U.S. Department of Justice

Criminal Division

Andrew S. Pak
Computer Crime & Intellectual Property Section
1301 New York Ave., N.W.
Washington, D.C. 20005

Hon. William E. Duffin
United States Magistrate Judge
Eastern District of Wisconsin
517 East Wisconsin Avenue
Milwaukee, WI 53202

Re: Two email accounts stored at Google, Inc., Case No. 17-M-1235

Your Honor:

The Government, in its Opposition to Google Inc.'s Motion to Amend the Search Warrant ("Gov't Opp."), indicated that a Magistrate Judge in the Middle District of Florida held that the Stored Communications Act could not be used to compel an email provider to produce information within its possession, custody, or control that is stored outside the United States. *See* Gov't Opp. at 2-3. As set forth in the attached order, the Magistrate Judge has since reconsidered his position and has reversed his prior ruling.

Respectfully,

GREGORY J. HAANSTAD
United States Attorney

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IN THE MATTER OF THE SEARCH OF:

PREMISES LOCATED AT:
[redacted]@yahoo.com, stored at premises owned, maintained, controlled, or operated by Yahoo, Inc.

CASE NO. 6:17-mj-1238

ORDER

As part of a criminal investigation, the United States applied to this Court for the issuance of a search warrant for information associated with a specific Yahoo, Inc., email account. The factual basis for the Government's request established probable cause for the issuance of the search warrant.

The information the Government sought included the contents of emails associated with the account; the source and destination addresses associated with each email; the date and time at which each email was sent; the size and length of each email; all records and other information regarding the identification of the email account; the types of services utilized by the account; all records and information stored at any time by any individual using the account; and other information concerning the account, subscriber and users.

In its application, the Government acknowledged that Yahoo may store some part of the information it sought outside the United States. For this reason, the Government asked the Court to issue the search warrant for "all responsive information–including data stored outside of the United States–pertaining to the identified account that is in the possession, custody, or control of Yahoo. The government also seeks the disclosure of the physical location or locations where the information is stored."

In a footnote to its application, the Government informed the Court that the Second Circuit, in Microsoft Corp. v. United States, 829 F.3d 197 (2nd Cir. 2016), held that the Government cannot enforce a warrant under the Stored Communications Act to require a provider to disclose records in its custody and control that are stored outside the United States. The Government also cited two other decisions, In Re Search Warrant No. 16-960-M-01 to Google, Misc. No. 16-960-M-01, 2017 WL 471564 (E.D. Pa. Feb. 3, 2017), and In re; Two email accounts stored at Google, Inc., Case No. 17-M-1234, Case No. 17-M-1235, 2017 WL 706307 (E.D. Wis. Feb. 21, 2017), which disagree with the holding in Microsoft. The Government noted that the Second Circuit's decision is not binding on this Court, and requested that the warrant apply to all responsive information, including data stored outside the United States.

I read the cases cited by the Government and found Judge Rueter's decision in Google, 2017 WL 471564 instructive. But, I was persuaded by the Second Circuit's decision, and in particular, Judge Lynch's concurring opinion in Microsoft, 829 F.3d 197 (2nd Cir. 2016). For the reasons explained in Microsoft, I decided that a warrant issued pursuant to the Stored Communications Act ("Act"0 reaches only as far as the territorial boundaries of the United States and the locations described in FED. R. CRIM. P. 41(b)(5). Accordingly, I issued the search warrant, but limited its scope such that, if Yahoo had responsive information which was stored at a place outside the United States, it was not required to produce that information.

Now pending before the Court is the Government's In Camera Motion to Review Order Limiting the Scope of Stored Communications Act Warrant, in which the Government asks the Court to reconsider and vacate its Order limiting the scope of the search warrant. For the reasons that follow, the motion is due to be granted.

The Act provides for the issuance of a search warrant requiring "the disclosure by a provider of electronic communications service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system." 18 U.S.C. § 2703(a). The warrant shall only issue "if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). An "electronic communications service" is "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). The warrant must be issued by a court of competent jurisdiction, which means a court that has "jurisdiction over the offense being investigated." 18 U.S.C. § 2711(3)(A)(i).

After reading the Government's brief, the Court agrees that the Act gives courts *in personam* power to require providers of electronic communication services to produce information responsive to a warrant. This makes a warrant issued pursuant to the Act function more like a subpoena in that it requires the provider to disclose information under its control. While a traditional search warrant permits the Government to enter, search, and seize tangible things from a private premises, the Act covers electronic data which may be stored in the "cloud." It is questionable whether this electronic data constitutes tangible property or if there is such a thing as an original, let alone copies of the information. Presumably, Congress understood this when it enacted the Act. This is borne

out by the Act's focus on the providers of electronic communications services and remote computing services.[1]

A court with *in personam* power can require a person to take acts, including the compelled disclosure of information, either within or outside of its territorial jurisdiction. See, e.g. State of New Jersey v. City of New York, 283 U.S. 473, 482, 51 S.Ct. 519, 75 L.Ed. 1176 (1931); Steele v. Bulova Watch Co., Inc., 344 U.S. 280, 289, n. 17, 73 S.Ct. 252, 97 L.Ed.2d 319 (1952); Republic of the Philippines v. Marcos, 862 F.2d 1355, 1364 (9th Cir. 1988). This is so because the court's jurisdiction over the person and its compulsion of that person, is not extraterritorial. And, this is true even if the information required to be disclosed is located outside of the United States.

The Microsoft court concluded that the focus of the Act's "warrant provisions is on protecting users' privacy interests in stored communications." Id., at 220. The Government argues, and I am now persuaded, that the focus of 18 U.S.C. § 2703 is on compelled disclosure. See In re: Two email accounts, 2017 WL 706307, at *3. I am also persuaded that the privacy concern identified by the Second Circuit is dealt with through the requirement that probable cause be demonstrated to the satisfaction of a court before a warrant may issue. Because the focus of § 2703 is on compelled disclosure, and the compulsion takes place in the United States, I find the application of § 2703 in this case is not extraterritorial.

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[1] But see, In re 381 Search Warrants Directed to Facebook, Inc., 2017 WL 1216079 (Ct. of App. N.Y. April 4, 2017) (Where the court rejected Facebook's contention that warrants issued pursuant to the Act "are more analogous to subpoenas than to traditional search warrants involving tangible property because they compel third parties to disclose digital data."); U.S. Bach, 310 F.3d 1063 n. 1 ("While warrants for electronic data are often served like subpoenas (via fax), Congress called them warrants and we find that Congress intended them to be treated as warrants. 18 U.S.C. § 2703(b)(1)(A).").

Accordingly, the Court **GRANTS** the motion for reconsideration. The Court will issue a second warrant for the information sought by the Government, which warrant is not limited to the territorial boundaries of the United States. Counsel for the Government should prepare and submit the proposed warrant to the Court.

DONE and **ORDERED** in Orlando, Florida on April 7, 2017.

THOMAS B. SMITH
United States Magistrate Judge

Copies furnished to Counsel of Record

I CERTIFY THE FOREGOING TO BE A TRUE
AND CORRECT COPY OF THE ORIGINAL
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MIDDLE DISTRICT OF FLORIDA
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