



Written by [Bob Adelman](#) on January 26, 2012

## Judge Rules Americans Can Be Forced to Decrypt Their Laptop Computers

Judge Robert Blackburn (left) of the U.S. District Court of Colorado ruled on Monday that a defendant must decrypt her laptop computer so that prosecutors can open the files containing data they need to complete building their case against her.



On May 14, 2010, the federal government executed search warrants at the home of Ramona Fricosu in Peyton, Colorado, looking for evidence in a case involving bank fraud, wire fraud, and money laundering as part of a real estate scam in which she and a partner were allegedly involved. During the search they removed a laptop computer which was encrypted with PGP ([Pretty Good Privacy](#)) software. When attempts by the government to open the files failed, they asked her to open the files for them. Following advice from her attorney, Phil DuBois, she turned them down, claiming protection under the Fifth Amendment of the Constitution.

DuBois says that the final deposition of the case will have a major impact on individual privacy in the digital age: The defendant can't be obligated to help the government interpret those files which could be used against her in court.

Prosecutors, on the other hand, say that inability to obtain data from encrypted files would "harm the public interest" by allowing potential criminals to hide evidence that would defeat their efforts to prosecute them.

In the Fricosu case, the prosecutors claim that all they want is the data in her computer, not the password. They offered to have her open the files without anyone looking at what password she used. DuBois held that that was beside the point — that her password was in her mind and under the Constitution such information was protected by the Fifth Amendment language: "No person shall be ... compelled in any criminal case to be a witness against himself..." If it was a simple matter of a physical key to a safe, for example, then the search warrant issued would apply.

The Electronic Frontier Foundation (EFF), a non-profit public interest law firm which defends "user rights to privacy, free speech, and innovation as applied to the internet and other new technologies," filed an *amicus curiae* (friend of the court) [brief](#) before Judge Blackburn last July. In its brief, EFF said:

The government makes an aggressive argument here that may have far-reaching consequences for all encryption users. Fricosu will be made a witness against herself if she is forced to supply



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information that will give prosecutors access to files they speculate will be helpful to their case but cannot identify with any specificity...

The Fifth Amendment...privilege protects the “expression of the contents of an individual’s mind...”

To illustrate this principle, the Supreme Court has explained that a witness might be “forced to surrender a key to a strongbox containing incriminating documents” but may not “compelled to reveal the combination to a wall safe...”

Forcing an individual to supply a password necessary to decrypt data is more like revealing the combination to a wall safe than to surrender[ing] a key; the witness is being compelled to disclose information that exists in her mind, not to hand over a physical item...

The government...claims that the laptop “has a very high likelihood of containing evidence pertaining to the charged crimes”...but a “very high likelihood” is nothing more than an educated guess. The government can identify neither specific evidence it expects to find on this particular laptop, nor where this supposed evidence might be found on the computer...

The government is overreaching to try to compel Fricosu to supply an encryption password that they hope will give them access to the full contents of a laptop. The court should decide this important constitutional question in a way that recognizes the substantial benefits of encryption to safeguard the security and privacy of digital information stored on computers.

In summarizing its brief, EFF senior staff attorney Marcia Hofmann said, “Decrypting the data on the laptop can be, in and of itself, a testimonial act — revealing control over a computer and the files on it. Ordering the defendant to enter an encryption password puts her in the situation the Fifth Amendment was designed to prevent: having to choose between incriminating herself, lying under oath, or risking contempt of court.”

Judge Blackburn was not impressed with EFF’s arguments and ruled instead that the Fifth Amendment posed no barrier to his decryption order. DuBois responded immediately: “I hope to get a stay of execution of this order so we can file an appeal to the 10th Circuit Court of Appeals. I think it’s a matter of national importance...”

[In an interview](#) with Declan McCullagh of CNET News, DuBois explained what’s really going on with this case:

The government is trying to expand its power. Back in the PGP days, the government was trying to prevent, futilely, the spread of encryption software around the world. Now they’re trying to increase their power by narrowing the Fifth Amendment. Like the others, the Fifth Amendment is aimed directly at the government, primarily the executive [branch]. The executive wants, as it always has and always will, to narrow the Fifth Amendment and thereby increase its own power.

For the moment the Fricosu case is in limbo, awaiting adjudication at the next level. If Blackburn’s decision is confirmed, this case could eventually wind up on the calendar of the Supreme Court.



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