

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

UNITED STATES OF AMERICA,

Plaintiff,

v.

FACEBOOK, INC. AND SUBSIDIARIES,

Defendant.

Case No. 16-cv-03777-LB

**ORDER REGARDING PRIVILEGED
DOCUMENTS STILL IN DISPUTE**

Re: ECF No. 55

The government has issued seven IRS summonses on Facebook, Inc. and Subsidiaries (“Facebook”) to produce documents and records. The parties have raised disputes regarding Facebook’s withholding of 153 documents on the grounds of attorney-client privilege, work-product protection, and/or tax-practitioner privilege under 26 U.S.C. § 7525.¹ The government asks the court to order Facebook to produce these documents or, in the alternative, to submit the documents to the court for an in camera review.² Facebook disputes the government’s arguments but does not object to an in camera review if the court deems it necessary.³

¹ Gov’t Mem. – ECF No. 55 at 6; Gov’t Mem. App’x A (privilege log excerpt). Citations refer to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of documents.

² *Id.* at 29.

³ Facebook Opp’n – ECF No. 60 at 15.

The court grants in part the government’s request to have Facebook submit the documents at issue for an in camera review. The government may select a sample of up to fifteen documents from among the 153 documents it identifies for Facebook to submit for an in camera review. *Cf. Desert Survivors v. US Dep’t of Interior*, 231 F. Supp. 3d 368, 370 (N.D. Cal. 2017) (allowing party challenging privilege designations as to 55 documents to select a sample of ten documents for in camera review). The government must inform the court and Facebook of its selection by Wednesday, March 28, 2018 at 2:00 p.m. Facebook thereafter must submit copies of those documents (in both hard copy and in an text-searchable electronic format) to the court by Thursday, March 29, 2018 at 9:00 a.m. In light of this order, the court continues the hearing currently set for March 29 to April 5, 2018 at 9:30 a.m. (If that date is inconvenient to the parties, they may continue the hearing by stipulation to any Thursday on or after April 19, 2018 at 9:30 a.m., or alternatively may stipulate to forgo the hearing and stand on their written submissions.)

The court raises one additional issue for the parties to address. Facebook asks for an opportunity to supply the court with additional evidence and arguments supporting its claims of privilege.⁴ Facebook contends that it should be permitted to submit its evidence and arguments ex parte.⁵ The government acknowledges that there is precedent for ex parte communication between a reviewing court and a party asserting privilege, but it argues that the need for such ex parte communication here is substantially lessened by the fact that the government has previously participated in a “quick peek” review process with Facebook.⁶ The issue of this “quick peek” review was raised only in the government’s reply, and Facebook has not had the opportunity to respond. The court directs the parties to meet and confer to discuss what additional evidence or arguments, if any, Facebook may wish to submit and what involvement by the government, if any, would be appropriate. If they are unable to resolve their differences, they should submit a joint

⁴ Facebook Opp’n – ECF No. 60 at 15.

⁵ *Id.*

⁶ Gov’t Reply – ECF No. 68 at 8–9.

1 letter brief in accordance with the court's standing order (attached) that sets out their respective
2 positions on this issue by Tuesday, April 3, 2018.

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4 **IT IS SO ORDERED.**

5 Dated: March 27, 2018



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7 LAUREL BEELER
United States Magistrate Judge
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United States District Court
Northern District of California