Study G-300 May 12, 2014

Memorandum 2014-21

State and Local Agency Access to Customer Information from Communication Service Providers: Constitutional Issues — Privacy

In 2013, the Legislature enacted Senate Concurrent Resolution 54 (Padilla), which directs the Commission[1] to make recommendations to revise the statutes that govern the access of state and local government agencies to customer information from communications service providers. The revisions are intended to do all of the following:

(1) Modernize the law.
(2) Protect customers' constitutional rights.
(3) Enable state and local agencies to protect public safety.
(4) Clarify procedures.

Memorandum 2014-5 introduced the study and proposed an overall organizational plan for conducting it. The Commission approved the proposed plan.[2] This memorandum continues the first step in that plan, analysis of the constitutional rights that are at issue in this study. It examines the constitutional right of privacy.

Future memoranda in this study will discuss (1) the constitutional rights of free expression and association, (2) federal statutes affecting government surveillance of communications, and (3) California statutes affecting government surveillance of communications. Once we have established that background information, the Commission will be prepared to discuss policy and draft proposed legislation.

The content of this memorandum is organized as follows:

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Minutes (Feb. 2014), p. 4.

The Commission invites public input on the matters discussed in this memorandum and any other point that is relevant to this study. Any interested person or group can submit formal comment to the Commission, either in writing or at a meeting. The staff is also open to receiving informal input, and is willing to meet with any interested group.

UNITED STATES CONSTITUTION

Source of Right

The United States Constitution does not contain express language guaranteeing a general right of privacy. However, there are several cases in which the Supreme Court has found a constitutional right of privacy, either in the "penumbra" of other enumerated constitutional rights, as a liberty interest protected as a matter of substantive due process, or as a right that preceded the Constitution and is preserved by the Ninth Amendment.

For example, in *Griswold v. Connecticut*,[3] the court found that a state law criminalizing the use of birth control violated a constitutional right of marital privacy. In reaching that conclusion, the Court noted earlier decisions that had found unexpressed constitutional rights in the "penumbras" of specifically enumerated rights:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of

3. 381 U.S. 479 (1965).

> the parents' choice — whether public or private or parochial — is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.
>
> …
>
> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. … Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[4]

The exact character and scope of the federal constitutional privacy right is difficult to describe with certainty. One source of difficulty is the inconsistency in discussing the source of the privacy right. Another is the fact that the term "privacy" has been used to describe two distinctly different concepts:

> The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.[5]

Said another way:

> The former interest is informational or data-based; the latter involves issues of personal freedom of action and autonomy in individual encounters with government. The distinction between the two interests is not sharply drawn — disclosure of information, e.g., information about one's financial affairs, may have an impact on personal decisions and relationships between individuals and government.[6]

The California Supreme Court has described those two types of privacy interests as "informational privacy" and "autonomy privacy," respectively:

4. *Id.* at 482-84.
5. Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (footnotes omitted).
6. Hill v. Nat. Collegiate Athletic Ass'n, 7 Cal. 4th 1, 30 (1994).

> Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ("informational privacy"); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ("autonomy privacy").[7]

Autonomy Privacy

Most of the Supreme Court decisions finding a constitutional privacy right involve autonomy privacy. They address an individual's right to make decisions about important personal matters, free from government interference:

> Although "[t]he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." Roe v. Wade, 410 U.S. 113, 152 (1973). This right of personal privacy includes "the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977). While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541-542 (1942); contraception, Eisenstadt v. Baird, 405 U.S., at 453-454; id., at 460, 463-465 (WHITE, J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, [262 U.S. 390, 399 (1923)]." Roe v. Wade, supra, at 152-153.[8]

Autonomy privacy does not have seem to have direct relevance to the current study, which concerns government access to private *information*. The study does not address direct government regulation of private conduct.

However, autonomy privacy might have indirect relevance, if government collection of private information would have a material effect on the exercise of personal liberty. For example, in *Whalen v. Roe*[9], a New York statute authorized the government to collect information about medical prescriptions for specified drugs. Appellees argued that this program would violate both informational privacy rights (by collecting private information about a person's medical care)

7. *Id.* at 35.
8. Carey v. Population Services Int'l, 431 U.S. 678, 684-85 (1977).
9. Whalen v. Roe, 429 U.S. 589 (1977).

and autonomy privacy (because the potential for exposure of stigmatizing private information could have a chilling effect on important choices about medical care). The Court was not persuaded:

> Nor can it be said that any individual has been deprived of the right to decide independently, with the advice of his physician, to acquire and to use needed medication. Although the State no doubt could prohibit entirely the use of particular Schedule II drugs, [30] it has not done so. This case is therefore unlike those in which the Court held that a total prohibition of certain conduct was an impermissible deprivation of liberty. Nor does the State require access to these drugs to be conditioned on the consent of any state official or other third party. Within dosage limits which appellees do not challenge, the decision to prescribe, or to use, is left entirely to the physician and the patient.
>
> We hold that neither the immediate nor the threatened impact of the patient-identification requirements in the New York State Controlled Substances Act of 1972 on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment.[10]

Moreover, an invasion of autonomy privacy of the type described above will only arise if there has been an invasion of informational privacy. If informational privacy is protected, then any ancillary invasion of autonomy privacy would also be avoided. Although it is not entirely clear that the United States Constitution protects informational privacy, the California Constitution clearly does (see discussion below). Thus, concerns about indirect effects on autonomy privacy are probably not relevant to this study.

Informational Privacy

The principal Supreme Court cases discussing informational privacy are summarized briefly below. As will be seen, those opinions do not expressly hold that a right of informational privacy exists in the Constitution.

Whalen v. Roe

In the *Whalen* opinion described above, the Court addressed informational privacy, as well as autonomy privacy. The purpose of the New York statute was to facilitate law enforcement investigation of misuse of the specified drugs. The appellees asserted that the statute was unconstitutional, in part because it violated the privacy rights of patients receiving prescriptions for the specified

10. *Id.* 603-04 (footnotes omitted).

drugs. The appellees claimed that collection of drug prescription information would invade doctor-patient confidentiality. They also argued that if the information were improperly disclosed, it could cause embarrassment or harm to those using the prescribed drugs.

While the Court seemed to implicitly concede the existence of a constitutional right of informational privacy, it did not do so expressly. Nor did it articulate a standard for determining whether any constitutional right had been violated.

Instead, the Court declared that the contested statute did not "on its face, pose a sufficiently grievous threat to … establish a constitutional violation."[11] The Court found no evidence that the statute's security provisions were insufficient to protect against unauthorized disclosure of the collected information. The Court also concluded that the invasion of privacy having government employees track prescription data was comparable to the invasion of privacy one tolerates when medical and insurance personnel handle that type of information.[12]

Finally, the Court recognized in *dicta* that government data collection could, if conducted on a "massive" scale, implicate a duty to protect the privacy of the collected information that "arguably has roots in the Constitution."

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data — whether intentional or unintentional — or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an

11. *Id.* at 601.
12. *Id.* at 601-02.

> invasion of any right or liberty protected by the Fourteenth Amendment.[13]

Nixon v. Administrator of General Services

In *Nixon v. Administrator of General Services*,[14] the Court considered a statute that required former President Richard Nixon to turn his presidential papers over to government archivists for review (for the purpose of segregating public documents, which would be archived, from private papers, which would be returned to the President). President Nixon objected to the statutory obligation, arguing in part that it would unconstitutionally invade his informational privacy.

The Court acknowledged that "[o]ne element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters'"[15] and found that the President had a legitimate expectation of privacy with respect to some of his papers. However, "the merit of appellant's claim of invasion of his privacy cannot be considered in the abstract; rather the claim must be considered in light of the specific provisions of the Act, and any intrusion must be weighed against the public interest in subjecting the presidential materials of appellant's administration to archival screening."[16]

The Court went on to conduct a balancing of the public's strong interest in the preservation of presidential papers against the minimal invasion of privacy that would result from archival screening (and the lack of any reasonable alternatives to such screening):

> In sum, appellant has a legitimate expectation of privacy in his personal communications. But the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant's status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials, of the important public interest in preservation of the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. When this is combined with the Act's sensitivity to appellant's legitimate privacy interests, … the unblemished record of the archivists for discretion, and the likelihood that the regulations to be promulgated by the Administrator will further moot appellant's fears that his materials will be reviewed by "a host of persons," …

13. *Id.* at 605-06 (footnote omitted).
14. 433 U.S. 425 (1977).
15. *Id.* at 457.
16. *Id.* at 458.

> we are compelled to agree with the District Court that appellant's privacy claim is without merit.[17]

NASA v. Nelson

Much more recently, in *National Aeronautics and Space Administration v. Nelson*,[18] the Court considered whether certain pre-employment background questionnaires violated a constitutional right of informational privacy.

The Court noted that most (but not all) circuit courts have found that there is a constitutional right of informational privacy:

> State and lower federal courts have offered a number of different interpretations of *Whalen* and *Nixon* over the years. Many courts hold that disclosure of at least some kinds of personal information should be subject to a test that balances the government's interests against the individual's interest in avoiding disclosure. *E.g.*, *Barry* v. *New York*, 712 F.2d 1554, 1559 (CA2 1983); *Fraternal Order of Police* v. *Philadelphia*, 812 F.2d 105, 110 (CA3 1987); *Woodland* v. *Houston*, 940 F.2d 134, 138 (CA5 1991) *(per curiam)*; *In re Crawford*, 194 F.3d 954, 959 (CA9 1999); *State* v. *Russo*, 259 Conn. 436, 459-464, 790 A.2d 1132, 1147-1150 (2002). The Sixth Circuit has held that the right to informational privacy protects only intrusions upon interests "that can be deemed fundamental or implicit in the concept of ordered liberty." *J. P.* v. *DeSanti*, 653 F.2d 1080, 1090 (1981) (internal quotation marks omitted). The D. C. Circuit has expressed "grave doubts" about the existence of a constitutional right to informational privacy. *American Federation of Govt. Employees* v. *HUD*, 118 F.3d 786, 791 (1997).[19]

Nonetheless, the Court made clear that it was not deciding whether a constitutional right of informational privacy exists. Instead, the Court *assumed* the existence of a privacy interest of the type "mentioned" in *Whalen* and *Nixon.* It then went on to explain why the statute would not violate any informational privacy interest that may "arguably" have its roots in the Constitution:

> In two cases decided more than 30 years ago, this Court referred broadly to a constitutional privacy "interest in avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U.S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977); *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 457, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977). …
>
> We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*. We hold, however, that the challenged portions of the Government's

17. *Id.* at 465.
18. 131 S. Ct. 746 (2011).
19. *Id.* at 756 n. 9.

> background check do not violate this right in the present case. The Government's interests as employer and proprietor in managing its internal operations, combined with the protections against public dissemination provided by the Privacy Act of 1974, 5 U.S.C. § 552a, satisfy any "interest in avoiding disclosure" that may "arguably ha[ve] its roots in the Constitution." *Whalen*, *supra*, at 599, 605, 97 S. Ct. 869, 51 L. Ed. 2d 64.[20]

Later in the opinion, the Court reemphasized that it was merely assuming the existence of the informational privacy right. Moreover, it characterized *Whalen* as having employed the same approach:

> As was our approach in *Whalen*, we will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance.[21]

In justifying that approach, Justice Alito explained that the parties had not presented the question of whether a constitutional right of informational privacy exists.[22]

Consequently, it is not certain whether there is a federal constitutional right of information privacy. If such a right does exist, it is not clear what test the Court would apply to determine whether it has been violated.

Informational Privacy and the Fourth Amendment

Even if a constitutional right of informational privacy exists, it might not have much relevance in the current study. In Justice Scalia's dissent in *NASA v. Nelson*, he argues that where an express constitutional protection is applicable, it supersedes any "generalized notion" of substantive due process:

> [T]he Government's collection of private information is regulated by the Fourth Amendment, and "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing those claims."[23]

20. *Id.* at 751.
21. *Id.* at 756.
22. *Id.* at 757 n. 10.
23. *Id.* at 765 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) ("if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.").

The case he quotes descends from *Graham v. Connor*.[24] In that case, the Court held that a constitutional claim based on alleged use of excessive force in effecting an arrest must be analyzed under the Fourth Amendment, and not as a matter of substantive due process under the Fourteenth Amendment:

> Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.[25]

The current study involves government acquisition of information relating to communications. This could include wiretaps, interception of email, access to files on cloud storage servers, retrieval of real-time GPS location data, and the like. Such matters seem to fall squarely within the ambit of the Fourth Amendment.[26] Under the principle discussed above, one could argue that the "explicit textual source of constitutional protection" provided in the Fourth Amendment should be used to test the constitutionality of such searches, rather than a generalized notion of privacy (whether grounded in substantive due process or in the penumbra of other enumerated rights). If that is correct, then a federal constitutional right of informational privacy would not be relevant in evaluating the types of searches that are within the ambit of the Fourth Amendment.

Summary

There is a federal constitutional right of autonomy privacy. It protects the right to make certain private decisions free from government interference. The cases discussing autonomy privacy involve fundamentally private matters such as child-rearing, procreation, marriage, and sexuality. Those types of concerns are unlikely to have much direct relevance to the issue presented in this study: government access to private communication information. To the extent that they are relevant, the relevance would be a secondary effect of an invasion of informational privacy.

It is not clear whether there is a federal constitutional right of informational privacy. The early cases on this issue (*Whalen* and *Nixon*) seem to assume that such a right exists, but they do not expressly hold that this is so. The more recent

24. Graham v. Connor, 490 U.S. 386 (1989).
25. *Id.* at 395.
26. See generally Memorandum 2014-13.

decision in *NASA v. Nelson* is carefully framed to be noncommittal on the issue (and it claims that the same noncommittal posture was employed in the earlier decisions).

If such a right does exist, it does not appear to be absolute. In all of the cases discussed above, the Court found that important governmental efforts to collect data, with sufficient safeguards against improper disclosure of private information, do not violate any constitutional right.

Moreover, there is precedent suggesting that any invasion of privacy falling within the sphere of the Fourth Amendment must be analyzed under that constitutional provision, rather than under a general liberty interest asserted as a matter of substantive due process. The current study involves government collection of information, which is susceptible to Fourth Amendment analysis. It is thus unclear whether a privacy right grounded in substantive due process would ever be applicable to the matters addressed in our study.

CALIFORNIA CONSTITUTION

Application of California Constitution

Before discussing the protection of privacy under the California Constitution, it is worth briefly revisiting the general scope of application of the California Constitution.

As discussed in Memorandum 2014-13, "[r]ights guaranteed by [the California] Constitution are not dependent on those guaranteed by the United States Constitution."[27] This means that the California Constitution can afford greater protections than the United States Constitution. The right of privacy expressly guaranteed by the California Constitution is an example of this.[28]

However, Article I, Section 28 of the California Constitution generally provides that relevant evidence cannot be excluded from a criminal trial. This means suppression of evidence is generally not available as a remedy for a violation of the California Constitution (though it remains available as a remedy for a violation of the United States Constitution).[29]

27. Cal. Const. art. 1, § 24.
28. Cal. Const. art. 1, § 1. An inititative that purported to limit the rights of criminal defendants under the California Constitution was invalidated on procedural grounds. See Cal. Const. art I, § 24; Raven v. Deukmejian, 52 Cal. 3d 336 (1990).
29. In re Lance W., 37 Cal. 3d 873, 886-87 (1985).

Express Privacy Right

Unlike the United States Constitution, the California Constitution includes an express right of privacy. Article I, Section 1 provides:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

That privacy right was added by initiative in 1972.[30]

The first California Supreme Court case to construe the constitutional privacy right was *White v. Davis*.[31] That case concerned a Los Angeles Police Department operation employing undercover officers who posed as college students in order to attend class discussions and build dossiers on student activists and their professors. Suit was filed to enjoin the practice. Among other grounds, the challengers alleged that the police activities violated California's constitutional right of privacy.

The trial court sustained a general demurrer in favor of the defendant. Based on the pleadings, the Supreme Court reversed. It found prima facie evidence that the program violated constitutional rights of speech and assembly. It also found a prima facie violation of the new privacy right:

> [T]he surveillance alleged in the complaint also constitutes a prima facie violation of the explicit "right of privacy" recently added to our state Constitution. As we point out, a principal aim of the constitutional provision is to limit the infringement upon personal privacy arising from the government's increasing collection and retention of data relating to all facets of an individual's life. The alleged accumulation in "police dossiers" of information gleaned from classroom discussions or organization meetings presents one clear example of activity which the constitutional amendment envisions as a threat to personal privacy and security.[32]

The Court held that the Constitution does not invalidate all information gathering, but instead requires that the government show a "compelling justification for such conduct."[33]

In considering the effect of the new privacy right, the Court looked to the election brochure materials for the proposition that created the right, stating that

30. Prop. 11 (Nov. 7, 1972).
31. 13 Cal. 3d 757 (1975).
32. *Id.* at 761.
33. *Id.*

such materials represent "in essence, the only 'legislative history' of the constitutional amendment available to us."[34] The Court noted that it had "long recognized the propriety of resorting to election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people."[35]

The Court discussed the election brochure at some length:

> In November 1972, the voters of California specifically amended article I, section 1 of our state Constitution to include among the various "inalienable" rights of "all people" the right of "privacy." Although the general concept of privacy relates, of course, to an enormously broad and diverse field of personal action and belief, the moving force behind the new constitutional provision was a more [focused] privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The new provision's primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy.
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> The principal objectives of the newly adopted provision are set out in a statement drafted by the proponents of the provision and included in the state's election brochure. The statement begins: "The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create "cradle-to-grave" profiles of every American. [para.] *At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian*." (Italics in original.)
>
> The argument in favor of the amendment then continues: "The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us.
>
> "*Fundamental to our privacy is the ability to control circulation of personal information*. [Italics in original.] This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not

34. *Id.* at 775.
35. *Id.* n. 11.

know that these records even exist and we are certainly unable to determine who has access to them.

"Even more dangerous is the loss of control over the accuracy of government and business records of individuals. Obviously if the person is unaware of the record, he or she cannot review the file and correct inevitable mistakes. . . . [para.] The average citizen . . . does not have control over what information is collected about him. Much is secretly collected. . . ."

The argument concludes: "The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the U.S. Constitution. This right should be abridged only when there is a compelling public need. . . ."[36]

The staff sees some important points to be drawn from that discussion:

- The focus on "government snooping and data collecting" seems directly germane to this study. This is especially true given the modern capacity to easily collect very large amounts of electronic data. For example, the National Security Agency's "Bulk Telephony Metadata Program" is reported to have been collecting telephone dialing information from virtually every phone in the country, for several years.[37] Regardless of whether such data collection is a "search" under the Fourth Amendment, it seems to be the sort of "government snooping and data collecting" that prompted the creation of the constitutional privacy right.
- The privacy right is "fundamental" and "compelling." These are familiar constitutional terms of art that imply a fairly high level of dignity and protection.
- There is particular concern about data collection without notice. Such secrecy makes it difficult for a person to "control circulation of personal information" and to correct any errors in information the government has gathered.

In another decision made later the same year, *Valley Bank of Nevada v. Superior Court of San Joaquin County*,[38] the Court considered a privacy-based objection to a civil discovery order requiring the production of non-party bank records.

The Court found that the privacy right applies to confidential bank records:

> Although the amendment is new and its scope as yet is neither carefully defined nor analyzed by the courts, we may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life.[39]

36. *Id.* at 773-75 (footnotes omitted).
37. See Klayman v. Obama, 957 F. Supp. 2d 1, 14-20 (D.D.C. 2013).
38. 15 Cal. 3d 652 (1975).
39. *Id.* at 656.

Consequently, there must be a "careful balancing of the right of civil litigants to discover relevant facts, on the one hand, with the right of bank customers to maintain reasonable privacy regarding their financial affairs, on the other."[40] While private bank records "should not be wholly privileged and insulated from scrutiny by civil litigants," neither should they be disclosed without the subject of the records having notice and an opportunity to object.[41] The Court put it this way:

> Striking a balance between the competing considerations, we conclude that before confidential customer information may be disclosed in the course of civil discovery proceedings, the bank must take reasonable steps to notify its customer of the pendency and nature of the proceedings and to afford the customer a fair opportunity to assert his interests by objecting to disclosure, by seeking an appropriate protective order, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered.[42]

Private Action

In *Hill v. National Collegiate Athletic Association*,[43] the California Supreme Court considered a constitutional privacy-based challenge to an NCAA drug testing program for collegiate athletes. Because the NCAA is a nongovernmental association, the Court was required to consider whether the constitutional privacy right applies to private action.

In addressing that question, the Court noted that the ballot arguments were "replete with references to information-amassing practices of both 'government' and 'business.'" The Court also referred to a string of court of appeal decisions finding that the privacy right applies to private action. In light of those authorities, the Court held that California's constitutional right of privacy creates a right of action against private as well as government entities.

Private action is not directly relevant to the core issue in this study, which examines governmental access to customer information of communication service providers. Nonetheless, private action may have some indirect relevance to the study. The fact that all communication service providers are constitutionally obliged to protect their customers' privacy may have an effect on

40. *Id.* at 657.
41. *Id.* at 658.
42. *Id.*
43. 7 Cal. 4th 1 (1994).

reasonable expectations of privacy. As discussed in Memorandum 2013-13, societal expectations of privacy can shape the scope of protected privacy rights.

Elements

In *Hill v. NCAA*, the Court took the opportunity to conduct a fairly thorough review of California's constitutional privacy right and its antecedents in the United States Constitution and the common law. After discussing those foundations, the Court set out the elements of a cause of action for a breach of privacy under Article I, Section 1, of the California Constitution:

(1) The identification of a specific legally protected privacy interest.
(2) A reasonable expectation of privacy on the part of the plaintiff.
(3) A "serious" invasion of the protected privacy interest.

Those elements are discussed further below.

Legally Protected Privacy Interest

In discussing legally protected privacy interests, the Court first drew a distinction between informational privacy and autonomy privacy. It then observed that the constitutional privacy right was primarily aimed at protecting informational privacy:

> Informational privacy is the core value furthered by the Privacy Initiative. (*White* v. *Davis*, *supra*, 13 Cal. 3d at p. 774.) A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity. Such norms create a threshold reasonable expectation of privacy in the data at issue. As the ballot argument observes, the California constitutional right of privacy "prevents government and business interests from [1] collecting and stockpiling unnecessary information about us and from [2] misusing information gathered for one purpose in order to serve other purposes or to embarrass us."[44]

This clear statement that protection of informational privacy is a "core" value furthered by the California Constitution is important to the current study, because of the uncertainty (discussed above) about whether the United States Constitution affords any protection to informational privacy.

44. *Id.* at 35-36.

The Court recognized that the ballot arguments also expressed concern about the types of intimate and personal decisions at issue in autonomy privacy. It pointed out, however, that the ballot arguments "do not purport to create any unbridled right of personal freedom of action that may be vindicated in lawsuits against either government agencies or private persons or entities."[45]

The Court concludes by noting that legally protected privacy rights are derived from social norms, which must themselves be grounded in sources of positive law:

> Whether established social norms safeguard a particular type of information or protect a specific personal decision from public or private intervention is to be determined from the usual sources of positive law governing the right to privacy — common law development, constitutional development, statutory enactment, and the ballot arguments accompanying the Privacy Initiative.[46]

Reasonable Expectation of Privacy

Even when a legally recognized privacy interest exists, the reasonableness of the expectation of privacy may affect any claim that the interest has been unconstitutionally invaded:

> The extent of [a privacy] interest is not independent of the circumstances." (*Plante* v. *Gonzalez*, *supra*, 575 F.2d at p. 1135.) Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy. For example, advance notice of an impending action may serve to "'limit [an] intrusion upon personal dignity and security'" that would otherwise be regarded as serious. (*Ingersoll* v. *Palmer*, *supra*, 43 Cal.3d at p. 1346 [upholding the use of sobriety checkpoints].)
>
> In addition, customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy. (See, e.g., *Whalen*, *supra*, 429 U.S. at p. 602 [51 L.Ed.2d at p. 75] [reporting of drug prescriptions to government was supported by established law and "not meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care"]; *Fraternal Order of Police, Lodge No. 5* v. *City of Philadelphia* (3d Cir. 1987) 812 F.2d 105, 114 [no invasion of privacy in requirement that applicants for promotion to special police unit disclose medical and financial information in part because of applicant awareness that such disclosure "has historically been required by those in similar positions"].)

45. *Id.* at 36.
46. *Id.*

> A "reasonable" expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. (See, e.g., Rest.2d Torts, supra, § 652D, com. c ["The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens."][47]

The Court also noted that advance voluntary consent can affect a person's reasonable expectation of privacy: "the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant."[48]

Serious Invasion of Privacy

Finally, the Court held that a constitutional privacy claim must involve a "serious" violation of a legally protected privacy interest. The Court's discussion of this element is short:

> No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy. "Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part." (Rest.2d Torts, *supra*, § 652D, com. c.) Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.[49]

This might seem to set a fairly high bar for an actionable claim, with the right of privacy only protecting against "an egregious breach of social norms." However, the Court quickly revisited the elements set out in *Hill* and made clear that they are not as strict as they might appear. That clarification is discussed below.

Effect of Elements

Just three years after it decided *Hill*, the Court clarified the elements of a constitutional privacy claim. In *Loder v. City of Glendale*,[50] the Court explained

47. *Id.* at 36-37.
48. *Id.*
49. *Id.* at 37.
50. 14 Cal. 4th 846 (1997).

that those elements "should not be understood as establishing significant *new* requirements or hurdles that a plaintiff must meet in order to demonstrate a violation of the right to privacy under the state Constitution…."[51]

> Under such an interpretation, *Hill* would constitute a radical departure from *all* of the earlier state constitutional decisions of this court cited and discussed in *Hill*…, decisions that uniformly hold that when a challenged practice or conduct intrudes upon a constitutionally protected privacy interest, the interests or justifications supporting the challenged practice must be weighed or balanced against the intrusion on privacy imposed by the practice.[52]

Instead, the elements laid out in *Hill* are "threshold elements" that serve to "screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy protection."[53] The Court went on to make clear that this threshold screening is actually fairly modest:

> These elements do not eliminate the necessity for weighing and balancing the justification for the conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, nontrivial invasion of a protected privacy interest.[54]

It is difficult to reconcile the language in *Hill*, stating that a plaintiff must have suffered a "serious" and "egregious" invasion of privacy, with the language in *Loder* explaining that an actionable invasion of privacy need only be "genuine" and "nontrivial." But the *Loder* Court directly states that *Hill* is consistent with the standard enunciated in *Loder*:

> Although in discussing the "serious invasion of privacy interest" element, the opinion in *Hill* states at one point that "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right"…, the opinion's application of the element makes it clear that this element is intended simply to screen out intrusions on privacy that are de minimis or insignificant.[55]

51. *Id.* at 891 (emphasis in original).
52. *Id.* (emphasis in original).
53. *Id.* at 893.
54. *Id.*
55. *Id.* at 895 n.22.

Standard of Review

In *White v. Davis* the Court held that the government must demonstrate a "compelling" public need in order to justify its invasion of the California Constitution's privacy right.[56] The Court quoted the part of the ballot brochure asserting that "[t]he right of privacy … should be abridged only when there is a compelling public need."[57]

In *Hill v. NCAA*, however, the Court made clear that the decision in *White v. Davis* was limited to the facts of that case:

> *White* signifies only that some aspects of the state constitutional right to privacy — those implicating obvious government action impacting freedom of expression and association — are accompanied by a "compelling state interest" standard.[58]

After reviewing a number of appellate decisions relating to the privacy right, the Court found that the compelling state interest standard only applies in cases involving particularly serious invasions of important privacy interests:

> The particular context, i.e., the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a "compelling interest" must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed.
>
> For the reasons stated above, we decline to hold that every assertion of a privacy interest under article I, section 1 must be overcome by a "compelling interest." Neither the language nor history of the Privacy Initiative unambiguously supports such a standard. In view of the far-reaching and multifaceted character of the right to privacy, such a standard imports an impermissible inflexibility into the process of constitutional adjudication.[59]

In other circumstances, a court need only consider whether an invasion of a legally protected privacy interest is justified by a "legitimate" and "important" competing interest:

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56. *White v. Davis*, 13 Cal. 3d at 776.
57. *Id.* at 775.
58. *Hill*, 7 Cal. 4th at 34.
59. *Id.* at 34-35 (footnote omitted).

> Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.
>
> Confronted with a defense based on countervailing interests, the plaintiff may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to defendant's conduct that would minimize the intrusion on privacy interests.[60]

Importantly, the Court in *Hill* held that the standard of review may differ depending on whether a privacy claim is brought against a public or private actor:

> Judicial assessment of the relative strength and importance of privacy norms and countervailing interests may differ in cases of private, as opposed to government, action.
>
> *First*, the pervasive presence of coercive government power in basic areas of human life typically poses greater dangers to the freedoms of the citizenry than actions by private persons. "The government not only has the ability to affect more than a limited sector of the populace through its actions, it has both economic power, in the form of taxes, grants, and control over social welfare programs, and physical power, through law enforcement agencies, which are capable of coercion far beyond that of the most powerful private actors." (Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?* (1989) 17 Hastings Const. L. Q. 139, 142-143 [hereafter Sundby].)
>
> *Second*, "an individual generally has greater choice and alternatives in dealing with private actors than when dealing with the government." (Sundby, *supra*, 17 Hastings Const.L.Q. at p. 143.) Initially, individuals usually have a range of choice among landlords, employers, vendors and others with whom they deal. To be sure, varying degrees of competition in the marketplace may broaden or narrow the range. But even in cases of limited or no competition, individuals and groups may turn to the Legislature to seek a statutory remedy against a specific business practice regarded as undesirable. State and federal governments routinely engage in extensive regulation of all aspects of business. Neither our Legislature nor Congress has been unresponsive to concerns based on activities of nongovernment entities that are perceived to

60. *Id* at 38.

> affect the right of privacy. (See, e.g., Lab. Code, § 432.2, subd. (a) ["No employer shall demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment"]; 29 U.S.C. § 2001 [regulating private employer use of polygraph examination].)
>
> *Third*, private conduct, particularly the activities of voluntary associations of persons, carries its own mantle of constitutional protection in the form of freedom of association. Private citizens have a right, not secured to government, to communicate and associate with one another on mutually negotiated terms and conditions. The ballot argument recognizes that state constitutional privacy protects in part "our freedom of communion and our freedom to associate with the people we choose." (Ballot Argument, *supra*, at p. 27.) Freedom of association is also protected by the First Amendment and extends to all legitimate organizations, whether popular or unpopular. (*Britt* v. *Superior Court* (1978) 20 Cal. 3d 844, 854 [143 Cal. Rptr. 695, 574 P.2d 766]; see also Tribe, American Constitutional Law (2d ed. 1988) § 18-2, p. 1691 [noting rationale of federal constitutional requirement of state action protects "the freedom to make certain choices, such as choices of the persons with whom [one associates]" which is "basic under any conception of liberty"].)[61]

The *Hill* argument focuses on explaining why a lower standard might be appropriate when reviewing the action of private groups. Yet it also contains a strong inference that the converse is true as well. When the *government* invades a privacy interest, the standard of review should arguably be stricter than when a private party engages in similar behavior. For example, the current study involves government access to private communications. In that context, the government is acting with the full coercive power of the state, there are no choices that a citizen could make to avoid the government's actions, and the government deserves no special consideration that might be due to protect the association rights of private voluntary groups. Thus, none of the rationales offered in the passage quoted above would seem to justify applying a lower standard when reviewing government access to private communication data.

Relationship to Search and Seizure Jurisprudence

In discussing federal constitutional privacy, the staff referred to a few sources suggesting that a privacy right based on generalized notions of substantive due

61. *Id*. at 38-39.

process is inapplicable to a situation governed by the express protections of the Fourth Amendment.[62]

A similar principle limits the effect of California's express privacy right, with regard to cases that involve a search and seizure. In *People v. Crowson*,[63] two men were arrested and placed into the back of a locked police car. While left alone in the vehicle, the two conversed. Their conversation was secretly recorded and the recording was introduced as evidence at trial. Mr. Crowson challenged the recording on the grounds that police had violated his right to privacy under Article I, Section 1, of the California Constitution.

The Court found that there had been no violation of the constitutional privacy right, because the defendant had no "reasonable expectation of privacy" under the circumstances. The Court consciously applied the same test that is used to determine whether there has been a "search" under the Fourth Amendment of the United States Constitution, or Article I, Section 13, of the California Constitution. It explained:

> In the search and seizure context, the article I, section 1 "privacy" clause has never been held to establish a broader protection than that provided by the Fourth Amendment of the United States Constitution or article I, section 13 of the California Constitution. "[The] search and seizure and privacy protections [are] coextensive when applied to police surveillance in the criminal context." (*People* v. *Owens* (1980) 112 Cal.App.3d 441, 448-449 [169 Cal.Rptr. 359].) "[Article I, section 1, article I, section 13 and the Fourth Amendment] apply only where parties to the [conversation] have a 'reasonable expectation of privacy' with respect to what is said…." (*People* v. *Estrada* (1979) 93 Cal.App.3d 76, 98 [155 Cal.Rptr. 731].)[64]

The defendant argued that *White v. Davis* had established stronger protections for the constitutional privacy right. The Court responded:

> Crowson argues that in *White* v. *Davis* … we held that article I, section 1 establishes an expanded right of privacy which may be abridged only where there is a compelling state interest. *White*, however, was not a traditional search and seizure case, but rather involved alleged police surveillance of noncriminal activity on a university campus. In that context, we held that the alleged police

62. See *supra* notes 24-26 and discussion.
63. 33 Cal. 3d 623 (1983).
64. *Id*. at 629.

> conduct implicated First Amendment as well as right to privacy principles.[65]

This suggests that any case involving a "traditional search and seizure" would be analyzed under the Fourth Amendment and Article I, Section 13 of the California Constitution, rather than under the Article 1, Section 1 privacy right.

That principle was reaffirmed in *In re York*,[66] in which petitioners objected to a court requiring drug testing as a condition of releasing a criminal suspect on his or her own recognizance pending trial. The practice was claimed to violate the suspect's Article I, Section 1 right to privacy as well as constitutional protections against unreasonable search and seizure under the Fourth Amendment and Article I, Section 13. The Court set aside the privacy claim, and analyzed the case under search and seizure doctrine, in express reliance on *Crowson*:

> We also observe that, "[i]n the search and seizure context, the article I, section 1 'privacy' clause [of the California Constitution] has never been held to establish a broader protection than that provided by the Fourth Amendment of the United States Constitution or article I, section 13 of the California Constitution." (*People v. Crowson* (1983) 33 Cal.3d 623, 629 [190 Cal.Rptr. 165, 660 P.2d 389].)[67]

The rule discussed above makes some sense. The constitutional search and seizure protections are designed to balance a person's reasonable expectations of privacy against the government's need to investigate crime. The Constitution strikes that balance by requiring that a neutral magistrate find probable cause to justify the invasion of privacy, and by limiting the scope of the invasion to the particulars of the probable cause. It isn't clear that anything useful would be gained by adding another layer of privacy protection to the protections that were carefully tailored to the search and seizure context. Moreover, adding some unspecified higher level of privacy protection in search and seizure cases would overturn the settled doctrine in that area. Law enforcement could not simply rely on a search warrant. In every case, a defendant could argue that some higher level of protection was required.

65. *Id*. at n.5.
66. 9 Cal. 4th 1133 (1995).
67. *Id*. at 1149.

Summary

The California Constitution contains an express privacy right. That right applies to both public and private action. The privacy right protects both informational privacy and autonomy privacy.

In order to "weed out" trivial, insignificant, and de minimis privacy violations, courts first determine whether a privacy right claim meets the following "threshold elements:" (1) an identifiable privacy interest, (2) a reasonable expectation of privacy, and (3) a serious violation of the privacy interest.

If an actionable claim is presented, the invasion of privacy may be justified by demonstrating a legitimate and important competing interest. This requires a balancing analysis, which takes into account the kind of privacy interest involved, the nature and seriousness of the invasion, and the nature of the countervailing interests. The level of protection may be lower when private party action is at issue. This implies that the converse may also be true, that stricter standards apply when reviewing government action.

In cases involving a traditional search and seizure (e.g., "police surveillance in the criminal context), the protection afforded by the privacy right is no greater than that afforded by the Fourth Amendment or Article I, Section 13 of the California Constitution.

GENERAL DISCUSSION

The current study is concerned with government access to private information (e.g., the interception or retrieval of phone calls, email, text messages, metadata, social media content, and files stored in cloud servers). For the most part, that sort of access would involve a "traditional search and seizure" situation. In such cases, the privacy right would not confer any greater protection than the Fourth Amendment or Article I, Section 13 of the California Constitution.

This does not mean that the privacy right is wholly irrelevant to the current study. One can imagine scenarios where government access to private communication information arguably falls outside the ambit of traditional search and seizure concerns. For example, suppose that a city government has been embarrassed by leaks about alleged illegalities in the conduct of a public construction project. The city would like to know the source of the leaks. As part

of its investigation, it provides internet service providers with the email domains of the local newspaper and the private contractors doing work on the project. It then asks for metadata about any email messages exchanged between those two groups. Who sent and received the messages? When were they sent? Did they include attachments? If so, what were the filenames? One could argue that this is not a "traditional search and seizure" case, because it does not involve "police surveillance of criminal activity." It seems more akin to the sort of political "snooping" conducted in *White v. Davis*.

If a court agreed that the scenario above was not a search and seizure case, then the California Constitution's privacy right would not be eclipsed by the Fourth Amendment and Article I, Section 13. A court would need to analyze the case under the framework set out in *Hill v. NCAA* (as clarified in *Loder v. Glendale*).

The scenario set out above would likely present grounds for a claim of invasion of informational privacy. It seems both subjectively and objectively reasonable to expect that email communication with journalists will remain private with respect to third parties, especially in the whistle-blower context. It isn't clear whether there would also be grounds for an autonomy privacy claim. While the hypothetical involves fundamental free expression concerns, it doesn't touch on the sort of intimate issues that have been at issue in the autonomy privacy cases (reproduction, marriage, child-rearing, sex). In any event, protection of the informational privacy right would also protect against any invasion of autonomy that might result from the invasion of informational privacy.

What about a right of privacy under the United States Constitution? The discussion above would seem to apply equally to the U.S. Constitution, *with one very important caveat*: It has not yet been established whether the U.S. Constitution protects informational privacy at all. This casts doubt on whether the U.S. Constitution adds any meaningful protection of privacy beyond whatever protection is provided by the California Constitution.

One final thought: It is important to remember that the California Constitution's privacy right also applies to private actors. This means that communication service providers have a constitutional obligation to protect the privacy of their customers. The precise contours of that obligation cannot be known with certainty, because it depends on the existence of a reasonable expectation of privacy. Such an expectation itself depends on social norms and

individual subjective views, which might be affected by voluntary consent to terms of service that include a right to invade customer privacy.

In one sense, this is just another iteration of the difficult circularity that lies at the heart of the concept of "reasonable expectation of privacy." We extend protection to that which we expect to be protected; if something has not been protected, then it is not deserving of protection.

However, the fact that the People have enshrined in our Constitution the obligation for private companies to protect customer privacy may provide something of a bulwark against the erosion of societal privacy expectations. The right was described as a fundamental part of our heritage, a protection against "government snooping" and the "computerization of records," which can "create 'cradle-to-grave' profiles of every American." Those constitutional norms seem relevant in weighing the level of privacy that our society expects.

That added context may be especially useful when considering forms of communication where reasonable expectations of privacy are especially hard to assess. For example, Memorandum 2014-13 expressed uncertainty as to expectations of privacy with regard to "social media," where conversations can take place within a large but closed group. If a person participates in a group discussion, with dozens of other participants, is it reasonable to expect privacy? The answer may look different when viewed through the lens of the California Constitution's privacy right.

Participants in a group discussion may have little or no expectation of privacy *with respect to one another*, but that does not mean that "government snooping" is expected. Government access to the content of a closed online discussion group seems similar to the undercover surveillance of college classrooms that was at issue in *White v. Davis*. The students in those classes could not reasonably expect that their discussions would remain fully secret. Any participant was free to repeat anything that was said to any outsider (including the police). But that does not mean that the participants expected police agents to be directly and secretly surveilling their discussions. The Court had no problem finding such surveillance to be a prima facie violation of the privacy right.

To summarize, even if the privacy right does not impose a higher level of protection than is afforded under constitutional search and seizure doctrines, it might have an indirect effect, by adding weight to the societal expectation of privacy that is central in determining whether government access to information

is a "search" under the Fourth Amendment and Article I, Section 13. The Commission should bear that possibility in mind.

Respectfully submitted,

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