COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, S.S. SUPERIOR COURT DEPARTMENT
DOCKET NO. 1784CV02023

MUSGRAVE & ANOTHER
v.
CLERK OF THE SUPERIOR COURT FOR CRIMINAL BUSINESS IN SUFFOLK COUNTY, ET AL.

COMMONWEALTH'S MOTION FOR SUMMARY JUDGMENT

The Commonwealth respectfully moves this Court pursuant to Mass. R. Civ. P. 56(b) for summary judgment. At the Commonwealth's request pursuant to Rule 10 of the Uniform Rules of Impoundment Procedure, the Court (Sullivan, J.) terminated the impoundment order of In Re: Grand Jury Investigation (Administrative Subpoena To Twitter, Inc.), Docket No. 1182GJ11308. The Court's file is now available for public inspection in the Clerk's Office. Because the plaintiffs' request to terminate the impoundment order is now moot, this Court ought enter summary judgment on behalf of the Commonwealth.

In support of this motion, undersigned counsel states:

1. On December 14, 2011, the Commonwealth issued an administrative subpoena to Twitter, Inc., pursuant to G.L. c. 271, § 17B. After the Commonwealth served the subpoena, the Commonwealth's email server and web site were subject to attempted hacking. The attack of the email server was directed specifically to the account of the prosecutor who issued the administrative subpoena.

2. John Doe, an anonymous Twitter subscriber, moved to quash the subpoena.[1]

3. The Honorable Carol S. Ball found that Doe had no standing to move to quash. Judge Ball also impounded the matter based on the Commonwealth's showing of good cause to justify that order.

4. After Judge Ball denied the motion to quash, she was the subject of a "tweet" in which a phone number purporting to be her home phone number was made public, which likewise appeared to be an act of retaliation.

5. One aspect of the hacker sub-culture is a desire shared by many hackers to gain notoriety by engaging in high-profile network intrusions. Because of this desire, there is a direct correlation between the publicity surrounding a target and the likelihood of an attack on that target. This case was impounded, and the prosecutor's affidavit was sealed, because the Commonwealth made a showing that additional publicity surrounding the subpoena would increase the likelihood of additional reprisals to the Commonwealth's technology platforms.

6. Doe filed a petition pursuant to G.L. 211, § 3, requesting (in part) that the impoundment order be modified and the matter be subject to public inspection. Justice Francis X. Spina, acting as single justice, denied Doe's request for relief from the impoundment order.

7. Justice Spina found that:

> Not only is the basis of the investigation substantial, but either it is not aimed at John Doe's right to speak anonymously, or it provides

[1] In the administrative subpoena matter, ACLU legal staff and Attorney Peter Krupp represented Doe. Attorney Krupp is now an Associate Justice of the Superior Court. The civil complaint did not include any representations about Doe, specifically whether he is still a client of the ACLU, or whether he waived any potential conflict now that the ACLU represents plaintiffs. *See, e.g.*, Mass. R. Prof. Conduct 1.7(a)(2); 1.8(b); (k); 1.9(a), (c).

> compelling reason to believe that John Doe's speech is not protected, or both. In addition, John Doe's subscription to Twitter essentially asserts that he has no reasonable expectation of anonymity, and he has at least implicitly acknowledged as much by agreeing to the subscription terms and conditions. (Amended Memorandum of Decision, Docket No. SJ-2012-0021 (dated Feb. 13, 2012).

8. Twitter complied with the subpoena on March 1, 2012.

9. Doe did not have a constitutional, statutory or common law right to access investigative materials at the time the administrative subpoena was issued. *See* Newspapers of New England, Inc. v. Clerk-Magistrate of Ware Div. of Dist. Court Dep't, 403 Mass. 628, 636-637 (1988) (proper to order impoundment of pre-arrest affidavits).

10. While the investigation was underway, there was a clear governmental interest in the nondisclosure of the materials, particularly prior to the completion of the investigation. Newspapers of New England, Inc., 403 Mass. at 638 (Wilkins, J., concur). The Court, thus, found good cause and agreed to impound the case. *See* Rule 7, Uniform Rules on Impoundment Procedure.

11. Sealing differs from impoundment in that it normally excludes the parties and their attorneys, as well as the general public, from access. *See* Pixley v. Commonwealth, 453 Mass. 827, 836 n.12 (2009).

12. The matter was treated by the Clerk's Office like a grand jury investigation because the only party to it was the Commonwealth. Doe did not have standing as a party. The order to impound, therefore, effectively functioned like an order to seal.

13. Undersigned counsel represented the Commonwealth in the underlying matter in 2011 and 2012. The case file for the matter was titled by the assistant clerk at the time as "Grand Jury Investigation" although that was a misnomer. I recall that the matter had to be treated as a grand jury investigation for filing purposes because of limitations inherent to the computer docketing system: the Clerk's Office had no filing option to indicate this was a matter about an administrative subpoena. This is why the docket includes "GJ" and not "CR" as criminal matters typically do. The clerk could not assign a "CR" docket number because there was no criminal indictment.
14. According to the complaint, on May 15, 2017, one of the plaintiffs in this action went to the Suffolk Superior Court to attempt to view a case file for In re Administrative Subpoena to Twitter, Docket No. 2011-CR-11308. Plaintiff provided the clerk with the wrong case name and the wrong docket number, for the reasons stated in ¶13,. No such file exists. Thus, the clerk was unable to provide Plaintiff with the requested file.
15. On June 27, 2017, the Commonwealth received service of this civil action, requesting termination of the order of impoundment.
16. On June 28, 2017, undersigned counsel viewed the Court's file for In Re: Grand Jury Investigation (Administrative Subpoena To Twitter, Inc.), Docket No. 1182GJ11308.
17. There is no longer good cause to continue the order to impound. Twitter complied with the subpoena in March 2012, the investigation is over, and the file is subject to this civil complaint seeking the materials

18. The Commonwealth moved to terminate the order to impound the pleadings pursuant to Rule 10 URIP so that the file would be available for inspection by the public (and plaintiffs).[2]

19. The Court (Sullivan, J.) granted the Commonwealth's motion and the file is now available for public inspection. *See* Order (dated July 12, 2017), attached as Exhibit 1.

For the foregoing reasons, the Commonwealth's moves the Court to grant the Commonwealth's Motion for Summary Judgment and dismiss the action because it is moot.

Respectfully submitted,
for the COMMONWEALTH

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by:

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Date: July 12, 2017

[2] In 2011, Judge Ball also issued an order to seal one document, an affidavit filed by the Commonwealth (Paper #8). The Commonwealth asked that the order to seal be terminated along with the order to impound.

-FILED UNDER IMPOUNDMENT-

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, S.S.

SUPERIOR COURT DEPARTMENT
DOCKET NO. 1182-GJ-11308

IN RE: ADMINISTRATIVE SUBPOENA TO TWITTER, INC.[1]

COMMONWEALTH'S MOTION TO TERMINATE AN ORDER TO IMPOUND A GRAND JURY CASE

The Commonwealth respectfully requests that this Court terminate the impoundment of this case. The matter resulted from an investigation and no indictment issued. There is no longer good cause to impound the matter. In support of its motion, the Commonwealth states the following:[2]

1. The administrative subpoena in this case was part of the investigation into efforts by a group referring to itself as "Anonymous" to undertake data breaches and intimidate criminal justice personnel into terminating certain court proceedings following the Occupy Boston protests in the late fall of 2011.
2. Specifically, the subpoena requested the subscriber information for a Twitter account held by John Doe. The subpoena did not seek the content of any statements or correspondence made to or by Doe.

[1] The case file is titled "Grand Jury Investigation" although that is a misnomer. No grand jury investigation resulted from this matter. Instead, the matter focused on an administrative subpoena. The Court (Ball, J.) impounded the case in the same manner as a grand jury investigation. Additionally, there was no option in the computer docket system to reflect a case about an administrative subpoena, hence the "GJ" docket number.

[2] Undersigned counsel also files an affidavit in support of the motion, attached.

3. The group "Anonymous" claimed to be responsible for a number of computer-related crimes involving network intrusions, identity theft, larceny, extortion and other offenses.
4. During the investigation, after the Commonwealth served an administrative subpoena on Twitter for Doe's subscriber information, the Commonwealth's email server and web site were subject to attempted hacking. The attack of the email server was directed specifically to the account of the prosecutor who issued the administrative subpoena, who is no longer with the Suffolk County District Attorney's Office (SCDAO).
5. Based on the timing, the attempted intrusion and denial of service attack on the SCDAO website appeared to be in retaliation for the issuing of the subpoena to Twitter.
6. The ACLU represented Doe in the matter, moving to quash the subpoena. The Honorable Carol S. Ball found that Doe had no standing to move to quash an administrative subpoena.
7. After Judge Ball denied the motion to quash, she was the subject of a "tweet" in which a phone number purporting to be her home phone number was made public, which likewise appeared to be an act of retaliation.
8. One aspect of the hacker sub-culture is a desire shared by many hackers to gain notoriety by engaging in high-profile network intrusions. Because of this desire, there is a direct correlation between the publicity surrounding a target and the likelihood of an attack on that target. This case was impounded, and the prosecutor's affidavit was sealed, because the Commonwealth made a

showing that additional publicity surrounding the subpoena would increase the likelihood of additional reprisals to the Commonwealth's technology platforms.

9. Neither Doe nor Anonymous had a constitutional, statutory or common law right to access investigative materials at the time the administrative subpoena was issued. *See* Newspapers of New England, Inc. v. Clerk-Magistrate of Ware Div. of Dist. Court Dep't, 403 Mass. 628, 636-637 (1988) (proper to order impoundment of pre-arrest affidavits).

10. While the investigation was underway, there was a clear governmental interest in the nondisclosure of the materials, particularly prior to the completion of the investigation. Newspapers of New England, Inc., 403 Mass. at 638 (Wilkins, J., concur). This Court, thus, found good cause and agreed to impound the case. *See* Rule 7, Uniform Rules on Impoundment Procedure (2015). The Uniform Rules on Impoundment Procedure allow, under particular circumstances, orders that prevent the public, but not the parties, from gaining access to specific case materials.

11. Sealing differs from impoundment in that it normally excludes the parties and their attorneys, as well as the general public, from access. *See* Pixley v. Commonwealth, 453 Mass. 827, 836 n.12 (2009).

12. Because the case was treated like a grand jury investigation, where the only party to it was the Commonwealth, the order to impound effectively functioned like an order to seal.

13. Massachusetts courts have long recognized a common-law presumption of public access to judicial records. *See* Commonwealth v. Pon, 469 Mass. 296, 311 (2014); Commonwealth v. Winfield, 464 Mass. 672, 678 (2013). The presumption of public access encourages openness, transparency, and an informed public while discouraging misconduct, bias, and dishonesty, all of which enhances public confidence in the judicial system. Winfield, 464 Mass. at 678, quoting Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 606 (2000) ("This presumption of public access to judicial records allows the public and the media to develop a full understanding of a judicial proceeding so that they may 'keep a watchful eye' on the judicial system"); Republican Co. v. Appeals Court, 442 Mass. 218, 222 (2004).

14. The Uniform Rules of Impoundment Procedure Rule 10 permit a party to file a motion to modify or terminate an order of impoundment. *See* Republican Co., 442 Mass. at 225.

15. The burden of demonstrating the existence of good cause always remains with the party urging the continued impoundment. Id. A party seeking the termination of impounded court records, however, need not bear the burden of demonstrating either that there has been a material change in circumstances or that whatever good cause may once have justified their impoundment no longer exists. Id. *See also* Adams v. Adams, 459 Mass. 361, 361 n.1 (2011) (husband's employer, which had sought impoundment in the first instance, did not demonstrate good cause to justify continued impoundment of the case).

16. This Court is to apply the same balancing test used in determining whether to grant an impoundment order in the first instance. Republican Co., 442 Mass. at 224-25. The termination of an order of impoundment may be granted only upon the court's entry of new written findings and the issuance of a new order. *Cf.* Care and Protection of Sharlene, 445 Mass. 756, 772 n.18 (2006) (judge's modification of original impoundment order was accompanied by written findings).

17. Here, the Commonwealth moves to terminate the order to impound the pleadings: Twitter complied with the subpoena in March 2012, the investigation is over, and the file is subject to a civil complaint seeking the materials. *See* Musgrave & another v. Clerk of the Superior Court for Criminal Business in Suffolk County, et. al., Docket No. 1784CV02023. Additionally, in the six years since the commencement of this matter, the security of the Commonwealth's technology platforms is more secure and thus less vulnerable.

18. Judge Ball also issued an order to seal one document, an affidavit filed by the Commonwealth (Paper #8). The Commonwealth asks that this order be terminated along with the order to impound for the identical reasons it provides to terminate the order impounding the matter.

19. The Commonwealth would like to provide the impounded materials and sealed affidavit to the parties in the civil case referenced in paragraph 17.

20. As with the rest of this case, the Court allowed the Commonwealth to proceed *in camera* until such time as the Court grants the Commonwealth's request here.

For the foregoing reasons, the Court should grant the Commonwealth's Motion to Terminate the Order to Impound and to Terminate the Order to Seal the Affidavit (Paper #8).

Respectfully submitted,
for the COMMONWEALTH
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Date: July 12, 2017

Certificate of Service

I hereby certify, under pains and penalties of perjury that I have made service upon the attorneys in this case by sending by first-class mail a copy to:

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Donna Jalbert Patalano
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July 12, 2017

-FILED UNDER IMPOUNDMENT-

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, S.S.

SUPERIOR COURT DEPARTMENT
DOCKET NO. 1182-GJ-11308

IN RE: ADMINISTRATIVE SUBPOENA TO TWITTER, INC.

AFFIDAVIT OF ASSISTANT DISTRICT ATTORNEY DONNA JALBERT PATALANO IN SUPPORT OF THE COMMONWEALTH'S MOTION TO TERMINATE ORDER OF IMPOUDMENT

I, Donna Jalbert Patalano, state the following:

1. I am an Assistant District Attorney in Suffolk County, Massachusetts assigned to the Appeals Division. I have been a member of the Massachusetts bar since 2002. In 2011, I appeared on behalf of the Commonwealth in the above-named matter in the Suffolk Superior Court.

2. Because the matter regarded an administrative subpoena and an on-going investigation, the Honorable Carol S. Ball found the Commonwealth established good cause to impound the matter. Her order still stands.

3. On June 28, 2017, I reviewed the Court's file in this matter in the Clerk's Office.

4. There no longer is good cause to continue the order to impound. The investigation is over and the file is subject to a civil complaint seeking the materials.

Signed under the pains and penalties of perjury this 12th day of July 2017 in Boston, Massachusetts.

Donna Jalbert Patalano
Assistant District Attorney

Certificate of Service

I hereby certify, under pains and penalties of perjury that I have made service upon the attorneys in this case by sending by first-class mail a copy to:

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July 12, 2017