



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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JUDGES

February 24, 2022

RETIRED JUDGES

Detective Scott Reeve
FAIRFAX COUNTY POLICE DEPARTMENT
12000 Government Center Parkway
Fairfax, VA 22035

Re: In the Matter of the Search of Information Stored at the Premises Controlled by
Google, February 8, 2022
Case No. KM-2022-79

Dear Detective Reeve:

The Fairfax County Police Department asks the Court to issue a "geofence" search
warrant, a search of personal location data using relatively new technology. No other court in
Virginia has issued an opinion approving, rejecting, or identifying criteria for properly issuing
such warrants. This Court has previously declined to issue the handful of proposed geofence
search warrants presented to it when they began to appear as quirky novelties. However, the
number of geofence search warrant requests are increasing and the Court's reasons for approving
or rejecting them should be public.

The Court holds approval of the present geofence search warrant application to be
unconstitutional, as applied. Therefore, the Court will not issue the warrant. It reserves for
another day the question as to whether geofence search warrants are ever constitutional.<sup>1</sup>

<sup>1</sup> See, Geofence Warrants and the Fourth Amendment, 134 HARV. L. REV. 2508, 2521 (2021) (suggesting it is
unconstitutional to compel a private company to create a customized dataset from a larger database).

## **I. FACTUAL OVERVIEW: THE POLICE SEEK A GEOFENCE SEARCH WARRANT.**

According to the Affidavit in Support of a Search Warrant (“Affidavit”), shootings occurred at a motel in Fairfax County.<sup>2</sup> A group of people had been having a party in a room at the motel when a dispute arose between two groups of party attendees. Security footage showed one group leaving and getting into a car. The car left at [REDACTED] and returned [REDACTED]. Upon returning, a person got out of the car who appeared to be one of the party attendees. The car drove around the motel parking lot.

At [REDACTED] five other people left the motel and were waiting outside.

At an unspecified time, the car that had been driving around approached the people waiting outside. A passenger in the rear began shooting a gun at them. The people waiting took cover and one of them returned fire. All five of them fled to the nearby woods.

Before the shootings, security footage showed most of the participants using mobile communication devices (hereinafter, “cell phones”). The police want a geofence warrant to help identify those people.

According to the Affidavit, the location of cell phones may be identified by their use of cellular towers for communication as well as by global positioning systems (“GPS”) and other technology, such as Wi-Fi and Bluetooth. Google, a company that provides electronic communication services to subscribers, keeps location data for Android-enabled cell phones as well as other cell phones associated with a Google account with location services enabled.

Using GPS coordinates, the police created a virtual fence around the motel (Zone 1), and two others around two adjoining spaces (Zones 2 and 3). There is a small overlap between each of Zones 2 and 3 and Zone 1. The police want the Court to order Google to search its database for the day of the shooting to identify all electronic communication devices in the designated zones as follows: (1) for Zone 1, from [REDACTED] to [REDACTED]; (2) for Zone 2, from [REDACTED] to [REDACTED] and from [REDACTED] to [REDACTED]<sup>3</sup>; and (3) for Zone 3, from [REDACTED] to [REDACTED]. The Affidavit includes a satellite photo of the motel with each of the three zones drawn for visual reference.

Using the zones and times specified, the police want to engage with Google in a three-step process. First, the police want Google to search its historical device-location database to produce an anonymized list of “corresponding unique Reverse Location Obfuscated IDs/Device ID, timestamp, coordinate, display radius, and data source (sic).” The Court assumes this means

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<sup>2</sup> The Court deliberately does not mention particularized details of the events or redacts details of the public version of this Opinion Letter, as disclosure may frustrate the pending investigation.

<sup>3</sup> Confusingly, the Affidavit refers to Addendum A of the proposed search warrant. Addendum A does not include the two time periods for Zone 2 as the Affidavit does.

a list of devices, by Google-assigned anonymized numbers, linked to all cell phones in its databased in each of the zones during the times specified.

Second, after the police get this list of anonymized devices, they want to review the list and remove cell phones from it they deem irrelevant to their investigation without any further Court involvement. (In the Affidavit, the detective cites as irrelevant cell phones not in a zone for a sufficient time).<sup>4</sup> As part of this review, and again without further Court involvement, the police want to be able to ask Google to expand the zones to improve the search.

Third, after the first two steps and yet again without further Court involvement, the police want to request from Google the personal identifying information for the cell phones they deem relevant. This information would include the name, address, telephone numbers, email addresses, payment information, and Internet Protocol addresses for the specified devices.

The police presented this Affidavit and proposed search warrant to the Court *ex parte*.

## II. GEOFENCE SEARCH WARRANTS REQUIRE SHOWINGS OF PROBABLE CAUSE AND PARTICULARITY.

It happened relatively quickly, but ours is a highly surveilled nation. Video cameras seem to be everywhere, and data storage is practically unlimited. People cannot walk down the block in an urban area without being automatically recorded on multiple occasions. Almost everyone possesses a cell phone, that is now effectively a personal tracking device. When a crime occurs, police want to access this data to help them solve the crime. It is the duty of the judiciary to make sure the government's use of new technology comports with familiar Fourth Amendment jurisprudence. After all, as the Supreme Court once said in the context of prior then-new technology—telephone wiretaps—“fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; \* \* \* indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments.” *Berger v. United States*, 388 U.S. 41, 62 (1967) (quoting *Lopez v. United States*, 373 U.S. 427, 441 (1963)) (ellipses in original).

The Fourth Amendment to the United States Constitution reads,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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<sup>4</sup> This is listed in the Affidavit as a nonexclusive example.

U.S. CONST. amend. IV. The Fourth Amendment was extended to the States by the Fourteenth Amendment. See *Fore v. Commonwealth*, 220 Va. 1007, 1010 (1980).<sup>5</sup>

By the Amendment's express terms, a Court may issue a search warrant only after finding probable cause and particularity. *Texas v. Brown*, 460 U.S. 730, 742 (1983); *Berger*, 388 U.S. at 55. Requests for search warrants are necessarily *ex parte* to avoid tipping off the subjects of the warrants. *Franks v. Delaware*, 438 U.S. 154, 169 (1978).

"Probable cause" means there are available facts leading a person of reasonable caution to believe that contraband, stolen property, or useful evidence of a crime will be found in a search. *Brown*, 460 U.S. at 742. Probable cause does not demand any showing that such a belief is correct or more likely true than false. "A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Id.* (citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

"Particularity" means the warrant must be narrowly tailored—a search warrant must specifically state that which is sought. "[N]o greater invasion of privacy [is] permitted than [is] necessary under the circumstances." *Berger*, 388 U.S. at 57. So, for example, "a search warrant directed against a multiple-occupancy building will be invalidated if it fails to specify a particular sub[-]unit to be searched." *Brown v. Commonwealth*, 212 Va. 672, 674 (1972). However, there is a reasonableness limitation to this principle. Therefore, a search may sometimes occur outside the warrant. A search warrant permitting the search of a home and curtilages may include the search of cars found there. *Glenn v. Commonwealth*, 10 Va. App. 150, 156 (1990).

One has a privacy interest in one's physical location, protected by the Fourth Amendment. *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). This is true even if the person voluntarily shares his location with a private company that stores the data. *Id.* at 2218-20. This is an exception to the "third-party doctrine" that would ordinarily hold that one has no legitimate expectation of privacy in the data privately shared with the private company. See *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979). According to *Carpenter*, cell site location information is something a person cannot avoid creating in the modern world, and that no one can be deemed to have voluntarily permitted the government access to one's catalogue of locations. *Carpenter*, 138 S. Ct. at 2220.

The Fourth Amendment protects people, not places, *Katz v. United States*, 389 U.S. 347, 351 (1967), even though search warrants are directed at places. *Zurcher v. Stanford Daily*, 436 U.S. 547, 555 (1978). Often the place is a person. While Virginia permits "all persons warrants"—where a warrant permits police to search all people in a specified location—the applicable circumstances are limited. There must be a good reason to search all the people, such as a nexus between the suspected crime and all the people then-present. *Morton v.*

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<sup>5</sup> Protections under the Virginia Constitution are substantially the same. *Lowe v. Commonwealth*, 230 Va. 346, 348 n.1 (1985).

*Commonwealth*, 16 Va. App. 946, 950 (1993); see also *Owens v. Lott*, 372 F.3d 267, 276 (4th Cir. 2004) (“all persons” warrants are constitutional if there is probable cause to believe all persons on the premises at the time of the search are involved in the criminal activity).<sup>6</sup> In *Ybarra v. Illinois*, 444 U.S. 85, 88 (1979), police suspected a bartender of possessing heroin. They obtained a search warrant for the bar, the bartender, and evidence of narcotics. *Id.* Upon entry, the police searched nine to thirteen patrons, arresting one of them, Ventura Ybarra, for possession of heroin after finding heroin on him. *Id.* at 88-89. The Court wrote

“[A] person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.” Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the “legitimate expectations of privacy” of persons, not places.

*Id.* at 91. Stated differently, “a warrant to search a place cannot normally be construed to authorize a search of each individual in that place.” *Id.* at 92, n.4. Thus, the bartender in *Ybarra* who was suspected of possessing heroin was not the only one in that bar with rights. The entirely innocent patrons who just happened to be at the bar had the right to be free from this unreasonable search. *Id.* at 99. Mr. Ybarra also had that right, even though he secretly possessed heroin, because police did not know this at the time of the search warrant. *Id.* at 91. Unlike the situation in *Katz*, where the trial court found all participants in an apartment had a nexus to drugs and prostitution, police had no suspicion to conclude that any of the bar patrons in *Ybarra* were involved in any criminal activity. There was no nexus between them and the bartender beyond the purchase of beer.

Following the precedent in *Ybarra*, the Supreme Court of Virginia in *Whitehead v. Commonwealth* dismissed a drug possession case wherein a drug detection dog identified suspected drugs in a car in which Travis Whitehead was an improperly searched passenger. 278 Va. 300, 314 (2009). The dog alerted police to the car and not to any of the four people in the car. *Id.* Nonetheless, police searched the occupants, including Mr. Whitehead, along with the car. *Id.* The Supreme Court held the police needed probable cause to search Mr. Whitehead. *Id.* at 314-15. His mere presence in the car was insufficient cause to search him. *Id.* at 308.

Of course, the Fourth Amendment is not so exacting that a search warrant must categorically avoid collateral damage to innocent third parties with independent privacy interests who happen to be in the way. In *Zurcher*, the U.S. Supreme Court approved a search of a

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<sup>6</sup> The limited scope of this must be appreciated. “All person warrants” seem dangerously close to prohibited “general warrants.” See VA. CODE ANN. § 19.2-55 (“Any person having authority to issue criminal warrants who wilfully (*sic*) and knowingly issues a general search warrant . . . shall be deemed guilty of a malfeasance).

newspaper publisher for photographs of people participating in a demonstration that turned violent. 436 U.S. at 550-553. The publisher was blameless and objected to this violation of its privacy interests. *Id.* at 551-52. The high court wrote that police with a probable cause-backed warrant may search a premises for things even if third party possessors are not implicated in any crime. *Id.* at 554. Courts must therefore ask: who or what is the target of the search? In *Zurcher*, the target was the photographs, not the publisher or the publisher's office.

There is very little case law concerning geofence search warrants, and none from Virginia. Two cases, in turn denying and approving a particular geofence search warrant, are particularly helpful.

*In the Matter of Search of: Information Stored at Premises Controlled by Google*, 481 F. Supp. 3d 730 (N.D. Ill. 2020) ("*Google I*") thoroughly discusses in detail Fourth Amendment jurisprudence as applied to geofence warrants.<sup>7</sup> In that case, an unknown individual entered two businesses on three occasions to receive and ship stolen medication. *Id.* at 732. The government applied for a geofence search warrant to obtain from Google data regarding the cell phones that traversed two geofences they set up covering two 45-minute windows. *Id.* at 736. On its third, unsuccessful attempt to obtain a warrant, the government narrowed its geofence zone, limited the number of cell phones it sought to identify, and eliminated the third step of the similar three-step process proposed in the present case. *Id.* at 746-47.

As to probable cause, the *Google I* court ruled that the proposed warrant was overbroad in that it could include searching anyone in two businesses, in two surrounding streets, in a parking lot, on sidewalks, and in an adjoining residential building. *Id.* at 750. Thus, any such person who happened to be near the unknown suspect would be searched without probable cause. *Id.* Police needed to offer probable cause to search them—or some nexus to the unknown suspect. *Id.* at 751. It held:

Because the proposed warrant here seeks information on persons based on nothing other than their close proximity to the [unknown individual] at the time of the three suspect shipments, the Court cannot conclude that there is probable cause to believe that the location and identifying information of any of these other persons contains evidence of the offense.

*Id.* at 753 (emphasis in original).

As to particularity, the *Google I* court held that the proposed geofences were not narrowly tailored in a manner justified by the investigation. It wrote:

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<sup>7</sup> This case considered the government's third attempt to obtain a geofence warrant. The prior two attempts were denied and, each time, the government sought to narrow its search to win approval. *Google I*, 481 F. Supp. 3d at 732-33.

[The list of items to be seized] does not identify any of the persons whose location information the government will obtain from Google. As such, the warrant puts no limit on the government's discretion to select the device IDs from which it may then derive identifying subscriber information from among the anonymized list of Google-connected devices that traversed the geofences. A warrant that meets the particularity requirement leaves the executing officer with no discretion as to what to seize, but the warrant here gives the executing officer unbridled discretion as to what device IDs would be used as the basis for the mere formality of a subpoena to yield the identifying subscriber information, and thus, those persons' location histories.

*Id.* at 754 (internal citation to *Stanford v. Texas*, 379 U.S. 476, 485 (1965) omitted).

For these two reasons, the *Google I* court refused to issue the search warrant for the third time.

In *In the Matter of the Search of Information Stored at the Premises Controlled by Google*, 2021 WL 6196136 (D.D.C. 2021) ("*Google IP*"), the government sought 185 minutes of data from a geofence zone in an industrial center to investigate federal crimes. *Google II* at \*5. The area was approximately 875 square meters and included the front half of the center, the center's parking lot, and the warrant excluded the shared part of the center's building and the road abutting the center. *Id.* The total minutes were split into segments spanning over five-and-a-half months, on eight days. *Id.* Surveillance video from inside the center confirmed the precision of the data requests because the government presented footage of the suspects alone or with only two or three others in the center. *Id.*

The *Google II* court wrote that the foundational legal standards in assessing any warrant are probable cause and particularity. *Id.* at \*7, (citing *Kentucky v. King*, 563 U.S. 452, 459 (2011)). As to probable cause, it held that there was probable cause the search would produce useful evidence to the government's investigation because there was a fair probability that "(i) the suspects were inside the geofence, (ii) [the suspects] were using their cell phones inside the geofence, (iii) those phones communicated location information to Google, and (iv) Google can trace that information back to a particular device, accountholder, and/or subscriber[.]" *Google II* at \*11.

As to particularity, *Google II* wrote that warrants must be specific, and that specificity has two prongs: particularity and breadth. *Google II* at \*8.<sup>8</sup> Particularity was meant to authorize searches of specific areas and things, so that "the manifest purpose of the particularity requirement was to prevent general searches" *Google II* at \*7, (citing *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)). Breadth requires that the time, location, and overall scope of the search are consistent with the probable cause. *Id.* The *Google II* court recognized that the government

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<sup>8</sup> It is confusing to define particularity as specificity with two prongs: particularity and breadth. This Court prefers to define particularity as having two prongs: specificity and breadth. It is the same point stated differently.

set out eight specific categories of information that were evidence. It decided these categories provided a meaningful limitation on that which could be seized. *Id.*

The *Google II* court found the time restriction in the warrant application was narrowly tailored to the surveillance footage, providing “cell phone users’ whereabouts in a single area for a handful of minutes . . . not the sum-total of their daily movements” *Id.* at \*12. The *Google II* court also distinguished *Google I*. The *Google II* court wrote:

Similar to this case, the government in [*Google I*] had surveillance footage showing the suspect three distinct times. Yet, instead of tailoring the warrant to request geofence data for only the approximate times at which the suspect appeared on the footage, the government demanded geofence data for “just before the second sighting to approximately 10 minutes after the [third sighting].” The [*Google I*] court questioned why “data for the entire period between the second and third sighting” was sought when the suspect was totally out of sight, and found the warrant was not sufficiently particularized. In [*Google II*], the government avoided this infirmity by only seeking times during which the government’s investigation showed the suspects were in the [] center.

*Id.* at \*12.

The *Google II* court concluded that the government targeted a location closely associated with the crime, encompassing only the location of the suspects and the area closely related to the suspects. *Id.* at \*13. It found that the warrant was not overbroad. *Id.* at \*13-17. In making this finding it concluded the location of the search zone was relatively remote. Therefore, it concluded the risk for infringement on third-party privacy rights was modest. There were no “particularly sensitive” areas encompassed, like residences. The request did not have the potential to sweep up a “substantial number of uninvolved persons.” And, though the times proposed were early to mid-afternoon normal business hours, the area was small and lightly trafficked. *Id.* at \*13-15.

The *Google II* court issued the geofence search warrant.

### **III. THE POLICE PRESENT A GEOFENCE SEARCH WARRANT APPLICATION LACKING PROBABLE CAUSE AND PARTICULARITY.**

Applying the Fourth Amendment principles of probable cause and particularity, the Court will deny the present application for a geofence search warrant.

#### **A. The Application Does Not Establish Probable Cause to Search the Motel Patrons.**

One has a privacy interest in one’s physical location. *Carpenter*, 138 S. Ct. at 2217. Therefore, the innocent motel patrons uninvolved in the shooting have constitutional privacy



interests in their location data. To search them, police must persuade the Court there is probable cause to do so.

The Court concludes the innocent motel patrons are more like the bar patrons in *Ybarra* than the publisher in *Zurcher*. This is clear when one focuses on the place and target of the search. In *Ybarra*, the place and target of the search was the bartender's person, and the bar itself. The warrant did not extend to the patrons. In *Zurcher*, the place of the search was the publisher's office for photos. The warrant did not contemplate searching people who happened to be in the office and did not target them.

For geofence search warrants, the place of the search is definitionally each person who happens to be in the geofence zone and the thing being searched is each person's individual location data. Therefore, the present geofence search warrant application affirmatively targets the location information of the innocent motel guests along with the shooters. Unlike in *Owens*, there was no proffer that the guests were involved in the shooting. The fact that police do not want the location of the innocent guests is irrelevant. They are explicitly targeting their data and, thus, need probable cause to search them.

The *Google II* court likely found probable cause to support the geofence search warrant because, unlike the *Google I* court and this Court, it focused on the suspects, not the patrons. This makes sense for most search warrants, where the place and target of the search are for things other than a bystander's person and that person's location information. However, in the unique circumstances of a geofence search warrant where the search is for the bystander and the location data, probable cause is more difficult to establish. Stated differently, and borrowing the facts from *Ybarra*, the police are seeking to search the bar patrons—thus, the patrons are not incidentals, collateral to the probable cause-supported search of the bartender and the bar. They become the targets. Similarly, the motel patrons at issue in the present case become the targets once police seek to affirmatively search their private location information.

Imagine if, in *Ybarra*, police knew someone in the bar possessed heroin, but they needed to identify who. Could a court authorize a warrant for police to search everyone in the bar to figure out who was the possessor? No. No court would properly authorize such a warrant. However, the Court sees little distinction between that search warrant application and the geofence search warrant application at issue in the present case. In both instances, police know a crime occurred but do not know the perpetrators. In both instances, police want to search everyone to find out who those people are. However, police may not do this physically in a bar full of patrons and a bartender. They similarly may not do so in a motel full of guests, visitors, and employees.

The Court finds there is no probable cause to search the motel patrons based on the present allegations. Without probable cause to conduct the search, the geofence search warrant must fail.

## **B. The Application is Overbroad and Not Particularized.**

The Court also finds the search warrant application presented in the instant case is insufficiently particularized and overwhelmingly overbroad, giving police too much discretion.

At each step of the police's proposed three-step process to obtain location history data from Google, the police seek too much discretion. Detailed more fully, above, the three steps are: (1) creating the virtual geofence zone to get an anonymized list of cell phones in the zone; (2) a review of the anonymized list to eliminate irrelevant cell phones, and work with Google to obtain refined data; and (3) an unmasking of the selected cell phones for the personal identification information of the owners.

### **1. Step One: An Overbroad Geofence Search Zone.**

The proposed search zone is overbroad as to size, time, and location. It is geographically too large, the search time is too long, and the nature of the place to be searched is too sensitive.

First, the police drew a GPS virtual zone that is geographically overbroad. It covers the entirety of the motel, the parking lot, and much of the residual property. Just as the police in *Google I* failed to tailor their zone to a smaller size to avoid overreach, the police here do not tailor their warrant application to approximate times where the suspects appear in the surveillance footage. At the time of the shooting, surveillance video showed one group of individuals in front of the motel and another in a vehicle that drove to the front of the motel. The warrant seeks data from three separate zones. Zone 1 encompasses the entire motel and much of the adjoining parking lot. Zones 2 and 3 target separate parking lots. Zone 1 partially overlaps Zones 2 and 3. Police have cast a net too broadly by seeking to search almost the entire motel property. Innocent motel patrons have a reasonable expectation of privacy within their respective rooms, as well as to common areas and the parking lot. There is no good reason to search patrons beyond the front area.

The current warrant is unlike the warrant in *Google II*. In *Google II*, the government limited the zone by excluding the shared part of the center and a nearby road. It sought data from only the front half of the center and the center's parking lot, where video footage confirmed the suspect was present. The police here do not limit the size of the zone, even though the surveillance video confirms they were in front of the motel using their cell phones just before the shooting.

Second, the police seek data for too long a time. Like the warrant in *Google I*, the current warrant seeks data for entire periods where the suspects were not present in the video footage. Though both *Google I* and *Google II* used video footage to request the data, the government in *Google II* particularized its request to the certain times where the suspects were present in the footage. Here, police want just under 3 hours of data—from [REDACTED] to [REDACTED]. From surveillance video the police know the approximate time of the shooting—shortly after [REDACTED]. The shooting appears to have been a short duration event. By extending the time for which police

seek data from Google to almost 3 hours, the police are likely to unnecessarily search too many motel patrons.

Third, by searching people in a motel and its grounds, police are targeting a particularly sensitive area. Motels are close proxies to one's home on the scale of privacy expectations. In some ways, one's privacy interests while in a motel exceed those in one's own home. There are noble examples of this: a businessperson on a business trip wishing to not tip off a competitor as to an opportunity; or people gathering secretly for political purposes. There are ignoble purposes: a secret tryst. In both circumstances motel patrons expect privacy in their location data. Therefore, this search is more like *Google I* than *Google II*. In *Google I*, the search zone was a populated area where many innocent people would be searched for their location information. *Google I*, at 752. In *Google II*, the search zone was in an industrial area with no residences or other particularly sensitive locations. *Google II* at \*14.

The proposed search is overbroad.

**2. Step Two: An Unchecked Review of the Anonymized List from Google.**

The police review of Google's anonymized list of cell phones located in the proposed zone during the proposed times gives police too much discretion.

First, police propose to self-select the cell phones they deem relevant for future unmasking. The police intend to receive an anonymized list of devices linked to all cell phones in all three zones. Then, without Court involvement, the police will declare cell phones relevant based on criteria not set forth in the warrant. This violates the Fourth Amendment particularity requirement. Just as the *Google I* warrant application did not limit government discretion to select device IDs, the police here are not limited in their discretion in selecting cell phones they deem relevant. The police are left with considerable discretion to select any cell phone without any meaningful limits on which cell phones they may choose. There is no objective procedure for Google or the police to determine relevant cell phones. So, the resulting search would allow the police to sort through all identifying information of multiple people within the three zones to try to identify the suspects. It would be a generalized search and violate the particularity requirement.

Second, police propose—without further Court involvement—to enlarge the zone of the search. The application reads:

If additional location information for a given Device ID is needed in order to determine whether that device is relevant to the investigation, law enforcement may request that Google provide additional location coordinates for the Time Period that fall outside of the Target Location.

Affidavit, page 3. The Court cannot fathom why it was asked to approve the zones if police and Google may together choose to enlarge them after approval. Enlarged zones circumvent judicial oversight. This proposed, unbridled discretion violates the particularity standard.

So, the police, in step two of their proposal, ask the Court to approve a warrant that lets them unilaterally: (1) determine cell phone relevancy, and (2) enlarge the Court-authorized search zone. This request is the proverbial blank check, which the Court cannot sign. The Court must decide who is to be searched or what place is to be searched—it may not leave this to police discretion. The police’s proposal is overbroad.

### **3. Step Three: An Unchecked Unmasking of Cell Phones.**


The Court’s objection to this step of the proposed warrant application is the same as that for step two. The police want to unilaterally tell Google which cell phones it wants to unmask to obtain the owner’s personal information. The Court may not give police this judicial discretion. Rather, the Court must be the entity to approve or deny the unmasking and disclosure of the personal identifying information of people to be searched. It can only do this after it makes a probable cause and particularity determination with full information. It cannot delegate this duty to the police. The proposed unmasking without Court approval is overbroad.

## **IV. CONCLUSION.**

The proposed geofence search warrant lacks sufficient probable cause and particularity. Therefore, the Court will not issue the warrant.

An appropriate Order is attached.

Kind regards,

  
David A. Oblon  
Judge, Circuit Court of Fairfax County  
19<sup>th</sup> Judicial Circuit of Virginia

Enclosure.

**OPINION LETTER**

VIRGINIA :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In the Matter of the Search of  
Information Stored at the Premises  
Controlled by Google, February 8,  
2022

KM-2022-79

**ORDER**

THIS MATTER came before the Court February 8, 2022, on the Fairfax County Police Department's Request for a Search Warrant, *ex parte*. It is

ADJUDGED, for the reasons set forth in the Court's Opinion Letter of February 24, 2022, that is incorporated to this Order by reference, the search warrant application lacks sufficient probable cause and particularity for approval.

It is, therefore,

ORDERED the Fairfax County Police Department's Request for a Search Warrant is DENIED; and

ORDERED the file shall be SEALED, except that this Order and the referenced, redacted, Opinion Letter shall be open to public inspection.

FEB 24 2022

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Entered

  
Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED  
IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA. OBJECTIONS  
MUST BE FILED WITHIN 10 DAYS.