

Memorandum 2021-32

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

At its October 2020 meeting, the Commission¹ decided to continue work on the question of whether the law should require notice to a customer when an administrative subpoena is served on a communication service provider, in order to obtain the customer's records.² Memorandum 2020-55 summarizes the legal background for this issue. That background is not reiterated here.

As explained in that prior memorandum, there is reason to believe that execution of an administrative subpoena on a communication service provider, without notice to the customer who is the target of the search, could violate the protections of the Fourth Amendment to the United States Constitution or Article I, Section 13, of the California Constitution.

Memorandum 2020-55 points to the California Right to Financial Privacy Act (CRFPA)³ as an example of a statute that requires such notice. This memorandum begins a discussion of the possible use of the CRFPA as a model in this study.

POSSIBLE MODEL FOR PROPOSED LAW

With specified exceptions, the CRFPA prohibits government access to a financial institution's customer records.⁴ One of those exceptions permits the

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 (Oct. 2020), p. 4.

³ Gov't Code §§ 7460-7493.

⁴ Gov't Code § 7470.

disclosure of customer records pursuant to an administrative subpoena, so long as the requirements of Government Code Section 7474 are met.⁵

Core Provisions of Section 7474

Subdivision (a) of Section 7474 authorizes the use of an administrative subpoena⁶ to access customer records of a financial institution, so long as a copy of the subpoena is served on the customer and 10 days are provided for the customer to raise any objections:

(a) An officer, employee, or agent of a state or local agency or department thereof, may obtain financial records under paragraph (2) of subdivision (a) of Section 7470 pursuant to an administrative subpoena or summons otherwise authorized by law and served upon the financial institution only if:

(1) The person issuing such administrative summons or subpoena has served a copy of the subpoena or summons on the customer pursuant to Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure, which copy may be served by an employee of the state or local agency or department thereof; and

(2) The subpoena or summons includes the name of the agency or department in whose name the subpoena or summons is issued and the statutory purpose for which the information is to be obtained; and

(3) Ten days after service pass without the customer giving notice to the financial institution that the customer has moved to quash the subpoena.

Section 7474(c) generally provides that a financial institution can also notify its customer when it is served with an administrative subpoena seeking the customer's records.

Finally, Section 7474(d) provides that any motion to quash the subpoena will be given priority on the court's calendar and heard within 10 days.

The staff recommends that those provisions be used as a model in this study.

Related Provisions

Government Code Section 7070 includes two further provisions that may be appropriate for inclusion in the proposed law.

⁵ Gov't Code § 7470(a)(2).

⁶ Section 7474 also governs an "administrative summons." The staff does not know what that term means. Section 7474 is the only California code section that uses the term.

Section 7070(b) provides, in relevant part, that a financial institution has no duty to look beyond the face of an administrative subpoena to determine whether the government has followed the law:

(b) Nothing in this section or in Sections 7473, 7474, 7475, and 7476 shall require a financial institution to inquire or determine that those seeking disclosure have duly complied with the requirements set forth therein, provided only that the customer authorization, administrative subpoena or summons, search warrant, or judicial subpoena or order served on or delivered to a financial institution pursuant to such sections shows compliance on its face.

That makes sense if the affected customer is given an adequate opportunity to move to quash a subpoena before records are disclosed. Any procedural concerns could be raised in that proceeding. There is no obvious reason to put an additional burden of inquiry (and perhaps liability) on the communication service provider, whose duty in response to an administrative subpoena would be largely ministerial.

Subdivision (c) requires that a financial institution maintain records of all government access to customer records under the CRFPA and make those records available to an affected customer on request:

(c) The financial institution shall maintain for a period of five years a record of all examinations or disclosures of the financial records of a customer pursuant to this chapter, including the identity of the person examining the financial records, the state or local agency or department thereof which he represents, and a copy of the customer authorization, subpoena, summons or search warrant providing for such examination or disclosure or a copy of the certification received pursuant to subdivision (b) of Section 7480. Any record maintained pursuant to this subdivision shall be available, within five days of request, during normal business hours for review by the customer at the office or branch where the customer's account was located when examined or disclosed. A copy of such record shall be furnished to the customer upon request and payment of the reasonable cost thereof.

That seems like a sensible requirement. Information about a search may be relevant in subsequent litigation. It should be preserved for that purpose.

Should the proposed law include provisions similar to those discussed above?

Special Concern Related to Communication Records

There is a special concern that exists for electronic communications that does not seem to be an issue for records in a financial institution — the possibility of spoliation of evidence.

Once created, financial records are under the control of the financial institution. A customer is not able to modify or delete those records. That is not the case for electronic communications. In general, a customer of an electronic communication service provider is able to delete or modify records (e.g., email, text messages, files in cloud storage). The provider may have a routine practice of storing backup copies that are not within the customer's control, but that would be a private choice, rather than a legal requirement.⁷ It is therefore possible that a customer who is served a copy of an administrative subpoena seeking electronic records could evade the search by deleting or modifying the records before they are provided to the government.

The federal Stored Communications Act addresses that possibility in two ways. First, it provides that the government can “request” that a communication service provider “preserve records and other evidence in its possession pending the issuance of a court order or other process.”⁸ The provider is obliged to honor the request, for a period of 90 days (subject to extension for another 90-day period on the request of the government).⁹ Second, an administrative subpoena may include a requirement that the service provider create a backup copy of the requested data.¹⁰ Ordinarily, the customer is given notice of the creation of the backup within three days after the backup copy is created.¹¹

The only downside to including a preservation mechanism in the proposed law is the added hassle and cost to the service provider. The federal statute addresses that by requiring the government to reimburse a service provider for its costs.¹²

The staff believes that something along those lines would be appropriate for inclusion in the proposed law being developed in this study. It would allow the

⁷ In fact, there are communication services that market the non-permanence of customer communications (e.g., SnapChat, Telegram).

⁸ 18 U.S.C. § 2703(f)(1).

⁹ *Id.* at (f)(2).

¹⁰ 18 U.S.C. § 2704(a)(1). See also *id.* at (a)(3) (retention of backup), (4) (release of backup), (5) (authority to order backup creation to avoid destruction of evidence).

¹¹ *Id.* at (a)(2).

¹² 18 U.S.C. § 2706.

government to prevent spoliation while awaiting the completion of the process required for access to the customer data. **Should such a provision be included in the proposed law?**

UNNECESSARY OR INAPPROPRIATE PROVISIONS

The CRFPA contains exceptions to the requirement that contemporaneous notice of an administrative subpoena be served on an affected customer. As discussed below, the staff does not believe that those exceptions should be included in the proposed law.

Suspicion of Crime

Government Code Section 7471(a) provides a special exception to the general restriction on financial institution disclosure of customer records to the government:

This section shall not preclude a financial institution, in its discretion, from initiating contact with, and thereafter communicating with and disclosing customer financial records to, appropriate state or local agencies concerning suspected violation of any law.

This allows a financial institution to voluntarily disclose customer records if the institution itself has reason to suspect a violation of law. For example, if an institution notices that a customer's transactions bear hallmarks of some form of financial crime, it could report that fact to the police and provide them with the relevant records. "Without such an exception, a bank aware of facts indicating criminal activity, involving its customers and/or itself, would be forced to stand idly to the side, without any other sensible recourse other than to merely *hint* such activity to the police. Undoubtedly, this would stifle police efficiency and more than likely promote criminal activity."¹³

Government Code Section 7470(d) provides a related exception — law enforcement may reach out to a financial institution and inform it that the financial institution itself may have been the victim of a crime. If the financial institution investigates and discovers confirming evidence, it can then voluntarily disclose customer records to law enforcement pursuant to Section 7471(c).

¹³ See, e.g., *People v. Nece* (1984) 160 Cal.App.3d 285, 291.

The staff does not believe that those issues need to be addressed in the proposed law.

The California Electronic Communications Privacy Act (Cal-ECPA)¹⁴ already covers much the same ground. Despite that statute's general protection of electronic communication from disclosure to the government, it includes an express exception for information voluntarily provided to government by a service provider, with particular attention to the voluntary provision of evidence of a crime:

(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.

(g) If a government entity receives electronic communication information voluntarily provided pursuant to subdivision (f), it shall destroy that information within 90 days unless one or more of the following circumstances apply:

(1) The government entity has or obtains the specific consent of the sender or recipient of the electronic communications about which information was disclosed.

(2) The government entity obtains a court order authorizing the retention of the information. A court shall issue a retention order upon a finding that the conditions justifying the initial voluntary disclosure persist, in which case the court shall authorize the retention of the information only for so long as those conditions persist, or there is probable cause to believe that the information constitutes evidence that a crime has been committed.

(3) The government entity reasonably believes that the information relates to child pornography and the information is retained as part of a multiagency database used in the investigation of child pornography and related crimes.

(4) The service provider or subscriber is, or discloses the information to, a federal, state, or local prison, jail, or juvenile detention facility, and all participants to the electronic communication were informed, prior to the communication, that the service provider may disclose the information to the government entity.¹⁵

The staff also believes that a suspicion of crime exception is beyond the scope of the current study. There is no necessary connection between that issue and the question of whether the law should require customer notice when an administrative subpoena is served on a communication service provider to obtain the customer's records.

¹⁴ Penal Code §§ 1546-1546.4.

¹⁵ Penal Code § 1546.1(f)-(g).

Court-Approved Disclosure Without Notice to Affected Customer

With court approval and in specifically prescribed types of investigations, the CRFPA allows postponement of customer notice of an administrative subpoena. Section 7474(b) provides:

(b)(1) In issuing an administrative subpoena or summons pursuant to subdivision (a), the Attorney General or the Commissioner of Business Oversight pursuant to the enforcement of statutes within his or her jurisdiction, or the district attorney of any county in connection with investigations of violations of antitrust law as authorized by Section 16759 of the Business and Professions Code, may petition a court of competent jurisdiction in the county in which the records are located, and the court, upon a showing of a reasonable inference that a law subject to the jurisdiction of the petitioning agency has been or is about to be violated, may order that service upon the customer pursuant to paragraph (1) of subdivision (a) and the 10-day period provided for in paragraph (3) of subdivision (a) be waived or shortened. For the purpose of this subdivision, an “inference” is a deduction that may reasonably be drawn by the Attorney General, the Commissioner of Business Oversight, or the district attorney from facts relevant to the investigation.

(2) Such petition may be presented to the court in person or by telephoned oral statement which shall be recorded and transcribed. In the case of telephonic petition, the recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court.

(3) Where the court grants such petition, the court shall order the petitioning agency to notify the customer in writing of the examination of records within a period to be determined by the court but not to exceed 60 days of the agency’s receipt of any of the customer’s financial records. The notice shall specify the information otherwise required by paragraph (2) of subdivision (a), and shall also specify the financial records which were examined pursuant to the administrative subpoena or summons. Upon renewed petition, the time of notification may be extended for an additional 30-day period upon good cause to believe that such notification would impede the investigation. Thereafter, by application to a court upon a showing of extreme necessity for continued withholding of notification, such notification requirements may be extended for three additional 30-day periods.

(4) The Attorney General shall not provide financial records obtained pursuant to the procedure authorized in this subdivision to a local law enforcement agency unless (i) that agency has independently obtained authorization to receive such financial records pursuant to the provisions of this chapter, or (ii) he or she obtains such records in an investigation conducted wholly

independently of the local agency and not at its instigation or request.

As indicated, the postponement rule only applies to the Attorney General and the Commissioner of Business Oversight, enforcing laws within their jurisdiction, or to a county district attorney enforcing anti-trust law.

It is not clear why postponement of customer notice is allowed in such investigations. If there is a need for government to keep its investigation secret while it is being conducted, it has the option of using a search warrant, based on probable cause. The “reasonable inference” required as justification for postponement under Section 7474(b) seems to fall short of the probable cause standard imposed by the federal and state constitutions. The staff found no published appellate decisions discussing that issue.

In addition, the staff believes that notice postponement runs counter to the policy logic that underlies this study. This study is based on an understanding that an administrative subpoena is different from a search warrant because it does not operate until after the subject of the subpoena has had a chance to challenge it in court. That is what justifies the use of the administrative subpoena without a prior judicial finding of probable cause.¹⁶

For those reasons, the staff recommends against including a notice postponement rule in the proposed law, at least for the purposes of a tentative recommendation. If interested groups can offer a convincing explanation of the need for such a rule, and its constitutionality, such a provision could be added at that time.

NEXT STEPS

After the Commission has made decisions on the issues discussed in this memorandum, the staff will prepare implementing language. That work will involve an assessment of how the proposed language would fit into existing law and whether there are other gaps that need to be filled.

Respectfully submitted,

Brian Hebert
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¹⁶ See generally Memorandum 2020-55.