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Twitter Responds to Criminal Judge's Decision to Deny a Defendant's Motion to Quash Subpoena on Third Party Website

May 26, 2012

The People of the State of New York, v. Malcolm HARRIS, –N.Y.S.2d–, 2012 WL 1644956 (N.Y. City Crim.Ct. May 7, 2012)

On May 15, 2012, we discussed a New York criminal court's decision to deny Defendant Malcolm Harris' (aka @destructuremal on Twitter) motion to quash a subpoena issued to Twitter by the District Attorney. The subpoena requested 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." In the Court's decision (hereafter the "Order"), the Court ruled that Twitter had to produce @destructuremal's "basic user information" all of his "tweets" for that period, pursuant to 18 U.S.C. § 2703(d).

In response to that Order, on May 7, 2012, Twitter filed a "Memorandum in Support of Non-Party Twitter, Inc.'s Motion to Quash § 2703(d) Order." In their memorandum Twitter argued essentially two points:

1. Twitter's users have standing to move to quash subpoenas directed to Twitter; and
2. The order compels Twitter to violate federal law.

In regard to their first point, Twitter argued that their terms of service expressly states: "You retain your rights to any Content you submit, post or display on or through the Services."[1] Twitter users neither transfer nor lose their proprietary interest in their content by granting a license to Twitter to provide the services. Moreover, unlike the bank records analogy used by the Court, Twitter argued, "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 [Stored Communications Act ("SCA")]."

According to Twitter, Section 2704(b) —entitled "Customer challenges"— of the SCA expressly states 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). Thus, because the Order found that the subpoena was issued under § 2703(b), Twitter contends that the Defendant is permitted to file a motion to quash. Moreover, since Section 2703(d) of the 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," Twitter argued that they are entitled to oppose the Order because it will impose an undue burden on their company with respect to all futureNew York subpoenas it receives.

Twitter's second argument stated that enforcement of the Order will compel them to violate federal law. More specifically, the Order requires that Twitter violate the Fourth Amendment and the SCA. First, Twitter shaped its Fourth Amendment argument around the fact that the Sixth Circuit squarely addressed the issue when they determined that the SCA violates the Fourth Amendment "to the extent it requires service providers to produce the contents of their subscribers' communications in response to anything less than a search warrant," and the fact that the U.S. has recently determined 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. Thus, because the Subpoena asks for communications that are older than 28 days, the District Attorney should be required to have a warrant. Second, Twitter also argued that the terms of the SCA also "provide that an order issued under [Section] 2703(d) can only compel a provider to produce content that is more than 180 days old," and under Section 2703(a) content that is less than "180 days old may only be disclosed pursuant to a search warrant. Since the requested content will not be 180 days until June 29, 2012, Twitter cannot comply with the Order without violating the SCA.

Do you agree with Twitter's position? After considering these arguments, does it make sense that Twitter should have to comply with every Subpoena issued to them? Personally, I think that the Court will most likely deny Twitter's motion for the simple fact that if a bank is not burdened by a similar request for financial data, why would requesting simple data that can be easily obtained through a well designed SQL statement be any more burdensome? Either way, check back soon as we report about the Court's final determination as to whether Twitter will have to respond to subpoenas issued in New York. *A special thanks to Sean Gajewski for helping with this post. Sean is a recent graduate of Hofstra University School of Law.*

[1] *See* Terms of Service (available at http://twitter.com/tos).