CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: JURY 7

The People of the State of New York, -Against- Malcolm Harris, Defendant.	Docket No.: 2011NY080152 **MEMORANDUM IN SUPPORT OF NON-PARTY TWITTER, INC.'S MOTION TO QUASH § 2703(d) ORDER**

I. INTRODUCTION & SUMMARY

Twitter, Inc. ("Twitter") hereby moves to quash the order of April 20, 2012 (the "Order) entered in the above-referenced matter. *See* Ex. 1 hereto. The Order denied Defendant Malcolm Harris' motion to quash a subpoena (the "Subpoena") issued to Twitter by the District Attorney calling for the production of "[a]ny and all user information, including email address, as well as any and all tweets posted for the period of 9/15/2011-12/31/2011" for the Twitter account @destructuremal. *See* Ex. 2 hereto. The Order holds that Twitter must produce "basic user information" in response to the Subpoena, and "compel[s] Twitter to disclose @destructuremal account's Tweets, pursuant to 18 U.S.C. § 2703(d)." *See* Order at 10-11.

Section 2703(d) of the federal Stored Communications Act ("SCA") provides that "[a] court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if . . . compliance with such order otherwise would cause an undue burden on such provider." *See* 18 U.S.C. § 2703(d). Twitter respectfully submits that the Order imposes an undue burden upon it for at least three reasons.

First, the Order surprisingly holds that Mr. Harris has no right to challenge the District Attorney's subpoena for his own communications and account information on Twitter. The

analysis, based on the assertion that Mr. Harris has no proprietary interest in the content that he submits to Twitter, contradicts Twitter's Terms of Service and the express language of the SCA. Twitter's Terms of Service unequivocally state that its users "retain [their] rights to any Content [they] submit, post or display on or through" Twitter (*available at* http://twitter.com/tos). Moreover, the SCA, 18 U.S.C. § 2704(b), expressly permits users to challenge demands for their account records. To hold otherwise imposes a new and overwhelming burden on Twitter to fight for its users' rights, since the Order deprives its users of the ability to fight for their own rights when faced with a subpoena from New York State. Twitter therefore requests that the Court vacate that portion of its Order denying Mr. Harris' standing to file a motion to quash.

Second, the Order imposes an undue burden on Twitter by forcing it to violate federal law. Specifically, the SCA has been held to violate the Fourth Amendment to the U.S. Constitution to the extent it requires providers to disclose the contents of communications in response to anything less than a search warrant, *Warshak*, 631 F.3d 266, 288 (6th Cir. 2010), and the Fourth Amendment's warrant requirement applies even when the government seeks information about allegedly public activities. *U.S. v. Jones*, 132 S. Ct. 945, 949 (2012). Moreover, *Warshak* and *Jones* notwithstanding, the terms of the SCA provide that an order issued under § 2703(d) can only compel a provider to produce content that is more than 180 days old. *See* 18 U.S.C. § 2703(a). Content less than 180 days old may only be disclosed pursuant to a search warrant, *id.*, yet the Order compels Twitter to shortly produce a multitude of content that will not be more than 180 days old until sometime this summer.

Finally, the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings ("Uniform Act") applies to requests for documents as well as demands for live testimony. *See* McKinney's CPL § 640.10; *Matter of Codey*, 82 N.Y.2d 521, 525-26 (1993)

("The Uniform Act provides detailed and constitutionally valid procedures whereby a party to a criminal proceeding in one State can either obtain the presence of a witness residing in another State or can compel the production of evidence located in another State."). Pursuant to the Uniform Act, a criminal litigant cannot compel production of documents from a California resident like Twitter without presenting the appropriate certification to a California court, scheduling a hearing and obtaining a California subpoena for production. *See* McKinney's CPL § 640.10; Cal. Penal Code § 1334, *et seq*. Because neither the Subpoena nor the Order comply with the Uniform Act, Twitter cannot be required to produce any documents in response to either. Notably, if the District Attorney were to obtain a search warrant for the desired records and content, the warrant need not comply with the Uniform Act because California law requires California-based providers to treat foreign search warrants as if they were issued by a California court. *See* Cal. Penal Code § 1524.2(c). No such provision exists, however, for foreign subpoenas or 2703(d) orders.

For these reasons and those stated in further detail below, Twitter respectfully requests that the Court quash the Order and direct the District Attorney to request a search warrant for the desired records.

II. ARGUMENT

A. Twitter's Users Have Standing to Move to Quash Subpoenas Directed to Twitter

The Order holds that Mr. Harris lacks standing to quash the Subpoena by drawing an analogy to cases dealing with the production of bank records, where customers have no ownership over or proprietary interest in the bank records. The Order proceeds to assert that Mr. Harris has no proprietary interest in his Twitter account's user information and Tweets merely because he has granted Twitter a license to the content as a part of the Terms of Service with

Twitter. *See* Order at 4. Twitter respectfully submits that this analysis contradicts the express language of Twitter's Terms of Service as well as of the language of the SCA.

Twitter's Terms of Service make absolutely clear that its users **own** their content. The Terms of Service expressly state:

> You retain your rights to any Content you submit, post or display on or through the Services.

See Terms of Service (*available at* http://twitter.com/tos). Twitter users neither transfer nor lose their proprietary interest in their content by granting a license to Twitter to provide the services. *See, e.g., Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 304 (S.D.N.Y. 2011) (license granted to Twitter did not preclude photojournalist from bringing copyright infringement claim against media companies). Moreover, unlike bank records, the content that Twitter users create and submit to Twitter are clearly a form of electronic communication that, accordingly, implicates First Amendment protections as well as the protections of the SCA.

The SCA, in fact, expressly provides in § 2704(b)—entitled "Customer challenges"—that a user who has received notice of a § 2703(b) subpoena for their account records "may file a motion to quash such subpoena . . . in the appropriate . . . State court." *See* 18 U.S.C. § 2704(b); *In re Toft*, 453 B.R. 186, 197 n.12 (Bkrtcy. S.D.N.Y. 2011)("A subscriber may challenge disclosure under 18 U.S.C. § 2704(b) within fourteen days of receiving notice."); *Doe v. S.E.C.*, No. 3:11–mc–80184 CRB (NJV), 2011 WL 4593181, at *2 (N.D. Cal. Oct. 4, 2011)(same). Because the Order separately finds that the Subpoena was issued under § 2703(b), *see* Order at 10, it follows that § 2704(b) entitles Mr. Harris to file a motion to quash the Subpoena. To the extent state law provides otherwise, it is preempted. *Lane v. CBS Broad. Inc.*, 612 F. Supp. 2d

623, 637 (E.D. Pa. 2009) ("Congress apparently wanted to ensure that states meet base-line standards, however, and thus [the SCA] supersedes to the extent that state laws offer less protection than their federal counterparts.").

Section 2703(d) entitles Twitter to oppose the Order's holding regarding Mr. Harris' standing because that portion of the Order will impose an undue burden on Twitter with respect to all future New York subpoenas it receives. If the Order stands, Twitter will be put in the untenable position of either providing user communications and account information in response to all subpoenas or attempting to vindicate its users' rights by moving to quash these subpoenas itself—even though Twitter will often know little or nothing about the underlying facts necessary to support their users' argument that the subpoenas may be improper. In no other jurisdiction has Twitter faced this overwhelming burden in response to law enforcement subpoenas, and therefore requests that the Court vacate that portion of its Order denying Mr. Harris' standing to file a motion to quash.

In sum, upon receiving notice of a legal demand for their account records or content, Twitter's users should have the option to exercise their right under § 2704(b) and state law to file a motion to quash. To hold otherwise will disrupt the careful balance that Congress struck in the SCA between law enforcement's need to obtain evidence of criminal activity and the public's right to challenge the government's efforts to obtain their electronic communication records.

B. The Order Compels Twitter to Violate Federal Law

1. The Order Compels Twitter to Violate the Fourth Amendment

The highest court in the country to squarely address the issue has determined that the SCA violates the Fourth Amendment of the U.S. Constitution to the extent it requires service

providers to produce the contents of their subscribers' communications in response to anything less than a search warrant. *Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) ("to the extent that the SCA purports to permit the government to obtain such emails warrantlessly, the SCA is unconstitutional.").[1]

While the *Warshak* decision arose in the context of email communications, the U.S. Supreme Court recently ruled in an electronic surveillance case that monitoring a suspect's movements through public streets for 28 days constitutes a search within the meaning of the Fourth Amendment and requires a warrant. *U.S. v. Jones*, 132 S. Ct. 945, 949 (2012). If the Fourth Amendment's warrant requirement applies merely to surveillance of one's location in public areas for 28 days, it also applies to the District Attorney's effort to force Twitter to produce over three months worth of a citizen's substantive communications, regardless of whether the government alleges those communications are public or private. *Id.* at 957 ("More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.")(Sotomayor, J., concurring).[2] This conclusion is also consistent with New York law. *People v. Weaver*, 12 N.Y. 3d 433, 444-45 (2009)(tracking of a vehicle's location through public streets for 65 days requires a warrant under the New York constitution). Accordingly, Twitter requests that the Court quash the Order and direct the District Attorney to request a search warrant for the desired records.

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[1] Twitter's initial email to the District Attorney's office upon receipt of the Subpoena expressly stated that "contents of electronic communications (including Tweets, direct messages, and other user generated content) will not be disclosed without a warrant or other process sufficient under the Stored Communications Act, 18 U.S.C. § 2701, et seq." *See* Ex. 3 hereto.

[2] To the extent the desired content is publicly available, the District Attorney could presumably have an investigator print or download it without further burdening Twitter or the Court.

2. The Order Compels Twitter to Violate the SCA

Warshak, Jones and *Weaver* notwithstanding, the terms of the SCA also provide that an order issued under § 2703(d) can only compel a provider to produce content that is more than 180 days old. *See* 18 U.S.C. § 2703(a)("A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.")(emphasis added); *see also id.* at § 2703(b)(1)(B)(ii)(governmental entity may require disclosure of contents "with prior notice from the governmental entity to the subscriber or customer if the governmental entity . . . obtains a court order for such disclosure under subsection (d) of this section.").

Content less than 180 days old may only be disclosed pursuant to a search warrant. *Id.* § 2703(a); *see also In re Toft,* 453 B.R. at 197 n.12 (content "less than 180 days old may only be disclosed to a governmental entity pursuant to a valid warrant").

The Order compels Twitter to produce all the content requested in the Subpoena, i.e., "all tweets posted for the period of 9/15/2011-12/31/2011", within twenty days of Twitter's receipt of the Order, or on or before May 13, 2012. However, not all of the requested content will be more than 180 days old until June 29, 2012, more than six weeks later. Accordingly, Twitter cannot comply with the Order without also violating the SCA. For this additional reason, Twitter requests that the Court quash the Order and direct the District Attorney to request a search warrant for the desired records.

C. Neither the Order Nor the Subpoena Comply With the Uniform Act

Twitter is a Delaware corporation with its principal place of business in San Francisco, California. *See* Affidavit of Jeremy Kessel, ¶ 2. Twitter's servers and records custodians also reside in California. *Id.*

Pursuant to the Uniform Act, a criminal litigant cannot compel the production of documents from a California resident like Twitter without presenting the appropriate certification to a California court, scheduling a hearing and obtaining a California subpoena for production. *See* McKinney's CPL § 640.10;[3] Cal. Penal Code § 1334, *et seq.*;[4] *Codey*, 82 N.Y.2d at 525-26.

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[3] McKinney's CPL § 640.10.3 provides in pertinent part:

> If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.
>
> If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, such judge may direct that such witness be forthwith brought before him; and the judge being satisfied of the desirability of such custody and delivery, for which determination said certificate shall be prima facie proof, may order that said witness be forthwith taken into custody and delivered to an officer of this state, which order shall be sufficient authority to such officer to take such witness into custody and hold him unless and until he may be released by bail, recognizance, or order of the judge issuing the certificate.

[4] Cal. Penal Code § 1334.2 provides in pertinent part:

> If a judge of a court of record in any state, which by its laws provides for commanding persons within that state to attend and testify in this state, issues a certificate under the seal of the court that there is a criminal prosecution pending in the court, or that there is a grand jury investigation, that a person within this state is a material witness in that prosecution or grand jury investigation, and that his or her presence will be required for a specified number of days, then, upon presentation of the certificate to a judge of a court of record in the county in which the person is, a time and place for a hearing shall be fixed by the judge and he or she shall make an order directing the witness to appear at the hearing.
>
> If, at the hearing, the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending or in which there is a grand jury investigation will give to the witness protection from

Twitter's initial email to the District Attorney's office upon receipt of the Subpoena incorporated Twitter's Guidelines for Law Enforcement, which expressly state that Twitter's acceptance of service by mail or fax "is for convenience only and does not waive any objections, including the lack of jurisdiction or proper service." *See* Exs. 3-4 hereto. After the District Attorney claimed that Twitter must produce records directly to the Court while Mr. Harris' motion to quash was pending, Twitter made clear by letter of March 16, 2012 that it was under no such obligation by virtue of the Subpoena's failure to comply with the Uniform Act. *See* Ex. 5 hereto.

Because neither the Subpoena nor the Order comply with the Uniform Act, Twitter should not be required to produce any records in response to either.[5]

III. CONCLUSION

For the reasons stated, Twitter respectfully requests that the Court quash the Order and direct the District Attorney to request a search warrant for the desired records.

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arrest and service of civil and criminal process and will furnish in advance to the witness the sum of ten cents ($0.10) for each mile necessarily traveled if the witness elects surface travel or the minimum round trip scheduled airline fare plus twenty cents ($0.20) a mile for necessary surface travel at either end of the flight if the witness elects air travel, and, except as provided in subdivision (b) of Section 1334.3, a per diem of twenty dollars ($20) for each day that he or she is required to travel and attend as a witness and that the judge of the court in which the witness is ordered to appear will order the payment of witness fees authorized by law for each day the witness is required to attend the court plus reimbursement for any additional expenses of the witness which the judge of the court in which the witness is ordered to appear shall find reasonable and necessary, he or she shall issue a subpoena, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where the grand jury investigation is, at a time and place specified in the subpoena. In any of these hearings the certificate shall be prima facie evidence of all the facts stated therein.

[5] If the District Attorney were to obtain a search warrant for the desired records and content, the warrant need not comply with the Uniform Act for the reasons stated in § I, *supra*.

Dated: New York, New York,
May 7, 2012

Respectfully submitted,

PERKINS COIE LLP

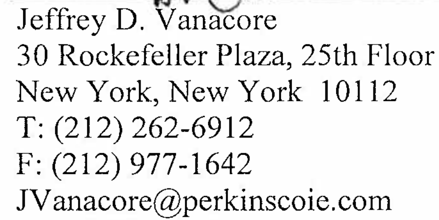

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EXHIBIT 1

CRIMINAL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK: JURY 7

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THE PEOPLE OF THE STATE OF NEW YORK

-AGAINST-

DECISION AND ORDER

Docket No.: 2011NY080152

MALCOLM HARRIS,

DEFENDANT.

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MATTHEW A. SCIARRINO, JR., J.:

The New York County District Attorney's Office seeks to obtain the #Twitter records of @destructuremal using a #[1]subpoena. The defendant is alleged to have participated in a #OWS protest march on October 1, 2011. The defendant, Malcolm Harris, along with several hundred other protesters, were charged with Disorderly Conduct (P.L. §240.20[5]) after allegedly marching on to the roadway of the Brooklyn Bridge. The defendant moved to #quash that subpoena. That motion is #denied.

On January 26, 2012, the People sent a subpoena *duces tecum* to the online social networking service and microblogging service, Twitter, Inc. ("Twitter"). The subpoena seeks user information including email address, and Tweets posted for the period of September 15, 2011 to December 31, 2011, for the Twitter account @destructuremal, the Twitter account which is allegedly used by Malcolm Harris.

[1] The # symbol, called a hashtag, is used to mark keywords or topics in a Tweet. For example, if you search #OWS on Twitter you'll get a list of tweets that mention #OWS.

On January 30, 2012, after conferring with the District Attorney's office, Twitter informed the defendant that the Twitter account, @destructuremal, had been subpoenaed.[2] On January 31, 2012, the defendant notified Twitter of his intention to file a motion to quash the subpoena. Twitter then took the position that it would not comply with the subpoena until this court rules on the motion.

The defendant moves to quash the subpoena in his own right or to intervene in the proceedings to quash the subpoena. The People oppose the motion to quash and the motion to intervene.

DISCUSSION

[2] Twitter's Guidelines for Law Enforcement addresses any requests for users' information. Twitter's policy is that prior to disclosure, Twitter will notify its users when information is requested unless forbidden from doing so by statute or court order. (*See* http://support.twitter.com/articles/41949-guidelines-for-law-enforcement).

Twitter is an online social networking service that is unique because it enables its users to post ("Tweet"), repost ("Retweet"), and read the Tweets of other users. Tweets can include photos, videos, and text-based posts of up to 140 characters.[3] Users can monitor, or "follow" other users' Tweets, and can permit or forbid access to their own Tweets. Besides posting Tweets or reposting other users' Tweets, users may also use the more private method to send messages to a single user ("Direct Message"). Each user has a unique username. In order to sign up to be able to use Twitter's services, you must click on a button below a text box that displays Twitter's Terms of Service ("Terms"). (*See* https://twitter.com/signup). By clicking on a button on the registration web page, you are agreeing to all of Twitter's Terms, including the Privacy Policy (*see* https://twitter.com/privacy). The Privacy Policy informs users about the information that Twitter collects upon registration of an account and also whenever a user uses Twitter's services. Twitter collects many types of user information, including IP address, physical location, browser type, mobile carrier among other types. By design, Twitter has an open method of communication. It allows its users to quickly broadcast up-to-the-second information around the world. The Tweets can even become public information searchable by the use of many search engines. Twitter's Privacy Policy informs the users that, "[w]hat you say on Twitter may be viewed all around the world instantly." (*See* https://twitter.com/privacy). With over 140 million active users and the posting of approximately 340 million Tweets a day (*see* http://blog.twitter.com/), it is evident that Twitter has become a significant method of communication for millions of people across the world.

1. Defendant's Standing to Move to Quash the People's Subpoena

The first issue that must be addressed is whether the defendant has standing to quash the subpoena served upon Twitter.

[3] The reality of today's world is that social media, whether it be Twitter, Facebook, Pinterest, Google+ or any other site, is the way people communicate and to some extent has supplemented email for many people. Twitter has also become the way many receive their news information. Twitter describes itself as, "[t]he fastest, simplest way to stay close to everything you care about." (*See* https://twitter.com/about).

New York courts have yet to specifically address whether a criminal defendant has standing to quash a subpoena issued to a third-party online social networking service seeking to obtain the defendant's user information and postings.[4] Nonetheless, an analogy may be drawn to the bank record cases where courts have consistently held that an individual has no right to challenge a subpoena issued against the third-party bank. New York law precludes an individual's motion to quash a subpoena seeking the production of the individual's bank records directly from the third-party bank as the defendant lacks standing.[5] (*People v Doe*, 96 AD2d 1018 [1st Dept 1983]; *People v DiRaffaele*, 55 NY2d 234 [1982]). In *United States v Miller*, (425 US 435 [1976]), the United States Supreme Court held that the bank records of a customer's accounts are "the business records of the banks," and that the customer "can assert neither ownership nor possession" of those records. In New York, the Appellate Division held that, "[b]ank records, although they reflect transactions between the bank and its customers, belong to the bank. The customer has no proprietary or possessory interests in them. Hence, he cannot preclude their production." (*People v Doe* at 1018).

Here, the defendant has no proprietary interests in the @destructuremal account's user information and Tweets between September 15, 2011 and December 31, 2011. As briefly mentioned before, in order to use Twitter's services, the process of registering an account requires a user's agreement to Twitter's Terms. Under Twitter's Terms it states in part:

> By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed). (*See* https://twitter.com/tos).

In order to register the @destructuremal account, the defendant had to have agreed to those very same terms. Every single time the defendant used Twitter's services the defendant was granting a license for Twitter to use, display and distribute the defendant's Tweets to anyone and for any purpose it may have. Twitter's license to use the defendant's Tweets means that the Tweets the defendant posted were not his. The defendant's inability to preclude Twitter's use of his Tweets demonstrates a lack of proprietary interests in his Tweets.

[4] In an unpublished short form order (Docket No. SUCR2011-11308), on February 23, 2012, the Suffolk Superior Court ordered Twitter to comply with the District Attorney of Suffolk County's administrative subpoena. Available at: http://aclum.org/sites/all/files/legal/twitter_subpoena/suffolk_order_to_twitter_20120223.pdf

[5] The same principle has been applied to the records of a telephone coimpany relating to an individual's account. (*Smith v Maryland*, 442 US 735 [1979])

This court finds that defendant's contention that he has privacy interests in his Tweets to be understandable, but without merit. Part of the Terms agreement reads: "The Content you submit, post, or display will be able to be viewed by other users of the Services and through third party services and websites." The size of the potential viewing audience and the time it can take to reach that audience is also no secret, as the Terms go on to disclose:

> What you say on Twitter may be viewed all around the world instantly . . . [t]his license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same. (*See* https://twitter.com/tos).

Another section within Twitter's Terms notifies its users of Twitter's Privacy Policy, which governs the collection and use of any information a user provides to Twitter. Most significantly, the Privacy Policy lays out what Twitter's services are designed to do. It is "primarily designed to help you share information with the world . . ." because, "[m]ost of the information you provide . . . is information you are asking [Twitter] to make public." (*See* http://twitter.com/privacy). This information consists of more than just a user's Tweets, it also includes: "the lists you create, the people you follow, the Tweets you mark as favorites or Retweet and many other bits of information." (*See* http://twitter.com/privacy).

As a result, public Tweets are even searchable by many search engines.[6] At the heart of Twitter are small and rapid bursts of information that can contain a whole lot more than a 140 character long Tweet.[7] Users' Tweets are what makes Twitter an information network that has the ability to reach out to people in nearly every country in the world.

In *Matter of Norkin v Hoey*, (181 AD2d 248, 253 [1st Dept 1992]), the Appellate Division held that, "there have been manifestations of an underlying discomfort with the facial unfairness of depriving a bank customer of any recourse, including standing, for disclosure of financial information concerning the customer's personal bank accounts which are widely believed to be confidential." Like bank records, user information and Tweets can contain sensitive personal information. With a

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[6] "About Public and Protected Tweets", available at: https://support.twitter.com/groups/31-twitter-basics/topics/113-online-safety/articles/14016-about-public-and-protected-tweets

[7] Hence Twitter's official mascot, Larry . . . an embodiment of the idea of small and rapid "chirps" or bursts of information.

click of the mouse or now with even the touch of a finger, Twitter users are able to transmit their personal thoughts, ideas, declarations, schemes, pictures, videos and location, for the public to view. The widely believed (though mistaken) notion that any disclosure of a user's information would first be requested from the user and require approval by the user is understandable, but wrong. While the Fourth Amendment provides protection for our physical homes, we do not have a physical "home" on the Internet. What an Internet user simply has is a network account consisting of a block of computer storage that is owned by a network service provider. As a user, we may think that storage space to be like a "virtual home," and with that strong privacy protection similar to our physical homes. However, that "home" is a block of ones and zeroes stored somewhere on someone's computer. As a consequence, some of our most private information is sent to third parties and held far away on remote network servers. A Twitter user may think that the same "home" principle may be applied to their Twitter account. When in reality the user is sending information to the third party, Twitter. At the same time the user is also granting a license for Twitter to distribute that information to anyone, any way and for any reason it chooses. In *United States v Lifshitz*, (369 F3d 173 [2d Cir 2004]), the Second Circuit held that individuals do not have a reasonable expectation of privacy in internet postings or e-mails that have reached their recipients. "Users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting" (*Id.* at 190 *citing Guest v Leis*, 255 F3d 325, 333 [6 Cir 2001]).

While a Twitter account's user information and Tweets contain a considerable amount of information about the user, Twitter does not guarantee any of its users complete privacy. Additionally, Twitter notifies its users that their Tweets, on default account settings, will be available for the whole world to see. Twitter also informs its users that any of their information that is posted will be Twitter's and it will use that information for any reason it may have. The @destructuremal account's Tweets were, by definition public. The defendant had knowledge that Twitter was to instantly distribute his Tweets to Twitter users and non-Twitter users, essentially anyone with Internet access. Indeed, that is the very nature and purpose of Twitter. Accordingly, this Court finds that the defendant has no standing to move to quash the subpoena.

2. DEFENDANT'S MOTION TO INTERVENE

The defendant moves to intervene in proceedings to quash the People's subpoena in the event that his direct standing to challenge the subpoena was denied.

The defendant argues that CPLR §1012 gives him the right to intervene, "when the representation of the person's interest is or may be inadequate and the person is or may be bound by the judgment." The defendant contends that his interest is not protected because of Twitter's inaction and defendant would be bound by any judgment allowing the subpoenaed information to be delivered to the District Attorney. The defendant also argues that pursuant to CPLR §1013, common questions of law and fact as to the legality of the subpoena, what the subpoena seeks for production, and the proper use of and procedure to obtain the records sought, are present by the defendant's claims in his motion to quash and the lack of a motion to quash by Twitter.

The People argue that CPLR §§ 1012 and 1013 do not apply to this case, as the defendant will not be bound by the enforcement of the subpoena on a third party. They also argue that the action seeking the enforcement of the subpoena on Twitter does not share any common question of law or fact with the defendant's disorderly conduct charge.

The Court finds that the defendant does not have intervention as of right. CPLR § 1012(a) states, "Upon timely motion, any person shall be permitted to intervene in any action . . . (2) when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment . . ." In *Vantage Petroleum, Bay Isle Oil Co. v Board of Assessment Review of Town of Babylon*, (61 NY2d 695 [1984]), the Court of Appeals specifically ruled that an applicant for intervention is "bound" by a judgment in an action, only when a judgment would be *res judicata* as against the applicant. While the defendant's interests may not be adequately represented because of Twitter's inaction, it is clear that the defendant will not be bound by any of the principles of res judicata by any ruling in regards to the People's subpoena. The defendant cannot be bound by the ruling granting the production of information that the People's subpoena seeks, because he is not a party and not in privity with any party in the underlying action. (*Tyrone G. v Fifi N.*, 189 AD2d 8 [1st Dept 1993]). There is no "judgment" per se as well, the People have not submitted a plenary action seeking a final judgment. (*People v Thain*,

24 Misc 3d 377 [Sup Ct, NY County 2009]). This ruling is only to enforce the People's subpoena served upon Twitter.

CPLR § 1013 states that, "Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." The court will not exercise its discretion to permit the defendant to intervene pursuant to CPLR § 1013. The defendant's arguments lacks any authority to justify the notion that he has a right to challenge the subpoena because the information sought may adversely affect him. ". . . [s]uch a broad and liberal rule would frustrate the very purpose of any investigation for such investigations always adversely affect someone and would not be necessary if they didn't." *(Matter of Selesnick,* 115 Misc 2d 993, 995 [Sup Ct, Westchester County 1982]).

Accordingly, the defendant's motions are denied. However, it should be noted that during oral arguments the People consented to allow the materials to be produced to the court for *in camera* inspection.

THE STORED COMMUNICATIONS ACT

While this court holds that the defendant has no standing to challenge the subpoena as issued, once the subpoena is brought to a courts attention, it is still compelled to evaluate the subpoena under federal laws governing internet communications.[8] The privacy of stored Internet communications in the United States is governed by the Stored Communications Act ("SCA")(*See* 18 USC §§2701 - 2711) which was enacted in 1986 as part of the Electronic Communications Privacy Act (Pub.L. No 99-508, 100 Stat 1848).[9]

[8] If asked to "so order" a subpoena it would be this court's responsibility to make sure the subpoena is "legal," relevant and not overbroad. Therefore, since the impact of this decision is to "so order" the People's subpoena in this case, this court must evaluate the subpoena in such a manner.

[9] *See,* Kerr, Orin S., "A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending it" 72 GEO WASH L REV 1208

The statute creates rights held by "customers" and "subscribers" of network service providers in both content and noncontent information held by two particular types of providers. In order to evaluate the legality of the subpoena[10], you must first classify the network service provider to see if the provider provides "electronic communication service," "remote computing service," or neither. Next, classify whether the information sought is the information content "in electronic storage," content held by a remote computing service, a non-content record pertaining to a subscriber, or other information enumerated by the SCA. Then the court must consider whether the government is seeking to compel disclosure or seeking to accept information disclosed voluntarily by the provider.

If you look at the purpose and method of Twitter, it is clear to this court that Twitter is a service provider of electronic communication. The information sought by the prosecutor in this case has been discussed previously. It is also clear that they are seeking to compel Twitter to provide this information.

The SCA permits the government to compel disclosure of the basic subscriber and session information listed in 18 U.S.C. § 2703(c)(2) using a subpoena:

> (A) name; (B) address; (C) local and long distance telephone connection records, or records of session times and durations; (D) length of service (including start date) and types of service utilized; (E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and (F) means and source of payment for such service (including any credit card or bank account number)
> (*See* 18 USC § 2703[c][2]).

The legal threshold for issuing a subpoena is low. *(See United States v Morton Salt Co.*, 338 US 632, 642-43 [1950]). Prosecutors may obtain disclosure using any federal or state grand jury or

[10] *See also*, "Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations," Published by The Computer Crime and Intellectual Property Section Criminal Division of The U.S.Dep't of Justice, available at: http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf.

trial subpoena or an administrative subpoena authorized by a federal or state statute (18 USC § 2703[c][2]).

To obtain any of the following, the prosecutor must either give notice or seek a ninety day delay of notice[11]:

> 1) everything that can be obtained using a subpoena without notice;
> 2) "the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days." 18 USC § 2703(a); and
> 3) "the contents of any wire or electronic communication" held by a provider of remote computing service "on behalf of . . . a subscriber or customer of such remote computing service." (18 (USC § 2703[b][1][B][i]), § 2703[b][2).

In this case, the subpoena adhered to all of the SCA's pertinent provisions. The People's subpoena is authorized by CPL § 610.10 and therefore, under 18 USC § 2703(c)(2), it may compel disclosure of the basic user information that the subpoena seeks.

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[11] 18 USC § 2705(a)(1)(B) permits notice to be delayed for ninety days "upon the execution of a written certification of a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result."

This court order will also compel Twitter to disclose @destructuremal account's Tweets, pursuant to 18 USC § 2703(d). In order to obtain the court order found in § 2703(d), the People must offer "specific and articulable facts showing that there are reasonable grounds to believe" that the Tweets "are relevant and material to an ongoing criminal investigation."(18 USC § 2703[d]). This court finds that the factual showing has been made. In the response to the defendant's motion, the People state that the information sought by the subpoena is needed to refute the defendant's anticipated defense, that the police either led or escorted the defendant into stepping onto the roadway of the Brooklyn Bridge. The People claim the defendant's anticipated defense is contradicted by his public statements, [12] which identifies the @destructuremal account as likely belonging to the defendant and indicates that while on the Brooklyn Bridge the defendant may have posted Tweets that were inconsistent with his anticipated trial defense.

This court holds that this hearing and the notice given to the defendant by Twitter clearly gave the defendant notice of what the prosecutor was doing.[13] The account holder clearly exercised his option to contest the subpoena in this case, and while the court ultimately has decided that the defendant does not have standing to quash the subpoena, the court has reviewed the subpoena and the court file to determine that there is in fact reasonable grounds to believe that the information sought was relevant and material to this investigation. Additionally, the court does not believe that the subpoena was overbroad in its request. Moreover, any privacy concerns of the defendant will be balanced and protected by the *in camera* review of the materials sought.

Accordingly, it is hereby:

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[12] *See*, Harris, Malcolm, "I'm the Jerk Who Pranked Occupy Wall Street," available at: http://gawker.com/5868073; *see also*, "A Bridge to Somewhere," available at: http://thenewinquiry.com/essays/a-bridge-to-somewhere/

[13] This court declines to opine on whether the actions of Twitter to unilaterally decide to give notice to the account holder may be in violation of state or federal laws.

ORDERED, that Twitter comply with the January 26, 2012 subpoena that was previously served on their offices within twenty days of receipt of this order; and it is further

ORDERED, that the materials be provided to this court for *in camera* inspection. The relevant portions thereof will be provided to the office of the District Attorney, who will provide copies to the defense counsel as part of discovery; and it is further

ORDERED, that The Clerk of this Court notify the Presiding Judge of Jury 7 of the receipt of the materials.

This opinion shall constitute the decision and order of the Court.

Dated: April 20, 2012

New York, New York

Matthew A. Sciarrino, Jr.
Judge of the Criminal Court

EXHIBIT 2

SUBPOENA (DUCES TECUM)

FOR A WITNESS TO ATTEND THE
CRIMINAL COURT OF THE CITY OF NEW YORK

In the Name of the People of the State of New York

To: Twitter, Inc.
c/o Trust & Safety
795 Folsom Street
Suite 600
San Francisco, CA 94107

YOU ARE COMMANDED to appear before the **CRIMINAL COURT** of the County of New York, **PART JURY 7**, at the Criminal Court Building, 346 Broadway, between Hogan Place and White Street, in the Borough of Manhattan, of the City of New York, on February 8, 2012 at 9:00 AM, **as a witness in a criminal action prosecuted by the People of the State of New York against:**

MALCOLM HARRIS

and to bring with you and produce the following items:

Any and all user information, including email address, as well as any and all tweets posted for the period of 9/15/2011-12/31/2011 for the following twitter account:

@destructuremal
http://twitter.com/destructuremal

IF YOU FAIL TO ATTEND AND PRODUCE SAID ITEMS, you may be adjudged guilty of a Criminal Contempt of Court, and liable to a fine of one thousand dollars and imprisonment for one year.

Dated in the County of New York,
January 26, 2012

CYRUS R. VANCE, JR.
District Attorney, New York County

By:

Lee Langston
Assistant District Attorney
212 335-9206

Case #: 2011NY080152

TWITTER IS DIRECTED not to disclose the existence of this subpoena to any party. Such disclosure would impede the investigation being conducted and interfere with the enforcement of law.

EXHIBIT 3

Tags

created_outbound hardcopy macro_888044 outbound_ticket

Comments

Hedwig
Twitter

Dear ADA Langston:

We've received notice that a motion to quash will be filed. We will suspend processing your request regarding @destructuremal pending resolution of the motion to quash.

Twitter Legal

January 31, 2012 10:53 am

Hedwig
Twitter

Dear ADA Langston:

Thanks for your confirmation. We will process your request per our stated procedure.

Best,

Lauren Markward
Legal Policy | Twitter, Inc.

January 30, 2012 02:28 pm

Langston

I acknowledge the policy and am not seeking to keep our request confidential.

Thank you for your prompt response.

Sincerely,

Lee Langston

January 30, 2012 01:14 pm

Hedwig
Twitter

Dear ADA Langston:

We have received your legal process, dated January 26, 2012, requesting information regarding user @destructuremal ("Subject User").

It is Twitter's policy to promptly notify users of government requests for their account information prior to disclosure unless we are prohibited from doing so by statute or court order. In order for us to continue processing your request and waive our objections as to jurisdiction and/or service of process, you must respond directly to this email within 48 hours of receipt with an acknowledgement of the following policy and procedures:

Upon receipt of your confirmation, we will process your request by sending the Subject User a notice, including a copy of your request. If the Subject User does not notify us of his or her intent to file a motion to quash or amend the process within 7 days, we will respond to your request with reasonably accessible records in our possession as required by law. This procedure will allow more expeditious processing of your request and help minimize or avoid required cost recovery for any production. More information is available in our Guidelines for Law Enforcement: https://support.twitter.com/articles/41949/

Please notify us if we should formally object to your request or if you do not consent to any necessary extensions of time for response. You must let us know if you require additional time to seek an order for non-disclosure under 18 U.S.C. § 2705(b) or if you wish to withdraw your request.

Please also note that contents of electronic communications (including Tweets, direct messages, and other user generated content) will not be disclosed without a warrant or other process sufficient under the Stored Communications Act, 18 U.S.C. § 2701, et seq.

Sincerely,

Lauren Markward
Legal Policy | Twitter, Inc.

January 30, 2012 12:51 pm

EXHIBIT 4

Twitter evaluates emergency disclosure requests on a case-by-case basis. If we receive information that gives us a good faith belief that there is an emergency involving the death or serious physical injury to a person, we may provide information necessary to prevent that harm, if we have it.

Requests From Non-U.S. Law Enforcement

U.S. law authorizes Twitter to respond to requests for user information from foreign law enforcement agencies that are issued via U.S. court either by way of a mutual legal assistance treaty or a letter rogatory. It is our policy to respond to such U.S. court ordered requests.

Will Twitter Notify Users of Requests for Account Information?

Yes. Twitter's policy is to notify users of requests for their information prior to disclosure unless we are prohibited from doing so by statute or court order (e.g., an order under 18 U.S.C. § 2705(b)).

What Information Must Be Included?

When requesting user information, your request must include:

- The username and URL of the Twitter profile in question (e.g., @safety and https://twitter.com/safety),
- Details about what specific information is requested and its relationship to your investigation,
    - **Note**: Please ensure that the information you seek is not available from our public API. We are unable to process overly broad or vague requests.
- A VALID EMAIL ADDRESS so we may get back in touch with you upon receipt of your legal process.

You can fax Twitter, attention Trust & Safety, at: 1-415-222-9958. Or you can mail your request to Twitter:

Twitter, Inc.
c/o Trust & Safety
795 Folsom Street
Suite 600
San Francisco, CA 94107

Twitter only accepts legal process from law enforcement agencies delivered by **mail or fax**. Acceptance of legal process by these means is for convenience only and does not waive any objections, including the lack of jurisdiction or proper service. We do not accept legal process via email.

How To Make an Emergency Request

To make an emergency request, please email lawenforcement@twitter.com, which we continuously monitor; you will receive an automated response that you must reply to in order for us to see your report (NOTE: our support system removes all attachments, please include the contents in the body of the message). Alternatively, fax your request to: 1-415-222-9958.

Please be sure to include the Twitter username and URL (e.g., @safety and https://twitter.com/safety) of the subject account, the nature of the emergency, any specific Tweets you would like us to review, and all other available details including how information from us may be necessary to prevent that

EXHIBIT 5

700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
PHONE: 202.654.6200
FAX: 202.654.6211
www.perkinscoie.com

John K. Roche
PHONE: (202) 434-1627
EMAIL: JRoche@perkinscoie.com

March 16, 2012

VIA EMAIL

Lee Langston
Assistant District Attorney
New York County District Attorney's Office
80 Centre St.
New York, NY 10013
langstonl@dany.nyc.gov

Re: Subpoena Duces Tecum to Twitter, Inc.,
***People v. Harris*, Docket No. 2011NY080152,**
Criminal Court for the City of New York

Dear Lee:

We represent Twitter, Inc. ("Twitter") and write in response to the subpoena for testimony and production of documents you issued to Twitter in the above-referenced matter. We understand this matter is currently being litigated on the defendant's motion to quash the subpoena, but you have nevertheless asserted that Twitter is in violation of the subpoena for failing to produce the requested documents to the Court. This is incorrect because the subpoena's demand for an appearance and production of documents is invalid for the reasons stated in Twitter's email of January 30, 2012, as well as its failure to comply with the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings ("Uniform Act"). *See* McKinney's CPL § 640.10.

Pursuant to the Uniform Act, a criminal litigant cannot compel an appearance by, or production of documents from, a California resident without presenting the appropriate certification to the California court, scheduling a hearing and obtaining a California subpoena for production. *See* Cal. Penal Code § 1334, *et seq.*; McKinney's CPL § 640.10; *see also Matter of Codey*, 82 N.Y.2d 521, 525-26 (1993) ("The Uniform Act provides detailed and constitutionally valid procedures whereby a party to a criminal proceeding in one State can either obtain the presence

of a witness residing in another State or can compel the production of evidence located in another State.").

Please feel free to contact me if you have any questions.

Very truly yours,

/s/

John K. Roche

Copies to:

Charles Collins (collinsc@dany.nyc.gov)
Martin R. Stolar (mrslaw37@hotmail.com)