The Validity of an Entity's Right to Privacy

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Tipping its cap to John Locke and Thomas Jefferson, our State's Constitution begins:

> *All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.*

Calif. Const. Art. 1, § 1.

Personally, I have come to accept that when an individual has a power or right, it is almost universally recognized that a non-human entity has the same. Defending life and liberty? A visit to a transactional attorney can trump that with perpetual corporate life. Acquiring, possessing, and protecting property? Without question among the main purposes of most entities. Pursuing and obtaining safety? Generally permitted and, in fact, required. Happiness? Sounds like a recital from a green tech's mission statement. At this point, a brief disclosure with regards to this topic seems necessary: I am one of the attorneys in the *Thalheimer v. City of San Diego* lawsuit, United States District Court Case No. 09-CV-2862, arguing on behalf of the City that non-human entities *do not* have a right to make contributions directly to candidates for office.

In the context of discovery none of the aforementioned categories draw more than a passing glance. However, the concept of privacy is a different animal. Conceptually, it seems simple enough to object with confidence when a request or subpoena is issued for an individual's medical records if medical conditions are not in dispute. In such instances, the validity of an objection grounded in the right of privacy requires a balancing of the respective needs of the parties, with the burden on the party seeking discovery. *Alch v. Sup. Ct.* (2008) 165 Cal.App.4th 1412, 1422. The same principle applies to an individual's private financial records. If, by means of example, you want a person's income tax return, you must meet the heavy burden of showing a specific need for that information, in a manner that is directly relevant to a cause of action or defense, with no alternative means of obtaining that information, all of which must outweigh the individual's privacy interest. This is an uphill battle, even if the income tax return likely contains the proverbial smoking gun. Make no mistake, an individual's right to privacy is universally labeled "fundamental." *See Board of Trustees v. Sup. Ct.* (1981) 119 Cal.App.3d 516, 525.

But, substitute a corporate client in the preceding example and the analysis is surprisingly not the same. The question of whether a business entity has "privacy rights" so as to create a privilege shielding meaningful discovery does not have an easy answer. One of the first courts to specifically consider this issue decided that Article I of the California Constitution "simply does not apply to corporations." *Roberts v. Gulf Oil Corp.* (1983) 147 Cal.App.3d 770, 791. Focusing on the word "people," *Roberts* definitively states that the privacy right enumerated in

our Constitution is "couched in terms of protecting real live people – not fictional persons such as corporations." *Id*. at 792. However, three years prior to *Roberts*, the Court of Appeal for the Fourth Circuit, in a matter-of-fact fashion, stated "businesses, regardless of their legal form, have zones of privacy which may not be legitimately invaded." *H&M Associates v. City of El Centro* (1980) 109 Cal.App.3d 399, 410. To date, neither case has been overruled or reconsidered. And, while *H&M Associates* stands for the proposition that an entity may state a cause of action for invasion of privacy, there seems to be little logic why one would be permitted a sword but not a shield in this context.

Particularly troubling is the fact that no courts have truly reconciled the two decisions, and provided a uniform rule. Several courts have accepted the *Roberts* analysis that the term "people" refers solely to individuals, and therefore entities do not have a right to privacy. *See, e.g., Zurich American Ins. Co. v. Sup. Ct.* (2007) 155 Cal.App.4th 1485, 1504-1505. But, others have not blindly accepted the *Roberts* rule and seem to indicate that "zones of privacy" still exist for entities. *See, e.g., S.B.C.C. Inc. v. St. Paul Fire & Marine Ins. Co.* (2010) 186 Cal.App.4th 383, 396 ["Thus, even if South Bay is correct in asserting that corporations have a right of privacy…"]. Unfortunately, when provided the opportunity to make a determination, our State Supreme Court side-stepped consideration of the issue. *Connecticut Indem. Co. v. Sup. Ct.* (2000) 23 Cal.4th 807, 817 ["Assuming without deciding that the insureds that are corporate entities have such rights …"]. Whether any weight should be given to the fact that our Supreme Court assumed that corporate entities have privacy rights for the purpose of its analysis is unclear. Indeed, "[t]he extent of any privacy rights of a business entity is unsettled." *Volkswagen of America, Inc. v. Sup. Ct.* (2006) 139 Cal.App.4th 1481, 1492.

Perhaps the answer to the question at hand is that the rule articulated in *Roberts* is not as definitive as its progeny suggests, and *Roberts* did not close the door on entity privacy rights. In stating that a corporation does not have standing under the California Constitution to assert a right of privacy, the *Roberts* court still affirmatively acknowledged that corporations may retain a "general right to privacy." 147 Cal.App.3d 770 at 794. More interesting, particularly in light of the necessary balancing test, is the recognition that "[p]rivacy rights accorded artificial entities are not stagnant, but depend on the circumstances." *Id*. at 796. In re-review of *Roberts*, one court stated it was "arguable whether a corporation or other artificial entity may have the necessary standing to assert a constitutional right to privacy," and then proceeded to a perform a balancing-like test before ordering discovery. *Hecht, Solberg, Robinson, Goldberg & Bagley v. Sup. Ct.* (2006) 137 Cal.App.4th 579, 594. Accepting *Hecht* seemingly leaves us back at the beginning of acknowledging a corporate privacy right, and performing the necessary balancing test.

But, before we are too quick to place the *Roberts* rule aside, the United States Supreme Court recently found that the term "personal privacy," as contained in the Freedom of Information Act ("FOIA") Exemption 7(c), did not include corporations because the word "personal" indicates human. *FCC v. AT&T, Inc*. (2011) 131 S.Ct. 1177. In doing so, the Court rejected the argument that the definition of "person" in the FOIA which includes corporation, necessarily included corporations in the phrase "personal privacy." Thus, the "personal privacy" of a corporation, whatever that may be, is not exempt from the Freedom of Information Act. One thing is obvious, entity right to privacy rules are in flux at every level

While it may not be clear if there is a recognized corporate right to privacy that will shield discovery, it remains incumbent on an attorney to protect an entity-client's interests in the event an issue of privacy is raised. In responding to a discovery request that seeks private information, first, consider the assertion of all other properly-raised objections. Often, private information that is sought will be of limited value, not be reasonably calculated to lead to admissible evidence, or may simply be a mechanism for harassing the responding party. Further, while an entity's right to privacy may be on unstable footing, protection afforded by trade secret law and confidentiality doctrines are not, and as such objections should be raised. Second, remember that many entities are comprised of individuals and their private information is definitively protected by the "fundamental" right to privacy. Also, consider if the information sought may have the private information of third-party individuals. If necessary, alert these individuals of the discovery requests to allow for an objection which will require a motion to compel to force production and the accompanying balancing test. Third, entertain the possibility of entering into a stipulated protective order with an "attorneys' eyes only" provision that may eliminate the respective concerns of both sides. A simple agreement to limit who sees which documents, or an agreement upon redactions therein, may remove the need to resort to uncertain and costly motion practice. Finally, do not assume the absence of an entity's right to privacy under California law; to date, our State Supreme Court has not.