



August 12, 2016

BY EMAIL

Dennis M. Fitzpatrick, AUSA
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**Re: Grand-Jury Subpoena Directed at Open Whisper Systems
(16-3 / A01-246 / 476 / 16-1090)**

AMERICAN CIVIL LIBERTIES
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OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT B. REMAR
TREASURER

Dear Mr. Fitzpatrick,

This letter concerns the gag order issued by Magistrate Judge Theresa C. Buchanan in connection with a June 30, 2016 grand-jury subpoena directed at Open Whisper Systems (“OWS”) seeking “subscriber account information” for two phone numbers. *See* Order, No. 15gj1141 (E.D. Va. June 30, 2016).¹ The American Civil Liberties Union represents OWS in this matter.

As I indicated in my July 14, 2016 letter to Special Agent Tracey Minnich providing OWS’s response to the subpoena, OWS has concerns about the scope of the gag order issued against it. Specifically, OWS believes the gag order to be unconstitutional because it is not narrowly tailored to a compelling government interest. I am writing in the hope of resolving this matter without the need for litigation, and I would welcome the opportunity to discuss it with you at your earliest convenience.

OWS seeks to make public redacted versions of: the government’s cover letter; the grand-jury subpoena and gag order issued to OWS; OWS’s response to the subpoena; and this letter. OWS also seeks to speak publicly about its receipt and compliance with the subpoena. As illustrated in the attachments to this letter, OWS’s versions of the documents redact,

from the government’s cover letter:

- the date of the letter,
- the case-specific information in the subject line, and

¹ On July 14, 2016, OWS timely responded to the grand-jury subpoena with the responsive information in its possession by email to Special Agent Tracy J. Minnich.

- the production deadline in the first paragraph;

from the subpoena:

- the case-specific information in the header,
- the date and time of the scheduled grand-jury hearing,
- the two target phone numbers, and
- the date of the subpoena;

from the certificate of authenticity:

- the case-specific information to the right of the signature block;

from the gag order:

- the target phone numbers in the case caption,
- the dates at the top and bottom of the order, and
- the case-specific information to the right of the case caption;

from OWS’s response to the subpoena:

- the date of the response,
- the case-specific information in the subject line,
- the date of the subpoena in the first paragraph,
- the two target phone numbers,
- the case-specific information and date in the citation on page 2, and
- two target phone numbers and responsive information in the attachment;

and, from this letter:

- the date of the letter,
- the case-specific information in the subject line and first paragraph,
- the dates of the subpoena and gag order in the first paragraph, and
- the date of OWS’s response to the subpoena in footnote 1 and the second paragraph.

OWS would also like to publicly explain that it received the request in the first half of 2016 for two target phone numbers, and that it later complied by sharing the only information it retains—the “last connection date” and the “account creation date”—for the only one of the two accounts as to which it possessed records.²

² OWS notes, as it did in its letter to Special Agent Minnich, that not all of the types of information listed in the grand-jury subpoena issued to OWS can be appropriately requested with a subpoena. Under ECPA, the government can use a subpoena to compel disclosure of information from an electronic communications service provider only if that information falls within the categories listed at 18 U.S.C. § 2703(c)(2). For other types of information, the

Neither the government nor a court may constitutionally prohibit OWS's proposed disclosures. The information OWS seeks to disclose would not reveal the target of the government's subpoena or any other information that could reasonably impair any legitimate governmental interest. Instead, the information OWS seeks to disclose would confirm only that it has received a subpoena for certain information relating to one of its millions of users; that it complied with the subpoena; and that it is currently forbidden from identifying the target of the subpoena. The government has no legitimate interest in restricting that speech, while OWS would further a significant public interest in making it. The proper role, scope, and limits of government surveillance are quintessential matters of public concern under the First Amendment, and electronic service providers—who have dual roles as custodians of Americans' private data and as necessary actors in the execution of government surveillance requests—have a critical role to play, and perspective to share publicly, about government surveillance practices.

Even more broadly, it is far from clear from the gag order that the government has satisfied the high constitutional hurdle for imposing any prior restraint on OWS. The order recites the government's general interest in keeping its criminal investigations secret, but that general interest applies in virtually every criminal investigation, including the countless ones in which the government routinely executes search warrants *with notice* to the targets of the investigation. *See* Order at 1 (“The Court determines that there is reason to believe that notification of the existence of the attached subpoena will seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates.”); *see also* 18 U.S.C. § 2705(b)(2), (3), (5). To justify the extraordinary remedy of restraining truthful speech, the government must make a greater showing.

Thank you for your attention to this matter. I look forward to speaking with you soon.

Respectfully,



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government must obtain a court order or search warrant. OWS objects to use of the grand-jury subpoena to request information beyond what is authorized in Section 2703(c)(2), though it did not possess any such information in this case.