

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

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

MALCOLM HARRIS,

Defendant
-----X

NOTICE OF MOTION
TO QUASH

DOCKET: 2011NY080152

SIRS/MADAMS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of MARTIN R. STOLAR, the annexed affirmation and exhibits, and the prior proceedings had herein the defendant will move this court in Jury Part 7 located at 346 Broadway, York, New York on February 10, 2012, for an Order quashing a subpoena served upon Twitter, Inc. for certain records of the defendant's Twitter account upon the grounds that.

1. The subpoena fails to comply with 18 USC § 2703;
2. The subpoena fails to comply with the procedural requirements of CPL § 640.10;
3. The subpoena is overbroad, issued for an improper purpose, and constitutes an abuse of court process;
4. The subpoena constitutes an unwarranted invasion of the defendant's right of privacy and is an infringement on his First and Fourth Amendment Constitutional rights;

NEW YORK COUNTY
DISTRICT ATTORNEY

2012 FEB -6 A 11:05

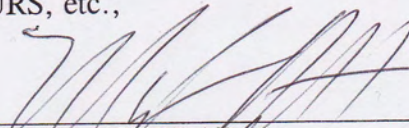
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2012 FEB -6 A 11:04
N.Y.C. CRIMINAL
COURT

And for such other and further relief as to this Court may deem just and proper, or may become appropriate as a result of information disclosed pursuant to this motion.

DATED: New York, New York
February 6, 2012

YOURS, etc.,



MARTIN R. STOLAR,
Attorney for Defendant
351 Broadway, 4th Floor
New York, New York 10013
(212) 219-1919; (fax) 212-941-0980
MrsLaw37@hotmail.com

TO: CYRUS R. VANCE, JR.,
District Attorney New York County
Attn.: A.D.A. Lee Langston, Esq.

CLERK,
CRIMINAL COURT OF THE CITY OF NEW YORK,
COUNTY OF NEW YORK

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

-----X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MALCOLM HARRIS,

Defendant

**AFFIRMATION IN
 SUPPORT OF MOTION
 TO QUASH**

DOCKET: 2011NY080152

-----X

MARTIN R. STOLAR, an attorney duly admitted to practice in the courts of the State of New York, pursuant to the CPLR, hereby affirms:

1. I am the attorney for the above-named defendant and submit this affirmation in support of his motion to quash a subpoena served upon Twitter, Inc., seeking certain account information and communications of the defendant. This affirmation is based upon information derived from conversations and documents received from Mr. Harris, and communications with Twitter, Inc.

2. On January 30, 2012, I was advised by Mr. Harris that he had received notice from Twitter, Inc., a company based in San Francisco, CA, that they had received a subpoena via fax at their San Francisco office from the NY County District Attorney seeking "any and all user information, including email address, as well as any and all tweets for the period **9/15/2011 - 12/31/2011**" for an account associated with Mr. Harris called "*@destructuremal*" and "*http://twitter.com/destructuremal*". A copy of the subpoena is attached as Exhibit A.

3. Twitter, Inc. also advised Mr. Harris that they had received the subpoena by fax transmission dated January 26, 2012. The fax's cover page is annexed hereto as Exhibit B. The fax

transmission also included a cover letter from the District Attorney's office calling for production of the records on or before February 8, 2012, attached hereto as Exhibit C.

4. On January 31, 2012, I advised "Twitter legal" by email that I was the attorney for Mr. Harris in connection with the case from which the subpoena was derived and that I intended to make this motion to quash the subpoena. "Twitter Legal" advised me by return email that they would delay processing the request based upon my stated intention to file this motion to quash. A copy of this motion has been sent to "Twitter Legal" by electronic mail and by fax. It is contemplated that the stay in responding to the subpoena will continue.

THE DEFENDANT

5. Malcolm Harris is a 22 year-old writer and has been a strong supporter of the Occupy Wall Street Movement in his writings and conduct.

On October 1, 2011, Mr. Harris was a participant in a protest march across the Brooklyn Bridge, which protest march was associated with Occupy Wall Street. He is one of approximately 700 persons arrested during that event and stands before this court accused of the single offense of Disorderly Conduct in violation of PL §240.20(5). A copy of the Criminal Court Complaint and Corroborating Affidavit is annexed as Exhibit D.

Mr. Harris is a subscriber to the internet service provided by Twitter and is associated with the Twitter "handle" *@destructuremal* and the website <http://twitter.com/destructuremal>.

TWITTER

6. Twitter is a social networking service that permits users to post pithy messages using short communications called "tweets", and to read the tweets of other users. Users can monitor, or "follow", other users' tweets, and can permit or forbid access to their own tweets. In addition to posting their own tweets, users may send messages to a single user (direct messages) or

repost other users' tweets (retweet). Each Twitter user has a unique username.¹ Twitter maintains both the "content" of subscribers' communications and "records" relating to the subscribers and the use of their accounts.

THE SUBPOENA'S REACH

7. The subpoena seeks all contents (tweets) and account information of the defendant for a 3 ½ month period. This is potentially a vast trove of information: some personal, and some associational. The materials which the subpoena seeks are those collected by Twitter about Mr. Harris and his friends which include all of the information described in the "privacy policy" posted by Twitter, Inc.:²

Information Collected Upon Registration: When you create or reconfigure a Twitter account, you provide some personal information, such as your name, username, password, and email address. Some of this information, for example, your name and username, is listed publicly on our Services, including on your profile page and in search results. Some Services, such as search, public user profiles and viewing lists, do not require registration.

Additional Information: You may provide us with additional information to make public, such as a short biography, your location, or a picture. You may customize your account with information such as a cell phone number for the delivery of SMS messages or your address book so that we can help you find Twitter users you know. We may use your contact information to send you information about our Services or to market to you. You may unsubscribe from these messages by following the instructions contained within the messages or the instructions on our web site. If you email us, we may keep your message, email address and contact information to respond to your request. Providing the additional information described in this section is entirely optional.

Tweets, Following, Lists and other Public Information: Our Services are primarily designed to help you share information with the world. Most of the information you provide to us is information you are asking us to make public. This includes not only the

¹ Description taken from *In Re Application of the United States of America for an Order pursuant to 18 USC §2703d*, Misc. No. 1:11-DM-3 (US District Court Eastern District of Virginia, 2011). (This is the "Wikileaks" case.)

² Site visited February 5, 2012: [Twitter.com/privacy policy](https://twitter.com/privacy-policy).

messages you Tweet and the metadata provided with Tweets, such as when you Tweeted, but also the lists you create, the people you follow, the Tweets you mark as favorites or Retweet and many other bits of information. Our default is almost always to make the information you provide public but we generally give you settings (<http://twitter.com/account/settings>) to make the information more private if you want. Your public information is broadly and instantly disseminated. For example, your public Tweets are searchable by many search engines and are immediately delivered via SMS and our APIs (http://dev.twitter.com/pages/api_faq) to a wide range of users and services. You should be careful about all information that will be made public by Twitter, not just your Tweets.

Tip What you say on Twitter may be viewed all around the world instantly.

Location Information: You may choose to note your location in your Tweets and in your Twitter profile. If you turn on Tweeting with your location, we may also save exact coordinates to help improve our service. You can control your location information settings in your account settings (<http://twitter.com/account/settings>).

Log Data: Our servers automatically record information ("Log Data") created by your use of the Services. Log Data may include information such as your IP address, browser type, the referring domain, pages visited, your mobile carrier, device and application IDs, and search terms. Other actions, such as interactions with our website, applications and advertisements, may also be included in Log Data. If we haven't already deleted the Log Data earlier, we will either delete it or remove any common account identifiers, such as your username, full IP address, or email address, after 18 months.

Links: Twitter may keep track of how you interact with links in Tweets across our Services including third party services and clients by redirecting clicks or through other means. We do this to help improve our Services, including advertising, and to be able to share aggregate click statistics such as how many times a particular link was clicked on.

Cookies: Like many websites, we use "cookie" technology to collect additional website usage data and to improve our Services, but we do not require cookies for many parts of our Services such as searching and looking at public user profiles or lists. A cookie is a small data file that is transferred to your computer's hard disk. Twitter may use both session cookies and persistent cookies to better understand how you interact with our Services, to monitor aggregate usage by our users and web traffic routing on our Services, and to improve our Services. Most Internet browsers automatically accept cookies. You can instruct your browser, by editing its options, to stop accepting cookies or to prompt you before accepting a cookie from the websites you visit.

Third Party Services: Twitter uses a variety of services hosted by third parties to help provide our Services, such as hosting our various blogs and wikis, and to help us understand the use of our Services, such as Google Analytics. These services may collect information sent by your browser as part of a web page request, such as cookies or your IP request.

THE SUBPOENA FAILS TO COMPLY WITH 18 USC § 2703

8. Title 18 USC § 2703, part of the Electronic Communications Privacy Act provides for limited protections of both the contents and records of a “provider of electronic communications service” (18 USC § 2703(a)) as well as a “remote computing service”. 18 USC § 2703(b). For purposes of this application, it makes no functional difference into which category Twitter falls.

9. If Twitter is a “provider of electronic communications service” the content of these communications (tweets) are only available to a governmental entity through a properly applied for warrant. There is no such warrant here.

10. If Twitter is a “remote computing service”, the contents of the communications may be compelled to be disclosed either through a warrant (18 USC § 2703(b)(I)(A)), or through a trial subpoena “with prior notice to the subscriber” (18 USC § 2703(b)(I)(B)(I)). No prior notice was provided to Mr. Harris, the subscriber in this case.

11. With respect to the “records” sought by the subpoena in question, no such records may be provided to a governmental entity without 1) a warrant; 2) a court order; 3) the consent of the subscriber; or 4) a “formal written request”. None of these is applicable here. 18 USC § 2703(c)(1)(B).

12. As a result, because the subpoena at issue here fails to comply with Federal law, it is invalid and must be quashed.

**THE SUBPOENA FAILS TO COMPLY WITH THE PROCEDURAL
REQUIREMENTS OF CPL §640.10**

13. The subpoena from the NY County District Attorney seeks testimony for a New York Court from a witness located in San Francisco, California. Where an out of state witness is sought by a subpoenaing party CPL § 640.10 outlines the procedure whereby an application is made to a New York judge for a request to a court in the state where a witness is located to have that court issue valid process from that court, returnable and enforceable in New York State.

14. Here, the NY County District Attorney simply faxed the subpoena to Twitter in California. (Exhibit B) As can be seen from the cover letter accompanying the fax (Exhibit C), there is no suggestion that Twitter, the recipient of this subpoena, has waived any of the procedures called for by CPL § 640.10.

15. As a result, the subpoena is invalid and should be quashed.

**THE SUBPOENA IS OVERBROAD, ISSUED FOR AN IMPROPER PURPOSE
AND CONSTITUTES AN ABUSE OF COURT PROCESS**

Overbroad:

16. The incident for which the subpoenaed evidence is sought occurred on October 1, 2011, an otherwise isolated incidence of disorderly conduct. The subpoena seeks content and records for a period from September 16, 2011, two weeks before the incident (and two days prior to the establishment of an occupation of Liberty (Zucotti) Park by Occupy Wall Street adherents; until the end of the year, some two and a half months after the incident. Without any specificity and indeed without any notion of a broader conspiracy charge, the subpoena is clearly overbroad seeking to cover a three and a half month period on both sides of a singular October 1, 2011 incident. It should be quashed on this basis alone.

Improper Purpose:

17. Pursuant to CPL § 610.20 a subpoena issued over the signature of a prosecution or defense attorney is a process of the court seeking the attendance of a witness at a criminal proceeding, here, the trial of the defendant for his alleged violation of the law.

18. However, the defendant's case is not yet ready for trial with unresolved motions to dismiss and motions to consolidate pending before the court. No trial date has been set.

19. The subpoena seeks compliance with its demands on or before February 8, 2012, a date when there is no trial, or hearings set to commence.

20. Further, the broad scope of the subpoena both for content sought and dates sought results in the conclusion that the subpoena is issued for investigative purposes, and not for the purpose of providing evidence at a trial.³

21. The use of a trial subpoena for investigative purposes to ascertain the existence of evidence is prohibited. *See, e.g. People v. Natal*, 75 NY2d 379 (1990); *Rodrigues v. City of New York*, 193 AD2d 79 (1st Department 1993). Such use of a subpoena can not be countenanced by the court and the subpoena must therefore be quashed.

Abuse of Process:

22. The trial subpoena (Exhibit A) contains the following legend:

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.

23. Because a subpoena issued pursuant to CPL § 610.20 is a process of the Court,

³ See below, the legend at the bottom of the subpoena, states that there is an "investigation being conducted".

the legend explicitly and implicitly places the seal of the court on the direction of non-disclosure and threatens that the Court with whom the subpoena demands compliance under the penalty of contempt also has the power to punish a disclosure of the “existence” of the subpoena as an interference with law enforcement.

24. As far as is known by your affirmant, no application has been made to this Court to invoke its contempt powers or for the permission to threaten the Court’s contempt power to punish the disclosure of the existence of a subpoena. The District Attorney can not be permitted to threaten the contempt powers of the Court when the Court has not lent its imprimatur to such a demand. There is no way a reasonable, law abiding person who has received such a subpoena would think anything other than that she was told that she was legally obligated under penalty of contempt of court not to engage in any course of action which would disclose even the very existence of the subpoena as a threat to “enforcement of law”.

25. Invoking the Court’s power to intimidate a potential witness and or to coerce behavior which might otherwise normally be undertaken is an abuse of process. The entire subpoena is tainted by this abuse and may be quashed on that basis alone.

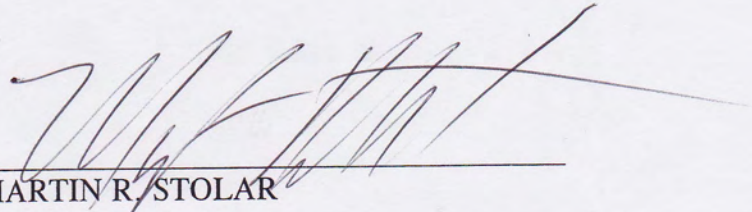
**THE SUBPOENA CONSTITUTES AN UNWARRANTED INVASION
OF THE DEFENDANT’S PRIVACY AND AN INFRINGEMENT
ON HIS FIRST AND FOURTH AMENDMENT RIGHTS**

26. Because the subpoena seeks to provide the government with the contents of the defendant’s communication and other personal and associational information, his constitutional rights are implicated. However, we believe that the Court need not reach these constitutional issues to resolve the question of whether the subpoena should be quashed – the grounds outlined above should be sufficient.

27. To the extent that they are not and the Court wishes to consider the constitutional questions involved, we will, upon request, brief these issues. We await the direction of the Court.

WHEREFORE the subpoena should be quashed.

Dated: February 6, 2012
New York, New York



MARTIN R. STOLAR

Exhibit A

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:

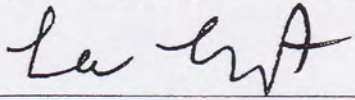
@destructuremal
<http://twitter.com/destructuremal>

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 B

DISTRICT ATTORNEY

OF THE

COUNTY OF NEW YORK

ONE HOGAN PLACE

New York, N. Y. 10013

(212) 335-9000



CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

FAX DOCUMENT COVERSHEET

To:	Twitter	From:	Charles Collins Trial Preparation Assistant
Location:	Trust and Safety	Location:	Manhattan District Attorney's Office: Trial Bureau 40
Telephone:		# of Pages:	3
Fax:	415 222 4458	Telephone:	(212) 335-4297
		Fax:	(212) 385-4009
CC:		Date:	1/26/2012

Urgent For Review Please Comment Please Reply Please Recycle

Exhibit C

DISTRICT ATTORNEY
OF THE
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N. Y. 10013
(212) 335-9000



CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

January 26, 2012

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

Re: People v. MALCOLM HARRIS
Docket No. 2011NY080152

To Whom It May Concern:

Enclosed please find a subpoena seeking records relating to the above referenced case. These records are needed on or before **Wednesday, February 8, 2012**. In lieu of appearing personally with the requested documents, you may email them to langstonl@dany.nyc.gov and collinsc@dany.nyc.gov. You may mail or deliver them to the New York County District Attorney's Office, 80 Centre St, New York, NY 10013, for the attention of Charles Collins room 721A.

If you have any problems or questions concerning the subpoena, please call me at 212 335-4297. Your attention to this matter is greatly appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles Collins", written over a horizontal line.

Charles Collins
Trial Preparation Assistant

Enc.

Exhibit D

THE PEOPLE OF THE STATE OF NEW YORK
-against-

VIOLATION
ADA O'BRIEN
212-335-9223

1. Malcolm Harris (M 22)

ECAB #
1269934

Defendant.

2011NY080152



Police Officer Thomas Manning, shield 10032 of the Patrol Boro Manhattan South Task Force, states as follows:

On October 1, 2011, at about 16:20 hours on the Brooklyn Bridge between Park Row and Centre Street in the County and State of New York, the Defendant committed the offenses of:

1. PL240.20(5) Disorderly Conduct
(1 count)

the defendant, with intent to cause public inconvenience, annoyance and alarm and recklessly creating a risk thereof, obstructed vehicular and pedestrian traffic.

The offenses were committed under the following circumstances:

Deponent states that deponent is informed by Sergeant Brian Byrnes, shield #00969 of the Patrol Boro Manhattan South Task Force, that informant observed defendant standing in a group of approximately six-hundred individuals in the traffic lane of the above-listed location. Deponent is further informed by informant that the above-described conduct of the defendant obstructed vehicular traffic and created a public disturbance/inconvenience in that it prevented all vehicles from being able to use the roadway at the above-listed location.

False statements made herein are punishable as a class A misdemeanor pursuant to section 210.45 of the penal law.

Deponent

11/2/11 1300

Date and Time

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Malcolm Harris,

Defendant.

SUPPORTING DEPOSITION
C.P.L. § 100.20

Docket No.

2011NY080152

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I, Sergeant Brian Byrnes, Shield #00969 of Patrol Boro Manhattan South Task Force, being duly sworn, depose and say that I have read the Accusatory Instrument pertaining to the above-entitled action and attached hereto and that the facts therein stated to be on information furnished by me are true upon my personal knowledge.

False statements made herein are punishable as a class A misdemeanor pursuant to section 210.45 of the penal law.

SGT Byrnes

Signature (Deponent)

11/2/11

Date