

facebook

August 3, 2011

VIA MAIL



Re: Your subpoena to Facebook, Inc. our ref.

Attorney

We are responding to the subpoena you directed to Facebook, Inc. issued on behalf of a private, non-governmental party.

First, Facebook is unable to provide the contents of a Facebook user's account in response to subpoenas issued on behalf of private individuals. Federal law specifically prohibits service providers such as Facebook from disclosing the contents of a user's account (for example, messages, Wall posts, photos, etc.) in response to legal process issued on behalf of private parties. You may, however, seek the content directly from the user, who owns and has custody and control of the content in his or her account and to whom the federal law prohibition does not apply. Active Facebook users can log in to their accounts at any time and preserve, collect, produce and authenticate the contents of their accounts. Facebook also provides to all users a "Download Your Information" tool accessible through the "Account Settings" drop down menu. This tool allows users to download the contents of their accounts.

Second, the most Facebook can provide in response to subpoenas issued on behalf of private parties is non-content information. To compel Facebook to provide this information, however, you must first properly identify the account at issue by providing the email address, Facebook user identification number or vanity URL associated with the account and ensure that your subpoena or other legal process is not objectionable for any other reason.

Third, please consider this letter Facebook's formal objection to your subpoena and include a copy with any pleadings you may file or any meet and confer correspondence you may send.

I. Federal Law Prohibits Facebook From Disclosing the Content of a User's Account Pursuant to a Civil or Non-governmental Subpoena.

The federal Stored Communications Act ("SCA") prohibits service providers from disclosing the contents of electronic communications held in electronic storage or carried or maintained on a remote computing service to any person. See 18 U.S.C. § 2702(a)(1), (2). There are eight limited exceptions to this prohibition, none of which enable subpoenas issued on behalf of



private parties to override the statute's flat prohibition. *See* 18 U.S.C. § 2702(b)(1)-(8). Courts have uniformly held that the SCA prohibits service providers from disclosing user content pursuant to subpoenas issued on behalf of private parties.¹

As noted above, any and all production demands for content should be directed to the applicable Facebook user.² The SCA's prohibition on the disclosure of content extends only to service providers, not to users. Facebook is a stranger to your dispute and takes no position on whether content is ultimately discoverable or admissible in your case. The SCA, however, makes clear that user content may not be obtained from Facebook.

II. Subpoenas Reaching Outside the Issuing Court's Subpoena Power

Facebook and the custodians who have control over Facebook's data are located in Palo Alto, California, which is also where Facebook resides. Therefore, federal civil subpoenas must issue from the Northern District of California and state court subpoenas must issue from a California state court or be properly domesticated under California law. Subpoenas issued on behalf of private parties and seeking user content are invalid no matter the jurisdiction.

III. Improperly Served Process

Facebook requires personal service of subpoenas issued on behalf of private parties.

IV. Overly Broad, Unduly Burdensome and Vague Requests

Facebook objects to requests for non-content that are overly broad, unduly burdensome and/or vague due to volume, lack of specificity, or for other reasons.

¹ *See Theofel v. Alwyn Farey-Jones*, 359 F.3d 1066, 1073 (9th Cir. 2004) (a subpoena seeking email cannot compel production of electronic communications under the SCA); *Chasten v. Franklin*, No. C10-8025, 2010 U.S. Dist. Lexis 113284, at *5 (N.D. Cal. Oct. 14, 2010) (holding that a service provider's "compliance with the [civil] subpoena would be an invasion . . . of the specific interests that the [SCA] seeks to protect") (citation omitted); *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 974-75 (C.D. Cal. 2010) (under 18 U.S.C. § 2703(b) only governmental entities can compel production of the content of electronic communications from service providers); *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 611 (E.D. Va. 2008) ("the [SCA] does not include an exception for the disclosure of electronic communications pursuant to civil discovery subpoenas."); *Flagg v. City of Detroit*, 252 F.R.D. 346, 366 (E.D. Mich. 2008) (declining to address whether a third-party service provider must respond to a civil subpoena for content but noting that "it seems apparent" that it would be unlawful for the service provider to do so); *Viacom Int'l Inc. v. YouTube Inc.*, 253 F.R.D. 256 (S.D.N.Y. 2008) (SCA "contains no exception for disclosure of [the content of] communications pursuant to civil discovery requests"); *F.T.C. v. Netscape Comm. Corp.*, 196 F.R.D. 559 (N.D. Cal. 2000) (SCA prohibits the disclosure of stored electronic communications in response to a subpoena); *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423 (Cal. App. 2006) (a service provider's compliance with a court order to produce electronic communications would be an "unlawful act"); *see also United State v. Warshak, et al.*, Nos. 08-3997/4085/4087/4212/4429; 09-3176 at 23 (6th Cir. Dec. 14, 2010) (governmental entities can compel the production of the content of electronic communications from an electronic communications service provider using only a search warrant supported by a finding of probable cause).

² *Flagg*, 252 F.R.D. at 348, 366-367; *O'Grady* 139 Cal. App. 4, at 1446.



V. Requests Seeking Privileged Communications or Other Protected Information

Facebook objects to your subpoena to the extent it seeks protected or privileged information, including information protected by the attorney-client privilege or Facebook's confidential, proprietary, or trade secret information.

VI. Improper Requests for Testimony and/or Declarations

Facebook is unable to provide custodian or expert witnesses for trial or deposition and an appearance is unnecessary. Pursuant to the California Rules of Evidence and the Federal Rules of Evidence, any business records produced are self-authenticating³ and/or the user who created and maintained the content is the proper person to authenticate that information.

VII. Tender of Fees and Processing Time for Non-Content

If you continue to seek non-content information, Facebook requests payment of \$500.00 per UID to help offset the costs incurred by Facebook in processing and responding to a subpoena issued by a private party. Facebook requires a minimum of 30 days to process non-content subpoenas. Delivery of any non-content documents may be delayed beyond 30 days without payment in full. Please remit payment by check payable to Facebook, Inc. to the attention of Facebook Security at 1601 S. California Avenue, Palo Alto, California, 9304. Please note the case name and the Facebook RT# above on your check.

If Facebook provides any materials in response to this subpoena, it does so without waiving any of its available objections or positions on the validity of your process, whether noted above or not. Also, neither this response nor any production constitutes consent by Facebook to the jurisdiction in any court or to the production of any additional materials or information. Facebook reserves its rights to seek its fees and costs associated with resisting your subpoena.

We trust this letter resolves your concerns. If not, please respond to it and include the "RT" number on your correspondence. If after fulfilling your meet and confer obligations, you seek the aid of a court in enforcing your subpoena over these objections, please include a copy of this letter or with any pleadings you may file. In addition, please include a copy of this letter with any correspondence you may have with the account holder whose content you are seeking.

Sincerely,

/S/ Parvez Jamshed
Facebook, Inc.

³ Calif. Evid. Code §§ 1561-64; F.R.E. 902, 903