United States
Foreign Intelligence Surveillance Court
Washington, D.C.

In re Motion to Disclose Aggregate Data Regarding FISA Orders	)	Docket Nos. Misc. 13-03, 13-04, 13-05, 13-06, 13-07
	)	**ORAL ARGUMENT REQUESTED**

Motion to Strike the Government's *Ex Parte* Response to Motions to Disclose Aggregate Data Regarding FISA Orders

Google Inc., Microsoft Corporation, Yahoo! Inc., Facebook, Inc., and LinkedIn Corporation (collectively, "the providers") have moved for declaratory relief to remove an unlawful prior restraint on their right to speak about an issue of substantial public importance: whether, and in what numbers, the providers receive orders or directives from the government under the Foreign Intelligence Surveillance Act ("FISA") or the FISA Amendments Act ("FAA"). The government has submitted a response and supporting declaration for *ex parte*, *in camera* review. It has given the providers only a heavily redacted version of its submissions, and it has rejected all requests for greater access.

Unless the government reconsiders its refusal to accommodate the providers' legitimate need to understand the basis for the government's response, the providers respectfully request that this Court strike the redacted portions of the government's brief and supporting declaration. The redacted version of the government's submissions does not comply with Foreign Intelligence Surveillance Court Rule 7(j) because it does not "clearly articulate the government's legal arguments," as the rule requires. If the government's interpretation of the rule were correct, the rule would violate both the First Amendment and the Due Process Clause. To avoid that result, the Court should construe the rule to require fuller disclosure to the providers.

Allowing the government to file an *ex parte* brief in this case will cripple the providers' ability to reply to the government's arguments and is likely to result in a disposition of the providers' First Amendment claims based on information that the providers will never see. The providers do not dispute that in some cases it may be appropriate for this Court to consider *ex parte* filings. In this case, however, such a course is neither justified nor constitutional. The providers already know the core information that the government seeks to protect in this litigation—the number of FISC orders or FAA directives to which they have been subject, if any. At issue here is only the secondary question whether the providers may be told the reasons why the government seeks to keep that information a secret. The government has not argued that sharing those reasons with the providers or their counsel would endanger national security. Accordingly, unless the government allows the providers' counsel to access its response, the Court should strike the redacted portions of that response.

BACKGROUND

The providers have sought a declaratory judgment permitting them to publish aggregate data about any orders or directives they may have received under FISA or the FAA. As the providers have explained, there is no statutory basis for the government's refusal to permit them to publish such data. And to the extent there is any basis for the government's restraint, it constitutes a content-based restriction on speech that violates the First Amendment because it is not narrowly tailored to promote a compelling governmental interest.

On September 30, 2013, the government responded to the providers' motions. Invoking FISC Rule 7(j), the government filed its response and a supporting declaration *ex parte* for *in camera* review by the Court. The government also served the providers with a heavily redacted version of its response and declaration.

The providers have attempted to accommodate the government's concerns. In advance of the government's filing, on September 20, 2013, the providers requested notice if the government intended to submit classified information. The government did not respond to that letter. Since receiving the government's redacted response, the providers have repeatedly conferred with the government in an effort to obtain access to the unredacted version of the government's filings and accompanying declaration under appropriate security procedures. The providers have suggested a range of alternatives to the government, including the following:

- Allowing counsel for providers who already hold Top Secret clearances to review the unredacted response.
- Granting uncleared counsel interim clearances (or entering into nondisclosure agreements) that would permit them to review some or all of the unredacted response.
- Withdrawing the current version of the response and filing an unclassified response, or at least a response at a lower level of classification.
- Agreeing to the appointment of a neutral third-party advisor or special master who would review the government's submission in unredacted form and make arguments on the providers' behalf relating to materials that providers' counsel are not permitted to see.
- Permitting counsel for the respective providers to review at least those aspects of the redacted submissions that pertain to those specific providers.

Those alternatives would not fully satisfy all of the providers' First Amendment and due process interests in understanding the factual bases of the government's position, but some of the alternatives could help to address at least some of the providers' interests. Nevertheless, the government has categorically refused any and all access by any of the providers' counsel—regardless of level of clearance—and has made clear that it is unwilling to entertain any of the foregoing

alternatives. In the government's view, the providers must litigate this case solely on the basis of the redacted filings that the government has already provided.

ARGUMENT

I. The government's response does not comply with Rule 7(j)

Rule 7(j) requires the Court to "review *ex parte* and *in camera* any submissions by the government, or portions thereof, which may include classified information," but it also requires the government to provide the adverse party with a redacted version, which, "at a minimum, must clearly articulate the government's legal arguments." The redacted version of the government's submissions fails to satisfy that requirement because it does not explain how the relief sought by the providers would harm national security. While the government suggests (Gov't Br. 6) that "[t]he FBI's assessment of harm" that would result from the disclosure sought by the providers "is entitled to deference," it does not argue that such deference is absolute, and rightly so. *See McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983) ("Considering that speech concerning public affairs is more than self-expression; it is the essence of self-government, and that the line between information threatening to foreign policy and matters of legitimate public concern is often very fine, courts must assure themselves that the reasons for classification are rational and plausible ones." (internal quotation marks and citation omitted)). To the contrary, the government devotes five pages of its brief to arguing the correctness of the FBI's assessment, thereby implicitly conceding that it is appropriate for the Court to evaluate, at least to some degree, the FBI's reasoning. In other words, establishing the reasonableness of the FBI's assessment of harm is a critical part of the government's legal argument. But the pages devoted to that part of the government's argument are almost entirely redacted; on that critical issue, the providers have no way to respond to the government's

contentions. The government has therefore failed to "clearly articulate [its] legal arguments," as Rule 7(j) requires.[1]

II. If Rule 7(j) were construed to permit the government's filing of heavily redacted submissions in this case, it would violate the First and Fifth Amendments

To the extent there is any doubt whether Rule 7(j) permits the government's *ex parte* filing, the Court should construe the rule so as not to permit the filing because a contrary interpretation would make the rule unconstitutional.[2] While *ex parte* filings might be permissible in some contexts, accepting the government's *ex parte* filing of September 30 would pose two constitutional problems. First, it would prevent the providers from participating fully in the resolution of their First Amendment claim, which would further chill the providers' (and others') speech, magnifying the harm that forced the providers to seek relief from this Court in the first place. Second, it would violate the providers' procedural due process rights by depriving the providers of adequate safeguards to protect their substantive First Amendment rights.

First Amendment. In preventing the providers from reviewing and analyzing the core evidence supporting its restraint on their speech, the government has prevented them from fully and

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[1] Additionally, in the section of the government's brief arguing that FISA itself prohibits disclosure, the redacted version omits the entirety of footnote 4. That footnote follows a citation to the FISA statute, and it comes in the middle of a paragraph that is otherwise entirely devoted to legal argument and that contains no factual discussion. It is therefore reasonable to infer that footnote 4 is part of the government's legal argument. The footnote's contribution to the argument, however, is impossible to discern from the redacted version. The government's failure to explain what argument it is making in the footnote is a further violation of Rule 7(j).

[2] At a minimum, a contrary interpretation would require the Court to resolve serious constitutional questions, and it should be avoided for that reason. *See Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *see also, e.g.*, *United States v. Wecht*, 484 F.3d 194, 204–05 (3d Cir. 2007) (invoking court's supervisory authority over local rules and narrowing contested rule to avoid First Amendment issue); *Gordon v. Idaho*, 778 F.2d 1397, 1400 (9th Cir. 1985) ("The First Amendment's guarantee of the free exercise of religion requires that our procedural rules be interpreted flexibly to protect sincerely-held religious beliefs and practices.").

meaningfully responding to its position. This substantially undermines the adversarial system, which is particularly critical in the context of First Amendment litigation. The government's prohibition on the disclosure of the aggregate data is a prior restraint on speech—that is, it "*forbid*[*s*] certain communications ... in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (internal quotation marks omitted). Under these circumstances, "the First Amendment generally requires procedural protections to guard against impermissible censorship." *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008) (citing *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)). Central to those procedural protections is the right to judicial review of any restraint in an adversarial proceeding. *See Freedman*, 380 U.S. at 58 ("[O]nly a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression...."). The Supreme Court has recognized that the "value of a judicial proceeding ... is substantially diluted where the process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968); *see id.* ("In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication.").

While this case is not an *ex parte* proceeding, the concerns that animated the Supreme Court's decision in *Carroll* apply equally here. The government is restraining the providers from speech using evidence that the providers will never see, based on its categorical interpretation of a procedural rule that, in the government's view, applies irrespective of the liberty interest at issue. Foreclosing the providers' ability to view, analyze, or reply to the government's unredacted submissions would preclude the meaningful "participation of the party seeking to exercise First

Amendment rights" and thereby "substantially imperil[] the protection which the Amendment seeks to assure." *Id.* at 184.

Fifth Amendment Due Process Clause. Where the government seeks to rely on classified information in a proceeding that implicates a protected liberty interest of a private party (here, the providers' right to engage in core First Amendment protected speech about the government and themselves), "the Constitution ... require[s] that the government take reasonable measures to ensure basic fairness to the private party and that the government follow procedures reasonably designed to protect against erroneous deprivation of the private party's interests." *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012).

To analyze whether Rule 7(j), as the government seeks to apply it in this case, comports with the Fifth Amendment, this Court should apply the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004) (plurality opinion) (recognizing that *Mathews* is the appropriate framework for determining the requirements of the Due Process Clause, even when national-security interests are at stake). Under *Mathews*, courts weigh three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 334–35. All three factors support the conclusion that the Court should not resolve this case on the basis of the government's unredacted filings if the providers are not given an opportunity to review and respond to them.

First, the liberty interest at issue in the providers' motion is substantial. "Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause." *First Nat'l Bank of*

Boston v. Bellotti, 435 U.S. 765, 779–80 (1978) (internal citations omitted). As previously explained, the providers are currently being restrained from correcting the misimpression, furthered by inaccurate media reporting, that they indiscriminately disclose their users' information to the government. In other words, on a subject at the core of the First Amendment—speech *about* the government—the providers cannot fully answer the media's inaccuracies with their own truthful speech. *See Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

Second, there is a considerable risk that deciding this case on the basis of factual assertions and arguments that the providers are not permitted to see could erroneously deprive the providers of their First Amendment rights. The Supreme Court has repeatedly held that "[t]he core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *see also* Henry J. Friendly, "*Some Kind of Hearing*", 123 U. Penn. L. Rev. 1267, 1280–1281 (1975). That basic feature of due process is lacking here because the providers lack notice of critical aspects of the government's argument, and without such notice, they cannot meaningfully respond to the government's brief. The premise of our adversarial system is that fair decision-making requires that the decision maker hear from both sides of the controversy. As courts have observed, "[o]ne would be hard pressed to design a procedure more likely to result in erroneous deprivations" than the "use of classified information without disclosure" to the opposing party. *Al Haramain*, 686 F.3d at 980 (internal quotation marks omitted). "[T]he very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error." *Id.* (internal quotation marks omitted). We have no doubt that the Court will carefully scrutinize the arguments and factual assertions in the redacted portions of the

government's submissions. But even the most searching judicial scrutiny of an *ex parte* filing is no substitute for the rigors of testing in an adversarial process.

With respect to the third factor, there is no dispute that the government has a compelling interest in maintaining national security. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation."). There is also no dispute that the government has a compelling interest in preventing the dissemination of classified information to unauthorized persons. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons."). But the providers have already been entrusted with the core information that the government seeks to protect in this litigation—the number of FISC orders or FAA directives to which they have been subject, if any—as well as with even more sensitive information, such as the names and identifiers of the targets of those orders. At issue in this motion is only the secondary question whether the providers may be told the reasons why the government seeks to keep that information a secret. The government has made no effort to explain how sharing those reasons with the providers or their counsel would endanger national security.

CONCLUSION

The Court should order that, unless the government agrees to take appropriate steps to permit counsel for the providers to access the unredacted version of its September 30 filing, the redacted portions of that filing will be stricken. Pursuant to Rule 1 of Rules of the Foreign Intelligence Surveillance Court and Rule 7 of the Federal Rules of Civil Procedure, the providers request oral argument on this motion.

Dated: November 12, 2013

Respectfully submitted,

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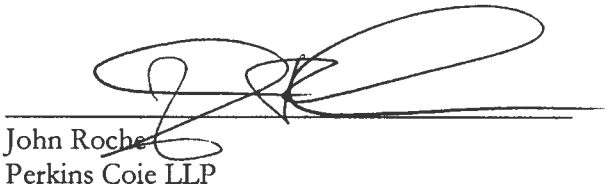
CERTIFICATE OF SERVICE

I hereby certify that at or before the time of filing this submission, the government (care of the Security and Emergency Planning Staff, United States Department of Justice) has been served with a copy of this motion pursuant to Rule 8(a) of the FISC Rules of Procedure.

Dated: November 12, 2013



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