IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN RE 2703(d) ORDER AND 2703(f) PRESERVATION REQUEST RELATING TO GMAIL ACCOUNT [redacted]	Misc. No. 10GJ3793 FILED UNDER SEAL

GOOGLE INC.'S REPLY IN SUPPORT OF ITS MOTION TO MODIFY 2703(d) ORDER FOR PURPOSE OF PROVIDING NOTICE TO ACCOUNT HOLDER

Google Inc. ("Google") hereby submits this Reply in Support of its Motion to Modify 2703(d) Order for Purpose of Providing Notice to Account Holder.

The government admits in its response brief that the demand at issue here (the "Order")[1] and the unsealed Twitter Order[2] relate to the same investigation. The government's brief also establishes that the targets of their investigation are already operating under the assumption that the government has sought information related to their Google accounts. These facts alone demonstrate that there is no cause for the Order to have been sealed in the first place or to remain sealed now. Moreover, rather than demonstrating how unsealing the Order will harm its well-publicized investigation, the government lists a parade of horribles that have allegedly occurred since it unsealed the Twitter Order, yet fails to establish how any of these developments could be further exacerbated by unsealing this Order. The proverbial toothpaste is out of the tube, and continuing to seal a materially identical order will not change it.

[1] *See* Declaration of John K. Roche, Ex. 1 ("Roche Decl.").

[2] *Id.* Ex. 2.

The government also prejudges any free speech or privilege objections that Google's user may wish to raise by describing them as "meritless." Of course, if the user's potential arguments are all so obviously meritless as to not even warrant a hearing, one is left to wonder why the government agreed to unseal the Twitter Order in the first place in order to allow those users an opportunity to file their objections. Indeed, the Twitter use[redacted]may have already filed an opposition to the Twitter Order with this Court. If he or she has, it would certainly be incongruous for this Court to hear those objections in relation to the Twitter Order, but to foreclose any opportunity to hear objections in relation to this Order based solely on the government's generalized ex parte and wholly speculative assertion that those objections are frivolous. We specifically ask that the government advise the Court whether such objections have been filed or motions made in regard to the Twitter order.

Accordingly, for these reasons and those stated below and in Google's motion, Google respectfully requests that the Court grant its motion and modify the Order pursuant to the terms of Google's proposed order.

I. ARGUMENT

A. The Government's Response Confirms There is No Need for Secrecy of this Order or the Preservation Request

The government admits that the Twitter Order and the Order involve the same investigation, yet inscrutably claims that the Order must remain sealed because it involves "a different case" than the Twitter Order. *See* Government Response, at 3 n.1; *see also id.* at 13. This opaque rationale for refusing to unseal the Order does not withstand scrutiny.

As noted in Google's motion, the Order does not meet any of the traditional standards for

grand jury confidentiality. *See* Google's Motion, at 9. Specifically, the Wikileaks investigation and the government's interest in [redacted] electronic communications are already a well-publicized matter of public record. *McHan v. C.I.R.*, 558 F.3d 326, 334 (4th Cir. 2009) ("it is a 'common-sense proposition that secrecy is no longer "necessary" when the contents of grand jury matters have become public.'") (quoting *In re Grand Jury Subpoena,* 438 F.3d 1138, 1140 (D.C. Cir. 2006)).

Furthermore, disclosure of the Order would not reveal any witness testimony, so there is no fear of retribution against witnesses as a result. *Finn v. Schiller*, 72 F.3d 1182, 1187 n.6 (4th Cir. 1996). The government claims that unsealing the Order may result in "witness intimidation" in the form of encouraging providers "to resist the government's attempts to gather relevant user information." *See* Government Response, at 16. This argument is specious. First, keeping orders in the shadows to prevent witness intimidation is one thing, but doing so to prevent public discourse is not a proper use of the mechanism. Second, providers are corporate entities advised by competent inside and outside counsel, some of whom are former government attorneys. The notion that these companies could be intimidated into resisting otherwise valid legal process is baseless. Google can only speak for itself, but when it resists legal process, it does so because its attorneys have a good faith belief that the process is deficient or unlawful in some respect, not because Google is trying to curry favor with some interest group. Google has no reason to believe that other providers' approach to legal process is any different.

Additionally, there is no risk of destruction of evidence because Google has preserved responsive information and the Order only demands historical records, not prospective data. The government nevertheless argues that unsealing this Order may cause the targets to "alter[] their modes of communication to evade future investigative efforts," but as the government notes in

its brief, the Twitter user [redacted]nd other targets of the investigation are already working under the assumption that their Google accounts are the subject of legal process from this grand jury investigation. *See* Government Response, at 14; *see also* Government Exhibits 3-4. Therefore, disclosing this Order will do nothing to alter anyone's behavior, and to the extent ioerror has already destroyed evidence, unsealing the Order will not reverse those actions either.

The government also claims that the Order must remain sealed "because it might cause suspects to . . . flee." *See* Government Response, at 13. This argument also fails because if [redacted] is a flight risk, the widespread media coverage of the Twitter Order would have already presumably given him or her and any co-conspirators all the notice they need to start packing their bags, regardless of whether Twitter's [redacted] and Google's [redacted] are one and the same.

Finally, the government asserts that its employees were harassed after the disclosure of the Twitter Order and implies that the same can be expected if this Order is disclosed. *See* Government Response, at 15-16; *see also* Government Exhibit 6. Google condemns any such attacks on government personnel and sympathizes with those forced to endure them. In order to ensure that the same behavior does not occur here, the government should request that the court order any personal identifiers of government personnel redacted before unsealing the Order or preservation letter.

In sum, there is no risk of destruction evidence, and none of the other interests served by the traditional secrecy of grand jury proceedings would be undermined in any way by disclosure of the Order or the preservation request. There is no cause for the Order to remain sealed.

B. The Court Should Grant [redacted] the Opportunity to Assess the Legality of the Order

Google understands that Twitter's [redacted]ser and the other users affected by the Twitter Order were granted a certain period of time in which to file their opposition to the Twitter Order. *See* Government Exhibit 5. The government should disclose whether or not such filings have been made. If Twitter's [redacted]ser did indeed file an opposition brief, it would be logical to assume there is an excellent chance that Google's [redacted] would similarly oppose this Order if one assumes the user is the same. Worse, the user and the Court hearing any such motions are misled into believing that only the Twitter Order is at issue when considering the scope of harm to the user and any First Amendment or other rights that are implicated by the government's demands.[3]

Google therefore suggests that the Court ask the government at oral argument whether the user for the [redacted] Twitter account has filed an opposition with this Court to the Twitter Order. If the user has, Google respectfully submits that the Court should not collaterally prejudge the merits of that opposition by accepting the government's assertions that any arguments raised by Google [redacted] in response to the Order "would be meritless." *See* Government Response, at 6. I[redacted]s arguments are meritless, then the government has nothing to fear. On the other hand, if [redacted]s arguments are valid, the user should be permitted to raise them here, just as Twitter's [redacted] user may have already done in regard to the Twitter Order. Regardless, not informing Google's [redacted]f the Order at the same time Twitter's [redacted] may be asserting his or her rights in regard to the materially identical Twitter Order seems unfair to the user.

[3] Indeed, Google is not privy to all the orders that may have been issued to all the providers of services to user [redacted] but the Court hearing any motion to quash or amend the Twitter Order, or to unseal a pending order such as here, ought to be made aware of the scope of such inquiry.

Furthermore, Google made clear in its motion that it is not in the best position to advocate for the free speech or other privilege rights of its users – the users are. Nevertheless, the government has seen fit to denigrate any potential arguments that Google's user might raise, even though those potential arguments are not as easily disposed of as the government suggests. For example, the government is dismissive of the fact that Wikileaks has been widely described as an enterprise that consists of, or works with, journalists and academics.[4] While Google does not comment on whether this is an accurate description of what Wikileaks does, one can assume that if [redacted] is somehow associated with Wikileaks, he or she may wish to assert his or her own First Amendment rights or any applicable journalistic, academic or other privileges or defenses to which [redacted] feels he or she is entitled. [redacted] might assert that the Order's demand for "the source and destination email addresses and IP addresses" for communications in his or her account will reveal confidential sources or information about Wikileaks' purported journalistic or academic activities. The extent to which such sources and information are protected from discovery by the grand jury is a hotly debated issue, and one that [redacted] may wish to raise before this Court. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1164 (D.C. Cir. 2006) (Tatel, J., concurring) (the Supreme Court's *Branzburg* decision "places limits on grand jury authority to demand information about source identities – though, again, the precise extent of those limits seems unclear."); *id.* at 1174 ("Of course, in some cases a leak's value may far

[4] *See, e.g., Salmeron v. Enterprise Recovery Systems, Inc.*, 579 F.3d 787, 791 n.1 (7th Cir. 2009) ("'[F]ounded by Chinese dissidents, journalists, mathematicians and startup company technologists, from the US, Taiwan, Europe, Australia and South Africa,' Wikileaks styles itself as 'an uncensorable version of Wikipedia for untraceable mass document leaking and analysis.' http:// wikileaks. org/ wiki/ Wikileaks: About (last visited July 16, 2009)."); Adam L. Penenberg, *Yes, He's a Journalist, Too,* Washington Post, Jan. 30, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/01/28/AR2011012806860.html ("Based on the wording of many of these [press shield] statutes, Assange fits the definition of a journalist, and what WikiLeaks does qualifies as journalism.") (last visited on Jan. 30, 2011); *US soldiers can be demoralized by WikiLeaks docs: Morrell*, Daily Pak Banker, Oct. 25, 2010, 2010 WLNR 21356017 (describing Wikileaks as working with "a group run by academics"); *Activists targeted as secrets exposed*, Australian, Apr. 12, 2010, 2010 WLNR 7507448 (describing Wikileaks as consisting of "computer programmers, academics and activists.").

exceed its harm, thus calling into question the law enforcement rationale for disrupting reporter-source relationships."); *In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223, 225 (2d Cir. 1984) ("Surely the application of a scholar's privilege, if it exists, requires a threshold showing consisting of a detailed description of the nature and seriousness of the scholarly study in question, of the methodology employed, of the need for assurances of confidentiality to various sources to conduct the study, and of the fact that the disclosure requested by the subpoena will seriously impinge upon that confidentiality."); *U.S. v. Doe*, 460 F.2d 328, 334 (1st Cir. 1972) (grand jury questions "seeking the names of persons interviewed who gave [a university professor] knowledge of participants in the Pentagon Papers study should be answered, *at least to the extent that the persons were not government officials or other participant-sources*.") (emphasis added).

Conversely, [redacted] may simply be an independent party who has voiced support for Wikileaks. If so, that activity is at the core of free speech and is certainly entitled to protection. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment.").

In any event, the point is that [redacted] – not Google or the government – is in the best position to assess the propriety of any legal process related to the [redacted] Gmail account, and the Court should have the opportunity to hear the objections. *In re Grand Jury Subpoena*, 438 F.3d at 1164 (Tatel, J., concurring) ("given that any witness – journalist or otherwise – may challenge [an unreasonable or oppressive] subpoena, the majority [in *Branzburg*] must have meant, at the very least, that the First Amendment demands a broader notion of 'harassment' for journalists than for other witnesses.").

C. The Order is a Prior Restraint on Google's Right to Free Speech

Finally, while arguments raised for the first time in reply are generally not considered, Google must correct the government's erroneous assertion that "Google has no viable First Amendment argument to make on its own behalf." *See* Government Response, at 6. On the contrary, the non-disclosure provision in the Order certainly prevents Google from communicating with its user and "is fairly characterized as a regulation of pure speech." *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (referring to Wiretap Act provision prohibiting disclosure of contents of illegally intercepted communication). The Order's non-disclosure provision also prevents Google from defending itself against public criticism such as that cited in the Government's brief. *See* Government Exhibits 3-4. It is of no moment that the person it restrains from speaking, *i.e.*, Google, is a corporate entity. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."). Prior restraints on speech "are constitutionally disfavored in this nation nearly to the point of extinction." *United States v. Brown*, 250 F.3d 907, 915 (5th Cir. 2001). Accordingly, such restraints are subject to the most demanding scrutiny. *In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 881-82 (S.D. Tex. 2008) ("Prohibiting a service provider from disclosing the existence of the pen/trap or the investigation means that the first-hand experiences of the recipients of these orders are completely excluded from the public debate" and "dries up the marketplace of ideas just as effectively as a customer-targeted injunction would do."). While Google certainly could have made its own First Amendment arguments, and this Court certainly may consider them on its own, the point of Google's motion was to ensure that its user had the opportunity to assert such rights.

Here, the government has offered to limit the nondisclosure requirement in the Order to a period of 90 days, with a provision allowing it to petition the Court for extensions if disclosure would seriously jeopardize the investigation or have an adverse result as defined by 18 U.S.C. § 2705(a)(2). Google agrees that such nondisclosure requirements of a limited duration are not uncommon in normal investigations, and are rarely challenged by providers. However, this is not a normal investigation. Because the government's interest in [redacted] electronic communications is already so well-publicized and there is absolutely no risk of destruction of evidence, Google fails to see how any nondisclosure period is justified under these highly unique and unusual circumstances.

II. CONCLUSION

For the reasons stated here and in Google's motion, Google respectfully requests that the Court grant its motion and modify the Order pursuant to the terms of Google's proposed order.

DATED this 1st day of February, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2011, the foregoing document was sent via hand delivery and email to the following persons:

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