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## How Private Is Your Cellphone Passcode?

In a case pending before the Florida Supreme Court, the question of whether police can compel you to disclose your passcode in order to give them access to texts, emails and pictures stored in the phone is at issue.

By **Harvey J. Sepler** | July 19, 2021



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Most of us have cellphones and have password or fingerprint-protected locks on them to ensure our privacy. We believe that unless we choose to give them out, these passcodes are completely private. This presumably includes whether police can have access to the passcodes without our consent. But are they really private? In a case pending before the Florida Supreme Court, the question of whether police can compel you to disclose your passcode in order to give them access to texts, emails and pictures stored in the phone is at issue.

In 2018, someone tossed a rock through the victim's apartment window as he lay in bed with his girlfriend. The window shattered and glass was strewn around the room and into the bed, resulting in cuts to the victim's elbow. Police were called to the scene and, in the course of their investigation, found a cellphone lying on the front lawn. The girlfriend identified it as her former boyfriend's phone. Police also found a GPS monitor that had been placed underneath the girlfriend's car without her knowledge or consent.

Police obtained a search warrant for the phone but couldn't open it because it was password-protected. Their IT people couldn't open it either. The defendant refused to comply with a court order compelling him to unlock the phone, asserting his Fifth Amendment right not to incriminate himself.

The trial court rejected that argument and the defendant appealed to the Fifth District Court of Appeal. The district court agreed with the defendant and held that the Fifth Amendment to the U.S. Constitution protects him from being forced to disclose the passcode. The state sought Florida Supreme Court review and the court accepted the case. The trial meanwhile is stayed pending Supreme Court review.

The issue before the court is whether the Fifth Amendment applies to the compelled disclosure of the phone's passcode. The very same issue is before the U.S. Supreme Court now. In the meantime, federal and state courts across the country, and in Florida, are split over whether revealing your passcode is "testimonial" and therefore covered by the Fifth Amendment. But what is testimonial evidence? Giving blood or fingerprints to police is not testimonial but answering questions may be. Where do you draw the line? If you ask me what my passcode is and after thinking about it for a few seconds, I tell it to you, my answer is testimonial and protected by the Fifth Amendment. But if my memory is bad and I write the passcode on a slip of paper and store it in my wallet only to give it to police when commanded, that may not be testimonial. Indeed, placing my finger on the phone to unlock it is not testimonial but reciting it from memory is. Does all of this make sense?

The case gets even more complicated when the government argues that even if my giving police the passcode is, in a general sense, testimonial, if police are aware that I own the phone and must therefore know its passcode, my act of disclosing it is a "foregone conclusion" that is an exception to Fifth Amendment protection.

What if this involves a laptop computer that is capable of storing a multitude of private information? Should that change the analysis? Does the privilege against self-incrimination include giving police access to evidence that, while not itself incriminating, opens the door to the discovery of previously unknown incriminating evidence?

The technological world is growing so quickly that courts are faced with constitutional challenges they could never have imagined twenty years ago. But as difficult as these challenges are, courts must respond to them. In this case, we're talking about passcodes; in the next case, the issue may be encryption or something far more advanced. Courts must balance the need for evidence to further law enforcement investigations against notions of privacy and protection from self-incrimination.

I recently submitted an amicus brief to the Florida Supreme Court in this case, laying all of this out. If you're interested in reading the brief, go to the Florida Supreme Court website, Case Information, On-line Docket, and enter the case number (SC20-1419).

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