

United States Foreign Intelligence Surveillance Court

U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT

2013 SEP -9 PM 12: 24

LEEANN FLYNN HALL CLERK OF COURT

In re Motion for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Orders and Directives

Case No. 13 - 0 6

Facebook, Inc. ("Facebook") hereby moves this Court, pursuant to 28 U.S.C. § 2201 and Rule 6(d) of the Rules of Procedure of the United States Foreign Intelligence Surveillance Court ("FISC"), for a declaratory judgment, or such other relief as the Court may deem appropriate, confirming that Facebook may lawfully disclose aggregate data regarding any orders and/or directives that Facebook may have received under the Foreign Intelligence Surveillance Act ("FISA") and/or FISA Amendments Act ("FAA"), 50 U.S.C. § 1801-1881g.¹

I. Background

Facebook, a corporation organized under the laws of the State of Delaware with its principal place of business in Menlo Park, California, is an online social networking service that enables people to connect and share information with their friends, family, and coworkers. Facebook is a global company with more than one billion active monthly users throughout the world. The company's technologies facilitate the sharing of information through the social graph – the digital mapping of people's real world social connections.

Over the past several months, Facebook and other entities have been the subject of intense media coverage concerning an alleged surveillance program operated by the United States government called "PRISM." See The Guardian, NSA Prism Program Taps In To User

¹ Nothing in this Motion is intended to confirm or deny that Facebook has received any orders or directives pursuant to FISA or the FAA.

Data of Apple, Google, and Others (June 6, 2013), available at <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>; The Washington Post, *U.S. British Intelligence Mining Data From Nine U.S. Internet Companies in Broad Secret Program* (June 6, 2013) available at http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html. These news reports have raised serious concerns among the people around the world who use Facebook and the public at large about the Internet surveillance activities of the U.S. government and the responses of providers who may receive orders issued by this Court.

Within the constraints imposed by the position of the U.S. government, Facebook has taken substantial steps to respond to these concerns. On June 7, 2013, Facebook Chief Executive Officer Mark Zuckerberg posted a public message on Facebook that clarified that Facebook carefully reviews all government requests for legal sufficiency, has never received a bulk order for metadata, and “is not and has never been part of any program to give the US or any other government direct access to our servers.” See <http://newsroom.fb.com/News/709/Personal-Response-From-Mark-Zuckerberg-About-PRISM>. The following week, on June 14, 2013, Facebook released information covering the second half of 2012, which showed, for the first time, the aggregate number of law enforcement and national security requests it received from government authorities in the United States, as well as the aggregate number of accounts specified in those requests, within ranges of 1,000. See <http://newsroom.fb.com/News/636/Facebook-Releases-Data-Including-All-National-Security-Requests>. And on August 27, 2013, Facebook published a global report of government requests for the first half of 2013 which again included the aggregate number of all U.S. law enforcement

and national security requests, and accounts specified in those requests, within ranges of 1,000.

See https://www.facebook.com/about/government_requests.

Despite Facebook's efforts to push for more transparency, which have included extensive discussions with government officials, the U.S. government has taken the position that Facebook is prohibited from disclosing the specific number and type of any such requests as well as even aggregate numbers of any national security requests within ranges. Based on the government's response to similar requests made by both Google, Inc. and Microsoft Corporation, Facebook understands that the government believes that publishing such information would be unlawful.

To appropriately and effectively respond to these inaccurate news reports and the related public concerns, Facebook seeks to be as transparent as possible regarding its receipt of orders under FISA and the FAA, if any. To that end, Facebook moves this Court to declare that it may lawfully disclose the following aggregate unclassified numbers covering a 6-month period (collectively, "the Aggregate Data"): (1) the total number of FISA court orders it has received during the period, if any, under specific FISA authorities, such as Physical Search Orders, Business Record Orders, and Wiretap and Pen Register/Trap and Trace Orders; (2) the total number of user accounts specified in such FISA orders; (3) the total number of Directives it has received during the period under 18 U.S.C. § 1881a, if any; and (4) the total number of user accounts specified under such directives. Facebook further requests the ability to release, in aggregate numbers, the number of requests that called for content of communications versus those that called for transaction or subscriber information.

II. Facebook May Lawfully Disclose the Aggregate Data.

Neither FISA nor the FAA prohibit Facebook from disclosing the Aggregate Data. The First Amendment also ensures Facebook's right to report these data and to respond to public

criticism.

A. FISA and the FAA Do Not Prohibit Facebook From Disclosing the Aggregate Data.

FISA and the FAA contain two confidentiality provisions. The first provides that orders and directives require the recipient to provide assistance to the government “necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy.” 50 U.S.C. § 1805(c)(2)(B); *see also id.* § 1881a(h)(1)(A) (providing the same for acquisition of foreign intelligence information). The second requires that the recipient “maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the surveillance or the aid furnished that such person wishes to retain.” *Id.* § 1805(c)(2)(C); *see also id.* § 1881a(h)(1)(B) (providing the same for acquisition of foreign intelligence information). Neither provision precludes Facebook from disclosing the Aggregate Data.

With respect to the first confidentiality provision, the recipient’s obligation to provide assistance to the government “necessary to accomplish” the intelligence-gathering “in such a manner as will protect its secrecy” imposes upon the recipient an obligation to assist the government in a way that preserves the secrecy of the *particular surveillance or acquisition*. This provision, however, does not prohibit disclosure of the Aggregate Data because disclosure of such data would not compromise the “secrecy” of any particular electronic surveillance or acquisition. In light of Facebook’s over one billion active users and the generalized information included in the Aggregate Data, disclosure could not lead any user to infer that he or she is or has been the target of an order or directive. Moreover, disclosure of the Aggregate Data would not diminish Facebook’s obligation under FISA and the FAA to provide any assistance required of it

under any order or directive in a manner protective of the secrecy of that surveillance or acquisition.

Similarly, although 50 U.S.C. §§ 1805(c)(2)(C) and 1881a(h)(1)(B) require providers to “maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning” the acquisition “or the aid furnished that such” recipient “wishes to” retain, those provisions on their face do not prohibit disclosure of aggregate numbers. Disclosing aggregate data, without indicating the specific process the government has invoked, does not put the secrecy of any particular FISA order or FAA directive in jeopardy.

B. Facebook has a First Amendment Right to Disclose the Aggregate Data and Respond to Public Criticism.

A restriction on the disclosure of the Aggregate Data would be a content-based restriction on speech and thus subject to strict scrutiny. *See Doe v. Mukasey*, 549 F.3d 861, 878 (2d Cir. 2008) (noting, in the context of an analogous challenge to the non-disclosure provisions of the National Security Letter statute, 18 U.S.C. § 2709, that “the Government has conceded that strict scrutiny is the applicable standard”). To survive strict scrutiny review, “the Government must demonstrate that the nondisclosure requirement is ‘narrowly tailored to promote a compelling Government interest.’” *Id.* (quoting *United States v. Playboy Entm’t*, 529 U.S. 803, 813 (2000)). “If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” *Playboy Entm’t*, 529 U.S. at 813 (citation omitted).

Undoubtedly, the security of the nation is a compelling government interest. *See Haig v. Agee*, 453 U.S. 280, 307 (1981). However, Facebook’s disclosure of Aggregate Data would not compromise the secrecy of the government’s surveillance or acquisition efforts. Facebook provides services to more than one billion subscribers; it is difficult to see how the disclosure of

the Aggregate Data could make any individual user suspicious, much less aware, that he or she was the target of government intelligence-gathering. As one court has recognized in the context of analyzing the prohibition on disclosure of National Security Letters, the plausibility of the notion that disclosure of the receipt of government-issued national security orders may compromise a national security investigation diminishes as the size of the recipient's customer base grows. *See In re Nat'l Sec. Letter*, 2013 WL 1095417, at *11 (N.D. Cal. Mar. 14, 2013).

Moreover, the government's own public release of similar data demonstrates that a prohibition on Facebook's disclosure is not narrowly tailored to the government's interest. Indeed, FISA already provides for the publication of aggregate data by the Attorney General, 50 U.S.C. § 1807, and such reports have previously been released to the public. More importantly, the government itself has committed to the publication of the aggregate numbers of orders issued during a 12-month period and the aggregate number of targets affected by these orders across all providers.² And the Director of National Intelligence ("DNI") recently has agreed to report each of the following categories of surveillance that the intelligence community has demanded:

- FISA orders based on probable cause (Titles I and III of FISA, and Sections 703 and 704)
- Orders under Section 702 of FISA
- FISA Business Records (Title V of FISA)
- FISA Pen Register/Trap and Trace (Title IV of FISA)
- National Security Letters issued pursuant to 12 U.S.C. § 3414(a)(5), 15 U.S.C. §§ 1681u(a) and (b), 15 U.S.C. § 1681v, and 18 U.S.C. § 2709.

See generally Office of the Director of National Intelligence, IC On the Record, icontherecord.tumblr.com, post dated August 29, 2013.

² *See* Letter to Majority Leader Harry Reid, United States Senate from Peter J. Kadzik, Principal Deputy Assistant Attorney General (Apr. 30, 2013) *available at* http://www.justice.gov/nsd/foia/foia_library/2012fisa-ltr.pdf (noting that during 2012, the government made 1,856 applications to the FISC for authority to conduct electronic surveillance and/or physical searches for foreign intelligence purposes; and (2) the FISC did not deny any applications in whole or in part.)

Finally, construing FISA and the FAA to bar disclosure fails strict scrutiny review because of the significant public interest in this information. As evidenced by the intense media coverage of PRISM and Facebook's alleged involvement therein, there is an ongoing debate over the government's use of its surveillance powers under FISA and the FAA. The government has confirmed that it uses its powers under FISA and the FAA and has weighed in on the public debate about the value of such programs. See Director of National Intelligence Statement on Activities Authorized Under Section 702 of FISA (June 6, 2013), *available at* <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/869-dni-statement-on-activities-authorized-under-section-702-of-fisa> ("Information collected under this program is among the most important and valuable foreign intelligence information we collect, and is used to protect our nation from a wide variety of threats."). By this motion, Facebook seeks to contribute to this important debate in a responsible way that is commensurate with the information that the government has released or intends to release regarding the very same surveillance and acquisition activity.

III. Conclusion

For the foregoing reasons, Facebook requests that this Court issue a judgment declaring that it may disclose the Aggregate Data. Facebook also requests that the Court set a briefing schedule for this motion that would allow it an opportunity to respond to any opposition the government files in response to this petition.³

³ Facebook is amenable to coordinating the schedule in this matter with the schedule to be entered in Case Nos. Misc. 13-03 and 13-04, which involve similar, but not identical, requests for relief filed by Google and Microsoft.

IV. Rule 7 Statement

Pursuant to FISC Rule of Procedure 7(I), Facebook states that its undersigned counsel, Chris Sonderby, holds a Top Secret security clearance, which was granted by the Federal Bureau of Investigation to permit him to advise Facebook concerning classified legal process. He is also a member in good standing of the State Bar of California. He has not previously appeared before this Court. Carl Nichols is a member in good standing of the bars of the District of Columbia and Commonwealth of Virginia. He does not presently hold a security clearance and has not previously appeared before this Court.

Dated: September 9, 2013



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CERTIFICATE OF SERVICE

I hereby certify that at or before the time of filing this submission, the Government (care of the Security and Emergency Planning Staff, United States Department of Justice) has been served by hand delivery with a copy of this motion pursuant to Rule 8(a) of the FISC Rules of Procedure.

Dated: September 9, 2013



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