# Data Collection by Agencies

# Learning Objectives for this Module

## Learn the difference between first party and third party reporting.

## Learn when a client can claim 4th and 5th Amendment protections and when these are not available.

## Learn about the legal consequences of giving information to third parties.

## Learn the exceptions to the loss of an expectation of privacy in information given to third parties.

## Learn the all-pervasive nature of administrative searches.

# Reading Assignment

## The remainder of Chapter 8.

# Issues to be addressed

## A primary function of the federal government is collecting information.

### Information is used for enforcement

#### IRS

#### EPA air and water pollution monitoring

### Information is used for research and standards

#### CDC flu reporting system

#### Unemployment reporting

#### Federal reserve data collection on banking

## Methods of Data Collection

### Administrative searches and inspections in which the agency collects the information itself.

### The agency can require people and business to report about their own activates. This is called first party reporting. Filing your tax form is first party reporting, as are required reports of emissions under the environmental law. First party reporting can raise can raise 4th & 5th amendment issues for individuals.

### The agency can require reports on data about third parties that is held by an individual or entity. This is called third party reporting. There is no constitutional expectation of privacy in information given to third parties, so there are no 4th and 5th amendment issues posed by third party reporting. The only limits are statutory and some court created doctrines designed to limit abuse data collection. Third partying reporting includes Google, Facebook, credit data aggregators (Equifax), license plate scanners, cell phone location and metadata, etc. Since these are also covered by the Silver Platter Doctrine, they can collect data and sell it to the government, as long as they government does not ask them to collect it. This can effectively gut the 4th Amendment.

#### The only common law exceptions are confessions to priests (or the equivalent), attorney-client privilege, and the spousal privilege. None of these can be waived by the third party. Even these are subject to a balancing when future harm is at issue.

#### There is no common law physician patient privilege, this is a relatively recent statutory creation that is very limited.

## Paperwork Reduction Act

### Intended to require agencies to be more thoughtful about reporting requirements

#### Requires review by OMB

#### Applies to most agencies, including independent agencies

#### OBM does not have the authority to veto requests by independent agencies

#### Provides a defense against claims by the government that the individual did not provide the requested information.

### What is covered?

#### Reports required of 10 or more people

#### Also covers requirements to give information to the public

##### MSDS

##### Food labels

##### Hazardous materials inventories

#### Applies to investigations of a class of persons

### Notice Provisions

#### Every agency must designate a ‘‘Chief Information Officer’’ to review each proposed collection of information for compliance with the Act. Id. §3506(a)(2) and (c)(1).

#### After review by the officer, the agency publishes notice of the proposed collection in the Federal Register and allows 60 days for public comment. §3506(c)(2)(A).

#### When the proposed collection is contained in a proposed agency rule, the notice of proposed rulemaking serves this function. Id. §3506(c)(2)(B).

### Substantive Requirements

#### The agency also must certify that the proposed collection meets certain requirements, including that the collection (1) is necessary for the agency’s proper performance of its functions; (2) does not unnecessarily duplicate other information reasonably accessible to the agency; and (3) is minimally burdensome.

#### The proposal for data collection must then be approved by OIRA.

## Reporting Laws

### Reporting requirements - class of persons

### Usually require the creation of a report

### Usually agency sanctions for noncompliance, as opposed to judicial sanctions.

### Most state and federal agencies that have significant regulatory powers may require reporting under their general grant of authority. If the agency has a limited grant of authority or does not have a regulatory role (CDC), it will need a specific authorization to require reporting. The CDC uses contractual provisions in grants to the states to require disease reporting.

### The first agency reporting requirements were promulgated by state agencies

#### Communicable disease reporting began in the colonies and was carried over to the state and city governments

#### Reports of smallpox were critical to quarantines and vaccination programs

#### Requiring physicians to report bad physicians - not in LA

### First United States Supreme Court Case on Reporting: Whalen v. Roe, 429 US 589 (1977) – not in book

#### Required reporting of narcotics prescriptions by physicians and pharmacies

##### Intended to develop data on abuse

##### Also intended to collect data for prosecution

#### What are the privacy concerns of the patients?

#### What about the physicians and pharmacies?

#### The government must avoid unneeded disclosure

### Contemporary Third Party Reporting

#### Public health

##### STIs

##### Tuberculosis

##### Vital statistics and disease registries

#### Law enforcement

##### Child, spousal, and elder abuse

##### Violent injuries, including gun shots

##### Cash transactions over 10K

#### What privacy issues are implicated by each of these types of reporting?

### Enforcement of Third Party Reporting

#### Governmental

##### Loss or limitation of professional license

##### Administrative fine

##### Criminal prosecution

##### There are few enforcement actions for public health reporting

##### Real enforcement for financial and environmental reporting

#### Private

##### Negligence per se claims

##### Slightly different from Tarasoff claims

## Subpoenas

### Just like subpoenas in civil litigation

#### Directed at a single, identified individual or company

#### Ask for existing documents

#### Can ask for testimony - subpoena ad testificandum, or documents - subpoena duces tecum.

#### Enforced through judicial orders and contempt, not agency process

#### Subpoena power requires a specific statutory grant of authority.

#### Subpoenas can also be issued on the behalf of parties before the agency to get information from other third parties. For example, a pilot contesting a license revocation proceeding might ask for a subpoena to get training and flying records from an airline.

### Contesting an Agency Subpoena - Timing

#### You can ask a court to quash the subpoena when you get it.

#### You can wait for the agency to go to court to get an order

##### You can then contest the authority for the subpoena in that proceeding

##### There should not be a penalty until there is an order, but you want to make sure

#### The agency may provide their own administrative review of subpoenas

##### This usually allows negotiating the demand, which is good because you will usually lose in court.

### 4th Amendment Issues

#### 4th Amendment issues are attenuated for agency subpoenas.

##### This may be because are not self-enforcing, so the target always gets a hearing if it wants it.

#### The *Morton Salt* Test

##### Does the agency have the legal authority to issue the subpoena?

##### Is the subpoena sufficiently specific?

###### Overly broad so it hard to comply with?

###### Is the subpoena unduly burdensome? (Not such a big deal in the electronic world.)

##### Does the agency have a proper purpose?

###### The court will reject a subpoena that is just for harassment

###### This is much broader than the test for determining if a civil trial discovery order is proper.

##### The court applies a reasonableness test.

###### Hard to beat an agency subpoena because of the general deference to agencies.

###### These are factors to use to negotiate with the agency to narrow the subpoena. The agency may be willing to limit the subpoena to avoid having to go to court to enforce the subpoena.

#### Substantive Challenges to the Reason for the Search

##### EEOC seeks records from a law firm on the treatment of partners

###### Firm does not comply and EEOC goes to court

###### Firm pleads that the partners are not employees for EEOC purposes

##### Can the court consider this?

###### Does this address Morton Salt factors?

###### What would the court need to know to answer this question?

###### Is that within the court’s competence or the agency’s?

###### The determination of employee status is a substantive part of the investigation. The defendant can contest this if the agency brings a substantive complaint against it.

#### Procedural challenge – OHSA

##### OSHA is limited to the basis of its warrant when it is doing a physical inspection. (Although it can use information it obtains outside of the warrant.)

##### Employer challenges a request from OSHA for all back and neck injury reports, arguing that the request is too broad.

##### Court finds that subpoena powers are much broader than the 4th Amendment limited search powers.

##### Should the employer get to claim that it is too burdensome to produce all the injury reports because there are so many of them?

##### These are all paper world cases. It is unlikely that burdensome challenges will survive when you can just give the government a data dump on a harddrive.

#### National Security Letters

##### These are subpoenas that do not allow the target to tell anyone about the subpoena. Originally there was no exception to the secrecy, but the courts found a right to tell your lawyer and the law was amended. But the lawyer must be very careful to not disclose anything when challenging the subpoena. These raise the issue of whether a third party assert the 4th Amendment on your behalf if you do not have a reasonable expectation of privacy. For example, the Stored Communications Act protects email at your ISP and one court has found an expectation of privacy in email. Should the ISP resist the subpoena to protect your interests?

#### Do you have a duty to contest an illegal subpoena or request for records of third parties, rather than complying?

##### What should the telcom companies have done when the NSA asked for phone information that it was not authorized to collect?

##### What about Google and other online data and cloud services?

## Fifth Amendment Limits - First Party Reporting Issues

### The privilege against self-incrimination is limited to human people giving oral testimony. (Blood samples are not 5th Amendment testimony, they are 4th amendment searches.)It does not extend to corporate people. Under a strict reading of the constitution, it should only be required in criminal prosecutions. But the courts have recognized that it would be unfair to deny the right against self-incrimination in civil proceedings, when it would force defendants to risk later criminal prosecution.

#### You can claim it in a civil proceeding to avoid producing evidence that could be used in a criminal case

##### You will lose the civil suit if the testimony is part of your prima facie case or defense.

#### You can claim it in an administrative proceeding.

##### You will suffer the administrative sanction for not producing the evidence. But the courts recognize the unfairness of forcing the defendant to choose between losing the administrative proceeding and facing criminal prosecution. If you can convince the court that the administrative sanction was sufficiently coercive, the court will exclude the evidence in a subsequent criminal trial.

##### For example, evidence may be excluded in a criminal trial if coerced by an administrative sanction like firing or loss of a law license.

##### Prosecutors can give immunity and obviate 5th amendment issues. Then if the individual will testify he can be imprisoned for contempt of court.

### Production of documents.

#### There is no protection for voluntarily created documents. Thus keeping a diary is a big mistake.

#### What if you are required to keep the record?

##### Depends on whether this is a legitimate purpose for requiring the record.

###### Assume you must keep wage and hour records

###### You cheat on the tax withholding, which is a crime

###### You cannot resist producing the records because they will incriminate you.

*Shapiro v. United States, 335 U.S. 1 (1948).*

##### Is the report targeted at identifying illegal behavior?

###### Marijuana tax stamps

###### Gambling reports

###### Is there a threat of criminal prosecution, i.e., if the report intended to incriminate the person making it?

##### *Marchetti v. United States, 390 U.S. 39 (1968)*

###### The law required gamblers to register and pay an occupational tax

Why?

What about the requirement that owners of illegal sawed off shotguns get a license for them?

###### The court found that these violated the 5th amendment because they targeted criminal activity

The key is that the law was not requiring a general business record but a specific record of illegal activity

##### Auto Grave Yard

###### LA decides to crack down on auto theft and passes a law requiring wrecking yards to record all vin #s and whether they have been altered or defaced.

It is illegal to receive parts with altered vin #s.

###### Is this a 5th amendment issue?

###### What can the state do?

### 5th Amendment and Third Party Reporting

#### Since you have no expectation of privacy in records held by third parties, there are no 5th Amendment issues in third party reporting or subpoenas. You have no right to intervene in the proceeding to contest the subpoena, or any right to be notified. You may be notified by the target, unless the government using a national security letter, which is a classified subpoena and cannot be disclosed to anyone but the target’s attorney.

### Act of Production Doctrine

#### Document would implicitly “testify” that

##### (1) the document existed;

##### (2) the document was authentic -- e.g., not a forgery; and

##### (3) that she had possession of the document at the time of production.

##### It is admitting that you have it that is the testimony which could incriminate you.

#### Tax example

##### You claim income of 50K

##### You have a document that says you were paid 100k in a business deal

###### Not a document like a wage and hour record you are required to keep and produce

###### Just having evidence that you had higher income is incriminating

##### What about records about your client's dope dealing?

# Evaluation Questions

## Reporting

### What is third party reporting?

#### What are common examples?

#### What is the basic legal assumption for the expectation of privacy in data held by third parties?

#### Given this assumption, can you assert a constitutional right to require your consent or a 4th amendment criminal warrant before the government can obtain evidence for your criminal prosecution from a third party?

### What are the three traditional legal privileges that prevent obtaining information from third parties for use in criminal prosecutions?

### What is first party reporting?

#### What are common examples?

#### When can a first party reporting law be unconstitutional?

##### What Amendment does it violate and why?

##### What does *Marchetti v. United States*, 390 U.S. 39 (1968) tell us about requiring individual to keep records of illegal activities?

## Administrative subpoenas

### How do you distinguish a reporting requirement and a subpoena?

#### Which can require the creation of new records?

### Your client has been served with an administrative subpoena.

#### What are the options for dealing with the subpoena if your client does not want to comply?

#### What are the *Morton Salt* factors for contesting a subpoena?

#### If you are required to keep a record of a legal activity, such as employee wage and hour laws, can you refuse to produce it because it might incriminate you for not paying your withholding taxes?

## Self-incrimination

### What is the constitutional test for self-incrimination?

#### Corporations may be people, but can a corporation take the 5th, i.e., claim the privilege against self-incrimination?

### Is forcing your client to give a blood sample a self-incrimination issue?

#### If not, what is it?

### Why doesn’t self-incrimination apply in administrative proceeding?

#### What is the usual result if your client claims a 5th amendment privilege in an administrative proceeding and refuses to testify?

#### If your client does provide the testimony, may it be used against him in a criminal proceeding?

#### When might a criminal court exclude testimony provided in an administrative proceeding?

### How can the DA or the court cure self-incrimination conflicts?

## What is the purpose of the Paperwork Reduction Act?

### What are the legal consequences if an agency covered by the act does not comply with it in promulgating a data collection form?