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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, -VS- AMMON BUNDY, et al., Defendants	Case No. 3:16-CR-00051-02-BR DEFENDANTS' MOTION FOR PRESERVATION ORDER

CERTIFICATE OF CONFERRAL

Undersigned counsel has conferred in real time with AUSA Geoffrey Barrows about the issues raised in this motion; the Government opposes the relief sought.

DEFENDANTS' MOTION

Defendants in *Bundy et al.,* through undersigned counsel for Defendant Jon Ritzheimer, move the Court to order preservation of all recorded information possessed by any governmental agent or agency that relates to the investigation or prosecution of this case or to any individual defendant. A

proposed Order with greater specificity is filed herewith and incorporated by reference.

Defendants so moves upon the grounds that:

(1) Preservation is necessary due to the parties' inability to determine at this early stage what may be discoverable in this very complex case, or be evidence outside the scope of the Government's discovery obligations that may be necessary to the defense at trial;

(2) Preservation is the best means to safeguard the Defendants' discovery rights, to shield the Government from future destruction of evidence claims, and avoid the delays and costs involved in forensic recovery of deleted data from digital devices should that information be held discoverable;

(3) Preservation will not impose an undue burden on the Government, as it creates no independent duty for the Government to investigate, collect or produce the items preserved by the involved agents and agencies; and

(4) This Court has inherent authority to enter a preservation order, and such orders are routinely entered in complex civil litigation as part of a court's case management authority.

PROCEDURAL POSTURE AND BASIS FOR MOTION

Claiming that "the discovery issues in defendants' case will be some of the most complicated in the history of the district," the Government requested the Court declare the case to be complex. [#185 at 2]. The Court so ruled. [#289 at 4-5]. The superseding Indictment names 26 defendants; references other known but unnamed conspirators and associates; spans a time period from on or about November 5, 2015, and continuing through February 12, 2016; and encompasses acts in Oregon and "elsewhere." Based on discovery and public source documents, the FBI, United States Attorneys Office, and other federal

agencies including the Bureau of Land Management and U.S. Forest Service, participated in and shared information about the investigation and individual defendants. A large number of state and local agencies including Oregon State Police, Oregon county sheriff's departments and police departments, and the Governor's office, acting in concert with federal authorities, also participated in and shared information about the investigation and individual defendants.

Discovery provided thus far has been voluminous, and more is coming. See Joint Status Report on Discovery [#442]. There is only so much information the FBI can or will gather from various local, state and federal agencies, given staffing and time constraints, and those efforts will naturally focus on information deemed important to the prosecution. As time passes, information that may be important to one or more Defendants risks destruction through the normal course of business and record retention/purging policies of the involved agencies. This is particularly true of emails, text messages and social media postings.

Defendants therefore sought agreement by way of a 3-page letter to the Government dated April 18, 2016, for a stipulated or at least unopposed preservation order, limited to information possessed by federal agents or agencies. The Joint Status Report [#442] contains a summary of the parties' positions and conferral regarding the proposed preservation order. On April 20, 2016, Defendants conferred among themselves and determined that a motion seeking a preservation order should encompass state and local agents and agencies that acted in concert with federal authorities. Undersigned counsel has conferred with AUSA Barrows as to that issue, and the Government's opposition is unchanged. The Government's primary contentions are that a preservation order is unprecedented in criminal cases, and unnecessary in this case.

AUTHORITIES AND ARGUMENTS

I. A Preservation Order Is Necessary To Protect Defendants' Exercise Of Their Rights To Discovery And To A Fair Trial.

The Government's investigation has included numerous Preservation Requests for electronically stored information, including communications, related to the Defendants.[1] Some requests have asked for preservation of account information since inception, and are on-going. What's good for the goose, is good for the gander.

A number of individual defendants have filed discovery requests that include generic categories of items such as rough notes "or equivalents" that may be discoverable under Rule 16, *Jencks*, or *Brady.* However, the Government has not affirmatively responded nor has the Court entered any orders on those requests. As a predicate to discovery, there must be preservation of potentially discoverable items. Just as the Government believes it is too early to respond with particularity to Rule 404(b) requests, it is too early for the parties to identify with any precision what may be discoverable out of the universe of information possessed or obtained by every governmental agency involved in the investigation and prosecution.

The FBI is the lead law enforcement agency in this case. FBI records policies permit individual field agents to determine which emails are "records" that must be retained. *FBI Records Management Manual,* at 19 (2007; unclassified copy)("Many e-mail messages can be characterized as transitory correspondence, which should be routinely purged once its usefulness has ended."). FBI agents may also maintain individual "Working files" used to create

[1] An incomplete search of discovery provided thus far identified Preservation Requests to entities including Twitter, AT&T, Verizon Wireless, Facebook, individual email accounts, GMAIL, YAHOO, YOUTUBE, and MSN.

reports or other records, that include "studies, policies, discussion and other materials" NOT included in the agency's Case File, which each agent is responsible for maintaining and purging. *Id.*, at 18.

The Harney County sheriff advised the FBI that he had deleted "verbal attack" messages from his Facebook account, and that his office shredded "hate mail." [MNWR_0011878]. Under the prosecution's theory, those items would be evidence of criminal threats. Under the defense theory, those items would be protected speech. Presumably the sheriff and his staff did not consider those items evidence of criminal threats when they destroyed them. "The burden of establishing the risk that documents will be destroyed in the future is 'often met by demonstrating that the opposing party has lost or destroyed evidence in the past or has inadequate retention procedures in place.'" *Treppel v. Biovail Corp.,* 233 F.R.D. 363, 371 (S.D.N.Y. 2006)(citation omitted).

Defendants have not undertaken an examination of other involved agencies' record retention policies, but are particularly concerned—as is the Government, from a prosecution perspective—about the preservation of emails, text messages, and other electronically stored information so that discoverable items necessary for the defense investigation and for evidence at trial are not purged by individual agents or agencies. This includes the Facebook pages, Twitter and email accounts of law enforcement agents containing information related to this investigation or individual Defendants.

II. Preservation Will Not Create An Undue Burden On Governmental Agents Or Agencies.

In conferring with the Government, no objection was voiced concerning the preservation request constituting a burden. Rather, the Government maintained it "will comply with its discovery obligations, which may include

taking steps internally to preserve evidence or materials that may otherwise be discoverable. We would stipulate that we will abide by our legal obligations; however, a stipulation along the lines of what you have suggested would be inappropriate." The Court in *Treppel, supra* at 369, commented on a similar response by the opposing party:

> As noted above, Biovail previously rejected the suggestion of a stipulated preservation order on the grounds that it was fully aware of its preservation obligations and that such an order was unnecessary given the modest scope of the case. Such reasoning is shortsighted. Even litigation that concerns 'relatively precise issues, statements and time frames' may nevertheless involve information, including electronic documents, that may be in danger of destruction in the absence of a preservation order. Further, a preservation order protects the producing party by defining clearly the extent of its obligations. In the absence of such an order, that party runs the risk of future sanctions if discoverable information is lost because it has miscalculated. (internal citations omitted).

Requiring preservation of recorded information possessed by local and state law enforcement agencies and the state executive branch (here, due to the Governor's office and Oregon Department of Justice involvement with state and federal law enforcement agencies during the occupation) is consistent with the federal prosecutor's duty to learn of discoverable information in their possession. *See, United States v. Price*, 566 F.3d 900, 908 (9th Cir. 2009)(duty to learn of discoverable information possessed by a local agency that led the investigation); *United States v. Cerna*, 633 F. Supp. 2d 1053, 1060 (N.D. Cal. 2009) (reasoning based on *Price* and *Kyles* that a federal prosecutor's duty to learn attaches any time the federal prosecutor receives access to state and local law enforcement information); *See generally, United States v. Pederson*, Amended Supervisory Opinion, 2014 WL 3871197 (Aug. 6, 2014) at *23 ("Regardless of which law enforcement agencies and how many law

enforcement agencies are involved in the investigation and prosecution of a criminal defendant, the government must ensure that the prosecution team is sufficiently organized to meet its discovery obligations.").

Apart from discovery, Defendants may obtain evidence through Rule 17 subpoenas, before litigation, for pretrial hearings, and for trial. Thus, the Government being fully able to comply with its discovery obligations is not the only concern when it comes to preserving information.

III. This Court Has Authority To Enter A Preservation Order.

The Court has inherent authority to enter a preservation order as the best means to safeguard the Defendants' discovery rights and to shield the Government from destruction of evidence claims. *United States v. W.R. Grace*, 526 F3d 499 (9th Cir. 2009)(district court has inherent authority to regulate discovery process so long as court's orders do not conflict with the Federal Rules of Criminal Procedure). A preservation order does not conflict with any federal rule of procedure. In fact, the civil rule counterpart to Rule 16 mandates the parties discuss any issues about preserving discoverable information, and preservation of electronically stored information, and include that in their discovery plan. FRCP 26(f)(2) & (3)(C).

Preservation orders are routine in complex civil litigation, and generally considered part of a court's case management order:

> In some cases, a preservation order that clearly defines the obligations of the producing party may minimize the risk that relevant evidence will be deliberately or inadvertently destroyed, may help ensure information is retrieved when it is most accessible (i.e., before it has been deleted or removed from active online data), and may protect the producing party from

> sanctions." *Managing Discovery of Electronic Information: A Pocket Guide for Judges,* at 17, Federal Judicial Center (2007)[2].

Bundy, et al., stems from an incident that was highly-politicized—reaching all the way to the White House—highly-publicized, and involving Defendants who have been demonized as violent extremists or domestic terrorists. This is precisely the type of case where individual law enforcement agents and other participants are likely to have motives to lose, misplace or destroy information perceived as helpful to the defense. It has happened in this district as recently as the *Pederson/Grigsby* prosecution. This Court's preservation order is necessary to ensure Defendants' rights to discovery and to a fair trial.

DATED this 25th day of April, 2016.

/s/ Terri Wood
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[2] http://search.uscourts.gov/search?affiliate=uscourts.gov&locale=en&query=Managing%20Discovery

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, -VS- AMMON BUNDY, et al., Defendants	Case No. 3:16-CR-00051-BR ORDER FOR PRESERVATION OF INFORMATION

THIS MATTER having come before the Court on Defendants' Motion For Preservation Order, opposed by the Government, and heard on May 4, 2016; and the Court being fully advised,

IT IS THEREFORE ORDERED that all recorded information, regardless of format, possessed by all local, state or federal law enforcement agents or agencies, and executive branch agents or agencies, that relates to the investigation or prosecution of this case, or the investigation of any individual Defendant related to this case, be preserved for the pendency of this action;

IT IS FURTHER ORDERED that the United States Attorney's Office for this District will provide notice of this Order to all entities that it knows or upon reasonable inquiry learns may be in possession of recorded information within the scope of this Order, due to participation in the investigation or prosecution of this case, or the investigation of any individual Defendant related to this case;

IT IS FURTHER ORDERED that this Order creates no independent right to discovery by Defendants not otherwise afforded by rule, statute or the Constitution; and creates no presumption that any recorded information within its scope that may have been lost or destroyed, prior to any individual or agency receiving notice of this Order, was done in bad faith or for any improper purpose.

DATED this _____ day of May, 2016.

_____
ANNA J. BROWN
United States District Court Judge

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