UNITED STATES DICTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE APPLICATION OF THE UNITED STATES OF AMERICA FOR NONDISCLOSURE ORDER PURSUANT TO 18 U.S.C. ¤ 2705(b) FOR GRAND JURY SUBPOENA #GJ2014031022709	Misc. No. 14287 (RWR) (JMF)
IN RE APPLICATION OF THE UNITED STATES OF AMERICA FOR NONDISCLOSURE ORDER PURSUANT TO 18 U.S.C. ¤ 2705(b) FOR GRAND JURY SUBPOENA #GJ2014031422765	Misc. No. 14296 (RWR) (JMF)

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONÕS CAPITAL TO INTERVENE AND FOR UNSEALING, AND FOR LEAVE TO FILE MEMORANDUM AS AMICUS CURIAE

Pursuant to Fed. R. Civ. P. 24(b), the American Civil Liberties Union and the American Civil Liberties Union of the NationÕs Capital (collectively ÒACLUÓ) hereby move to intervene in these matters for the purpose of challenging this CourtÕs docket sealing orders. Additionally, the ACLU seeks leave to file this memorandum as amicus curiae addressing the propriety of Magistrate Judge FacciolaÕs invitation to the parties who would be subject to gag orders to file papers expressing their positions on the governmentÕs applications.

The American Civil Liberties Union is a nationwide, nonprofit organization that since 1920 has sought to protect the civil liberties of all Americans. The American Civil Liberties Union of the NationÕs Capital is the Washington, D.C. affiliate of the American Civil Liberties

Union. The ACLU has frequently appeared in this Court, as counsel to parties and as amicus, to defend the right of public access to court proceedings and filings.

The government opposes the ACLUÕs motion for intervention for purpose of unsealing and believes the Court need not address the ACLUÕs motion for leave to file as amicus until it resolves whether the ACLU may intervene in these sealed proceedings.

INTRODUCTION

Over the past few weeks, the government has submitted to Magistrate Judge Facciola at least three applications for gag orders, pursuant to 18 U.S.C. ¤ 2705(b), that would prevent Twitter and Yahoo from disclosing to any person the existence or content of grand jury subpoenas issued to the companies. With regard to the first two applications, Judge Facciola invited Yahoo!, Inc. (ÒYahooÓ) and Twitter, Inc. (ÒTwitterÓ) to inte

The government filed interlocutory appeals on both sets of orders and also moved this Court to reach the applicationÕs merits and issue the proposed gag orders. See id. (citing GovernmentÕs Appeal from Magistrate JudgeÕs Orders Regarding GovernmentÕs Application for Order Pursuant to 18 U.S.C. ¤ 2705(b), Misc. Case No. 14-287, ECF No. 5-1 (ÒGovernmentÕs Appeal 14-287Ó)(sealed); GovernmentÕs Appeal from Magistrate JudgeÕs Orders Regarding Application for Order Pursuant to 18 U.S.C. ¤ 2705(b), Misc. Case No. 14-296, ECF No. 5-1 (ÒGovernmentÕs Appeal 14-296Ó)(sealed)). Both appeals were filed under seal, apparently only Òbecause each contains a single sentence on the second page explaining the general basis for the underlying grand jury investigationÓ. Id. n.1. This Court granted the governmentÕs motions to seal both appeals and ordered Yahoo and Twitter not to file during the appeal proceedings Òany notice on the public docket indicating the intent of the company to be heard on the merits of the governmentÕs non-disclosure application, or any other filingÓ. Order, Misc. Case No. 14-287, ECF No.7; Order, Misc. Case No. 14-296, ECF No. 7.

The documents filed in these prior proceedings are judicial records of significant interest to the American public. Insofar as the government claims an interest in preventing the disclosure of these documents because they might reveal information about a grand jury investigation, redactionÑ as opposed to blanket sealingÑ is the appropriate way to reconcile that interest with the publicÕs First Amendment and common law rights of access. Additionally, Magistrate Judge FacciolaÕs decision to invite Twitter and Yahoo to participate in briefing on the governmentÕs gag order application was well within his inherent powers. Magistrate Judge FacciolaÕs rulings were therefore correct, and this Court should, accordingly, unseal the records in these

heard, and that the common law right of access required that the filings in matt/TT3 1 TTT3 1 TT(ng

proceedings with only those redactions necessary to protect the governmentÕs grand jury investigation, and permit Yahoo and Twitter to be heard on the governmentÕs application for an order that would restrain their speech.

ARGUMENT

I. The ACLU Should Be Allowed to Intervene for the Purpose of Asserting the PublicÕs Right of Access And Should Also Be Allowed to Participate as .

Under Federal Rule of Civil Procedure 24(b)(1)(B), the Court Òmay permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.Ó Courts, including the D.C. Circuit, have held Òthird parties may be allowed to permissively intervene under Rule 24(b) for the limited purpose of seeking access to materials that have been shielded from public view either by seal or by a protective order.Ó E.E.O.C. v. NatÕl ChildrenÕs Ctr., Inc., 146 F.3d 1042, 1046 (D.C. Cir. 1998). To litigate a claim on the merits under Rule 24(b)(1)(B), Ò[i]t is

inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicantÕs rights, and the probability of prejudice to those already in [the] case.Ó Aristotle IntÕl, Inc. v. NGP Software, Inc., 714 F. Supp. 2d 1, 19 (D.D.C. 2010) (alterations in original) (quoting United States v. AT&T, 642 F.2d 1285, 1295 (D.C. Cir. 1980)) (internal quotation marks omitted). Here, the ACLUÕs motion to intervene for the limited purpose of asserting the publicÕs right of access comes only 19 days after the CourtÕs sealing decision. Moreover, because the ACLU does not seek to contest the merits of the litigation itself, intervention will not impede the governmentÕs ability to litigate the merits of the underlying dispute. For this reason, courts routinely allow intervention for unsealing purposes even after lengthy delays. See id. (holding that intervention was timely Òmore than one year after the routine briefing was completed on the motion for summary judgment, and some six months after the last hearingÓ in the case (citing Nat'l Children's Ctr., 146 F.3d at 1047)); see also, e.g., San Jose Mercury News, Inc. v. U.S. Dist. Court, 187 F.3d 1096, 1100 (9th Cir. 1999); United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990); Public Citizen v. Liggett Grp., Inc., 858 F.2d 775, 786 (1st Cir. 1988).

Second, the ACLUÕs public right of access claim shares a common question of law or fact with the underlying litigation. As with the jurisdiction and timeliness factors, the commonality requirement is flexibly applied when the movant seeks to intervene for the

intervene for the limited purpose of asserting the publicÕs right to access these documents. See In re Guantanamo Bay Detainee Continued Access to Counsel, --- F. Supp. 2d ---, Misc. No. 12-mc-398 (RCL), 2013 WL 5189595, at *2 (D.D.C. Sept. 17, 2013) (granting reporterÕs motion to intervene for the purpose of asserting the publicÕs right to access a sealed declaration); In re Motion for Totten Metrorail Cases, 960 F. Supp. 2d 1, 5 n.3 (D.D.C. 2013) (ÒThe parties do not seriously dispute that the Post, as a nonparty newspaper, may Ôpermissively intervene under Rule 24(b) for the limited purpose of seeking access to materials that have been shielded from public view either by seal or by a protective order.ÕÓ (quoting NatÕl ChildrenÕs Ctr., 1146 F.3d at 1046)).[2]

Third, although the ACLU is not privy to the contents of the grand jury subpoenas in these cases, it is nevertheless troubled, as the Court should be, by the governmentÕs overuse of gag orders to prevent public and judicial scrutiny of its invasions of citizensÕ privacy. As noted in footnote 1, the government recently withdrew a gag order application when ordered to file a redacted version publicly, suggesting that the application had not been necessary in the first place. In two cases in this Court, the ACLU filed motions to quash grand jury subpoenas on behalf of customers of WordPress and Twitter after the customers had been notified of the subpoenas by those companies. In the first case, the government withdrew the subpoena, presumably to avoid the granting of the motion to quash on the ground that the allegedly

[2] Regardless whether the Court grants the ACLUÕs motion to intervene, however, it has an independent duty to evaluate the publicÕs right of access to these proceedings. See, e.g., Citizens First NatÕl Bank of Princeton v. Cincinnati Ins., 178 F.3d 943, 945 (7th Cir. 1999) (ÒThe judge is the primary representative of the public interest in the judicial process and is duty-bound

suspicious activity that had prompted the subpoena was political commentary that was clearly protected by the First Amendment, and not remotely suggestive of any crime. Id. The motion papers were then placed on the public docket. In re Grand Jury Subpoena No. 10218019, No. 11-mc-362 (D.D.C. June 17, 2013). In the second case, the ACLU was able to agree with the government on a procedure

II.

information filed in connection with the lawsuit, particularly filings related to purely legal issues.Ó) Patuxent PublÕg Corp. v. State, 429 A.2d 554, 555 (Md. Ct. Spec. App. 1981) (ÒThe litigation of a First Amendment issue can be as sensitive a public concern as the litigation of a violation of the criminal law.Ó) (holding that the closure of gag order proceedings violated the publicÕs First Amendment right of access); In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp. 2d 876, 890 (S.D. Tex. 2008) (ÒDispositive documents, that is documents that influence or underpin the judicial decision are Ôpresumptively open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality.ÕÓ (quoting Baxter IntÕl, Inc. v. Abbott Labs., 297 F.3d 544, 545 (7th Cir. 2002))[3]). Moreover, ¤ 2705(b) provides no automatic sealing provision for gag order applications. This statutory default of openness stands in stark contrast to the automatic sealing accorded applications for judicial orders in other contexts. See 15 U.S.C. ¤ 57b-2a(e)(2) (ÒUpon application by the [Federal Trade Commission], all judicial proceedings pursuant to this section [including proceedings under 18 U.S.C. ¤ 2705(b)] shall be held in camera and the record thereof sealed until the expiration of the period of delay or such other date as the presiding judge or magistrate judge may permit.Ó); 18 U.S.C. ¤ 2518(8)(b) (ÒApplications made and orders granted under this chapter [of the Wiretap Act] shall be sealed by the judge.Ó)

The logic prong of the analysis focuses on whether access to the sealed documents would serve a Òsignificant positive role in the functioning of the particular process in question.Ó Press-

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and essential to preserve [that] compelling government interest. Robinson, 935 F.2d at 289 & n.10; see also Press Enter. I, 478 U.S. at 15 (ÒThe First Amendment right of access cannot be overcome by [a] conclusory assertion.Ó)

Here, the government invokes precisely the sort of generalized law enforcement interest that the publicÕs right of access forbids. It apparently argues that its interest in protecting the secrecy ofthe grand juryinvestigation justifies the imposition of a blanket seal on these collateral gag order proceedings. See Order, Misc. Case No. 14-480, ECF No. 2. But it fails to demonstrate that each of the documents at issue must be sealed in its entirety. Indeed, there is good reason to believe that the government could easily redact the documents to remove any reference to the underlying grand jury proceedings. The appeals to this Court Òwere apparently filed under seal because each contains a single sentence on the second page explaining the general basis forthe underlying grand jury investigation.Ó See id. And Judge Facciola has observed that an appropriately redacted gag order application would reveal Ò[n]o details about the grand jury investigation.Ó Id. If the government can trump the publicÕs right of access to a document simply by mentioning the existence of a grand jury proceeding, then the right of access will extend only so far as the government wishes. That is not the law. This Court should require the government to explain why every single document in

documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings. 650 F.2d 293, 317 (D.C. Cir. 1980). As with the First Amendment right of access, the party seeking closure Òbears the burden of showing that the material is the kind of information that courts will protectÓ and that Òdisclosure will work a clearly defined and serious injury.Ó In re Cendant Corp., 260 F.3d 183, 194 (3d Cir. 2001) (quoting Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d Cir. 1994)) (internal quotation marks omitted).

In this case, the balancing of interests unequivocally supports disclosure. First, the American people have a strong and legitimate interest in learning about the governmentÕs attempt to judicially silence companies that are not parties to any relevant court proceeding, particularly where the government relies on 5) l 0 0 (l) 0.2 (e) 0.2 (.2 (re (nc) 0.2 () -50.2 (l) 0.2 (s(t)

implications for the balance between privacy and law enforcement, and is a matter of first impression in this circuit as well as most othersÓ).

Second,

Bank AG, 377 F.3d 133, 140 (2d Cir. 2004). The ACLU respectfully requests that the Court exercise this authority.

This case raises a novel and complex legal issue (explained more fully below) about the governmentÕs statutory authority to impose a prior restraint on a party not before the Court. The public has a strong interest in learning about the legal arguments raised by the government to support that authority, both because the public has an inherent interest in learning about government attempts to impose prior restraints and because the imposition of gag orders under 18 U.S.C. ¤ 2705(b) deprives the public of crucial information regarding the governmentÕs electronic surveillance activities, itself a topic of intense public debate. Indeed, this very case has already received attention from the legal press. See Zoe Tillman, Judge Asks Twitter and Yahoo to Respond to Subpoena Question, Blog of the Legal Times (March 24, 2010).[5] The people cannot assess the countryÕs laws, the work of their legislators, or the powers conferred upon their executive officials unless they know how the government and the courts interpret the laws. In this way, the sealed documents at issue have far-reaching implications. Moreover, Judge FacciolaÕs opinions demonstrate that the type of tailored, limited publication of the documents requested here can be accomplished without prejudicing the governmentÕs investigation. Disclosure of these documents would thus substantially advance the public interest without compromising the governmentÕs interests and should be granted regardless whether the law requires it.

[5] Available at http://www.nationallawjournal.com/legaltimes/blog-legal-times/id=1202648129128/Judge+Asks+Twitter+and+Yahoo+to+Respond+to+Subpoena+Question%3Fmcode=1383246464404&curindex=98

III. Judge Facciola Properly Exercised His Inherent Authority to Invite Briefing on the GovernmentÕs Gag Order Applications.

Additionally, in its capacity as *amicus curiae*, the ACLU urges this Court to affirm Judge FacciolaÕs decision inviting Yahoo and Twitter to brief the legality of the governmentÕs application for a gag order pursuant to 18 U.S.C. ¤ 2705(b). A magistrate judgeÕs ruling on a nondispositive pretrial matter, such as the decision to invite briefing from an interested party, may be reversed by this Court only Òwhere it has been shown that the magistrate judgeÕs order is clearly erroneous or contrary to law.Ó 28 U.S.C. ¤ 636(b)(1)(A); Fed. R. Crim. P. 59(a). Judge FacciolaÕs order inviting Yahoo and Twitter was fully within his inherent authority, and therefore neither clearly erroneous nor, indeed, not erroneous at all nor contrary to law.

Courts have inherent authority to Òmanage their own affairs so as to achieve the orderly and expeditious disposition of cases.Ó *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)

Disclosure of Telecommunications Records & Authorizing the Use of a Pen Register, Trap and Trace, a case where the government sought certain types of cell site data pursuant to statutory authority that had been denied insufficient by several other district courts, Magistrate Judge Gorenstein asked the Federal Defenders of New York, Inc. to appear as amicus curiae and Ògreatly benefitted from the briefing provided by both sides.Ó 405 F. Supp. 2d 435, 436 (S.D.N.Y. 2005); see also, e.g., In re United States, 665 F. Supp. 2d 1210, 1212 (D. Ore. 2009) (stating that the district court has Òasked the Federal Public DefenderÕs office to respond to the United StatesÕs briefing [regarding a magistrate judgeÕs order to provide notice of 18 U.S.C. ¤ 2703(a) warrant searches to e-mail subscribers] as amicus curiaeÓ); In re Application for an Order Authorizing the Use of Two Pen Register, Trap and Trace Devices, 632 F. Supp. 2d 202, 203 (E.D.N.Y. 2008) (ÒBecause of the complexity and significance of these legal issues [regarding the governmentÕs supplemental application for prospective cell site information], the court invited the Electronic Frontier Foundation . . . to submit a memorandum of law as amicus curiae.Ó); In re Application for an Order, 411 F. Supp. 2d 678, 680 (W.D. La. 2006) (noting that the court had solicited a letter brief from the Federal Public Defender regarding the governmentÕs application for prospective cell site information); cf. In re Application for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government, 620 F.3d 304, 306 n.1 (3d Cir. 2010) (ÒBecause the Government's application was ex parte, and there was no adverse party to review or oppose it. However, we received amici briefs in support of and in

No. 2. In In re Application for an Order Pursuant to 18 U.S.C. ¤ 2705(b), Magistrate Judge Zaresky of the United States District Court for the Central District of California held that 18 U.S.C. ¤ 2705(b) does not authorize courts to prohibit Internet Service Providers (ISPs) from notifying subscribers about grand jury subpoenas seeking their information. 866 F. Supp. 2d at 1179-80. Observing that Federal Rule of Criminal Procedure 6(e)(2) prohibits courts from gagging recipients of grand jury subpoenas, the court held that ¤ 2705(b) does not trump this prohibition, because the provision applies only to applications for content information under ¤ 2703(b), not applications for subscriber information under ¤ 2703(c). See id. at 1173-74. In response to a similar request for a ¤ 2705(b) gag order on Twitter, Magistrate Judge Robinson of

invitation for supplemental briefing regarding the governmentÕs gag order application was