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Phone passcodes protected by Fifth Amendment

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The Securities and Exchange Commission sued Bonan Huang and others, seeking penalties, disgorgement and equitable relief. The SEC alleged that the defendants traded certain retail stocks based on material nonpublic information available to the defendants while they worked as data analysts for Capital One Bank.

Capital One provided the defendants with smartphones but allowed them to create and set their own passcodes to access the smartphones. Capital One owned the smartphones and any corporate documents stored on them.

Capital One requested its employees not keep records of their personal passcodes for security reasons. Upon leaving Capital One, the defendants returned their smartphones.

Capital One provided the smartphones to the SEC, but the SEC could not access the data on the smartphones because it did not know the passcodes.

The defendants apprehended an imminent threat of prosecution but had not yet been convicted.

The SEC moved to compel production of the defendants' passcodes. The SEC argued the defendants, as former Capital One data analysts, were corporate custodians in possession of corporate records and, as such, could not assert their Fifth Amendment privilege in refusing to disclose their passcodes.

The defendants disagreed, arguing that providing the passcodes was "testimonial" in nature and violated the Fifth Amendment.

The SEC claimed the "corporate records" cases governed the analysis. See *Bellis v. U.S.*, 417 U.S. 85 (1974); *Braswell v. U.S.*, 487 U.S. 99 (1988). In *Bellis*, a partner of a dissolved law firm was subpoenaed to appear and testify before a grand jury and to bring all partnership records within

his possession. He appeared but refused to bring the records and asserted his Fifth Amendment privilege against compulsory self-incrimination.

The U.S. Supreme Court rejected the privilege, relying on the collective entity doctrine. The doctrine prevents an individual from relying upon the privilege to avoid producing records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally.

Here, though, the defendants pointed to more recent cases. In *In re Grand Jury Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1346 (11th Cir. 2012), the 11th U.S. Circuit Court of Appeals found a person accused of possessing child pornography could assert his Fifth Amendment privilege to avoid decrypting a hard drive.

The court of appeals did not focus on whether the privilege applied to underlying documents but on whether the acts of decryption and production were testimonial. The court of appeals held decryption and production of the hard drives would require the use of the contents of Doe's mind and could not be fairly characterized as a physical act that would be non-testimonial in nature. The decryption and production therefore were testimonial and within the scope of the Fifth Amendment.

Defendants also pointed to *U.S. v. Kirschner*, 823 F. Supp. 2d 665 (E.D. Mich. 2010) where the government subpoenaed all passwords associated with defendant's computer. The U.S. District Court found that revealing the password was akin to providing the combination of a wall safe — an act deemed to be testimonial by the Supreme Court.

The district court denied the government's request to compel the defendant to produce his computer passcodes.

The SEC's reliance on the content of the documents was also misplaced. *In re Grand Jury* persuaded the court that it should not look at the underlying documents to determine whether the act of producing a passcode was testimonial.

By relying on the corporate records cases of *Bellis* and *Braswell*, the SEC would have the court focus on the nature of the documents allegedly contained in the phone rather than what the SEC requested, which were passcodes to the phones. This would require intrusion into the knowledge of the defendants and no one else.

There was no evidence that Capital One assigned or kept track of the defendants' passcodes. To the contrary, the bank asked employees not to keep records of their passwords for safety reasons.

Because the court found the passcodes were not corporate records, it did not need to reach the issue of whether the defendants were corporate custodians.

The SEC also argued that any incriminating testimonial aspect to the defendants' production of their personal passcodes already was a foregone conclusion because the SEC could show the defendants were the sole users and possessors of their respective work-issued phones. The court found the SEC's argument missed the mark.

In *In re Grand Jury*, the court of appeals refused to apply the foregone conclusion doctrine because the government could not meet its burden of showing with reasonable particularity what if anything, was hidden behind the encrypted wall.

While the government need not identify exactly the underlying documents sought, categorical requests for documents the government anticipated are likely to exist would not suffice.

Here, the SEC argued only possession of the smartphones and that the defendants were the sole users and possessors of their respective work-issued smartphones. The SEC did not show the existence of any requested documents on the smartphones.

Merely possessing the smartphones was insufficient if the SEC could not show what was actually on the device.

The SEC had no evidence that any documents it sought were actually located on the work-issued smartphones, or that they existed at all. Thus, the foregone conclusion doctrine was not applicable.

Since the passcodes to the defendants' work-issued smartphones were not corporate records, the act of producing their personal passcodes would be testimonial in nature and the defendants properly invoked their Fifth Amendment privilege.

Securities and Exchange Commission v. Huang, 2015 WL 5611644 (E.D. Pa. Sept. 23, 2015).

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