California Electronic Discovery Act: Part Two

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Part Two in a multi-part series on the topic.

In Part One of this series, we discussed California's Electronic Discovery Act, which established procedures for parties to discover electronically stored information ("ESI") from opposing parties for use as evidence in state court actions.

ESI that may be subpoenaed as evidence in a lawsuit includes information from social media sites, like Twitter and Facebook.

In a recent criminal case in New York, the defendant, Harris, was charged with disorderly conduct for marching onto the Brooklyn Bridge during an Occupy Wall Street protest. Harris moved to quash a subpoena served on Twitter seeking his "subscriber information, e-mail addresses, etc. and content information such as tweets."

His motion failed because the court ruled that he had no reasonable expectation of privacy in his tweets.

Then Twitter itself intervened, moving to quash the subpoena. But this effort also failed in People v. Harris (6/30/12). Twitter had an additional argument to make, one not available to Harris, namely that it was protected from producing the ESI based on the Stored Communications Act ("SCA"). [18 USC §2701 et.seq.] The SCA deals with the disclosure of wire and electronic communications and transactional records by providers of computing and electronic communication services.

But the Court, after reviewing the statute, noted that the SCA "protects only private communications and allows disclosure of electronic communication when it's not overbroad."

As such, the Court ordered Twitter to turn over the ESI in question, with the exception of recent tweets that had been in Twitter's possession for less than 180 days, for which a search warrant was required under the SCA.

Harris may have been a matter of first impression, as noted in a recent article, because it was a criminal case, not civil, and because the social media site itself moved to quash the subpoena seeking ESI .

On a broader basis, any business whose employees, managers or directors compose and publish tweets, or use other forms of social media, may face subpoenas from opposing parties in lawsuits related to this social media use.

Most social media sites are likely to object to subpoenas they receive for ESI. As noted in a recent article: "Facebook takes the position that it is prohibited by the SCA from disclosing a user's private information, and generally asks to dismiss a subpoena that asks for private information."

There is, of course, a distinction between Facebook and Twitter. Twitter is a public forum where anyone can read anyone's tweets. Because of this, it's difficult for Twitter users to argue that they have a reasonable expectation of privacy in what they tweet. By contrast, Facebook users generally post only for Facebook friends, a private group.

As a party to a lawsuit, if you need to subpoena information that may have been posted on a social media site, the best method is to subpoena the opposing party, the individual (or company) who composed and published the information. Individuals are not "internet service providers" under the SCA. As such, they are not protected from disclosing electronic information under the SCA in certain circumstances.

But, as *Harris* points out, you may also subpoena the social media provider and, in some cases, this tactic is likely to succeed. This may become important if some of this ESI has been removed or deleted by the user.

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