Study G-300 October 1, 2020

Memorandum 2020-55

State and Local Agency Access to Customer Information from Communication Service Providers: Notice of Administrative Subpoena

Memorandum 2020-20 reintroduced the Commission's study of government access to customer information from electronic communication service providers.[1] The memorandum provided an overview of the history of the study and a summary of the potential reforms that have not yet been addressed by the Commission. The staff is preparing a series of memoranda discussing those remaining issues in greater detail and presenting questions for Commission decision.

This memorandum discusses whether the law needs to be revised to expressly require that a customer receive notice when an administrative subpoena is served on a communication service provider to obtain the customer's electronic communications. As used in this memorandum, "administrative subpoena" means an investigative subpoena used by state or local government to access records when enforcing administrative law.[2] It is not the type of subpoena used by litigants to conduct pretrial discovery.

BACKGROUND

One of the key considerations in this study is whether a particular type of search of electronic communications comports with the requirements of the Fourth Amendment of the United States Constitution, which reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon

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 Gov't Code §§ 11180-11191.

> probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[3]

In the Commission's 2015 report of its findings on the constitutional and statutory requirements for government access to electronic communications,[4] the Commission noted that there are circumstances in which an administrative subpoena can be used, rather than a warrant, to obtain electronic communications.

The Commission wrote, in relevant part:[5]

> A warrant is not the only constitutionally sufficient authority to conduct a search that is governed by the Fourth Amendment and Article I, Section 13 of the California Constitution. In some circumstances, a search pursuant to an investigative subpoena *duces tecum*, … issued by a … government agency, can also be constitutionally reasonable.
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> …
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> The use of such a subpoena to compel the production of evidence (rather than a warrant) does not violate the Fourth Amendment, so long as the subpoena is authorized, sufficiently definite, and reasonable:
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> > Insofar as the prohibition against unreasonable searches and seizures can be said to apply at all it requires only that the inquiry be one which the agency demanding production is authorized to make, that the demand be not too indefinite, and that the information sought be reasonably relevant.[6]
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> However, there is a limitation on the constitutional use of an investigative subpoena. to compel the production of records: "the subject of the search must be given an opportunity for precompliance review before a neutral decisionmaker."[7] The

3. For a similar provision in the California Constitution, see Cal. Const. Art. I, § 13 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.").

4. *State and Local Agency Access to Electronic Communications: Constitutional and Statutory Requirements*, 44 Cal. L. Revision Comm'n Reports 229 (2015).

5. *Id.* at 261-64. The footnotes in the block quote that follows (notes 6-10 *infra*) are reproduced as they appeared in the Commission's 2015 report, but with different numbering. Material from the Commission's report that discusses grand jury subpoenas is not relevant here and has been replaced with ellipses.

6. Brovelli v. Superior Court, 56 Cal. 2d 524, 529 (1961) (citing United States v. Morton Salt Co., 338 U.S. 632, 651-54 (1950)); see also Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208 (1946) ("The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.").

7. Los Angeles v. Patel, 2015 U.S. LEXIS 4065, at *16.

rationale for that requirement is explained in a decision of the Fourth Circuit Court of Appeal:

> While the Fourth Amendment protects people "against unreasonable searches and seizures," it imposes a probable cause requirement only on the issuance of warrants. Thus, unless subpoenas are warrants, they are limited by the general reasonableness standard of the Fourth Amendment (protecting the people against "unreasonable searches and seizures"), not by the probable cause requirement.
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> A warrant is a judicial authorization to a law enforcement officer to search or seize persons or things. To preserve advantages of speed and surprise, the order is issued without prior notice and is executed, often by force, with an unannounced and unanticipated physical intrusion. Because this intrusion is both an immediate and substantial invasion of privacy, a warrant may be issued only by a judicial officer upon a demonstration of probable cause — the safeguard required by the Fourth Amendment.
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> *A subpoena, on the other hand, commences an adversary process during which the person served with the subpoena may challenge it in court before complying with its demands. As judicial process is afforded before any intrusion occurs, the proposed intrusion is regulated by, and its justification derives from, that process.*
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> In short, the immediacy and intrusiveness of a search and seizure conducted pursuant to a warrant demand the safeguard of demonstrating probable cause to a neutral judicial officer before the warrant issues, whereas the issuance of a subpoena initiates an adversary process that can command the production of documents and things only after judicial process is afforded. And while a challenge to a warrant questions the actual search or seizure under the probable cause standard, a challenge to a subpoena is conducted through the adversarial process, questioning the reasonableness of the subpoena's command.[8]

Advance notice and an opportunity for judicial review before records are searched are a routine feature of the procedure for issuance and execution of an investigative subpoena *duces tecum*,[9] when the subpoena is used to search records that are held by the person whose records are to be searched. But when a subpoena is instead served on a third party service provider, to search a

8. *In re* Subpoena Duces Tecum, 228 F.3d 341, 347-48 (4th. Cir. 2000) (citations omitted) (emphasis added). See also People v. West Coast Shows, Inc., 10 Cal. App. 3d 462, 470, (1970) ("the Government Code provides an opportunity for adjudication of all claimed constitutional and legal rights before one is required to obey the command of a subpoena duces tecum issued for investigative purposes").

9. See… Gov't Code § 11188 (judicial hearing to review and enforce administrative subpoena).

customer's records, that customer might not receive any notice of the search or an opportunity for judicial review of the constitutionality of the search. In such a situation, only the service provider would have an opportunity for judicial review of the subpoena. Often, the service provider would not be an adequate surrogate to protect the interests of the customer. The service provider may have no reason to object to the search, is sometimes shielded from liability for complying with the subpoena, and in some circumstances, may be legally prohibited from notifying the customer.

It is not clear how common it would be for customer records to be produced pursuant to an investigative subpoena, without prior notice to the customer. Even if notice is not required by statute, a service provider will often have practical incentives to provide notice to its customer before complying with an investigative subpoena that demands the production of the customer's records. For example, the production of a customer's records without notice to the customer could expose the service provider to liability for violating the customer's legally-protected privacy rights or for breaching a service agreement that promises to protect customer privacy. Nonetheless, it is possible that a service provider could comply with an investigative subpoena without notifying the affected customer. Further, in unusual circumstances, a court may require the production of records without prior notice to the customer.[10]

The Commission has not found any case of the United States or California Supreme Courts expressly holding that the use of an investigative subpoena *duces tecum*, without notice to the person whose records are to be searched, would violate the Fourth Amendment or Article I, Section 13 of the California Constitution. However, that conclusion could perhaps be drawn from the cases that explain why the use of a subpoena is constitutionally permissible.

DISCUSSION

As discussed above, courts have explained that the constitutional propriety of using an administrative subpoena to obtain private information turns on the fact that the administrative subpoena does not effect an immediate seizure. Instead, it initiates an adversarial process of pre-enforcement judicial review. In that process, the person whose privacy would be breached has an opportunity to oppose the administrative subpoena on the grounds that it is unconstitutionally unreasonable or indefinite.

10. See, e.g., 18 U.S.C. § 2705(b), Gov't Code § 7474(b).

The effectiveness of that remedy depends on the target of the subpoena having notice of the subpoena before any records are turned over. Meeting that requirement is automatic when serving a subpoena on the person whose records are being sought. But it is not automatic when a subpoena is served on a communication service provider seeking the records of a customer. In that situation, the customer whose privacy will be breached will have no notice of the action, unless an additional step is taken to provide such notice.

Such notice to an affected customer does not appear to be required under the general law on administrative subpoenas.[11]

When the Commission first considered this issue in 2015, we received informal comment from a senior state attorney with experience using administrative subpoenas to obtain records. Because he did not have authority to speak for his agency, he provided information for background purposes only. The staff paraphrased his input as follows:

> The state attorney concedes that there is nothing in the general Government Code provisions on state agency investigative subpoenas that requires notice to a customer when a subpoena is used to obtain the customer's records from a service provider. Nonetheless, in the state attorney's experience, customers typically do receive such notice.
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> As the state attorney explains: Service providers are generally not prohibited from giving notice to affected customers before complying with a subpoena, and could face liability if they were to provide customer records without giving such notice. That liability could arise under the right of privacy guaranteed in the California Constitution, state or federal statutes protecting the privacy of certain kinds of confidential information, or a contractual service agreement. If the risk of such liability can be avoided by providing notice to a customer, and if there is no prohibition on providing such notice, prudent service providers will provide the notice.[12]

While that may be correct, reliance on the self-interest of service providers to notify their customers of an administrative subpoena seeking their reccords may not always result in such notice being given. A more certain approach would be to require that the government agency that is serving the subpoena also notify the customer.

11. See Gov't Code §§ 11180-11191.
12. Memorandum 2015-31, p. 5.

That is the approach taken in the California Right to Financial Privacy Act.[13] Government Code Section 7474 permits the use of an administrative subpoena to obtain customer records from a financial institution, but generally requires that the agency seeking those records give contemporaneous notice to the affected customer. The customer can then move to quash the subpoena.

Section 7474 provides precedent for the idea of imposing a similar requirement when an administrative subpoena is served on a communication service provider in order to obtain customer records. If it is good policy to require customer notice before obtaining financial records, why not have the same requirement for electronic communications?

Although this memorandum is not focused on the use of a subpoena for pre-trial discovery, it is also worth noting the treatment of such a subpoena under California Civil Procedure Section 1985.3. Under that section, when a subpoena is served on specified entities (which include medical providers, financial institutions, telephone companies, and schools) to obtain a consumer's personal records, a copy of the subpoena must be served on the consumer. This is another example of how existing law protects privacy by ensuring that a person whose records are sought from a third party has actual notice and an opportunity for judicial review prior to the records being produced.[14]

The Commission needs to decide whether to pursue this issue further or set it aside. In making that decision, it would be helpful to have public comment on whether the issue discussed in this memorandum is a significant problem in actual practice. Are communication service providers routinely notifying their customers when they are served with an administrative subpoena seeking customer records? Are agencies giving such notice, despite the apparent lack of a general statutory rule requiring it?

Respectfully submitted,

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13. Gov't Code §§ 7460-7493.

14. See also Valley Bank of Nevada v. Superior Court, 15 Cal. 3d 652, 658 (1975) ("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.")