

August 14, 2020

CALIFORNIA SUPREME COURT ANNOUNCES 7-FACTOR “GOOD CAUSE” TEST FOR THIRD-PARTY SUBPOENAS

To Our Clients and Friends:

On August 13, 2020, the California Supreme Court issued its ruling in *Facebook v. Superior Court* (“*Touchstone*”), No. S245203, ___Cal.5th___. The decision provides a framework for courts evaluating a criminal defendant’s third-party subpoena of records relating to a crime victim or prosecution witness. In *Touchstone*, a criminal defendant facing trial for attempted murder sought his alleged victim’s records from Facebook—instead of from the victim himself—in an effort to bolster the defendant’s self-defense theory and gather witness impeachment material. Facebook moved in the Superior Court to quash *Touchstone*’s subpoena on the basis of the Stored Communications Act, 18 U.S.C. § 2701 *et seq.* (“SCA”), which prohibits an electronic communications service from disclosing the contents of people’s communications in the absence of certain exemptions, such as consent. The Superior Court denied Facebook’s motion to quash, the Court of Appeal reversed, and the California Supreme Court granted *Touchstone*’s petition for review.

Writing for a unanimous Court, Chief Justice Cantil-Sakauye remanded the case for a renewed analysis of whether the subpoena was supported by good cause. The Court held that on remand the Superior Court should employ a seven-factor balancing test to determine the existence of good cause, evaluating such factors as, among others, the defendant’s “plausible justification” for the third-party subpoena, the infringement on third-party privacy rights posed by the subpoena, and the availability of the materials sought from alternative sources. The Court’s decision provides much-needed clarity to social media and other web-based companies that are routinely inundated with requests for third-party communications and data for use in court proceedings.

I. The Court Establishes a Good-Cause Framework for Third-Party Subpoenas of User Communications and Data

In *Touchstone*, the Superior Court had allowed *Touchstone* to submit the declaration and exhibits supporting his proposed subpoena under seal and on an *ex parte* basis, thus depriving both the prosecution and Facebook of any opportunity to challenge whether the subpoena was supported by good cause. *Touchstone*, *supra* at [p. 36].

During appellate proceedings, the California Supreme Court unsealed *Touchstone*’s declaration and exhibits and requested argument from Facebook and the prosecution (which had intervened in the appeal) regarding *Touchstone*’s subpoena’s good-cause backing. *Id.* at [p. 38]. Upon viewing the newly-unsealed information, Facebook and the prosecution argued that the subpoena was overbroad (it sought the alleged victim’s entire Facebook account history, without any date limitation); that the subpoena was predicated on speculation that relevant communications might exist; that the material sought was readily

available from alternative sources (including the alleged victim himself, whom Touchstone had never attempted to subpoena); and that the alleged victim should be afforded the chance to interpose his own privacy objections to the subpoena.

The California Supreme Court remanded, instructing the Superior Court to hear argument from Facebook, the prosecution, and the defense as to whether the subpoena was supported by good cause, applying the following seven-factor balancing test:

- (1) Has the defendant carried his burden of showing a ‘plausible justification’ for acquiring documents from a third party;
- (2) Is the sought material adequately described and not overly broad;
- (3) Is the material reasonably available to the . . . entity from which it is sought (and not readily available to the defendant from other sources);
- (4) Would production of the requested materials violate a third party’s confidentiality or privacy rights or intrude upon any protected governmental interest;
- (5) Is defendant’s request timely, or, alternatively, is the request premature;
- (6) Would the time required to produce the requested information . . . necessitate an unreasonable delay of defendant’s trial; and
- (7) Would production of the records containing the requested information . . . place an unreasonable burden on the [third party]?

Id. at [pp. 15-19] (quotations omitted).

The Court explained that unless this balancing test is satisfied, a criminal defendant’s third-party subpoena must be quashed, regardless of whether the SCA or any other law also independently bars disclosure in a given circumstance. The Court walked through several of the factors in detail.

Alternative Sources. The Court explained that if alternative sources for information sought via third-party subpoena have not been exhausted, the subpoena is more likely to fail for lack of good cause. The Court offered several helpful illustrations, citing with approval cases quashing subpoenas where “the proponents can obtain the same information by other means,” the defendant can “readily obtain the [discovery] information through his own efforts,” or “there existed an alternative source for the requested information.” *Id.* at [p. 17] (citations omitted). In *Touchstone*, for instance, Touchstone never subpoenaed the alleged victim for his own records, nor any of the recipients of the alleged victim’s communications.

Plausible Justification. The Court further explained that whether the defendant has shown a “plausible justification” to acquire the documents sought requires that “each legal claim that a defendant advances

to justify acquiring and inspecting sought information must be scrutinized and assessed regarding its validity in strength.” *Id.* at [p. 27].

Third-Party Privacy Interests. The Court also explained that “[w]hen, as in the present case, a litigant seeks to effectuate a significant intrusion into privacy by compelling production of a social media user’s restricted posts and private messages, the fourth factor . . . becomes especially significant.” *Id.* at [p. 29]. In such cases, the “plausible justification” factor “must be subject to even closer examination in the absence of an apparent relationship between the alleged crime and the sought private communications.” *Id.* (noting that in the “present case,” “it is questionable whether there is any [] substantial connection between the victim’s social media posts and the alleged attempted murder”).

Finally, the Court also questioned the trial court’s use of *ex parte* and under-seal proceedings, *id.* at [pp. 35-38], admonishing trial courts to carefully consider whether “it is necessary and appropriate to proceed *ex parte* and/or under seal, and hence to forego the benefit of normal adversarial testing.” *Id.* at [p. 37].

II. The Court Reserves All Ruling on the SCA’s Independent Bar to Production

Because the Court resolved the appeal by determining that the Superior Court had failed to conduct an adequate threshold good-cause analysis regarding Touchstone’s subpoena, it declined to reach Facebook’s argument that regardless of good cause, Touchstone’s subpoena was barred by the SCA, which broadly prohibits electronic communications providers from divulging the contents of communications in response to a criminal defendant’s subpoena absent an applicable exception. *See Facebook, Inc. v. Superior Court*, 4 Cal. 5th 1245, 1250 (2018) (holding that third-party subpoenas of electronic service providers are “unenforceable under the [SCA] with respect to communications addressed to specific persons, and other communications that were and have remained configured by the registered user to be restricted”); *Facebook, Inc. v. Wint* 199 A.3d 625, 629 (D.C. 2019) (“[E]very court to consider the issue has concluded that the SCA’s general prohibition on disclosure of the contents of covered communications applies to criminal defendants’ subpoenas.”). In other words, the Court ruled that because the subpoena may not be supported by good cause, the SCA’s independent bar on disclosure was not yet implicated and need not be addressed.

Chief Justice Cantil-Sakauye and Justice Cuéllar wrote separate concurring opinions to suggest that lower courts should apply a context-dependent and critical lens in future cases regarding the threshold determination of whether an entity is covered by the SCA in the first instance.

III. Implications of the Court’s Decision

The Court’s decision clarifies the standard that criminal defendants must meet before enforcing third-party subpoenas on social media and other companies seeking the records of potential crime victims or witnesses, holding that their subpoenas fail unless they meet a seven-factor balancing test that evaluates whether the materials can be obtained from a different source, the defendant’s need for the materials, and third-party privacy interests.

Gibson Dunn represented Facebook in the California Supreme Court.

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