DIALOGUE ON DIVERSITY

Privacy Notes IV

July 22, 2012

Dialogue on Diversity continues its occasional series of reminders exploring the news on privacy – its species, the Mercurial forms taken by its assailants and by the insistent trespassers on our confidential preserve, and the remedies – at law and in commercial and social practice – for the proliferating invasions. Today's set of privacy stories, while they are perhaps merely anecdotal showings of the directions of intrusion, bring into sharp focus at least a couple of facets of privacy concern: first, the links between telecommunications carriers and official agencies in their enforcement functions in U.S. society, and, then, a question of personal security from official searches.

THE 1.3 MILLION REQUESTS — CITIZENS IN THE CROSS HAIRS

Enterprising reporters for the justly fabled N.Y. Times were piqued some months ago with a persistent curiosity, which had been for long smoldering, as to the networking thought to be at work between the country's police and investigatory agencies on the one hand and, on the other, the purveyors and holders of electronic communications, specifically the mobile telephone carriers. They delivered their fragmentary information to Rep. Edward Markey of Massachusetts, surely the dean of Congressional privacy hawks, who proceeded to request of the principal telecommunications carriers the crude data on the requisitions of information presented to them by law enforcement agencies – and on the responses made by the carriers. Rep. Markey has only very recently received the information from the carriers. It has been compiled in a report. He confesses to being astounded – and he, of all persons in public life, is eminently well informed concerning the dimensions of the privacy assaults – by the volume of such requests, most of which were indeed acted on by the carriers. There were 1.3 million such requests in the year just ended, and some million responses. The requests took the forms, at one pole, of warrants and court orders; then formal written requests; and at the other pole emergency (or purportedly so) telephoned requests. The number of entities affected were undoubtedly greater than the 1.3 million, probably far greater, since the requests often sought, for example, telephone or other identification data on persons at or near a specified GPS location or cell tower site. If this were a parking lot, then dozens – perhaps indeed many hundreds, or more – persons would be tracked, all but one, it may be supposed, entirely uninvolved in the matter being investigated. The question whether any of these items of data are retained by the carriers or by the investigating agency once placed in possession of the information, is of considerable importance but is very foggily explained, if at all, by the holders. The carriers, at no inconsiderable expense, have engaged clerks to receive the requests, a formidable host of lawyers to review them and opine as to whether they may or must be responded to by the carriers, and another corps of clerks to retrieve and deliver the information. The carriers somewhat ruefully note these expenses, which are necessarily incurred as they wade into the flood of requests. They dutifully record the expenses and invoice the official agencies accordingly. Often, the report avers, the invoices are paid. Often even in a timely way. But, they complain, not quite always.

A further note: the carriers and their counsel do consider it licit to comply with otherwise proper requests communicated solely by telephone, but only under the logic of emergency. They are growingly skeptical, however, of certain pretended emergencies, and seek to filter out requests when the matter could without danger wait on the submission and review of a written request. Actionable emergencies would include: kidnappings in progress, fleeing bandits, and such non-criminal matters as reduced-capacity elderly wandering with a smart phone in the pocket.

NEW YORK'S TERRY STOPS LITE – AND THE SCARS ON NEIGHBORHOOD INHABITANTS

For years past, but in a notable crescendo over recent months, misgivings have arisen over the apparent practices of the NYC police in stopping large numbers of persons, most of them young men, and, unfortunately for the good name of the police, massively concentrated in African American and Latino communities (in both an ethnic and a geographical sense). Some of the stops appear to be triggered by minor irregularities in demeanor, others by cognizable infractions of urban housekeeping rules of decidedly minor import. The suggestion of numerous observers, moreover, is that a good many of these stops are random. There is to be sure the relatively infrequent serious offense in question. But in the greater number of situations either the police, unable to make out even a slight offense, turn the subject loose, to be sure somewhat shaken, to go on his way, or, when some semblance of illegality can be teased out of the observed conduct, a summons is issued. The recipients of summonses are obliged

to appear in the lower level NY courts to which this flood of proceedings are funneled. Judges in these courts have acidly observed to the police and prosecuting authority that in some years on the job they have yet to find a defendant who is other than African American or Latino. In the larger number of cases on some days the charge is having a drink (alcoholic) in hand on the street. Police would offer as evidence that they had sniffed the cup the unhappy pedestrian was clutching. This is the proffered proof of the alcoholic character of the drink. One judge, exasperated by the burdening of his judicial dignity with a flood of such stuff, recently refused to accept the sniff as sufficiently persuasive evidence. Is there a piece of scientific evidence that the drink was in fact some species of booze? For drugs there is the standard laboratory test and presentation of the assay report in the court [Under a recent Supreme Court decision prosecutors must, moreover, make the expert from the laboratory available as a witness, so that this is, on its face, a yet more cumbersome procedure – a rule that will in general come to be a pawn in the plea-bargaining chess game]. But for a beer, too much work. The fourth amendment interests of the targets of these dragnet–like procedures have finally gained the attention of the more sensitive of New Yorkers, not to mention persons of like inclinations in other cities with their own corresponding programs or the project of instituting same. The movement is clearly gaining traction.

It has been part of police enforcement law for some years that the officer having suspicion founded on "articulable" facts that a specific crime has been committed or is about to be committed may stop a person who is at once reasonably believed to be the perpetrator and ask for the person's name and an explanation of the conduct that gave rise to the officer's suspicion. This warrant exception derives from the Supreme Court case of a defendant named Mr. Terry [Terry v. Ohio, decided in 1968] – thus "Terry stops", within these constitutional bounds, were set up as a closely regulated category by statute in a good many states, among these New York. The officer may ask the name and a few other carefully circumscribed questions. A pat-down ("frisk") may be undertaken if [and only if] the officer reasonably believes the person to be armed or otherwise dangerous. A higher degree of certitude – probable cause – is required for an arrest. This is seen as a sensible and studiedly modest accommodation conceded by the law for the exigencies of police practice in difficult situations. The reasonableness standards implicated in the Terry stop rules have been the subject of extensive judicial construction for the succeeding forty four years, clarifying those standards but necessarily remaining short of an unambiguous, mechanistic yes or no determination.

The specifically NY practice stems historically, it appears, from the policy of Rudolph Giuliani, a much renowned federal prosecutor in New York City, who was elected Mayor in an era of alarmingly high street crime rates. Mayor Giuliani instituted a system of strict and vigorous enforcement of the prohibitions against offending behaviors minor in themselves (one example: sipping an alcoholic drink on the street; another example: the practice of teen-agers in washing the windows of cars just emerged from the Holland Tunnel and halted at a stop light – welcome to New York! – for an expected fee) but seen as a texture of gateway violations to the more grievous offenses of robbery, rape, and homicide. The crime rates for the serious offenses were seen to decline in the years following. Whether this was the result of the novel Giuliani policies or an evolution from demographic or other causes is something of a speculative proposition. But the story has been a seductive one in the NY law enforcement ethos. The practice, as noted, is focused, by the present Mayor's own reasoning, in high-crime areas, which are, as it turns out, ethnically delineated. Whatever the merits of this rule as a heuristic device, the effect on the inhabitants is disconcerting in the extreme, persons of the subject ethnicity and falling in the critical age/gender class are afraid to go about engaged in even the most innocent conduct by reason of the common neighborhood understanding that the police may light on passengers in the way in what appears to the targets a nearly random process. (This is an effect on top of the notorious reluctance of immigrant communities to face any encounter with officialdom, from police to firemen to public health and other assorted bureaucrats.) The experience of being run through the criminal court mill tags the subject with that much of a criminal record, which in turn will block official and private sector opportunities of a variety of kinds. Is it all worth it. . . ? The controversy is gathering steam in New York, and the privacy interests, measured against a claimed public good, stand in the balance. For a nice summary of the law and the (generally unchanged) facts of police practices as of 2010 see —

www.jjay.cuny.edu/web_images/PRIMER_electronic_verson.pdf.