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Development in the US: Curtailing The Collection of Geolocation Info

The collection, use and disclosure of geolocation information obtained from customers' mobile devices has become commonplace among mobile phone providers and third-party application developers. Geolocation information identifies the location of the individual using the device and is often used to provide location based information, advertisements and services to consumers.

Current federal law allows companies to collect and share this information with third parties without the need to obtain consent from their customers.[1] This practice has garnered significant media attention in recent months and has raised privacy concerns among consumers.

In response to these privacy concerns, two federal bills, the Location Privacy Protection Act ("LPPA")[2] and the Geolocational Privacy and Surveillance Act ("GPS Act"),[3] were recently introduced. If enacted, this legislation would restrict the collection and use by nongovernmental entities (and, in the case of the LPPA only, governmental entities including law enforcement agencies) of geolocation information collected by mobile devices without consumer consent.

The LPPA was introduced by Sen. Al Franken, D-Minn., and Sen. Richard Blumenthal, D-Conn., on June 16, 2011, while the GPS Act was introduced by Sen. Ron Wyden, D-Ore., and Rep. Jason Chaffetz, R-Utah, on June 15, 2011.

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Hong Kong
White & Case
9th Floor, Central Tower
28 Queen's Road Central
Hong Kong
+ 852 2822 8700

Singapore
White & Case Pte. Ltd.
8 Marina View #27-01
Asia Square Tower 1
Singapore 018960
+ 65 6225 6000

Tokyo
White & Case LLP
White & Case Law Offices
(Registered Association)
Marunouchi Trust Tower Main, 26th Floor
1-8-3 Marunouchi
Chiyoda-ku, Tokyo 100-0005
Japan
+ 81 3 6384 3300

1 *See*, e.g., Electronic Communications Privacy Act, 18 U.S.C. § 2702.

2 A bill to address voluntary location tracking of electronic communications devices, and for other purposes, or the Location Privacy Protection Act of 2011, S.1223, 112th Cong. (Jun. 16, 2011) (hereafter "Location Privacy Protection Act").

3 A bill to amend title 18, United States Code, to specify the circumstances in which a person may acquire geolocation information and for other purposes, or the Geolocational Privacy and Surveillance Act, or the GPS Act, S.1212, 112th Cong. (Jun. 15, 2011) (hereafter "the GPS Act").

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Location Privacy Protection Act

Under the LPPA, nongovernmental individuals or entities, involved in the business of providing a service to electronic communication devices, would not be allowed to knowingly collect, receive, record, obtain or disclose to other nongovernmental individuals or entities, the geolocation information from "electronic communication devices" without the express authorization of the individual using the device.[4]

The LPPA defines "electronic communication device" broadly to include any device that enables access to an electronic communication or geolocation information system or service that is designed or intended to be carried by the individual or travel with the individual (including a vehicle driven by the individual).[5]

This definition would cover any mobile device such as mobile phones, smartphones, Wi-Fi-equipped laptops, GPS navigation units or other mobile devices that provide information regarding the location of the device. The LPPA provides exceptions for collection and use of geolocation information in emergencies or when required by statute, regulation or appropriate judicial process.[6]

Under the LPPA, express authorization requires affirmative consent following a clear and prominent notice that is displayed on the device separate from any end-user license agreement, privacy policy or other similar document and includes information about what geolocation information will be collected and to whom it will be disclosed.[7] Where information is disclosed to another individual, a second notification must be provided to the individual within a week (but not before 24 hours) from the initial authorization date.[8]

4 Location Privacy Protection Act, supra note 2, § 2713(b)(1).

5 *Id.* § 2713(a)(2).

6 *Id.* § 2713(b)(2).

7 *Id.* § 2713(a)(2).

8 *Id.* §2713(c).

This second notification must inform the individual that geolocation information is being disclosed to another individual through the use of the mobile device.[9] This notification must also contain instructions on how the individual can revoke the previously given consent to the provider collecting and using the user's geolocation information.[10]

The LPPA does not apply to the activities of telecommunications or cable carriers to the extent the activities are subject to §§ 222 or 631 of the Communications Act of 1934 (47 U.S.C. §§ 222 and 551).[11] However, the LPPA would supersede any state or local laws that allow collection and use of geolocation information prohibited by the LPPA.[12]

The LPPA also authorizes the United States attorney general, state attorney generals and private individuals to bring a cause of action against entities that violate the LPPA, although simultaneous causes of action are not permitted.[13] For example, if the U.S. attorney general brings an action, this would preclude the state attorney general and individuals from filing claims for the same violation during the pendency of the federal cause of action.

Similar mechanisms giving the federal government priority for enforcement have been proposed in other pending privacy legislation, such as the Commercial Privacy Bill of Rights legislation introduced by Sen. John Kerry, D-Mass., and Sen. John McCain, R-Ariz.[14] An action by the state attorney general similarly precludes individuals from bringing a cause of action.[15] Under the LPPA, courts are authorized to award actual damages of not less than $2,500, punitive damages and reasonable attorneys' fees for violations of the LPPA.[16]

9 *Id.*

10 *Id.*

11 *Id.* § 2713(e)(2).

12 *Id.* § 2713(e)(1).

13 *Id.* § 2713(d).

14 A bill to establish a regulatory framework for the comprehensive protection of personal data for individuals under the aegis of the Federal Trade Commission, and for other purposes, or the Commercial Privacy Bill of Rights Act of 2011, S.799, 112th Cong. (Apr. 12, 2011), § 403(c). Although the Federal Trade Commission may intervene in any action brought by a state attorney general, *Id.* § 403(b)(2), if the FTC institutes an action, no attorney general may bring a civil action against any defendant named in the FTC action. *Id.* § 403(c).

Geolocation Privacy and Surveillance Act

The GPS Act similarly prohibits the use, disclosure or interception of the geolocation information of another person without the individual's consent.[17] However, unlike, the LPPA, the GPS Act applies to both governmental and nongovernmental entities, and contains no provisions regarding how consent may be obtained from individuals.[18]

As its proposed application is broader than the LPPA's, the GPS Act makes several exceptions for: (1) access, use and disclosure of geolocation information by providers of geolocation services in the normal course of business, as long as the provider does not engage in random monitoring other than for mechanical or service quality control checks; (2) interception of geolocation information of a minor by a parent or legal guardian (or by another person authorized by the parent or legal guardian to do so); (3) interception or access of geolocation information by law enforcement or emergency responders where it is used to assist the individual or in emergency situations; (4) electronic surveillance as authorized by the Foreign Surveillance Act (50 U.S.C. 1801 et seq.); (5) access of geolocation information of another person through any system that is configured so that the information is readily accessible to the general public; and (6) interception of geolocation information by governmental entities that have obtained a warrant.[19]

15 Location Privacy Protection Act, supra note 2, § 2713(d)(4)(B).

16 *Id.* § 2713(d)(5).

17 GPS Act, supra note 3, § 2602(a).

18 *Id.* § 2601(8).

19 *Id.* § 2602.

Violators under the GPS Act may be fined and/or imprisoned for up to five years.[20] Furthermore, geolocation information obtained or disclosed in violation of the GPS Act may not be used as evidence in any trial, hearing or other proceeding in court, legislative committee, administrative agency, or any other federal, state or local authority.[21] This interesting evidentiary provision is not included in other pending privacy legislation.[22]

The GPS Act also creates a private cause of action against entities, other than the United States, who have illegally obtained, used or disclosed geolocation information in violation of the act. Individuals whose geolocation information was unlawfully used may be awarded, in addition to punitive damages, the greater of the sum of the actual damages suffered and any profits made by the violator as a result of the violation, or statutory damages of the greater of $100 a day for each day of violation or $10,000.[23]

20 *Id.* § 2602(a)(2).

21 *Id.* § 2603.

22 *See*, e.g., Commercial Privacy Bill of Rights, supra note 14; *see* also, A bill to protect and enhance consumer privacy, and for other purposes, or the Consumer Privacy Protection Act of 2011, H.R. 1528, 112th Cong. (Apr. 13, 2011), introduced by Rep. Cliff Stearns, R-Fla., and previously discussed.

23 GPS Act, supra note 3, § 2605.

Conclusion

Given the bipartisan support for the proposed restrictions on the use of geolocation information and the general concerns of the public with respect to consumer privacy, companies would be well advised to start reviewing their policies regarding consumer geolocation information, specifically their collection and use protocols.

As is the case with other privacy related policies, companies should start now, if they have not already, developing procedures to provide clear and prominent consent mechanisms to consumers, in order for companies to quickly comply with any new legislation or regulation on this issue.

The trend in all of the pending privacy legislation is to require companies to obtain specific consents. Therefore, regardless of the type of personal consumer information being collected or used, companies need to be evaluating how they notify consumers and obtain informed consent.

Development in Hong Kong: Hong Kong Court of Appeal overturns an order of the Court of First Instance to set aside ICC arbitration award

The Hong Kong Court of Appeal has recently handed down a decision in *Pacific China Holdings Ltd v. Grand Pacific Holdings Ltd*[1] overturning an order of the Court of First Instance to set aside an ICC arbitration award made in Hong Kong. On the facts of the case, the Court of Appeal concluded that there was no violation of due process pursuant to Article 34(2) of the UNCITRAL Model Law. The Court of Appeal also discussed its views on what constitutes a violation of due process and how the Court should exercise its discretion should a violation be established. This decision demonstrates the Hong Kong Courts' pro-enforcement stance when faced with an application to set aside or enforce an international arbitration award.

The Arbitration

The ICC arbitration began in 2006. The claimant, Grand Pacific Holdings Ltd ("**GPH**") claimed from the respondent, Pacific China Holdings Ltd ("**PCH**") a sum of US$40 million under an agreement executed by the parties. The Tribunal rendered an Award in August 2009 ordering PCH to pay GPH a sum in excess of US$55 million together with interest.

PCH applied to set aside the Award in Hong Kong, being the seat of arbitration. PCH relied on Article 34(2)(a)(ii) and (iv) of the UNCITRAL Model Law, alleging that it was unable to present its case and that the arbitral procedure was not in accordance with the agreement of the parties. The challenge was based on various procedural matters which arose during the course of the arbitration.

First Instance Decision

In his judgment, Mr. Justice Saunders came to the view that there were violations of due process in all of the matters raised by PCH.

Saunders J recognises the "pro-enforcement bias" of the Hong Kong legislation and noted that the overall scheme of both the Hong Kong legislation and the UNCITRAL Model Law reflects a view that arbitration awards are generally to be upheld and enforced. When exercising its discretion to enforce an award despite a violation being established, the learned judge stated that the court must ask itself this question: "is the court able to say that it can exclude the possibility that if the violation established had not occurred, the outcome of the award would not be different?"

1 CACV 136/2011; Date of judgment: 9 May 2012.

In the present case, Saunders J concluded that he was unable to say that if the violations had not occurred, the result could not have been different. Accordingly, the Award was set aside.

Court of Appeal Decision

The Court of Appeal, in a judgment written by Mr. Justice Tang, the Vice President, with Madam Justice Kwan and Mr. Justice Fok concurring, indicated that its approach is to concern itself with the "structural integrity of the arbitration proceedings". After reviewing commentaries on Articles 18 and 34 of the UNCITRAL Model Law, the Court of Appeal, without deciding on how serious or egregious the conduct must be before a violation could be established, said that the conduct complained of "must be sufficiently serious or egregious so that one could say that a party has been denied due process." Further, it is said that a party who has had a reasonable opportunity to present its case would "rarely be able to establish that he has been denied due process."

Looking at the matters raised by PCH, the Court of Appeal disagrees with Saunders J and concludes that there was no violation of due process and, in any event, the matters complained of were not sufficiently serious or egregious. The Court of Appeal considers the relevant orders made by the Tribunal were case management decisions which were made fully within the Tribunal's discretion. Thus, the court is not entitled to interfere or question the merit of such decisions. Reference was made to s.2GA of the now repealed *Arbitration Ordinance* (Cap.341)[2] which provided that the Tribunal was entitled to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute.

Having concluded, on the facts of the case, that there was no violation of Article 34(2)(a)(ii) or (iv), the Court nevertheless discussed how the discretion would be exercised if a violation was established.

2 s.2GA is now found in s.46 of the new Arbitration Ordinance (cap.609) which came into force in June 2011, after the commencement of these proceedings.

Agreeing with Saunders J's proposition, the Court of Appeal considers that the "court may refuse to set aside an award notwithstanding such violation if the court was satisfied that the outcome could not have been different."

If the violation has no effect on the outcome of the arbitration, or the error is trivial or not serious, these, according to Tang VP, are good basis for exercising the discretion not to set aside an award. On the other hand, it is said that how a court may exercise its discretion in any particular case will depend on the view it takes of the seriousness of the breach. Some breaches may be so egregious that an award would be set aside although the result could not be different.

Tang VP's discussion on what constitutes an inability to present one's case, what amounts to serious or egregious violation and how a court should exercise its discretion when a violation is established are all obiter dicta. These questions remain to be fully answered. Nonetheless, it is clear that the Hong Kong Court does thrive to enforce and uphold arbitration awards and is only prepared to set aside arbitration awards in extreme and rare cases.

Development in China: SIPO Publishes Draft Amendments to Patent Compulsory Licensing Rules

On October 12, 2011, the State Intellectual Property Office (SIPO) released for public comment draft amendments to the *Measures for Compulsory Licensing of Patents* that were promulgated in 2003 (the "Draft Amended Measures"). According to SIPO, the Draft Amended Measures incorporate provisions in the *Measures for Public Health Related Compulsory Licensing of Patents*, published in 2005, into the 2003 Compulsory Licensing Measures. SIPO stated that the Draft Amended Measures are intended to facilitate the implementation of the amended *Patent Law* and associated regulations, which include compulsory licensing provisions.

As a matter of background, the *Patent Law* provides that compulsory licensing can be imposed where, among other things, "the use of patent rights is found to be monopolistic". However, neither the *Patent Law* nor its implementing regulations define what conduct or use would be considered monopolistic in the compulsory licensing context. They also make no express reference to the *Anti-Monopoly Law* (AML) in this regard. The Draft Amended Measures are intended to fill the gap.

If adopted in the current form, the Draft Amended Measures will likely broaden the existing compulsory licensing regime. While the Draft Amended Measures do not depart significantly from the two sets of existing Measures, there are subtle changes that would allow for a broader interpretation of the grounds for compulsory licensing. For example, under the Draft Amended Measures, "monopoly conduct" will be a basis for imposing compulsory licensing. However, just like the *Patent Law*, the Draft Amended Measures fail to clearly define what the term means and does not make reference to the AML. Another ground for compulsory licensing is where "the patented invention represents a major technological advancement with remarkable economic significance." The terms "major technological advancement"

and "remarkable economic significance" are further examples of vague terms used in the Draft Amended Measures. Such ambiguity might give aggressive third parties more room to unfairly exploit the compulsory licensing provisions to seek access to patents technology without paying the patent owner reasonable compensation. It also leaves the government officials charged with handling China Business, Trade and Competition Bulletin compulsory licensing applications with too little guidance and too much discretion in reviewing and granting such applications.

The State Council Legislative Affairs Office accepted public comments on the Draft Amended Measures on SIPO's behalf until November 13, 2011. We will continue to monitor this legislative development and provide relevant updates in future issues of this newsletter.

Development in the US: Courts Reject Bright-Line Approach to Defining "Foreign Official" in Favor of Fact-Based Approach, Creating Greater Uncertainty for Business

Highlights

- The Department of Justice (DOJ) and Securities Exchange Commission (SEC) broadly interpret the terms "foreign official" and "instrumentality" under the Foreign Corrupt Practices Act (FCPA).
- Several federal judges have recently ruled that whether a state-owned or state-controlled entity qualifies as an "instrumentality" of a foreign government under the FCPA is a case-by-case fact-intensive inquiry based on a set of non-exhaustive factors.
- While providing some guidance, this emerging consensus in favor of a fact-based approach is less clear and predictable than the bright-line approaches often urged by defense counsel, resulting in considerable uncertainty for business.

On February 16, 2012, Judge Selna of the Central District of California issued an order in *United States v. Carson* regarding jury instructions pertaining to the terms "foreign official" and "instrumentality" of the government under the FCPA.[1] Judge Selna's order rejected defendant's proposal for a bright-line approach[2] in favor of a "fact-based finding in light of the totality of the circumstances."[3] This ruling is a recent example of a federal judge finding that whether a state-owned or state-controlled entity qualifies as an instrumentality of a foreign government under the FCPA and, accordingly, whether employees of the entity qualify as "foreign officials" under the statute, is a fact-based question for the jury.

Judge Selna's ruling closely parallels his earlier treatment of the issue in the same case. In April 2009, prosecutors indicted six former executives of Controlled Components Inc. ("CCI"), a manufacturing company with state-owned customers in China, Korea, Malaysia and United Arab Emirates. The indictment alleges that "US$4.9 million in bribes or corrupt payments were made to officers and employees of CCI's foreign, state-owned customers between 2003 and 2007."[4] Defendants moved to dismiss the indictment arguing, among other things, that because "state-owned companies are not departments, agencies, or instrumentalities of a foreign government," employees of state-owned companies can never be foreign officials.[5]

In May 2011, Judge Selna denied the motion to dismiss. In so doing, he emphasized that one could not simply assume employees of state-owned companies were "foreign officials" under the FCPA, but that several factors must be considered on a case-by-case basis, including:

1. The foreign state's characterization of the entity and its employees
2. The foreign state's degree of control over the entity
3. The purpose of the entity's activities
4. The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions The circumstances surrounding the entity's creation
5. The foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment and loans)[6]

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1 Order re Select Jury Instructions, *United States v. Carson*, No. 09-cr-00077-JVS (C.D. Cal. Feb. 16, 2012).

2 *Id.* at 4.

3 Order Denying Defendants' Mot. to Dismiss Counts 1 though *[sic]* 10 of the Indictment, at 3, *United States v. Carson*, No. 09-cr-00077-JVS (C.D. Cal. May 18, 2011).

4 *Id.* at 2.

5 *Id.* at 1. The FCPA prohibits corrupt payments to foreign officials. Foreign official is defined as "any officer or employee of a foreign government or any department, agency or instrumentality thereof." 15 U.S.C. § 78dd-2(h)(2)(A). The FCPA does not define instrumentality. Both the DOJ and the SEC have long held the view that state-owned entities (SOEs) are "instrumentalities" of the government and, accordingly, that all employees of SOEs qualify as foreign officials under the FCPA.

6 Order Denying Defendants' Mot. to Dismiss Counts 1 though *[sic]* 10 of the Indictment, at 5, *United States v. Carson*, No. 09-cr-00077-JVS (C.D. Cal. May 18, 2011).

In his recent order, Judge Selna identified two additional factors to be considered: "whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government" and "the status of employees under the foreign government's law, including whether the employees are considered public employees or civil servants."[7] Judge Selna stated that the factors he identified are "not exclusive" and determined that "there is no basis to instruct that the jury must find that each factor is present."[8] The trial in the *Carson* matter is scheduled to begin on June 5, 2012.

The same issue has recently been considered by other federal judges, all of whom have reached similar conclusions:

- In *United States v. Aguilar*, (commonly known as the "Lindsey Manufacturing Case"), defendants argued that "because under no circumstances can a state-owned corporation be a department, agency, or instrumentality of a foreign government," officers or employees of a state-owned corporation cannot be foreign officials.[9] Judge Matz of the Central District of California rejected the defendants' argument, set forth a list of non-exhaustive factors similar to Judge Selna's, and held that Mexico's state-owned utility company, Comisión Federal de Electricidad, may be an "instrumentality" under the FCPA and its employees may therefore be "foreign officials."[10] Although the jury convicted the defendants, the conviction was subsequently vacated on prosecutorial misconduct grounds.
- In *United States v. Esquenazi*, (commonly known as the "Haiti Teleco Case"), the court for the Southern District of Florida denied defendants' motion to dismiss, which argued that "entities controlled or partially controlled by departments, agencies, or instrumentalities" do not fall under the FCPA's definition of those terms, and that "the phrase department, agency, or instrumentality is unconstitutionally vague if it is premised solely on government control of ownership."[11] The court rejected defendants' arguments and ruled that the "plain language" of the FCPA and the "plain meaning" of "foreign official" are such that, "as the facts are alleged in the indictment, Haiti Teleco could be an instrumentality of the Haitian government" and the directors of the company could therefore be foreign officials.[12] In August 2011, Mr. Esquenazi was sentenced to 15 years in prison.
- In *United States v. O'Shea*, the defendant filed a motion to dismiss arguing that the employees of the state-owned company did not fall under the definition of "foreign official." On January 3, 2012, Judge Hughes of the Southern District of Texas denied defendant's motion to dismiss in a single sentence, without explanation.[13] The FCPA charges were later dismissed on other grounds.

In short, courts faced with challenges to charges based on the terms "foreign official" or "instrumentality" as used in the FCPA have rejected bright-line approaches in favor of case-by-case inquiries based on the totality of the circumstances. These recent cases point to a growing consensus and provide some guidance, but the fact-intensive case-by-case approach utilized by courts fails to provide certainty to companies that interact with business entities affiliated with a foreign government.

Amidst increasing calls from the business community for legislative reform of the FCPA, a subcommittee of the House of Representatives Committee on the Judiciary held a hearing in June of last year to consider, among other possible amendments, proposals to define with greater particularity key terms in the FCPA, such as "foreign official." In addition, the DOJ has announced that it intends to release "detailed new guidance on the Act's criminal and civil enforcement provisions" sometime this year.[14] However, it is not clear whether the new guidance will address the agency's interpretation of "foreign official" or "instrumentality" or recent court decisions on the issue. Even if the DOJ's guidance does address these key terms, its guidance is unlikely to have much impact in light of the case-by-case fact-specific approach increasingly endorsed by courts.

Particularly since some courts have considered a "non-exhaustive" list of factors in resolving several recent challenges, continued litigation over the terms "foreign official" and "instrumentality" is likely. Given the case-by-case approach that has been increasingly endorsed, corporations should continue to be particularly mindful of FCPA risks when transacting business with state-owned entities, especially in high-risk areas. The safest approach remains to interpret the term "instrumentality" broadly and operate as if all employees of state-owned entities are "foreign officials" for FCPA purposes.

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7 Order re Select Jury Instructions, at 5-6, *United States v. Carson*, No. 09-cr-00077-JVS (C.D. Cal. Feb. 16, 2012).

8 *Id.* at 6.

9 Criminal Minutes—General, at 2, *United States v. Aguilar*, No. 10-cr-01031-AHM (C.D. Cal. Apr. 20, 2011).

10 *See id.* at 2-16.

11 Order Denying Defendant Joel Esquenazi's (Corrected and Amended) Mot. to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness, at 2, *United States v. Esquenazi*, No. 09-cr-21010-JEM (S.D. Fla. Nov. 19, 2010) (internal quotation marks and citations omitted).

12 *Id.* at 2-3.

13 *See* Management Order, at 1, *United States v. O'Shea*, No. 09-cr-00629 (S.D. Tex. Jan. 3, 2012).

14 Lanny A. Breuer, Assistant Attorney General, Criminal Division, US Department of Justice, Remarks at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011) available at http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html

For more information, please contact:

David Case
Partner, Tokyo
dcase@whitecase.com

Yuji Ogiwara
Partner, Tokyo
yogiwara@whitecase.com

Nandakumar Ponniya
Partner, Singapore
nponniya@whitecase.com

Aloke Ray
Partner, Singapore
aray@whitecase.com

Osamu Umejima
Partner, Tokyo
oumejima@whitecase.com

Melody Chan
Counsel, Hong Kong
mchan@whitecase.com

Jake Baccari
Associate, Tokyo
jbaccari@whitecase.com

Joel Greer
Associate, Tokyo
jgreer@whitecase.com

Hiroshi Naito
Associate, Tokyo
hnaito@whitecase.com

Tadanao Oshima
Associate, Tokyo
toshima@whitecase.com

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