

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 23

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IN RE SEARCH WARRANTS
DIRECTED TO FACEBOOK, INC. AND
DATED JULY 23, 2013

DECISION
Undocketed

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Melissa C. Jackson, J.:

On July 23, 2013, this court ordered the execution of three-hundred eighty-one search warrants directed at subscribers of Facebook, Inc., ("Facebook") authorizing the District Attorney and its investigators to search and seize digital information, uploaded by hundreds of individual account users, stored within Facebook's servers. The search warrants, identical in scope, were supported by a ninety-three page affidavit filed by the New York County District Attorney's Office detailing the evidence culled during a long-term investigation into a massive scheme to defraud and other related crimes.

On August 20, 2013, Facebook moved to quash the search warrants on the grounds that the warrants constituted a violation of its users' Fourth Amendment rights. In the alternative, Facebook moved to vacate the nondisclosure portion of the warrants, asserting that the warrants were defective because they did not cite the correct provision of the Federal Stored Communications Act. Should the court deny disclosure, Facebook, requested that the court create an independent monitor and minimization protocol to safeguard its subscribers' alleged privacy interests.

For the foregoing reasons Facebook's motion is denied in its entirety.

Factual Findings and Background

Facebook is a social online media website which enables computer users to set up personal accounts and profiles.¹ These individual accounts are managed by the end user (or customer) and are subject to an end user agreement between Facebook and the account user outlining the terms of use for the website. The individual account user is able to control their privacy settings on their accounts which allows (or disallows) certain users from viewing their profiles and postings.

Facebook could best be described as a digital landlord, a virtual custodian or storage facility for millions of tenant users and their information. The digital information (i.e., a photograph or video), once "uploaded" to Facebook, is stored in Facebook's digital repository. A

¹ Each Facebook account user is given a "wall" (which functions as a digital corkboard) which permits the account user or another user (i.e. friend, family or someone from the general public) to post pictures, links, stories, videos and other items for others to see. The wall is broken down by a "timeline" feature which permits the posting user to post such items by the relevant month and year in which they may apply.

user can then access the photograph anywhere in the world and from any device that connects to Facebook because the picture is now stored on Facebook's servers. The mechanism of "global" or "open" access is distinguishable from users that "download" digital information to their personal computers from the Internet. Downloaded digital information transfers from cyberspace to the individual user's computer. Hypothetically, were a court to authorize the search of the latter downloaded information, the warrant would permit the seizure of the individual user's physical computer (also known as the hard drive) to enable a forensic analyst to search the digital information to seek evidence of a crime. In the matter at bar, Facebook is a digital storage facility of its subscriber's digital information; the information is not kept on the user's computer. Hence, the search warrants authorize the search and seizure of digital information contained within the Facebook server.

Due to the unique nature of Facebook as an online repository of digital information, the search warrants at issue require Facebook to permit the District Attorney access to individual user accounts as well as archived or stored information maintained by Facebook. Due to the fungible nature of digital information, the ability of a user to delete information instantly and other possible consequences of disclosure, the court ordered the search warrants sealed and Facebook not to disclose the search and seizure to its users.

AUTHORITY

First and foremost, the court is authorized to issue search warrants pursuant to New York State law which codifies the State and Federal Constitutional requirements. See CPL §690.05. Secondly, the court is empowered to order the search and seizure of the "type" of evidence sought by the New York County District Attorney's Office. See CPL §690.10(4).

Under Federal law, the court is authorized to issue search warrants targeting digital information pursuant to 18 USC § 2703. The Federal statutory language clearly and unequivocally grants a governmental entity the authority to seek a court order to compel an electronic service provider, such as Facebook, to disclose electronic information which they maintain. The District Attorney has followed all of the requisite procedures outlined in 18 USC §2703(d) and CPL §690.35 with regard to obtaining a court order to search and seize digital information stored by Facebook.

STANDING

The Fourth Amendment to the United States Constitution provides "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See US Const, 4th Amend. See also NY Const, Art I, §12.

Under State and Federal law, a moving party must first establish standing to claim a violation of the Fourth Amendment. See *People v. Ramirez-Portoreal*, 88 NY2d 99 [1996].

People v. Ortiz, 83 NY2d 840 at 842 [1994]. The movant must have an objective or subjective expectation of privacy in the area or item to be searched and seized. *Ramirez-Portoreal* at 108. In the case at bar, it is the Facebook subscribers who could assert an expectation of privacy in their postings, not the digital storage facility, or Facebook. In fact, Facebook delegates the issue of privacy to the individual user, subject to Facebook's "Terms of Use Agreement", which enables the user to choose the degree of privacy for their postings and account. Clearly Facebook has failed to establish the crucial procedural hurdle of standing to challenge the search warrant. On this basis alone, the court denies Facebook's Motion to Quash. However, despite the failure to establish standing, the court will address Facebook's secondary challenges and remedial requests.

SCOPE

Facebook argues that many personal items not particularly of import to a criminal investigation, but certainly sensitive, private and important to their customers, will be disclosed if they are forced to comply with the court's order and this potential privacy violation requires the court to quash the search warrants. Facebook's argument is without merit.

Under New York State law, the government must follow the court's order to search and seize only that which is particularly described within the search warrant. Any violation of the court's order may result in pre-trial suppression of evidence seized beyond the scope of the warrant. However, a search warrant is not invalidated or deemed constitutionally infirm nor is seized evidence inadmissible simply because, at first glance, it is not evidence of criminality.

In the course of a long-term criminal investigation, the relevance or irrelevance of items seized within the scope of a search warrant may be unclear and require further investigatory steps. Frequently ambiguous items may yield further investigation and evidence of new crimes. Conversely, items seized within the scope of a search warrant are subsequently determined to be tangential or irrelevant to the underlying investigation. For example, the seizure of a computer's hard drive in a cyber child pornography investigation requires a forensic investigator search through hundreds of computer files to find evidence relating to the investigation. The authorized seizure of a company's files relating to a larceny and tax fraud investigation requires a government investigator to comb through thousands of documents seized within the scope of the warrant to find evidence of criminality. The authority to search and seize a massive amount of material to seek evidence of criminality is clear. See e.g., *People v. Dominique*, 229 AD2d 719 [1997], *aff'd* 90 NY2d 880 [1997];

There are various procedural safeguards to ensure that evidence is constitutionally seized. The court, in the form of an independent magistrate, conducts the initial constitutional scrutiny of the government application to determine whether there is probable cause that evidence of a crime may be found in an individual's zone of privacy, whether that zone be digital or physical. If the search warrant is approved, the government seizes and searches the material to uncover evidence of a criminal activity. The court reviews the inventory of items seized by the government and ensures that the evidence is safeguarded to protect its integrity for future court proceedings. Finally, in pre-trial proceedings, the court determines the admissibility of evidence seized pursuant to the search warrant. It is the court's scrutiny of the search warrant application and the

fruits of the execution of the search warrant that protect the individual citizen from an unreasonable search and seizure.

In the matter at bar, the court reviewed the government application and found probable cause that evidence of criminality would be found within the subject Facebook accounts. Implicitly the court found the necessary nexus between evidence of criminality and the particular accounts and items to be seized and determined that the scope of the warrant was not overbroad nor constitutionally vague. Facebook's challenge to the search warrant on this particular ground is unpersuasive and without merit.

NONDISCLOSURE

Facebook asserts that the Nondisclosure Order rendered by the court is defective as a matter of law. This argument has no merit. State and Federal law authorize the court to order nondisclosure as a necessary exercise of its discretion. Under New York law, the court possesses the inherent authority to seal documents or records of proceedings pertaining to sensitive matters and pending investigations. In particular, the State legislature amended the old Code of Criminal Procedure to create the current Criminal Procedure Law wherein motions to controvert search warrants were limited solely to "defendants" as a means to protect Grand Jury investigations against disruptive collateral challenges. See *In Re Search Warrant L-18/81*, 108 Misc2d 440 [1981] citing Judiciary Law §2-b(3). "A court of record has power to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." This court possesses specific authority to seal or order the nondisclosure of the search warrants (and their applications) to the subjects of the warrants in order to protect the existence of evidence subject to an ongoing Grand Jury investigation.

Federal law also grants specific authority to this Court and permits the court to mandate disclosure of electronic communication "without required notice to the subscriber or customer if the governmental entity obtains a warrant issued using [S]tate warrant procedures...by a court of competent jurisdiction." See 18 USC §2703(b)(1)(A). Furthermore, the court is permitted to mandate nondisclosure when the court finds that disclosure would have an "adverse result." The term "adverse result," includes "(c) destruction of or tampering of evidence" and "(e) otherwise seriously jeopardizing an investigation or unduly delaying a trial." See 18 USC §2705(a)(1)&(2).

It is obvious that any disclosure by Facebook of the underlying search warrants to the targeted account holders would potentially have dire direct and indirect consequences. Evidentiary leads resulting from the Facebook material could be destroyed, removed or deleted. Individuals of interest, suspects or witnesses could flee or be intimidated. The integrity of any long-term criminal investigation could be severely compromised.

In the alternative, Facebook requests that the court appoint a monitor or establish a protocol to ensure the privacy rights of its subscribers. The court denies this application as not only unnecessary but also as an unwieldy, time-consuming expense proffered by Facebook to satisfy its contractual obligations to its users. In light of the court's clear Federal and State authority to order nondisclosure of a pending investigation or existence of a court order,

Facebook's application to disclose any portion of the search warrants, the underlying investigation, or any details relating to the pending matter is hereby denied. The Nondisclosure Order remains in effect until the court orders otherwise.

CONCLUSION

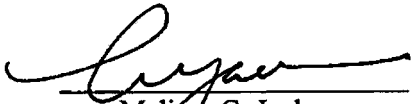
IT IS HEREBY ORDERED that Facebook's Motion to Quash the search warrants in this matter is denied in its entirety;

IT IS FURTHER ORDERED that Facebook abide by the Nondisclosure Order previously issued by this court. Any violation of the court's Nondisclosure Order may subject Facebook to criminal contempt, civil penalties of State and Federal law and any relief the court deems just and proper;

IT IS FURTHER ORDERED that Facebook immediately comply with the Search Warrants authorized to be executed in July, 2013. Any further delay will impede the progress of the grand jury investigation and unnecessarily lead to the destruction of potential evidence.

SO ORDERED.

Dated: New York, New York
September 17, 2013



Melissa C. Jackson
Acting Justice Supreme Court