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Can Twitter Protect a User's Information?

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The People of the State of New York, v. Malcolm HARRIS, —N.Y.S.2d—, 2012 N.Y. Slip Op. 22109 (N.Y. Crim. Ct. Apr. 20, 2012).

Data obtained from social networking websites continue to become more essential to developing a parties' case. Production of that data, however, has become more burdensome for the companies developing the technology. For example, rather than having to produce the data themselves, Facebook has recently made more information available to be downloaded by an individual user. The new data provides even greater historical information about Facebook users. According to the Facebook Privacy Blog,

> *"Starting today, you will be able to download an expanded archive of your Facebook account history. First introduced in 2010, Download Your Information lets you get a copy of what you've shared on Facebook, such as photos, posts, messages, a list of friends and chat conversations. Now you can access additional categories of information, including previous names, friend requests you've made and IP addresses you logged in from…"*

Now Twitter is looking to remove the burden of having to produce the data themselves, but in a different fashion in *People v. Harris*, —N.Y.S.2d—, 2012 N.Y. Slip Op. 22109 (N.Y. Crim. Ct. Apr. 20, 2012). In that case, the defendant, Malcolm Harris, along with several hundred other occupy wall street protesters, were charged with disorderly conduct after allegedly marching on to the roadway of the Brooklyn bridge. On January 26, 2012, the People sent a subpoena duces tecum to Twitter seeking the Defendant's user information for his "@destructuremal" Twitter account, including his email address and Tweets posted for the period of September 15, 2011, through December 31, 2011. On January 31, 2012, however, after Twitter informed the Defendant that his account had been subpoenaed, 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 the court ruled on the Defendant's motion.

When ruling on the Defendant's motion to quash, the Court noted that New York has yet to rule on whether a criminal defendant has the standing to quash a subpoena issued to a third-party online social networking service seeking to obtain the defendant's user information and postings, except for an unpublished short form order by the Suffolk Superior Court (Docket No. SUCR2011-11308), on February 23, 2012.[1] Nonetheless, the Court wrote that in these situations an analogy could be drawn to bank record cases where courts have consistently held that an individual has no right to challenge a subpoena issued against the third-party bank.

Furthermore, relying on the theory that since the user is sending information to a third party, Twitter, every time a user "tweets," they grant a license for Twitter – pursuant to Twitter's terms of service – to distribute that information to anyone, anyway, and for any reason it chooses. Moreover, while the "Fourth Amendment provides protection for our physical homes, we do not have a physical 'home' on the Internet," and the Second Circuit in *United States v Lifshitz*, 369 F.3d 173 (2d Cir. 2004) has specifically stated that individuals do not have a reasonable expectation of privacy in internet postings or e-mails that have reached their recipients: "[u]sers would logically lack a legitimate expectation of privacy in materials intended for publication or public posting."[2]

Accordingly, on April 20, 2012, the Court found that the Defendant had no standing to move to quash the subpoena, especially in light of the fact that the Defendant knew his tweets were "public" and would be distributed to essentially anyone with Internet access. Thus, due to the Defendant's lack of standing and upon analysis of the Stored Communications Act, the Court ordered that Twitter comply with the subpoena.

In our next post, we will discuss Twitter's response to that order. *A special thanks to Sean Gajewski for helping with this post. Sean is a third-year law student at Hofstra University School of Law.*

1. **[1]** In the unpublished short form order the Suffolk Superior Court ordered Twitter to comply with the District Attorney of Suffolk County's administrative subpoena. The order is available at http://aclum.org/sites/all/files/legal/twitter_subpoena/suffolk_order_to_ twitter_20120223.pdf
2. **[2]** *Lifshitz* at 190 (citing *Guest v Leis*, 255 F.3d 325, 333 (6 Cir. 2001)).