters

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

v.

AARON SWARTZ,

Defendant.

Crim. No. 11-CR-10260-NMG

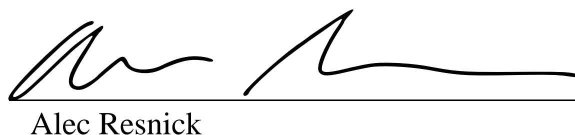
DECLARATION OF ALEC RESNICK IN SUPPORT OF DEFENDANT'S MOTION TO MODIFY PROTECTIVE ORDER

I, ALEC RESNICK, declare as follows:

1. I am the executor for the estate of Aaron Swartz. Unless otherwise stated below, I have personal knowledge of the facts set forth in this declaration and, if called upon, could and would testify competently thereto.

2. I have authorized Mr. Swartz's defense counsel, Elliot R. Peters, Daniel Purcell, and Michael J. Pineault, to represent and act on behalf of Mr. Swartz's estate for the sole purpose of moving for modification of the Protective Order entered in the criminal case against Mr. Swartz. As the executor of Mr. Swartz's estate, I confirm that the estate has a direct and compelling interest in public disclosure of the full factual record regarding the investigation and prosecution of the case against Mr. Swartz, which disclosure can be accomplished only by modification of the Protective Order and the publication of information related to the investigation and prosecution.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed in Massachusetts on March 08, 2013.



Alec Resnick

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/s/ Elliot R. Peters
Elliot R. Peters

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. AARON SWARTZ, Defendant.	Crim. No. 11-CR-10260-NMG

DECLARATION OF MICHAEL PINEAULT IN SUPPORT OF DEFENDANT'S MOTION TO MODIFY PROTECTIVE ORDER

I, Michael J. Pineault, declare as follows:

1. I am an attorney licensed to practice law in the Commonwealth of Massachusetts and a partner at Clements & Pineault, LLP, counsel for the above-named Defendant. Unless otherwise stated below, I have personal knowledge of the facts set forth in this declaration.

2. On or about February 4, 2013, Mr. Swartz's counsel received a letter from the United States House of Representatives Committee on Oversight and Government Reform, requesting copies of the discovery provided by the Government to Aaron Swartz in this matter, in order to assist that committee's investigation of Mr. Swartz's prosecution. A true and correct copy of that letter is attached hereto as Exhibit A.

3. By correspondence dated February 7, 2013, I notified First Assistant U.S. Attorney Jack Pirozzolo in the U.S. Attorney's Office for the District of Massachusetts of the foregoing request and asked whether the Government would assent to modify the November 30, 2011 Protective Order in this matter [Dkt. #28] so as to permit Mr. Swartz's counsel to produce the requested materials to Congress. A true and correct copy of my letter to Mr. Pirozzolo is attached hereto as Exhibit B.

4. Since February 7, I have engaged in extensive meet and confer discussions with Mr. Pirozzolo regarding the extent to which the Government might agree to any modifications to the Protective Order.

5. Mr. Pirozzolo has represented to me that the Department of Justice is willing to assent to modification of the Protective Order so as to permit the production of certain, but not all, of the requested discovery materials to the United States House of Representatives Committee on Oversight and Government Reform. Specifically, Mr. Pirozzolo has communicated the Department of Justice's desire to except from any production the following materials: (a) transcripts of grand jury testimony; (b) immunity orders issued to grand jury witnesses; (c) copies of any JSTOR articles that are not generally available to the public (i.e., that are only available to JSTOR subscribers); (d) any computer code that may have been written in connection with efforts to download such articles from JSTOR; and (e) criminal history information.

6. With respect to the remaining discovery materials that the Government produced to counsel for Mr. Swartz, Mr. Pirozzolo has communicated the Department of Justice's intention to assent to the production of such materials to Congress, subject to the following redactions:

a) As to Assistant U.S. Attorneys Stephen Heymann and Scott Garland, the Department seeks to redact any references to home addresses or conference call-in numbers;

b) As to the following four law enforcement personnel – Secret Service Special Agents Seidel and Pickett, Cambridge Police Officer Murphy, and Government Expert Geiger – the Department seeks to redact any references to home addresses, conference call-in numbers, e-mail addresses or telephone numbers;

c) As to all other individuals, including but not limited to: (i) other law enforcement personnel, (ii) current and former employees of JSTOR and the

Massachusetts Institute of Technology, and (iii) four private individuals who were questioned by the Government during its investigation, the Department seeks also to redact names, job titles, and other information that might reveal the identities of such individuals, absent express and individualized consent from each individual to disclose his or her name or other identifying information.

7. Mr. Pirozzolo further has stated that, at present, the Department of Justice is inclined to assent to a modification of the Protective Order that, subject to the foregoing conditions, would permit the production of the discovery materials to any member of the public. The Department has reserved the right to reassess the latter issue.

8. Finally, Mr. Pirozzolo has communicated MIT's and JSTOR's desire to receive notice of any motion to modify the Protective Order, so as to permit them an opportunity to seek leave to intervene and be heard on the motion.

9. Based on the file in this case, I am informed and believe that on August 12, 2011, prior to my involvement in this matter, the Government produced the first discovery materials to Mr. Swartz. A true and correct copy of the letter from the Government to Mr. Swartz's former counsel accompanying that disclosure is attached hereto as Exhibit C.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed electronically in Boston, Massachusetts on March 15, 2013.

/s/ Michael J. Pineault
Michael J. Pineault

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the NEF (NEF), that paper copies will be sent to those indicated as non-registered participants, and that copies simultaneously will be served by overnight mail on the following attorneys:

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/s/ Elliot R. Peters
Elliot R. Peters

EXHIBIT A

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February 4, 2013

Mr. Daniel Purcell
Keker & Van Nest
633 Battery Street
San Francisco, CA 94111

Dear Mr. Purcell:

We understand that you are currently representing the family of Aaron Swartz. We ask that you extend to them our deepest sympathies for the loss of their son.

As you know, the Committee is investigating allegations relating to the circumstances surrounding Mr. Swartz's prosecution. The Committee is also examining the Computer Fraud and Abuse Act, which was cited in several counts of the indictment in this matter, to determine whether reforms may be necessary.

In discussions with our staff, you explained that you are in possession of documents that were turned over by the U.S. Attorney's Office as part of the discovery process in the case against Mr. Swartz, but that these documents currently may be under seal as a result of an order issued by the court during the litigation.

We are writing to officially request copies of the documents provided to Mr. Swartz during this case. In terms of communicating with the court regarding any sealing orders, this letter serves as written confirmation of the Committee's interest in obtaining copies of these documents.

If you have any questions, please contact Henry Kerner at (202) 225-5074 or Jaron Bourke at (202) 225-5051. Thank you for your cooperation with this matter.

Sincerely,

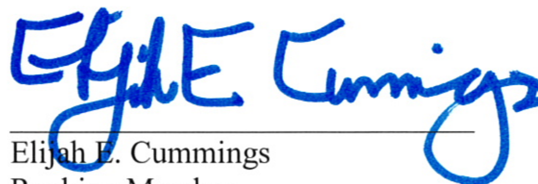

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EXHIBIT B

CLEMENTS & PINEAULT, LLP
24 FEDERAL STREET
BOSTON, MASSACHUSETTS 02110

Michael J. Pineault
mpineault@clementspineault.com

Phone: 857-445-0135
Fax: 857-366-5404

February 7, 2013

VIA E-MAIL and FIRST CLASS MAIL

Jack Pirozzolo
First Assistant U.S. Attorney
U.S. Attorney's Office
John Joseph Moakley Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210

Re: United States v. Swartz, No. 11-cr-10260-NMG

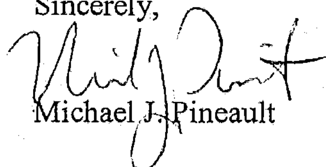
Dear Jack:

I write to convey two requests concerning the Aaron Swartz matter.

First, Aaron's family requests the return of the property that was seized from him. Please let me know if the United States will agree to return the seized property and, if so, how quickly that can happen. If there any items that the United States believes it has a legitimate reason to retain, please provide a list of such items with a brief explanation of the basis for the government's belief that it is entitled to retain them.

Second, by letter to Keker & Van Nest dated February 4, the House Committee on Oversight and Government Reform (the "Committee") has requested that Aaron's counsel produce copies of all discovery materials provided to the defense by the U.S. Attorney's Office in this matter. Cooperation with that request will necessitate a modification to the Protective Order that the court entered in this matter (Docket # 28) so as to permit Aaron's counsel to produce the requested materials to the Committee. Would you please let me know if the United States will stipulate/assent to such a modification? Thank you.

Sincerely,



Michael J. Pineault

cc: Elliot Peters, Esq.
Daniel Purcell, Esq.
Stephen P. Heymann, Esq.
Scott Garland, Esq.

EXHIBIT C

U.S. Department of Justice

Carmen M. Ortiz
United States Attorney
District of Massachusetts

Main Reception: (617) 748-3100

United States Courthouse, Suite 9200
1 Courthouse Way
Boston, Massachusetts 02210

August 12, 2011

Mr. Andrew Good
Good and Cormier
83 Atlantic Avenue
Boston, MA 02110

Re: United States v. Aaron Swartz
Criminal No. 11-CR-10260

Dear Counsel:

Pursuant to Fed. R. Crim. P. 16 and Rules 116.1(C) and 116.2 of the Local Rules of the United States District Court for the District of Massachusetts, the government provides the following automatic discovery in the above-referenced case:

A. Rule 16 Materials

1. Statements of Defendant under Rule 16 (a)(1)(A) & (a)(1)(B)

a. Written Statements

The defendant's booking sheet and fingerprint card from the Cambridge Police Department are contained on enclosed Disk 5.

There are numerous relevant statements not made to government agents drafted by Defendant Swartz before the date of his arrest contained in electronic media, such as Twitter postings, websites and e-mail. These are equally available to the defendant. Those that the government intends to use in its case-in-chief are available for your review, as described in paragraph A(3) below.

Subject thereto, there are no relevant written statements of Defendant Swartz made

following his arrest in the possession, custody or control of the government, which are known to the attorney for the government.

b. Recorded Statements

The defendant made recorded statements at the time of his booking by Cambridge Police on January 6, 2011. A copy of his booking video is enclosed on Disk 7.

c. Grand Jury Testimony of the Defendant

Defendant Aaron Swartz did not testify before a grand jury in relation to this case.

d. Oral Statements to Then Known Government Agents

Defendant Aaron Swartz made oral statements at the time of the search of his apartment to individuals known to him at the time to be government agents. The only statements made by him then which the government believes at this time to be material are memorialized in the affidavit in support of the search warrant for his office at Harvard, a copy of which affidavit is enclosed on Disk 3.

2. Defendant's Prior Record under Rule 16 (a)(1)(D)

Enclosed on Disk 3 is a copy of the defendant's prior criminal record.

3. Documents and Tangible Objects under Rule 16(a)(1)(E)

All books, papers, documents and tangible items which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial of this case, or were obtained from or belong to the defendant, may be inspected subject to a protective order by contacting the undersigned Assistant U.S. Attorney and making an appointment to view the same at a mutually convenient time.

Because many of these items contain potentially sensitive, confidential and proprietary communications, documents, and records obtained from JSTOR and MIT, including discussion of the victims' computer systems and security measures, we will need to arrange a protective order with you before inspection. Please review the enclosed draft agreement and let us know your thoughts.

4. Reports of Examinations and Tests under Rule 16 (a)(1)(F)

Enclosed you will find Disks 1, 2, 5 & 6 containing reports of examination of the following:

- Acer laptop computer recovered at MIT
- Western Digital hard drive recovered at MIT
- HP USB drive seized from the defendant at the time of his arrest
- Apple iMac computer seized at Harvard
- Western Digital hard drive seized at Harvard
- HTC G2 cell phone seized during the search of the defendant's residence
- Nokia 2320 cell phone seized during the search of the defendant's residence
- Sony Micro Vault seized during the search of the defendant's residence
- Four Samsung hard drives delivered to the Secret Service by Defendant Swartz and his counsel on June 7, 2011 (Please note that because of the number of files contained on Samsung model HD154UI hard drive, serial number S1Y6J1C2800332, it has not been practicable to date to make a complete file list in an Excel readable format, unlike the other drives.)
- A fingerprint analysis report from the Cambridge Police Department with respect to the Acer Laptop and Western Digital hard drive recovered at MIT
- A supplemental fingerprint analysis report with respect to these items

While not required by the rules, intermediate as well as final forensic reports where available are enclosed for many of the recovered and seized pieces of equipment on Disks 6 and 1, respectively.

B. Search Materials under Local Rule 116.1(C)(1)(b)

Search warrants were executed on multiple pieces of electronic equipment and at multiple locations. Copies of the search warrants, applications, affidavits, and returns have already been provided to you, but are further found on Disk 3.

Four Samsung Model HD154UI hard drives were examined following their consensual and unconditional delivery to the United States Secret Service on June 7, 2011. As an additional precaution, a warrant, enclosed on Disk 3, was also obtained.

C. Electronic Surveillance under Local Rule 116.1(C)(1)(c)

No oral, wire, or electronic communications of the defendant as defined in 18 U.S.C. § 2510 were intercepted relating to the charges in the indictment.

D. Consensual Interceptions under Local Rule 116.1(C)(1)(d)

There were no interceptions (as the term "intercept" is defined in 18 U.S.C. § 2510(4)) of wire, oral, or electronic communications relating to the charges contained in the indictment, made with the consent of one of the parties to the communication in which the defendant was intercepted or which the government intends to offer as evidence in its case-in-chief.

E. Video Recordings

On January 4, 2011 and January 6, 2011, Defendant Aaron Swartz was recorded entering a restricted wiring closet in the basement of MIT's Building 16. Copies of relevant portions of the recordings (where he is seen entering, in, or exiting the closet) are enclosed on Disk 4.

F. Unindicted Coconspirators under Local Rule 116.1(C)(1)(e)

There is no conspiracy count charged in the indictment.

G. Identifications under Local Rule 116.1(C)(1)(f)

Defendant Aaron Swartz was a subject of an investigative identification procedure used with a witness the government anticipates calling in its case-in-chief involving a photospread documented by MIT Police Detective Boulter. Relevant portions of the police report of Detective Boulter and a copy of the photospread used in the identification procedure are enclosed on Disk 3. In both instances, the name of the identifying MIT student has been redacted to protect the student's continuing right to privacy at this initial stage of the case. On page 2 of the Report of Photo Array, USAO-000007, the initials beside each of the enumerated items have been redacted for the same reason.

H. Exculpatory Evidence Under Local Rule 116.2(B)(1)

With respect to the government's obligation under Local Rule 116.2(B)(1) to produce "exculpatory evidence" as that term is defined in Local Rule 116.2(A), the government states as follows:

1. The government is unaware of any information that would tend directly to negate the defendant's guilt concerning any count in the indictment. However, the United States is aware of the following information that you may consider to be discoverable under Local Rule 116.2(B)(1)(a):

- Email exchanges between and among individuals at MIT and JSTOR as they sought to identify the individual responsible for massive downloads on the dates charged in the Indictment. While the defendant has admitted to being responsible for the downloads and produced one copy of most of what was downloaded on these dates, these e-mails reflect JSTOR's and MIT's initial difficulties in locating and identifying him in light of the furtive tactics he was employing. The email exchanges will be made available in accordance with paragraph (A)(3) above.

- Counsel for the government understands that a number of external connections were made and/or attempted to the Acer laptop between January 4, 2011 and January 6, 2011, including from a Linux server at MIT and from China. The Linux server was connected to a medical center at Harvard periodically during the same period. While government

counsel is unaware of any evidence that files from JSTOR were extracted by third parties through any of these connections, the connection logs will be made available to you in accordance with paragraph (A)(3) above.

- An analysis of one of the fingerprints on the Acer laptop purchased and used by the defendant cannot exclude his friend, Alec Resnick. The analysis is being produced for you; see paragraph (A)(4) above.

- While not a defense or material, one or more other people used or attempted to use scrapers to download JSTOR articles through MIT computers during the period of Defendant Swartz's illegal conduct. On the evening of November 29, 2010, the network security team at MIT was contacted and investigated journal spidering occurring on the site of the Institute of Electrical and Electronic Engineers. It was tracked to a group of shared computers on which anyone at MIT can host a virtual machine. It was determined that a virtual machine had been compromised. The user was notified that scripts placed on it were downloading journals from JSTOR, IEEE and APS. The machines were taken offline early the morning of November 30, 2010.

- The login screen on the Acer laptop when observed by Secret Service Agent Pickett on January 4, 2011 identified the user currently logged in as "Gene Host." A user name is different from a host name, and accordingly is similarly immaterial.

2. The government is unaware of any information that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude.

3. Promises, rewards, or inducements have been given to witness Erin Quinn Norton. Copies of the letter agreement with her and order of immunity with respect to her grand jury testimony are enclosed on Disk 3.

4. The government is aware of one case-in-chief witness who has a criminal record.

Please be advised that one of the government's prospective trial witnesses was the subject of a charge in Somerville District Court in 1998 of being a minor in possession of alcohol and that the case was dismissed the following month upon payment of court costs. The government intends to make no further disclosures with respect to this matter, as the criminal charge could have no possible admissibility under either Fed.R.Crim.P. 609 or 608(b). If you believe you are entitled to additional information, including the identity of the prospective witness, please advise the undersigned, in which event the government will seek a protective order from the court to permit non-disclosure.

5. The government is aware of one case-in-chief witnesses who has a criminal case pending.

Please be advised that one of the government's prospective trial witnesses has pending state charges brought on July 7, 2009, involving the Abuse Prevention Act, Possession of Burglarious Tools, Criminal Harassment, and Breaking and Entering in the Daytime With Intent to Commit a felony. The events underlying the charges arise from the break-up of a personal relationship. The government has withheld the name of the witness and the others involved to protect their privacy, but will make them available along with the police reports in its possession subject to a protective order ensuring that the names, events and reports will not be disclosed publicly until the trial of this case, should the Court determine that a charge or information contained in the police reports is admissible for the purposes of cross-examination.

6. Based on the timeline as the government presently understands it from Officer Boulter's report described in paragraph G above and contained on Disk 3, no named percipient witnesses failed to make a positive identification of the defendant with respect to the crimes at issue. As reflected in the report, three students present when the Acer computer and Western Digital hard drive were recovered from Building 20 by law enforcement stated that they did not see anyone come in and place the computer there. However, as the timeline reflects, this was not a failed identification, but rather that they were not percipient witnesses to the event which had occurred earlier.

I. <u>Other Matters</u>

The government has preliminary analysis notes prepared at Carnegie Mellon of certain code and files contained on the Acer Laptop, as referenced on Page 2 of SA Michael Pickett's Forensic Cover Report contained on Disk 1. While these are not encompassed by Rule 16 (a)(1)(F) (formerly 16(a)(1)(D)), the government will make these available for review as described in section (A)(3), above, subject to the same procedures proscribed for preliminary transcripts in Local Rule 116.4 (B)(2).

Your involvement in the delivery of four hard drives containing documents, records and data obtained from JSTOR creates potential issues in this case under the Rules of Professional Conduct, as I am sure you are aware. To avoid the potential for those issues under Rule 3.7 in particular, we propose a stipulation from your client that the hard drives were from him, thus taking you out of the middle and rendering the origin an uncontested issue under the Rule. This stipulation would be without prejudice to all arguments on both sides as to the admissibility of the drives and their contents at any proceeding.

The government is aware of its continuing duty to disclose newly discovered additional evidence or material that is subject to discovery or inspection under Local Rules 116.1 and 116.2(B)(1) and Rule 16 of the Federal Rules of Criminal Procedure.

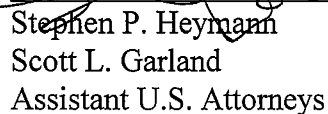
The government requests reciprocal discovery pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure and Local Rule 116.1(D).

The government demands, pursuant to Rule 12.1 of the Federal Rules of Criminal Procedure, written notice of the defendant's intention to offer a defense of alibi. The time, date, and place at which the alleged offenses were committed is set forth in the indictment in this case a copy of which you previously have received.

Please call the undersigned Assistant U.S. Attorney at 617-748-3100 if you have any questions.

Very truly yours,

CARMEN M. ORTIZ
United States Attorney

By: 

Stephen P. Heymann
Scott L. Garland
Assistant U.S. Attorneys

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