

[REDACTED]

[REDACTED]

December 21, 2020

[REDACTED]

Re: Subpoena to Testify Before Grand Jury dated April 17, 2020

Dear Special Agent [REDACTED]:

This letter responds to the April 17, 2020 grand-jury subpoena (the "Subpoena") directed at Brave New Software Project ("Brave New Software") that seeks subscriber information for a single IP Address. [REDACTED] represents Brave New Software for purposes of responding to the subpoena. Please direct future correspondence about this matter to undersigned counsel.

Brave New Software does not possess the information sought by the Subpoena and therefore has no records to provide as to that IP Address.

Although Brave New Software does not have, and therefore cannot produce, other categories of information listed in the Subpoena, Brave New Software notes that not all of those types of information can be appropriately requested with a subpoena. Under the 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 government must obtain a court order or search warrant. Brave New Software objects to use of the grand-jury subpoena to request information beyond what is authorized in Section 2703(c)(2).

Brave New Software also has concerns about the scope of the nondisclosure order included with the subpoena. See Order, Case No. [REDACTED] Undersigned counsel will communicate separately with the U.S. Attorney's Office about this issue.

Sincerely

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Re: [REDACTED] [REDACTED]

Dear [REDACTED]

This letter concerns the non-disclosure order issued by Judge [REDACTED] in connection with a [REDACTED], grand-jury subpoena (the "Subpoena") directed at Brave New Software Project ("Brave New Software") that seeks certain information [REDACTED]. [REDACTED] represents Brave New Software for purposes of responding to the subpoena. Please direct future correspondence about this matter to undersigned counsel.

As we discussed when we spoke and as indicated in my [REDACTED] letter to Special Agent [REDACTED] providing Brave New Software's response to the Subpoena, Brave New Software has two concerns about the order as issued.

First, Brave New Software publishes a Bi-Annual Transparency Report (the "Report") that discloses the number of government subpoenas and inquiries it has received.² The Report furthers an important public interest in transparency and accountability. Brave New Software will be disclosing, in the Report, the fact that it received the Subpoena and that Brave New Software did not disclose any user data in response. We do not believe that disclosing "the government's requests abstractly" violates the gag order. See *Matter of Subpoena 2018R00776*, 947 F.3d 148, 156 (3d Cir. 2020). Please inform us in writing if you disagree.

Second, Brave New Software intends to seek court approval to make public redacted versions of the government's cover letter; the grand-jury subpoena and gag order issued to Brave New Software; Brave New Software's response to the subpoena; and this letter. Brave New Software also seeks to speak publicly about its receipt and compliance with the subpoena. As illustrated in the attachments to this letter, Brave New Software would redact the following information:

Government's Cover Letter

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

¹ On [REDACTED], Brave New Software responded to the grand-jury subpoena by email to Special Agent [REDACTED].

² The Report is available here: <https://s3.amazonaws.com/lantern/TransparencyReport.pdf>.

[REDACTED]

[REDACTED]

December 14, 2020

[REDACTED] AUSA

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The Subpoena

- The case-specific information in the header,
- The date and time of the scheduled grand-jury hearing,
- The targeted IP Address, and
- The date of the subpoena;

The Gag Order

- The dates at the top and bottom of the order, and
- The case-specific information to the right of the case caption;

Brave New Software'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, and
- The case-specific information and date in the citation on page 2;

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 Brave New Software's response to the subpoena in footnote 1 and the second paragraph.

With the proposed redactions, the information Brave New Software 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. The government has no legitimate interest in restricting that speech, while Brave New Software 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 Brave New Software. 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 countless ones in which the government routinely executes search warrants with notice to the targets of the investigation. See Order at 1 ("there is reason to believe that notification of the existence of the attached grand jury subpoena will seriously jeopardize the investigation, including by causing flight from prosecution, causing the destruction of or tampering with evidence, and otherwise seriously jeopardizing the investigation."); 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.

We would like to proceed by filing an *ex parte* motion with the Magistrate Judge asking her to issue an amended order permitting the disclosure of the documents, redacted as set forth in the attachments.

[REDACTED]

[REDACTED]

December 14, 2020

[REDACTED] AUSA

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We request either your agreement to such a motion or statement of non-opposition, which we would indicate in our filing. If you do oppose such a motion, let's talk about an appropriate briefing schedule.

Thank you for your attention to this matter. We look forward to hearing back from you regarding your position.

Sincerely,

[REDACTED]

[REDACTED]