Legis. Prog., Study G-300 October 5, 2023

Memorandum 2023-42

2023 Legislative Program (Status Report)

This memorandum provides an update on Assembly Bill 522 (Kalra), which would implement the Commission's recommendation on *State and Local Agency Access to Electronic Communications: Notice of Administrative Subpoena* (Mar. 2022).[1]

The status of the other parts of the Commission's 2023 legislative program will be discussed in one or more supplements to this memorandum.

Brief Summary of Commission's Recommendation

As part of its broader study of government access to electronic communications, the Commission considered the constitutional propriety of a state agency using an administrative subpoena[2] to obtain a person's electronic communication records from a communication service provider.

As discussed in the Commission's recommendation, the use of an administrative subpoena does not violate the Fourth Amendment of the U.S. Constitution or Section 13 of Article I of the California Constitution, because an administrative subpoena does not compel production of information until after the person whose records are sought (hereafter, the "target" of the subpoena) has had an opportunity for judicial review. This is in contrast to a search warrant, which operates immediately and intrusively. The immediate effect of a search warrant necessitates the constitutional requirement that a magistrate find probable cause before the warrant will issue.

For the target of an administrative subpoena to have a meaningful opportunity for pre-enforcement judicial review, the target must have pre-enforcement notice.

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. The term "administrative subpoena" is used in this memorandum to refer to an investigative subpoena, rather than a subpoena issued during disovery in a trial or administrative adjudication.

In most cases, the target of a subpoena will also be the person served with the subpoena. In that straightforward scenario, the target will necessarily have pre-enforcement notice.

But that will not necessarily be true when the target's records are held by a third party (e.g., an electronic communication service provider). If the subpoena is served only on the third party, and the third party does not voluntarily notify the target, the target will not have received pre-enforcement notice. This will effectively foreclose the opportunity for a pre-enforcement judicial challenge that is the rationale for the constitutional validity of an administrative subpoena.

For those reasons, the Commission recommended that notice to the target should be required when an administrative subpoena is used to obtain a target's records from an electronic communication service provider.

A similar requirement already exists when an administrative subpoena is used to obtain a target's financial records from a financial institution, presumably for the same reason.[3]

Concerns About the Bill

In June, the California Department of Justice (hereafter "DOJ") contacted Assembly Member Kalra's office to raise some concerns about the bill. Those concerns were discussed over the next months. Assembly Member Kalra and DOJ did not come to agreement on how to resolve all of the issues that were raised.

There are two main issues that remain unresolved:

(1) DOJ proposes that the effect of the bill be limited to targets who are natural persons. As presently drafted, it would apply to all persons, including legal entities such as corporations.

(2) DOJ proposes that the *communication service provider* be required to notify the target of an administrative subpoena, rather than the *agency* that issued the administrative subpoena.

The first proposal, that all businesses be exempted from the proposed law, is probably grounded in the principle that highly-regulated businesses have a reduced expectation of privacy in their records. Of course, not all businesses are highly-regulated. For that reason, the exemption of all business entities seems overbroad.

However, it might be possible to create a more narrowly-tailored exception. For example, the law could exempt businesses that are subject to the inspection of

3. Gov't Code § 7474.

their records by the agency that served the subpoena.

The second proposal, that the service provider give notice to the target, rather than the agency, is grounded in *practical* concerns about the ability of an agency to give the notice. DOJ points out that modern electronic communication services involve a high level of anonymity. Many customers use pseudonyms, without providing their actual names or addresses, even to a service provider. For example, some email services allow the establishment of an account based solely on providing an already-existing email address to the provider. No confirmed name or mailing address need be provided.

In that environment, it might be much easier for a service provider to contact their customer (through some form of direct messaging), than for an agency to do so. For example, a customer may have blocked direct messaging from anyone not already known to the customer. The service provider could presumably cut through that obstacle; an agency may be unable to do so.

The staff sees merit in that concern and thinks it is worth considering possible alternative approaches. For example, perhaps the law could require a service provider to either (1) provide the notice to the target, or (2) provide the target's mailing address to the agency. In the latter case, the agency could rely on the address and would give the notice.

The possible changes to the Commission's recommendation that are discussed above are offered only as illustrations. The staff makes no prediction of whether those specific changes would be workable or sufficient.

Status of the Bill

Because the staff saw merit in DOJ's concerns, and because those concerns were not resolved in time for the bill to progress to enactment this year, the staff suggested to Assembly Member Kalra's office that the bill might be made into a two-year bill. That would provide time for the Commission to take a relatively quick second look at the unresolved issues. This would require reactivation of the study and, if successful, the issuance of a supplemental recommendation setting out any recommended improvements.

Does the Commission wish to proceed as discussed above, by expediting a narrow second look at the administrative subpoena recommendation? If not, Assembly Member Kalra would presumably continue discussions with DOJ to see if they can find a mutually acceptable way to address DOJ's concerns.

Respectfully submitted,

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