Study G-300 January 17, 2014

Memorandum 2014-5

State and Local Agency Access to Customer Information from Communication Service Providers (Introduction of Study)

In 2013, the Legislature enacted Senate Concurrent Resolution 54 (Padilla), which assigned the Commission[1] a new study:

> WHEREAS, Widespread use of 21st Century mobile and Internet-based communications technologies and services enable service providers to monitor, collect, and retain large quantities of information regarding customers, including when and with whom a customer communicates or transacts business, location data, and the content of communications; and
>
> WHEREAS, Government requests to communications service providers for customer information have increased dramatically in recent years, especially by law enforcement agencies; and
>
> WHEREAS, California statutes governing access to customer information lack clarity and uniform definitions as to the legal standard for government agencies to obtain customer information from communications service providers, and many were enacted prior to the advent of wireless mobile services and the Internet; and
>
> WHEREAS, Revising and updating these statutes is necessary to reflect modern technologies and clarify the rights and responsibilities of customers, communications service providers, and government agencies seeking access to customer information; now, therefore, be it
>
> Resolved by the Senate of the State of California, the Assembly thereof concurring, That the California Law Revision Commission shall report to the Legislature recommendations to revise statutes governing access by state and local government agencies to customer information from communications service providers in order to do all of the following:
>
> (a) Update statutes to reflect 21st Century mobile and Internet-based technologies.

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.

(b) Protect customers' constitutional rights, including, but not limited to, the rights of privacy and free speech, and the freedom from unlawful searches and seizures.

(c) Enable state and local government agencies to protect public safety.

(d) Clarify the process communications service providers are required to follow in response to requests from state and local agencies for customer information or in order to take action that would affect a customer's service, with a specific description of whether a subpoena, warrant, court order, or other process or documentation is required; and be it further

Resolved, That the Secretary of the Senate transmit copies of this resolution to the author for appropriate distribution.

This memorandum introduces the new study. It discusses the scope of the study and proposes a general plan for organizing the study.

SCOPE OF STUDY

The first step in any new study is to understand and define the scope and purpose of the study.

Aside from the practical value of setting clear boundaries and goals before launching a large and complex undertaking, the issue also has legal significance. By law, the Commission can only study matters that have been expressly referred to it by concurrent resolution or statute.[2] The authority to conduct the current study is provided by SCR 54. In order to achieve the results intended by the Legislature and avoid any overreach, we must closely examine the parameters of our authority, as set out in the resolution.

In general, SCR 54 requires the Commission to make

> recommendations to revise statutes governing access by state and local government agencies to customer information from communications service providers….

The general goal is to modernize the law and clarify the processes involved, while protecting customers' constitutional rights and the ability of state and local government to protect public safety.

In considering the precise scope of the new study, it is helpful to separately consider the following key elements of the resolution:

2. Gov't Code § 8293.

- State and local government agency.
- Access.
- Customer records.
- Communication service provider.
- Modernization.
- Clarification.
- Constitutional rights.
- Public safety.

Those elements are discussed briefly below.

State and Local Government Agency

The Commission is authorized to make recommendations relating to "state and local government agency" access to specified information.

Significantly, the Commission has not been authorized to make recommendations relating to *federal* agency access to the specified records. However, there might be some aspects of state and local agency practice that will incidentally affect federal agencies. For example, the Commission's study is likely to examine the use to which a state or local agency can put customer records that it legally obtains. To thoroughly address this issue, the Commission will probably need to consider whether such information can be shared with federal agencies.[3] That sort of incidental effect on federal law enforcement agencies would seem to be properly within the scope of the study.

Because the Commission's authority is expressly limited to *governmental* access to communication records, the Commission does not appear to be authorized to study *private* access to customer records. For example, a communication service provider might wish to sell aggregated customer data to a private company, for market analysis purposes. Such transactions do not involve state or local government agency access to customer records and are therefore beyond the scope of our authority under SCR 54. However, as discussed above, the regulation of state and local government agency access to specified records might incidentally affect private third parties. The Commission probably has authority to examine such incidental effects.

3. See, e.g., Prob. Code § 629.74 (authorizing the sharing of certain information with federal agents under specified circumstances).

Access

SCR 54 refers to state and local government agency *access* to specified records. Such access could arise in two general scenarios: (1) Before trial, as part of an investigative search. (2) During trial, through discovery processes.

Taken as a whole, the resolution seems to be concerned with investigative searches rather than discovery processes. The legislative analyses of SCR 54 appear to have the same emphasis, discussing issues relating to investigative searches, while making no mention of discovery.[4] Moreover, while SCR 54 was pending in the Legislature, the staff spoke informally with legislative staff to ask whether the resolution was intended to address discovery processes. We were told that it was not intended to have that effect. While this kind of informal staff communication is not legally dispositive as to legislative intent, it is still useful in determining the intentions of those most directly involved in framing the resolution.

For the reasons discussed above, the staff recommends that the study be limited to investigative access. It should not encompass established discovery processes.

Customer Records

The Commission has been authorized to study state and local agency access to the "customer records" of communication service providers. What types of records are within the scope of the study? The first clause of SCR 54 gives some indication:

> information regarding customers, including when and with whom a customer communicates or transacts business, location data, and the content of communications.

In other words, both communicative content and "meta-data" (i.e., information *about* communications, such as the numbers dialed on a phone) are intended to be included. "Customer records" probably also include business records that are not related to the details of any particular communication (e.g., a customer's billing history).

Because SCR 54 is focused on information obtained from service providers about their customers, the staff does not believe that the following types of searches are within the scope of the study:

4. Senate Committee on Judiciary Analysis of SCR 54 (July 2, 2013); Assembly Committee on Judiciary Analysis of SCR 54 (Aug. 27, 2013).

- The seizure of electronic information directly from an individual, without the involvement of a communications service provider. For example, a police search of a person's cell phone during a traffic stop.
- The direct interception of electronic communications, without the involvement of a communications service provider. For example, police monitoring of radio transmissions.
- The use of a surveillance device, without the involvement of a communication service provider. For example, the placement of a tracking device, by police, on a suspect's car.
- Access to non-customer records. For example, police access to a company's video recordings of passersby on a public street.

The staff is not suggesting that these matters are unimportant or undeserving of legislative attention. They simply do not appear to be within the scope of the authority conferred by SCR 54.

Communication Service Provider

What is a "communication service provider?" The staff could find no useful statutory definition.

It seems clear that the term encompasses entities that provide their customers with a medium for communication (e.g., landline and cell phone service, Internet service, video conferencing, social networking, and discussion forums).

But what about services that involve communication between the customer and the service provider only, without any intention that the information be communicated to third parties? For example:

- A customer installs a GPS navigational device in a car. The device uses satellite communications to provide locational data to the customer. That information is not shared with any other person.
- A customer stores information on a cloud-based storage server. The information is transferred to and from storage over the Internet, but is not shared with any other person.

Are those communication services?

Does it matter whether the services described above can also be configured, at the customer's option, to communicate with third parties? For example, what if the GPS device is configured to provide real-time location data to specified third parties? What if a cloud storage server is configured to allow third party access to the stored information? Should the legal status of a service vary case-by-case, based on how each individual customer happens to *use* the service? Such an

approach could introduce a large amount of uncertainty into the operation of the law.

Importantly, SCR 54 does not limit the term "communication service provider" to private entities. In some situations that seems appropriate, as there are public entities that provide communication services directly to members of the public (e.g., California's public universities offer email service to hundreds of thousands of students). That said, the staff is not sure of the extent to which SCR 54 was intended to address "data matching," where two or more government agencies compare the content of their records. That issue should be considered later, when the Commission has greater familiarity with the general subject matter.

Many companies provide an array of services, which might include both communication and non-communication services. Should such a company be viewed monolithically as a "communication service provider?" For example, Amazon provides some cloud-based communication services, but its mainstay is the sale of books and other physical goods. Should SCR 54 be interpreted to authorize the Commission to study state and local agency access to *all* of Amazon's customer records, including those that are not related to communication services? **The staff recommends against that broad an interpretation of our authority.** The focus of SCR 54 is clearly on law enforcement access to *communication service* records.

The staff believes it would be premature to attempt to exhaustively define "communication services" at this time. The issue should be reevaluated as the study proceeds, after further research, analysis, and public input.

Modernization

SCR 54 directs the Commission to "[u]pdate statutes to reflect 21st Century mobile and Internet-based technologies."

Electronic surveillance laws were first developed at a time when most people used analog landline telephones to communicate.[5] While there have been subsequent adjustments,[6] statutory law does not appear to have kept pace with technological development. For example, recent legislative analysis described the federal Stored Communications Act as problematically out-of-date:

5. See, e.g., 18 U.S.C. §§ 2510-2520 (Title 3 of the Omnibus Crime Control and Safe Streets Act of 1968).
6. See, e.g., 18 U.S.C. §§ 2701-2712 (Stored Communications Act).

> Although SCA is the principal federal statute protecting the privacy of stored e-mail communications – and possibly Internet and social media communications – it has been widely criticized as being seriously out of date. It was enacted primarily with only e-mail in mind and prior to the widespread use of the Internet. According to one SCA expert, the statute is "dense and confusing, and few cases exist explaining how the statute works. The uncertainty has made it difficult for legislators to legislate in the field, reporters to report about it, and scholars to offer scholarly guidance in this very important area of law."[7]

To be successful in modernizing the law, the Commission should not just draft statutory language to accommodate *existing* technologies. The Commission should attempt to draft language that will be durable enough to avoid future obsolescence to the greatest extent possible. To accomplish this, it would be best to use language that describes the fundamental character of different modes of communication, rather than describing particular media or services.

For example, California statutory law used to have many references to "*tape* recording." Those references became obsolete as digital media recording technology came into widespread use. On the Commission's recommendation, the obsolete references to tape recording were replaced with references to "*audio* recording."[8] This achieved the desired substantive result, while avoiding any implied limitation based on the medium used to make a recording. Looking forward, there might be some situations where a reference to audio *recording* would be too narrow (e.g., where information is streamed live or is intentionally ephemeral[9]).

The staff believes that the careful framing of definitional categories will be crucial to the success of this study.

Clarification

The Commission has also been charged with developing a statutory scheme that will provide clear procedures and standards to be used by state and local agencies in requesting customer records from communication service providers.

Procedural clarity is important, because unclear requirements are likely to produce confusion, disputes, costs, and delay. If a communication service

7. Assembly Committee on Judiciary Analysis of SB 467 (July 2, 2013), p. 4.
8. *Technical and Minor Substantive Statutory Corrections: References to Recording Technology*, 37 Cal. L. Revision Comm'n Reports 211 (2007).
9. E.g., "Snapchat" is a service that is designed to send text, still images, and video in a form that can only be viewed for a brief period of time, after which it is permanently deleted from all storage.

provider is not sure that a government request for records is lawful, it may resist the request. This could lead to litigation to resolve any disagreements about the meaning of the law.

Constitutional Rights

In developing a proposed statute, the Commission is expressly directed to "[p]rotect customers' constitutional rights, including, but not limited to, the rights of privacy and free speech, and the freedom from unlawful searches and seizures." In a sense, this is a given, as California law cannot violate constitutional rights. However, it is an important reminder to take a hard look at all relevant constitutional issues.

In particular, the staff anticipates the need for thorough and thoughtful analysis of the "reasonable expectations of privacy" that attach to different modes of communication.

Public Safety

Finally, the Commission is expressly directed to develop a statute that will "[e]nable state and local government agencies to protect public safety." In other words, the law should not place unreasonable burdens on the conduct of criminal investigations. While statutory law obviously cannot afford less protection than the Constitution requires, any protection above the constitutional minimum may come at a price. Extra procedural requirements could result in extra costs and delays, which could affect law enforcement's performance of its mission. These potential trade-offs should be kept firmly in mind as the study proceeds.

PROPOSED ORGANIZATION OF STUDY

This study involves a complex intersection of constitutional law, federal statutory law, and state statutory law, overlain with competing policy interests that must be carefully balanced. In order to move through the various issues methodically and efficiently, the staff recommends that the study be organized as follows:

(1) Constitutional Requirements

The Commission should first identify and analyze federal and state constitutional requirements relating to searches, privacy, and the freedom of expression and association.

This will establish the minimum protections below which any statutory requirements cannot fall. This analysis should also help the Commission to identify relevant doctrinal principles that can be applied when analyzing new modes of communication that have not been clearly addressed by existing decisional law.

(2) Federal Statutory Law

Next, the Commission should identify and analyze federal statutory law that regulates access to customer records of communication service providers. The most obviously relevant statute is the Electronic Communications Privacy Act of 1986, which regulates the interception of wire, electronic, or oral communications,[10] disclosure of information about telephone numbers dialed,[11] and the disclosure of electronically stored information.[12] Because the Commission's study is limited to state and local agency actions, it is unlikely that the Commission will need to closely examine statutes that regulate national security surveillance activities (e.g., the Foreign Intelligence Surveillance Act[13]).

The analysis of federal statutory law should answer two questions:

(1) Does federal law impose specific requirements that are applicable to state and local agencies?

(2) To what extent does federal law preempt state regulation?

The answers to those questions will help to define the permissible scope of state regulation in this area.

It is likely that the federal statutes will also be instructive as to the sorts of practical issues that should be addressed in a comprehensive state statute.

10. 18 U.S.C. §§ 2510-2522 (Wire and Electronic Communications Interception and Interception of Oral Communications).

11. 18 U.S.C. §§ 3121-3127 (Pen Registers and Trap and Trace Devices).

12. 18 U.S.C. §§ 2701-2712 (Stored Wire and Electronic Communications and Transactional Records Access).

13. 50 U.S.C. §§ 1801-1885c.

(3) California Statutory Law

The next step will be to describe and analyze existing California statutory law. While the Commission is free to recommend changes to existing law, it is prudent to start with a thorough understanding of existing law and policy.

The staff will also keep an eye out for any proposed legislation that sheds light on the policy preferences of the Legislature and the Governor. For example, a bill in 2013 would have broadened the search warrant requirement for stored electronic records.[14] A 2012 bill would have required a warrant in order to obtain location data generated by cell phones and other electronic devices.[15] Both of those bills were approved by the Legislature but vetoed by the Governor. Analysis of the proposed legislation and the veto messages should be instructive.

(4) Tentative Policy Framework

Once the Commission has considered the background discussed above, it can begin roughing out policy objectives — what result should the proposed law achieve?

(5) Proposed Legislation

After determining tentative policy objectives, the Commission will need to draft implementing legislation.

(6) Tentative Recommendation

Pursuant to its usual study practice, the Commission will prepare a tentative recommendation that contains a draft of proposed legislation, official Comments stating the derivation of each code section affected by the proposed legislation, and a narrative "preliminary part" that describes the Commission's findings and recommendations. The tentative recommendation will be circulated widely, with an invitation for public review and comment. Typically, the Commission sets a fixed period for public comment on a tentative recommendation, usually in the range of 60 to 90 days.

Although the Commission welcomes and benefits from public comment at every stage of a study, distribution of a tentative recommendation is the main way that the Commission solicits public comment on its initial findings and recommendations.

14. SB 467 (Leno) (2013).
15. SB 1434 (Leno) (2012).

(7) Analysis of Public Comment

After the close of the public comment period, the Commission will take whatever time is necessary to analyze and respond to the issues raised in public comments. The proposed legislation may be revised. Once that process has been completed to the Commission's satisfaction, it will be in a position to approve a final recommendation for submission to the Legislature.

NEXT STEP

If the Commission decides that the study should be organized as proposed above, the staff will prepare a memorandum discussing relevant constitutional requirements. That memorandum would be considered at the Commission's April 2014 meeting.

Respectfully submitted,

Brian Hebert
Executive Director