

Tech Companies Challenge Subpoenas and Gag Orders

By Roslyn Akel, J.D. Candidate 2019 | October 11, 2016

Tech companies are increasingly resisting what they believe to be government overreach in an effort to protect the privacy of their consumers' communications and personal information. Recently, lawyers for these companies have argued that the increase in gag orders accompanying court-ordered subpoenas, as allowed by the Electronic Communications Privacy Act of 1986, is unconstitutional. Specifically, they cite that such practices violate the First and Fourth Amendment rights of their consumers. The ACLU has also indicted this practice as well. It charged that the government is [keeping its investigations secret](#) in circumstances where transparency not only is required but would also serve the public good.

The issue is not simply the use of gag orders for ongoing investigations per se. Instead, it is the unprecedented increase in the use of these gag orders that has come under fire. Facebook recently divulged that [sixty percent of the data requests](#) it receives from world governments include some kind of an attached gag order. Similarly, Microsoft provided that of the 5,600 federal demands for consumer data that it received between September 2014 and March 2016, [nearly half](#) were accompanied by secrecy orders that prevented Microsoft from telling affected consumers that it had turned over their information to the government.

Officials from the Department of Justice urge that these gag orders are necessary to [protect developing cases](#) and to avoid alerting potential targets. However, while the Department of Justice argues that it has an interest in protecting ongoing investigations, technology companies have countered that they have an interest in protecting their consumers' data. Accordingly, tech companies have taken action to challenge these individual orders in court but are also taking aim at the process of issuing the orders itself.

For example, Open Whisper Systems, a data encryption company, recently was served a subpoena for subscriber information during a criminal investigation associated with two phone numbers that came up during a Virginia federal grand jury investigation. The ACLU successfully challenged the gag order and had it lifted. Although this is a victory for Open Whisper Systems and the gag order was lifted, the company is still not allowed to tell the specific account holders about the investigation.

In another case, Microsoft decided to take aim at the process of issuing gag orders itself in a federal suit filed in April against the Department of Justice on the grounds that the Electronic Communications Privacy Act of 1986 is unconstitutional. Apple, Amazon, Google, Snapchat, and other tech companies joined Microsoft in the case. Microsoft hopes that this suit will draw public attention to the legal issues faced by tech companies as they work to protect their consumers' privacy.

Jennifer Granick, director of civil liberties at the Stanford Law School Center for Internet and Society, says that “[b]ig companies like Apple and Microsoft have the wherewithal to push back

. . . . But smaller companies may cave, rather than risk an expensive fight.” Although smaller companies may not have the resources to fund a fight as expensive as Microsoft’s, the public pressures created by the Microsoft case will inevitably benefit all companies, large or small.

Looking forward, the Department of Justice will likely continue to serve tech companies with subpoenas as part of pending investigations. However, public pressures to reconcile the conflicting interests of investigative secrecy and personal privacy will surely put into question whether this climate of secrecy will be allowed to continue in its current form.