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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE APPLICATION OF THE UNITED STATES FOR AN ORDER PURSUANT TO 28 U.S.C. § 1651(A) FOR ORDER PRECLUDING NOTICE OF GRAND JURY SUBPOENA	Case No. 17-mc-01604 (BAH) Chief Judge Beryl A. Howell **FILED UNDER SEAL**

MEMORANDUM OPINION

Pending before the Court is the government's *ex parte* Application for an Order Pursuant to the All Writs Act, 28 U.S.C. § 1651, precluding Uber Technologies, Inc. ("Uber") from disclosing the existence of grand jury subpoena number GJ2017070640571 (the "Subpoena") to any other person (except attorneys for Uber for the purpose of receiving legal advice) for a period of 180 days or until further order of the Court. For the reasons stated herein, the government's application is granted.

This application raises three issues of first impression in this Circuit: (1) whether a district court may issue an order of non-disclosure of a grand jury subpoena to third parties under the All Writs Act; (2) whether Federal Rule of Criminal Procedure 6(e)(2) prohibits such an order; and (3) the appropriate standard for issuing a nondisclosure order under the All Writs Act. For this reason, some discussion is warranted.

The All Writs Act confers on federal courts the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The authority to issue orders under the Act may be exercised in the court's "sound judgment" when necessary "to achieve the rational ends of law" and "the ends of justice entrusted to it." *United States v. New York Telephone Co.*, 434 U.S. 159, 172, 173 (1977) (internal quotation marks and citations omitted). As such, the Act provides a "residual source of

authority to issue writs that are not otherwise covered by statute." *Penn. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). "Although that Act empowers federal courts to fashion extraordinary remedies when the need arises," however, "it does not authorize them to issue *ad hoc* writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.* Nonetheless, there are at least three reasons why the All Writs Act empowers courts, in some circumstances, to issue non-disclosure orders with regard to grand jury subpoenas.

First, the All Writs Act affords district courts the authority to "fill statutory interstices." *Id.* at 42 n.7 (citing *New York Telephone Co.,* 434 U.S. at 159, *Price v. Johnston,* 334 U.S. 266 (1948), and *Harris v. Nelson,* 394 U.S. 286 (1969)). In some cases, Congress has expressly authorized the issuance of non-disclosure orders by statute. For example, 18 U.S.C. § 2705(b) permits orders to delay notice to subscribers regarding the issuance of warrants, subpoenas or orders for disclosure to governmental entities of subscriber information or communications under the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701 *et seq*. Similarly, the Right to Financial Privacy Act ("RFPA") includes non-disclosure provisions. *See* 12 U.S.C. §§ 3413(i) and 3409. In this matter, the government indicates that Uber "does not believe itself to be a provider" of an "electronic communications service," as defined in 18 U.S.C. § 2510(15), or a "remote computing service," as defined in 18 U.S.C. § 2711(2), and thus would challenge a non-disclosure order issued under 18 U.S.C. § 2705(b).[1] Gov't Mot. at 3–4 ¶ 7, ECF No. 1.

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[1] "Title II of the Electronic Communications Privacy Act of 1986 ("ECPA")—the Stored Communications Act ("SCA"), 18 U.S.C. § 2701, *et seq.*—governs the government's access to "electronic information stored in third party computers," *In re Zynga*, 750 F.3d 1098, 1104 (9th Cir. 2014), and addresses "electronic communications services (*e.g.*, the transfer of electronic messages, such as email, between computer users) and remote computing services (*e.g.*, the provision of offsite computer storage or processing of data and files)." *Id.* at 1103. This law defines "electronic communications service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications," 18 U.S.C. § 2510(15), and "remote computing service" as "the provision to the public of computer storage or processing services by means of an electronic communications system," 18 U.S.C. § 2711(2). As described by the government, Uber offers a "smartphone application[] that

Apparently to avoid undue delay arising from such a challenge, and because Uber has advised the government that it would accept a non-disclosure order pursuant to the All Writs Act, *id.* at 3 ¶ 5, the government has chosen not to pursue a non-disclosure order pursuant to § 2705(b).[2] Accordingly, the Court assumes, without deciding, that the authority to order nondisclosure provided by § 2705(b) is not available. Thus, because there is a gap in the law, resort to the All Writs Act is appropriate.

Second, "[t]he Supreme Court 'consistently has recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings,'" *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1070 (D.C. Cir. 1998) (quoting *Douglas Oil Co. of California v. Petrol Stops Northwest,* 441 U.S. 211, 218 (1979) (alteration adopted)), "a long-established policy . . . older than our Nation itself," *id.* (quoting *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 399 (1959)); *see also In re Sealed Case,* 199 F.3d 522, 526 (D.C. Cir. 2000) ("Unlike typical judicial proceedings, grand jury proceedings and related matters operate under a strong presumption of secrecy."); *In re Motions of Dow Jones & Co.,* 142 F.3d 496, 499 (D.C. Cir. 1998) ("A grand jury is a body that conducts its business in private. The Framers knew this as well as we do. 'Since the 17th century, grand jury proceedings have been closed to the public,

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connect riders with driver-partners who provide transportation services" by allowing a rider, who has created an Uber account with a credit card, to request travel to a desired location, which request when accepted by a "driver-partner," provides "both the rider and the driver-partner . . . with information about each other (*e.g.*, name, car make and model, license plate, rating)." Gov't Mot. at 3 ¶ 4. In addition to facilitating this communication between the requester and driver-partner, "Uber tracks the progress of the trip and allows fare payment to be made automatically using the rider's credit card." *Id.* Thus, Uber's service has features that would appear to satisfy the broad definitions of the types of providers covered by the SCA, such as allowing Uber users the ability to send and receive electronic communications regarding ride requests and acceptances, and supporting the processing of transactions using personal information the company retains in storage. Nevertheless, the government does not pursue this point.

[2] Further, the government posits that Uber "does not appear to be a 'financial institution'" and, consequently, the non-disclosure provisions of the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401, *et seq.*, would not apply. Gov't Mot. at 4 ¶ 8. For the purposes of the RFPA, a "financial institution" is defined as "any office of a bank, savings bank, card issuer . . ., industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution . . . ." 12 U.S.C. § 3401(1).

and records of such proceedings have been kept from the public eye.'" (quoting *Douglas Oil Co.*, 441 U.S. at 218–19 n. 9)). In *United States v. Procter & Gamble Co.*, the Supreme Court articulated the reasons why grand jury secrecy is so essential:

> (1) [t]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; [and] (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. Procter & Gamble Co., 356 U.S. 677, 681–82 n. 61 (1958); *see also In re Grand Jury Subpoena, Judith Miller,* 493 F.3d 152, 154 (D.C. Cir. 2007) ("Grand jury investigations are conducted in strict secrecy to encourage witnesses to testify 'fully and frankly,' to prevent those about to be indicted from fleeing, and to ensure that 'persons who are accused but exonerated by the grand jury will not be held up to public ridicule.'" (quoting *Douglas Oil Co.*, 441 U.S. at 219)). As the grand jury "'is a constitutional fixture in its own right.'" *United States v. Williams*, 504 U.S. 36, 47 (1992) (quoting *United States v. Chanen,* 549 F.2d 1306, 1312 (9th Cir. 1977) (quoting *Nixon v. Sirica,* 487 F.2d 700, 712, n. 54 (D.C. Cir. 1973))), a district court must be empowered to "effectuate and prevent the frustration of" the grand jury system, *New York Telephone*, 434 U.S. at 172 (holding that a district court could, under the All Writs Act, compel a third party to assist the Federal Bureau of Investigation in installation of pen register devices). Thus, a non-disclosure order may, in some cases, be necessary to achieve "the rational ends of law." *Harris*, 394 U.S. at 299 (quoting *Price*, 334 U.S. at 282).

Finally, a non-disclosure order is not prohibited by Federal Rule of Criminal Procedure 6(e). That provision prevents disclosure of matters occurring before a grand jury, but states that

"[n]o obligation of secrecy may be imposed" except in accordance with the Rule. FED. R. CRIM. P. 6(e)(2)(A). Under the rule, certain persons (such as grand jurors and court reporters) are prohibited from disclosing a matter before a grand jury, but witnesses are not named among them. *See* Fed. R. Crim. P. 6(e)(2)(B). The original advisory committee note also specifically states that "[t]he rule does not impose any obligation of secrecy on witnesses," and that a "seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." Rule 6 Advisory Committee Notes, 1944 Note to Subdivision (e). As the First Circuit observed, "[a]t first blush this appears to be a strong argument" that Rule 6(e) would prohibit a non-disclosure order to a grand jury witness. *In re Grand Jury Proceedings*, 417 F.3d 18, 26 (1st Cir. 2005).

Most courts to address this question, however, have read Rule 6(e)(2)(A) "to set a default rule of permitting disclosure by witnesses absent a contrary order by the court in that proceeding, but also to leave open the possibility of restrictions where they can be justified by particular and compelling circumstances." *Id.*; *see, e.g.*, *In re Subpoena To Testify Before Grand Jury Directed to Custodian of Records,* 864 F.2d 1559, 1563–64 (11th Cir. 1989); *In re Grand Jury Subpoena Duces Tecum,* 797 F.2d 676, 680 (8th Cir.), *cert. dismissed* 479 U.S. 1013 (1986); *but see United States v. Radetsky,* 535 F.2d 556, 569 (10th Cir.), *cert. denied* 429 U.S. 820 (1976), *overruled in part on other grounds by United States v. Daily,* 921 F.2d 994, 1004 & n. 11 (10th Cir. 1990). Accordingly, the Rule allows for "rare exceptions premised on inherent judicial power" and "[a]bsent restriction, courts have inherent power, subject to the Constitution and federal statutes, to impose secrecy orders incident to matters occurring before them." *In re Grand Jury Proceedings*, 417 F.3d at 26. As the First Circuit recognized, Rule 6(e) was intended merely to "abolish a general practice . . . of automatically silencing grand jury witnesses as to their

testimony." *Id.* The Rule does not state that it prohibits non-disclosure orders to witnesses and "[t]here is no indication in the history of an intent to cut off the courts' power to restrict disclosure based on extraordinary circumstances." *Id.* (citing *United States v. Aisenberg*, 358 F.3d 1327, 1347 (11th Cir. 2004)). Accordingly, despite Rule 6(e)'s "seemingly unequivocal language," *In re Grand Jury Proceedings*, 814 F.2d 61, 69 (1st Cir. 1987), a district court may, in appropriate circumstances, issue a non-disclosure order to a grand jury witness.

A remaining question is what showing is required to obtain a non-disclosure order barring the recipient from revealing the existence of a grand jury subpoena. The Eighth Circuit has required a demonstration of "compelling necessity . . . shown with particularity." *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d at 681. This standard is drawn from the Supreme Court's test in *Procter and Gamble Co.* for a Rule 6(e)(3) disclosure of grand jury materials. *Id.*; *see also In re Grand Jury Subpoena Duces Tecum,* 575 F. Supp. 93, 94 (S.D.N.Y. 1983) (holding that the government did not meet its own standard of "particularized showing of need for secrecy"); *Beacon Journal Publishing Co. v. Unger,* 532 F. Supp. 55, 59 (N.D. Ohio 1982) (stating that the standard is "case-specific and based upon the facts and circumstances of each situation as it arises"); *In re Swearingen Aviation Corp.,* 486 F. Supp. 9, 11 (D. Md. 1979) (stating that secrecy is appropriate where necessary to protect the "integrity of the judicial process"), *modified* 605 F.2d 125 (4th Cir. 1979). This "compelling necessity" test also aligns with this Circuit's test for overriding the presumption of public access to criminal proceedings. *See Washington Post v. Robinson*, 935 F.2d 282, 290 (D.C. Cir. 1991) (holding that the general presumption of access to plea agreements can be overridden if "(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately

protect the compelling interest." (quoting *Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon,* 920 F.2d 1462, 1466 (9th Cir. 1990))).

In this case, there is a "compelling necessity" for a non-disclosure order with respect to Uber. According to the government, Uber's policy is to "notify riders and driver-partners of any requests for their information from law enforcement prior to disclosure." Gov't Mot. at 3 ¶ 5. This policy directly conflicts with the primary reason for grand jury secrecy: "prevent[ing] the escape of those whose indictment may be contemplated." *Procter & Gamble Co.,* 356 U.S. at 681–82 n. 61. As the government argues, if Uber disclosed the subpoena to the target individuals, it would "seriously jeopardize the ongoing investigation, including by giving the target individuals an opportunity to flee from prosecution and/or destroy or tamper with evidence." Gov't Mot. at 3 ¶ 6.

For the reasons stated above, the government's *ex parte* Application for an Order Pursuant to the All Writs Act, 28 U.S.C. § 1651, precluding Uber from disclosing the existence of Subpoena to any other person (except attorneys for Uber for the purpose of receiving legal advice) is granted.[3] An Order consistent with this Memorandum Opinion granting the government's motion is issued separately.

BERYL A. HOWELL
Chief Judge

Date: July 7, 2017

[3] The government is directed, by July 21, 2017, to review this Memorandum Opinion and propose any portions that may be partially unsealed for filing on the public docket.