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Occupiers' Motion to Quash Subpoenas of Tweets Raises Privacy Questions

By Craig Cardon and Rachel Tarko Hudson on April 3, 2012

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Occupy protesters in New York are attempting to quash the Manhattan District Attorney's subpoenas of their tweets and Twitter account information. The protesters were arrested for obstructing the Brooklyn Bridge during a protest in October. The District Attorney wants to use the tweets to show that the protesters knew their actions were not sanctioned by the police. The D.A. is also attempting to obtain account information in order to connect anonymous Twitter accounts to their real owners. The protesters' motions argue that the subpoenas violate their privacy rights and their right to speak anonymously.

Craig Cardon of Sheppard Mullin was quoted by Law 360 on this issue as saying that it is more of an urban myth than an actual privacy right that the anonymity of the internet provides unfettered privacy protection to users. While the First Amendment provides protection for anonymous speech the Tweets at issue here were not anonymous. The users Tweeted publicly under their own names, removing any expectation of privacy in the Tweet content. But even had the Tweets been anonymous or private, a court would engage in the traditional balancing test used in cases where an individuals' privacy rights must be weighed against a prosecutor's need for information for a criminal investigation. Nevertheless, subpoenas of internet service providers to reveal anonymous posters have readily been allowed for over a decade.

The district attorney's decision to refrain from requesting private direct messages that can not be publicly viewed or searched for and his explanation that the requested information would be used to disprove beyond a reasonable doubt that the protesters' defense that they believed their obstruction of the Brooklyn Bridge was authorized by the police should help mitigate any privacy concerns. The argument that allowing these subpoenas would allow investigators in the future to request direct messages and other information will not likely get a lot of traction in this case. As Law360 quoted Cardon, "Judges do not want to hear about a parade of horribles; they are focused on what's falling on us today."

While the issue makes for good headlines, it is likely a tempest in a tea pot and simply a harbinger of challenges to come in the future. The law is fairly clear that subpoenas of the nature involved here (seeking public Tweet content and corresponding time log information for evidentiary purposes) are permitted where as here the prosecution has a well articulated need.