

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CRIMINAL DIVISION – FELONY BRANCH

In the Matter of the Search of Information )  
Associated with Facebook Accounts disruptj20, )  
lacymacauley, and legba.carrefour That Is Stored )  
at Premises Controlled by Facebook, Inc. )  
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Special Proceeding Nos. 17 CSW 658,  
17 CSW 659, and 17 CSW 660  
Chief Judge Morin

FILED  
DC SUPERIOR COURT  
SPECIAL PROCEEDINGS  
2017 NOV 15 PM 2:42

**MOTION OF DOE 1, DOE 2, AND DOE 3 FOR CLARIFICATION  
OR, IF NECESSARY, RECONSIDERATION OF  
THE PROCEDURE FOR SEARCHING THIRD-PARTY EXPRESSION  
ON THE ACCOUNTS OF LEGBA CARREFOUR AND LACY MACAULEY**

Doe 1, Doe 2, and Doe 3 move the Court to clarify and, if need be, to modify in one narrow respect, its final order regarding the manner in which the search warrants to Facebook seeking data from the accounts of Lacy MacAuley and Legba Carrefour will be executed. There is an ambiguity in the language on page 15 of the Court’s order with respect to the redactions that Facebook is to make from the data in MacAuley and Carrefour accounts before the information is turned over to the government for “front to back” review. One reading of the language is that any content posted by innocent third parties is to be redacted; another is that only identifying information is to be redacted from such content, after which that content, like the content posted by MacAuley and Carrefour, is to be subject to “front to back” review. **If** the latter is the proper interpretation, then the Does ask for reconsideration, based on the contention that a factual distinction drawn in the Court’s opinion about how Facebook accounts work is incorrect, and not supported by the record. An affidavit from a digital media professional is attached to explain the facts more generally. Defendants also ask that the denial of their motion for leave to intervene be reconsidered so that they may present this argument.

## **The Court's Order**

The Court's opinion recognized that the showing of probable cause that supported the search warrants for the MacAuley and Carrefour accounts, as well as for the DisruptJ20 Facebook page, did not support any finding that there was probable cause to believe that expression by third parties on the accounts contained any evidence of criminal activity. Order at 15, 2017 WL -----.

Consequently, the Court protected the identities of the third parties from disclosure, *id.* a ruling that the Does applaud. Pages 14 and 15 of the order appear to provide that communications and postings in the account are among the information that is subject to "front to back review," although there is some ambiguity in paragraph 1 on page 15, in that it says that in addition to redacting identifying information of third-party persons, "other information not directly related to an account holder" is to be redacted. It is not clear to the Does whether this aspect of the redaction direction means that Does' posts and comments on the MacAuley and Carrefour accounts are to be redacted from the files to be turned over to the government for review, or whether only identifying information is to be redacted, while the posts and comments themselves would be within the scope of the search.

If the Court intends to allow Facebook to redact text posted by third parties to the account, then the Does ask only that the Court clarify that interpretation. But if third-party postings are to be provided to the government for search, then this motion is addressed to the search methodology for such third-party expression on the individual accounts.

The Court decided that the DisruptJ20 page must be searched through the adoption of a court-approved search protocol (involving keywords) because the DisruptJ20 page had been a common forum for various members of the public desirous of protesting the Trump inauguration to discuss plans, and a keyword search would ensure that fragments of the account in which there was no

evidence relating to the riots would not be subject to inspection by law enforcement officials. Order at 13. Again, the Does applaud that decision. On the other hand, the court decided that the individual accounts could be subjected to a “front-to-back” review, in which the prosecutors and police would be allowed to read every part of the account rather than only looking at those parts that responded to a keyword search. Order at 14-15. The Court reasoned that an individual Facebook account is more like an email account which, the Court indicated, is traditionally subject to unrestricted review. *Id.* Moreover, the Court wrote, to the extent that MacAuley and Carrefour are subject to having highly private materials reviewed by law enforcement pursuant to the warrant, that result follows from their own choice to “intermingl[e]” private materials with the evidence of criminal activity that the affidavits claimed is present in their accounts. Order at 15.

### **Argument**

Assuming that content posted to the MacAuley and Carrefour accounts is not to be redacted entirely, then under the terms of the Court’s order, that material, like the postings from the account holders themselves, would be subject to the same sort of “front to back” review. Whether or not the distinctions that the Court drew between event pages and individual accounts are fair ones with respect to the individual account holders, they are incorrect with respect to third parties whose expression may be found on the individual accounts. For third parties who post material on a friend’s Facebook timeline, an individual account functions as a common forum in much the same way as an event page does; the Facebook Messenger function can also function as a common forum for discussions among limited groups of friends. Moreover, even if it may be said that Carrefour and MacAuley deliberately commingled their own Facebook postings with evidence of criminal activity, that is not true of third parties who placed their expression on those accounts.

Doe 2 addressed this issue in passing when her affidavit explained how she had used Legba Carrefour's Facebook timeline to initiate a discussion among his mutual friends:<sup>1</sup>

3. I sometimes use Facebook to engage in political discussions with my Facebook friends. For example, I recall posting an inquiry on Legba Carrefour's status once about a criticism he raised which I disagreed with. I think it is appropriate and worthwhile for citizens to have these discussions with each other, in a forum where other members of our common community can participate.

The attached affidavit of digital media professional Zach Stone shows that such discussions are a common feature of individual Facebook accounts, where discussions of issues of common interest occur constantly. Discussions can result when the account holder herself initiates a conversation by posting a statement, an image or a link to which others respond. Stone Affidavit ¶ 3. An account holder's friend can also initiate a discussion on the account holder's page, sometimes by posting directly to the page, or by posting to the friend's own page but "tagging" the account holder. *Id.* ¶ 4. In this way, an account holder's Facebook page is a common forum indistinguishable from the DisruptJ20 group page where, under the Court's order, innocent third parties' comments are protected from pervasive police snooping by the Court's interposition of the requirement of a keyword-based search protocol.

Moreover, the Facebook Messenger service can also be used for group discussions. A Facebook friend might send a group message to several different Facebook accounts, and a group discussion can then result with or without the account-holder's participation, although unlike a discussion on the account holder's timeline, this discussion is visible only to the group of Facebook friends to whom the initial message was sent. Stone Affidavit ¶ 5. Again, this phenomenon is more

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<sup>1</sup>This brief uses female generic pronouns to refer to anonymous clients without intending any actual gender references.

like the Disrupt J20 “common forum” Facebook account that the Court has held should be protected against pervasive scrutiny than like the contents of an individual email account.<sup>2</sup>

Doe 2’s affidavit explained, “I would not want the DC police or federal prosecutors to have access to such discussions, which they could use to try to drive wedges among Americans.” Doe No. 2 Affidavit ¶ 3. This sentiment is likely shared by all of the anonymous third parties who participated in discussions of political issues on these two forums (that is, the individual MacAuley and Carrefour accounts). The Court should protect the privacy of political discussion, and not just the identify of the discussants, by limiting review to a keyword search protocol that ensures only expression relating in some way to riot activity is examined.

The Court also explained that the difference between the treatment of the DisruptJ20 and the individual Carrefour and MacAuley accounts was justified because the two individual account holders had “intermingl[ed]” protected political expression and private matters with the evidence of criminal activity that the probable cause affidavits indicate is likely to be found on the two accounts. Order at 15. But whatever deliberate intermingling is fairly attributed to Carrefour and MacAuley, it cannot be attributed to the innocent third parties who were the Facebook friends of one or another of these two, and who simply participated in political discussions on those pages without having placed any evidence of crimes there. Consequently, their expression, if it is to be searched at all, should be searched pursuant to a keyword-based search protocol so that their innocent political expression cannot be scrutinized by hostile police and prosecutors.

In addition, the Does seek the Court’s reconsideration of the denial of their motion for leave

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<sup>2</sup> Even email accounts have been protected by the imposition of keyword-based search protocols. *E.g.*, *United States v. Matter of Search of Info. Associated with Fifteen Email Addresses Stored at Premises Owned*, 2017 WL 4322826, at \*8 (M.D. Ala. Sept. 28, 2017).

to intervene, so that they may present the foregoing argument for a limitation of the means of searching their expression on the two accounts. We recognize that the Court has already decided, in footnote 14 on page 16, that intervention would serve no purpose because their identifying information has been protected for now, and the government might never come back to court seeking that information. But, as discussed above, it appears that the Court may not have shielded their expression from search, and the Does ought to be allowed to be heard on that question. It is, the Does suggest, somewhat backward to decide the merits by first according full participation in litigation, and then denying leave to intervene because participation has already been allowed. The Court should not hesitate to attach the label “intervention” to the participation that it has, thankfully, freely allowed.

\* \* \*

The details of the search procedures adopted by this Court, and the Court’s ruling on the ability to intervene, both matter, and not only for this case. We face a new Administration whose elected head made clear as recently as this week his determination to deploy federal prosecutors to pursue his perceived political adversaries. And the discovery techniques used in criminal investigations can oppress dissenters as much as prosecution, and even more so in that no jury is interposed between law enforcement officials and the dissenter. Although the subpoenas in this case relate to a prosecution arising out of violent conduct, future prosecutions may not be so based. Both protestors and prosecutors alike are watching this case to learn what tools will be available to prosecutors in the District of Columbia, and what risks innocent third parties take by associating with protest leaders whose accounts might later be said to harbor evidence of some real or imagined crime. We count on the courts to stand as a bulwark between lawful expression and overweening

prosecutors. We urge the Court to extend its requirement of the use of keyword protocols to ensure that this case sets a strong precedent for insisting that searches be limited to fragments of expression containing evidence of crimes, and not to all expression on accounts that are alleged to contain, somewhere within them, evidence of crimes. Only that approach can ensure that the order meets the Supreme Court's requirement of "scrupulous exactitude" for searches implicating First Amendment rights. *Stanford v. Texas*, 379 U.S. 476, 485 (1965).<sup>3</sup>

### CONCLUSION

The Court's final order should either be clarified to make clear that content posted to the individual accounts by anonymous third parties is to be redacted from the files Facebook is ordered to provide to the government for review. In the alternative, the Court's order should be modified so that the search protocol requirement set forth in paragraphs 1 and 2 on page 13 of the order (regarding search of the DisruptJ20 Facebook page) is applied to the search of third-party content placed on the individual MacAuley and Carrefour accounts.

Respectfully submitted,

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November 16, 2017

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<sup>3</sup> In this regard, the Does join in the arguments set forth in the reconsideration motions being filed by Mr. Carrefour and Ms. MacAuley.

## CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of November, 2017, I am both mailing and emailing copies of this motion to counsel for the Government, for the account-holder intervenors, and for Facebook.

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**AFFIDAVIT OF ZACHARY STONE**

1. My name is Zachary Stone. I am a 2015 graduate of Colorado College. I am currently employed by Public Citizen as a social media associate, where my duties entail facilitating Public Citizen’s social media outreach effort. I came to Public Citizen from the Colorado Consumer Health Initiative in Denver, Colorado, where I worked for two years as the Communications and Community Engagement Coordinator; my responsibilities there included managing CCHI’s social media accounts, and developing and administering online marketing campaigns. I have been a Facebook member since 2007, and I use Facebook in both my personal and professional capacities.

2. I have read the Court’s opinion in this case dated November 9, 2017, which discusses the way in which the DisruptJ20 Facebook page constituted a common forum on which various third parties were able to express their views, contrasting that page with the Facebook accounts of two individuals which, the Court indicated, were not a common forum but more like an email account. As I explain below, this determination appears to me to be based on a misunderstanding of the ways in which an individual’s Facebook timeline and messaging functions can often serve as a common forum in which the account holder’s Facebook friends (or even other third parties) participate in discussions.

3. There are two main ways in which a Facebook page (also called a Facebook timeline) can

function as a forum for third parties. First, Facebook account holders can themselves begin discussions on their pages. If, for example, one of my Facebook friends places a post on his timeline (an “opening post” or “OP”), I, or any of his other Facebook friends, might comment on that post. Indeed, depending on my Facebook friend’s settings, friends of his friends might be able to see and comment on that page. Frequently an extended discussion ensues among the community of the various friends of my Facebook friend (or, again, possibly including friends of friends), which will at times go forward with occasional involvement or even no further involvement of my friend himself.

4. Second, depending on the account holder’s settings, a discussion can occur on an individual’s Facebook page without any involvement by the account holder. This happens if a Facebook holder allows his or her friends to post directly to his page. For example, I could start a discussion on my friend’s pages. Similarly, an OP can appear on an individual’s Facebook page if one of his friends posts an OP (or image) to his own page while tagging the individual. Then, other members of the community of friends of the account holder may post comments to that OP. Frequently there are extended discussions among third parties that appear on an individual’s Facebook page.

5. There can also be discussions among a more limited subset of the friends of a given individual using Facebook’s private messaging system. One Facebook account holder can send a private message to a single individual, whether or not the sender is a “friend” of the recipient. An account holder can also send a message to several different Facebook account holders. Discussions among the group of recipients often continue based on the opening message, with or without the active involvement of any given account holder, but the group messages will remain in the account

holder's messaging mailbox.

I hereby certify under penalty of perjury that the foregoing is true and correct. Executed on  
November 15, 2017.

  
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Zachary Stone