

Second Supplement to Memorandum 2015-10

**State and Local Agency Access to Customer Information
from Communication Service Providers:
Staff Draft Tentative Report**

In the First Supplement to Memorandum 2015-10,¹ the staff discussed *People v. Blair*² and its holding regarding the use of a subpoena *duces tecum* in a criminal case. In that discussion, the staff described the problem in *Blair* as a failure to abide by a requirement of Section 1326 that the subpoenaed documents be delivered to the court. In studying the case further, however, the staff discovered that the language requiring delivery to the court was added to Section 1326 in a later amendment.³ The staff regrets that error.

Nonetheless, the staff's analysis of the underlying issue remains the same. The deficiency identified in *Blair* was the *complete absence* of an opportunity for judicial review of the propriety of a criminal subpoena *duces tecum*. As the Court put it, the issuance of such a subpoena pursuant to Penal Code Section 1326 is "purely a ministerial act and does not constitute legal process in the sense that it entitles the person on whose behalf it is issued to obtain access to the records described therein *until a judicial determination has been made that the person is legally entitled to received them.*"⁴

The Court did not hold that judicial review must occur *before* issuance of the subpoena. Nor did the Court discuss whether post-issuance judicial review would be constitutionally adequate if conducted without notice to the person whose records are sought (when the subpoena is served on a third party service provider).

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. 25 Cal. 3d 640 (1979).

3. 2004 Cal. Stat. ch. 162.

4. *Id.* at 651 (emphasis added).

The current version of Section 1326 does not require pre-issuance judicial review. Nor does it expressly address the situation where a subpoena is served on a third party service provider without notice to the customer whose records are sought.

Consequently, **the discussion of investigative subpoenas in the staff draft tentative report (attached to Memorandum 2015-10) is sound as currently written.** The staff apologizes for any confusion resulting from its inadvertent error in describing *Blair* in the First Supplement to Memorandum 2015-10.

Respectfully submitted,

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