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Facebook Bid to Shield Data From the Law Fails, So Far

By VINDU GOEL and JAMES C. McKINLEY Jr. JUNE 26, 2014

Facebook and the Manhattan district attorney's office are in a bitter fight over the government's demand for the contents of hundreds of Facebook accounts.

In confidential legal documents unsealed on Wednesday, Facebook argues that Manhattan prosecutors last summer violated the constitutional right of its users to be free of unreasonable searches by demanding nearly complete account data on 381 people, ranging from pages they had liked to photos and private messages.

When the social networking company fought the data demands, a New York judge ruled that Facebook had no standing to contest the search warrants since it was simply an online repository of data, not a target of the criminal investigation. To protect the secrecy of the investigation, the judge also barred the company from informing the affected users, a decision that prevented the individuals from fighting the data requests themselves.

The case, which is now on appeal, pits the Fourth Amendment right to be free from unreasonable searches by the government against the needs of prosecutors to seek evidence from the digital sources where people increasingly store their most sensitive data.

The issue has risen repeatedly in court cases. Just before a Manhattan judge lifted the seal on the Facebook case, the United States Supreme

Court issued a major decision on similar privacy issues, ruling 9 to 0 that cellphones are so vital to people's lives that the police must get a warrant to search them, just as they would need to do to search a person's home.

"In that case, they were talking about how revealing the information could be on a cellphone. You could make a similar point about people's social media profiles," said Kurt Opsahl, deputy general counsel of the Electronic Frontier Foundation, a nonprofit group that promote digital civil liberties.

Lawyers for Facebook, which has about 1.28 billion active users worldwide, said they were pressing the fight in the appellate courts because they were troubled both by the vast scope of the district attorney's search warrants and by the judge's ruling that Facebook could not challenge the warrants.

Prosecutors say that the information gleaned from the accounts contributed to the highly publicized indictments in January and February of more than 130 police officers, firefighters and other civil servants on charges of defrauding the Social Security system with fake disability claims. Photos posted on Facebook showed supposedly disabled people riding personal watercraft, teaching karate, deep-sea fishing and pursuing other vigorous activities. Those photos supported other evidence, like wiretapped conversations, that prosecutors gathered in their three-year investigation.

"This was a massive scheme involving as many as 1,000 people who defrauded the federal government of more than \$400 million in benefits," said Joan Vollero, a spokeswoman for the Manhattan district attorney, Cyrus R. Vance Jr. "The defendants in this case repeatedly lied to the government about their mental, physical and social capabilities. Their Facebook accounts told a different story. A judge found there was probable cause to execute search warrants, and two courts have already found Facebook's claims without merit."

Orin S. Kerr, a law professor at George Washington University who is an expert on digital searches and seizures, said Facebook was trying to do

something unusual in establishing a right for service providers to challenge a warrant. “The real question is, ‘Can they challenge warrants for their customers?’ And I think the answer is probably not, under current law,” Mr. Kerr said.

Chris Sonderby, deputy general counsel for Facebook, said that if Facebook could not challenge the warrants and the users remained in the dark, no one would ever get the chance to object to the possible invasion of privacy. “It appeared to us from the outset that there would be a large number of people who were never charged in this case,” he said. “The district attorney’s response was that those people would have their day in court. There are more than 300 people that will never have that chance.”

Mr. Sonderby said that the district attorney’s demand for data was far larger than anything it had ever received from any other prosecutor. And Mr. Vance’s office was unwilling to discuss narrowing the scope of its requests to be more directly relevant to its investigation.

The relationship was so chilly, said Mr. Sonderby, that when Facebook pressed its challenge to the warrants, one of the prosecutors called and threatened to press criminal contempt of court charges against the company and throw its officials in jail. “I’ve never seen anything like it,” he said.

The district attorney’s office said that about 600 possible suspects have been identified, and the investigation was continuing. Prosecutors said they had provided Supreme Court Justice Melissa C. Jackson with a 93-page affidavit with evidence to support each of the individual warrants, including information from wiretaps and documents filed with the Social Security Administration. They also maintain almost everything in the Facebook pages was relevant, since the people targeted in the investigation were faking mental illnesses to obtain benefits and had claimed to be too sick to leave the house, travel or work.

Justice Jackson, in denying Facebook’s effort to quash the warrants, said that the government must be granted some latitude. “In the course of a long-term criminal investigation, the relevance or irrelevance of items