Study G-300 March 2, 2022

Memorandum 2022-20

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

After its September 2021 meeting, the Commission[1] released a tentative recommendation that would require that notice be given to a customer when the government uses an administrative subpoena to obtain the customer's records from a communication service provider.[2]

The tentative recommendation was given a fairly long public comment period (approximately five months) to allow state agencies time to review the proposal and offer their input on it. The tentative recommendation was sent to the Commission's existing mailing list for this topic. That list currently has 139 contacts, which include persons affiliated with civil liberties groups, the legislature, law enforcement, the communications industry (and the California Public Utilities Commission), certain courts, the Department of Justice, academics, and numerous individuals. The staff also made a more targeted distribution of the proposal, reaching out to counsel at several state regulatory agencies.[3]

The Commission did not receive any comment on the tentative recommendation.

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. Tentative Recommendation on *State and Local Agency Access to Electronic Communications: Notice of Administrative Subpoena* (Sept. 2021).

3. The outreach included email to counsel at the Air Resources Board, the Department of Alcoholic Beverage Control, the Board of Equalization, the Department of Conservation, the Department of Consumer Affairs, the California Environmental Protection Agency, the Department of Fair Employment and Housing, the Department of Healthcare Services, the Department of Industrial Relations, the Department of Insurance, the Department of Pesticide Regulation, the Department of Social Services, and the Department of Toxic Substances Control.

That lack of response may be because the proposal is well-grounded in constitutional requirements, parallels other similar requirements in existing law (e.g., the California Right to Financial Privacy Act[4]), and would not impose much additional burden on the process for issuing an administrative subpoena.

Furthermore, the Commission did receive some relevant input *before* the preparation of its tentative recommendation:

- In 2015, a senior attorney at the Department of Justice informally corresponded with the staff about the issues surrounding use of an administrative subpoena. His input was discussed in a memorandum, without attribution. While he agreed that existing statutory law does not require notice to a customer when an administrative subpoena is used to obtain customer information from a communication service provider, he stated that such notice is typically given.[5] This supports the idea that the proposed law would provide useful clarity and uniformity, without imposing much in the way of new burdens.
- In 2020, the American Civil Liberties Union of Northern California wrote to express its support for the Commission's analysis and conclusions that were later expressed in the tentative recommendation. They urged the Commission to proceed with a proposal along those lines.[6]

The Commission should decide whether to approve the attached draft as a final recommendation, for submission to the Governor and Legislature. An alternative would be to defer that decision and make a more forceful attempt to elicit comment from the public (including administrative agencies). The prior effort relied on email distribution. This could be supplemented with an attempt to reach individuals by telephone. There is no particular rush to complete this recommendation. So long as it is completed this calendar year, it could be introduced in 2023.

Respectfully submitted,

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Executive Director

4. Gov't Code §§ 7460-7493.
5. See Memorandum 2015-31, pp. 4-5.
6. See Second Supplement to Memorandum 2020-54, Exhibit p. 2.

#G-300

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

State and Local Agency Access to Electronic Communications: Notice of Administrative Subpoena

March 2022

California Law Revision Commission
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SUMMARY OF RECOMMENDATION

The California Law Revision Commission has been directed to prepare proposed legislation on government access to customer records of communication service providers, in order to protect customers' constitutional rights.

Most of the areas for possible reform that the Commission identified were addressed by the California Electronic Communication Privacy Act ("Cal-ECPA"), which was enacted before the Commission could complete its work on this study.

This recommendation addresses one issue that was not resolved by Cal-ECPA, the need for notice to a customer when an administrative subpoena is served on a communication service provider to obtain the customer's information. The proposed law would require such notice.

This recommendation was prepared pursuant to Resolution Chapter 115 of the Statutes of 2013.

STATE AND LOCAL AGENCY ACCESS TO ELECTRONIC COMMUNICATIONS

INTRODUCTION

In 2013, the California Law Revision Commission was directed to study the constitutional and statutory law on state and local agency access to customer records of communication service providers.[1] The Commission was also directed to prepare statutory reforms to protect customers' constitutional rights.

As a first step in its study, the Commission conducted extensive research into the statutory and constitutional requirements that apply when a government entity seeks access to customer information from an electronic communication service provider (the most significant right being the protection against unreasonable searches and seizures that is provided by the Fourth Amendment of the United States Constitution and Section 13 of Article I of the California Constitution).

Before the Commission could begin work on the development of concrete statutory reforms, legislation was introduced to create the California Electronic Communications Privacy Act ("Cal-ECPA").[2] That legislation addressed nearly all of the legal deficiencies that the Commission had identified in its study.

In order to avoid duplication of effort, the Commission decided to postpone further work on developing proposed statutory reforms, until after the Legislature and Governor had taken final action on Cal-ECPA. Instead, the Commission prepared a report setting out its findings and conclusions regarding the constitutional and statutory law that applies to government access to electronic communications.[3]

Cal-ECPA was enacted, obviating most of the need for further Commission work in this area.[4] The Commission decided to set this study aside for several years, to provide time for the new law to operate before making more changes.

In 2020, the Commission returned to this study, to make reform recommendations regarding a few minor matters that had not been addressed by Cal-ECPA. This recommendation addresses one of those issues, the constitutionality of a search of a customer's electronic communications by use of an administrative subpoena that is served on the customer's communication service provider.

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1. 2013 Cal. Stat. res. ch. 115.

2. SB 178 (Leno) (2015).

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

4. See Penal Code §§ 1546-1546.4; 2015 Cal. Stat. ch. 651.

ADMINISTRATIVE SUBPOENA

A warrant supported by probable cause is not the only constitutionally sufficient authority to conduct a search that is governed by the Fourth Amendment of the United States Constitution and Section 13 of Article I of the California Constitution. In some circumstances, a search pursuant to a subpoena *duces tecum*,[5] issued by a state administrative agency, can also be constitutionally reasonable.

The use of an administrative 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:

> 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]

However, courts have held that a search pursuant to an administrative subpoena is constitutionally permissible only if the person whose records would be searched has notice and an opportunity to move to quash or modify the subpoena before any records are actually produced. As one court explained:

> 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

5. This recommendation does not consider the use of a subpoena as an instrument of discovery in a pending adjudicative proceeding.

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

> 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.[7]

That reasoning is sound when a subpoena is served on the person whose records will be searched. However, that will not necessarily be the case when a subpoena is served on a communication service provider for access to a customer's records.

In the latter situation, the customer may not be notified of the subpoena and might have no real opportunity to object before records are produced. That would undermine or negate the above argument for the constitutionality of a search by administrative subpoena.

In particular, if the customer is not separately notified of the subpoena, then only the communication service provider will have an opportunity to object to the subpoena through an adversarial judicial process. That will often be insufficient to protect the interests of the customer, because the interests of the service provider and customer are not the same. The service provider will mostly be concerned with unreasonable burdens created by the subpoena; the customer is concerned with privacy.

In order to ensure that the use of an administrative subpoena to obtain customer records from a communication service provider is constitutional, the customer must be given notice and an opportunity to challenge the subpoena in court before the customer's records are produced.

That is the approach taken in the California Right to Financial Privacy Act, a statute that regulates government access to customer records held by financial institutions.[8] If an administrative subpoena is used to obtain such records, notice of the subpoena must be provided to the customer whose records are sought and the customer is given 10 days to move to quash the subpoena before any records are produced.[9]

A similar rule exists for the use of a subpoena *duces tecum* to obtain certain personal records of a "consumer" in the discovery process. Before the date

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7. *In re* Subpoena Duces Tecum (4th Cir. 2000) 228 F.3d 341, 347-48 (citations omitted) (emphasis added). See also People v. West Coast Shows, Inc. (1970) 10 Cal.App.3d 462, 470 ("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").

8. Gov't Code §§ 7460-7493.

9. Gov't Code § 7474. There is an exception to the advance customer notice requirement, when the purpose of the search relates to specified financial offenses. See Gov't Code § 7474(b). The proposed law does not include a similar exception, for two reasons:

(1) It is not clear that the grounds for those exceptions are relevant to a search of communication records.

(2) It is not clear why delayed notice in such cases is proper.

specified for production of records, the subpoenaing party must serve notice on the consumer whose records are being sought.[10]

In the contexts to which they apply, those existing requirements ensure that before a customer's records are disclosed by a service provider, the customer receives actual notice of the proposed disclosure.

RECOMMENDATION

The proposed law would require notice to the affected customer when an administrative subpoena *duces tecum* is served on a communication service provider to obtain the customer's records. Specifically, the following steps would be required:

(1) When an administrative subpoena is served on a communication service provider to obtain customer records, the subpoenaing agency would need to serve notice on the affected customer. The notice would include a copy of the subpoena and a specified advisory statement.

(2) The subpoena would require that the service provider make and retain a copy of the requested records, to prevent spoliation, until the subpoena operates or is quashed.

(3) Proof of service of the notice to the customer would be served on the communication service provider.

(4) Unless the customer first moves to quash the subpoena and notifies the service provider of that fact, the requested records must be produced 10 days after the proof of service is served on the communication service provider.[11]

That procedure would ensure that a customer whose records are sought by means of an administrative subpoena will have actual notice of the subpoena before it operates. This would provide a meaningful opportunity for an adversarial judicial process to challenge the subpoena, before the state intrudes on the customer's privacy. The Commission believes that is good policy and that it is likely a constitutional requirement.

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10. Code Civ. Proc. § 1985.3(b).

11. The 10-day waiting period before production of records could not be circumvented by a service provider voluntarily producing the requested records before the time period has run. Although Cal-ECPA generally permits voluntary disclosure by a service provider, there is an important exception. Voluntary disclosure is not permitted where disclosure is prohibited by other law. See Penal Code § 1546.1(f). Federal law provides a blanket prohibition on service provider disclosure of customer records. See 18 U.S.C. § 2702(a). There are narrow exceptions to that prohibition. The only ones that appear to be relevant are exceptions for disclosure of child abuse to the National Center for Missing and Exploited Children and disclosure required to address an imminent threat of death or serious physical injury. 18 U.S.C. § 2702(b)(6) & (8). The proposed law would not affect the voluntary disclosure of information pursuant to those existing exceptions.

PROPOSED LEGISLATION

Gov't Code § 11181.5 (added). Subpoena for customer's electronic communication information

SECTION 1. Section 11181.5 is added to the Government Code to read:

11181.5. (a) For the purposes of this section, the following terms have the following meanings:

(1) "Customer" means a person or entity that receives an electronic communication service from a service provider.

(2) "Electronic communication information" has the meaning provided in subdivision (d) of Section 1546 of the Penal Code.

(3) "Electronic communication service" has the meaning provided in subdivision (e) of Section 1546 of the Penal Code.

(4) "Service provider" has the meaning provided in subdivision (j) of Section 1546 of the Penal Code.

(b) In addition to any other requirements that govern the use of an administrative subpoena, an administrative subpoena can only be used to obtain a customer's electronic communication information from a service provider if all of the following conditions are satisfied:

(1) The department has served notice of the administrative subpoena on the customer pursuant to Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.

(2) A copy of the administrative subpoena is attached to the notice.

(3) The administrative subpoena includes the name of the department that issued it and the statutory purpose for which the information is to be obtained.

(4) The notice includes a statement in substantially the following form:

"The attached subpoena was served on a communication service provider to obtain your communication information. The service provider has made a copy of the information specified in the subpoena. Unless you (1) move to quash or modify the subpoena within 10 days of service of this notice, and (2) notify the service provider that you have done so, the service provider will disclose the information pursuant to the subpoena."

(5) The department has served a proof of service on the service provider, attesting to compliance with paragraphs (1) through (4), inclusive.

(c) Unless the customer has notified the service provider that a motion to quash or modify the subpoena has been filed, the service provider shall produce the information specified in the subpoena no sooner than 10 days after the department served the proof of service required by paragraph (5) of subdivision (b).

(d) If a customer files a motion to quash or modify an administrative subpoena issued pursuant to subdivision (b), the proceeding shall be afforded priority on the

court calendar and the matter shall be heard within 10 days from the filing of the motion to quash or modify.

(e) Nothing in this section shall require a service provider to inquire whether, or determine that, the department has complied with the requirements of this section, provided that the documents served on the service provider show compliance on their face.

(f) Nothing in this section shall preclude a service provider from notifying a customer of the receipt of an administrative subpoena pursuant to subdivision (b).

(g) The service provider shall maintain a record of any disclosure of its customers' electronic communication information pursuant to this section. That record shall be retained for a period of five years. The record shall include a copy of the administrative subpoena providing for examination of the electronic communication information. Upon request and the payment of the reasonable cost of reproduction and delivery, a customer shall be provided any part of the record that relates to the customer.

(h) When an administrative subpoena is served on a service provider pursuant to this section, the service provider shall promptly make a copy of any electronic communication information that is within the scope of the subpoena and within the possession of the service provider at the time that the subpoena was served. The copy shall only be preserved until it is disclosed pursuant to the subpoena or the subpoena is quashed or modified.

Comment. Section 11181.5 imposes specified requirements when an administrative subpoena is used to obtain a customer's electronic communication information from a service provider. Similar requirements exist when a government agency uses an administrative subpoena to obtain customer information from a financial institution. See Section 7474. See also Code Civ. Proc. § 1985.3 (notice to consumer when personal information sought by subpoena).

Subdivision (b) is similar to Section 7474(a)(1)-(2).

Subdivision (c) is similar to Section 7470(a)(3). Federal law generally bars a service provider from voluntarily disclosing a customer's electronic communication records. 18 U.S.C. § 2702(a). However, there is an exception for voluntary disclosure of child abuse information or voluntary disclosure required to address an imminent and severe emergency. See 18 U.S.C. § 2702(b)(6) & (8). See also Penal Code Section 1546.1(f) ("A service provider may voluntarily disclose electronic communication information or subscriber information when that disclosure is not otherwise prohibited by state or federal law.").

Subdivision (d) is similar to Section 7474(d).

Subdivision (e) is similar to Section 7470(b).

Subdivision (f) is similar to the first sentence of Section 7474(c).

Subdivision (g) is similar to Section 7470(c).

Subdivision (h) is new. It requires the service provider to preserve requested information to prevent its deletion or modification by the affected customer. See also 18 U.S.C. § 2703(f).