
The Impact of Silver Alerts on an Older Adult's Right to Informational Privacy

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Introduction

Walter is a seventy-three-year-old widower living on his own. Though never diagnosed with dementia, Walter, like many of his peers, struggles with occasional memory loss and confusion. To help manage his daily routine, Cindy, a home health aide, visits Walter for several hours each day. Cindy helps Walter organize his medication, clean his home, and prepare his meals. Though Walter keeps a car, he drives infrequently and only on well-trod routes, typically to the local pharmacy and bank.

One afternoon, Cindy arrives at Walter's home to find the house empty and Walter's car missing. Concerned, Cindy contacts the police. At Cindy's request, the police issue a "Silver Alert," sharing Walter's name, photo, and vehicle information with local media outlets who broadcast the Alert on television and radio and post it on their websites. In addition to providing Walter's identifying information, the Alert indicates that Walter may suffer from dementia and is considered at risk. Identical information is issued to police personnel through the local law-enforcement notification system.

Two hours after Cindy reported him missing, a police officer spots Walter's car parked by the side of a road, only five miles from his home. Walter is inside the car, physically unharmed, but clearly disoriented. Though he had left home that morning to drive to the pharmacy, a mere mile from his house, he became confused after taking a wrong turn, and circled the block several times before pulling over to the side of the road. Following his location, Walter is reunited with Cindy, and the Silver Alert is canceled.

Walter and Cindy are not alone in their plight. Protecting the health and safety of older adults is a growing concern for twenty-first-century Americans. In the eighty years between 1934 and 2014, life expectancies at birth in the United States increased nearly eighteen years, with the average child born in 2014 expected to live to 78.9 years of age, even longer for

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female children.¹ Longer life expectancies substantially increase the likelihood that a person will experience abnormal changes in memory or cognition during his lifetime, with the risk of developing Alzheimer's disease or other dementia doubling every five years after the age of sixty-five.² While the effects of normal brain aging are often harmless—forgetting a phone number, losing a key, repeating a story—abnormal changes in memory or cognition can, at times, place an older adult's health or safety in danger.

An older adult with abnormal memory changes may be particularly prone to “wandering,” leaving his residence with purpose, but once away from familiar surroundings, becoming confused or disoriented and unable to find his way home. Wandering is remarkably common among those with abnormal age-related memory changes—the Alzheimer's Association estimates that sixty percent of people suffering from dementia will experience at least one episode of wandering in their lives.³ Without a caregiver at his side, substantial risks to the wandering older adult's health and safety may arise. Medical treatment following a fall or other acute episode may be delayed. Thieves or others with ill intent may target the confused older adult. The situation presents an even greater danger when the wandering older adult has access to a vehicle, as the acts of a disoriented driver may injure others on the road.

To aid efforts to locate missing older adults, a majority of states have implemented some form of a “Silver Alert” scheme.⁴ Modeled after “AMBER Alert” programs established to help locate kidnapped children, Silver Alert statutes authorize local law enforcement to publicly disseminate information about an absent older adult (i.e., an “Alert”) by providing the information to local news outlets for broadcast, posting it on the Internet, or displaying messages on electronic roadway signs.⁵ While these Alerts can, in some cases, help to locate a missing, vulnerable older adult, they also often disclose to the public information about the older adult that is sensitive and personal in nature. As a result, if not carefully applied, these Alerts risk unnecessarily—and potentially unconstitutionally—compromising an older adult's right to informational privacy.

For Walter, the Silver Alert was a useful way to enlist the community's help to locate an at-risk older adult. Although he was ultimately located

¹ Elizabeth Arias et al., *United States Life Tables, 2014*, NAT'L VITAL STAT. REP., Aug. 14, 2017, at 1, 45–46, <https://perma.cc/FRP5-N4RK>.

² RISK FACTORS FOR DEMENTIA, ALZHEIMER'S SOC'Y 4 (2016), <https://perma.cc/VM94-PZQB>.

³ *Wandering*, ALZHEIMER'S ASS'N, <https://perma.cc/BAQ8-DETD>.

⁴ See *infra* Part I.

⁵ See, e.g., Erika Gergerich & Lindsey Davis, *Silver Alerts: A Notification System for Communities with Missing Adults*, 60 J. GERONTOLOGICAL SOC. WORK 232, 233 (2017).

by the police—as occurs for most subjects of Silver Alerts⁶—the Alert may have increased the likelihood that Walter would be located by a private citizen acting as a good Samaritan. At the very least, the Alert provided some comfort to Cindy, who was no doubt reassured knowing that members of the community might be looking out for Walter. Walter's confusion placed his own health and safety (as well as that of other drivers and pedestrians) at risk, and the Silver Alert was a reasonable means for protecting him from potential harm.

Not all “missing” or absent older adults pose a risk to themselves or others, though. Consider Betty, an eighty-one-year-old woman, also living on her own. Like Walter, Betty has never been diagnosed with dementia, though her habits have changed over the last few years. Previously a meticulous housekeeper, Betty's home is no longer so tidy, with stacks of unread magazines and old postcards accumulating in her living room. Concerned by a recent overdue payment to the water company, Betty's daughter, Diana, has begun to handle her mother's finances. Betty, fiercely independent, resents her daughter's interference. Though admitting her occasional forgetfulness, Betty believes Diana's main motivation is to protect her inheritance. Diana, on the other hand, worries that Betty's recent behavior is an early indication of cognitive decline.

One morning, Betty decides to drive to a nearby town to visit her cousin, who is recovering from a recent fall. Betty drives to her cousin's home for the day, forgetting that Diana was stopping by that afternoon to review Betty's monthly bills. Diana arrives at her mother's home to find the house empty and the car gone. Diana calls the police and reports Betty missing, sharing with them her suspicion of Betty's cognitive impairment. As a result, the local police issue a Silver Alert, sending to media outlets Betty's name, physical description, driver's license photograph, vehicle information, and a statement that Betty may suffer from dementia. Several local television stations broadcast the Alert, including Betty's photograph and suspected medical condition, on their midday news programs.

Betty returns home by early evening and is furious to learn that Diana reported her missing. As an adult, she believes she has the right to go where she pleases when she pleases, without reporting her activities to her daughter. She is even more upset when she learns that her name, driver's license photograph—which she finds unflattering—and a statement questioning her mental capacity were broadcast to her neighbors. She felt

⁶ Indeed, a study of Silver Alerts for missing drivers in Florida over a twenty-month period from 2008–2010 found that out of the eighty-nine percent of missing drivers successfully located, only 2.3% were located by members of the public, with the remainder found by law enforcement. Meredith A. Rowe et al., *Missing Drivers with Dementia: Antecedents and Recovery*, 60 J. AM. GERIATRICS SOC'Y 2063, 2063, 2065–66, 2066 tbl.3 (2012). See also *infra* Part I.C.

these were personal details that the police had no right under the circumstances to share with her community.

Unlike Walter's confused trip to the pharmacy, Betty's unannounced travel to visit her cousin posed no substantial risk to her health and safety. In Betty's case, the Silver Alert resulted in the unnecessary public disclosure of Betty's personal information, including her age, an unflattering photograph, and an unconfirmed medical condition—sensitive personal information that Betty would have preferred to remain private. Not only did disclosure result in personal embarrassment for Betty, but by revealing a possibly diminished cognitive state, it may have increased the possibility that Betty will be a target of elder fraud.

Given that Silver Alerts disclose intimate personal information to a wide public audience, such programs should be closely scrutinized to ensure that they do not inadvertently infringe an older adult's right to informational privacy—that is, her “right to control, limit access to, or determine for [herself] when, how, and to what extent information about [her] is communicated to others.”⁷ This Comment examines Silver Alert programs from the perspective of a subject of the Alert, evaluating the risks such programs pose to an older adult's right to informational privacy and proposing specific, actionable ways to mitigate those risks.⁸

Part I of this Comment provides an overview of state statutes establishing Silver Alert programs and describes their common characteristics, including eligibility requirements and actions that result from the issuance of an Alert. As an example, this Part highlights the practices of three states in the mid-Atlantic region—Delaware, Maryland, and Virginia. Part I also reviews the effectiveness of Silver Alerts for locating absent older adults based on the limited available studies.

Though a person's right to be protected from government acquisition or disclosure of personal data has constitutional origins,⁹ that right is not

⁷ Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479, 487 (1990) (internal quotation marks and footnote omitted).

⁸ Note that Silver Alert programs have the potential to implicate privacy rights beyond simply informational privacy. For example, Silver Alert programs risk violating a person's *decisional privacy* by impairing or restricting a person's autonomy in making decisions related to his freedom of movement and association (e.g., by limiting his ability to go where and with whom he pleases). See, e.g., Helen L. Gilbert, *Minors' Constitutional Right to Informational Privacy*, 74 U. CHI. L. REV. 1375, 1378 (2007). While the risk of limiting a person's autonomy is yet another reason that Silver Alert programs are worthy of more heightened scrutiny than they have yet been given, this Comment examines only such programs' impact on a person's right to informational privacy, arguably the right most strongly implicated by Silver Alert programs' current form.

⁹ See *id.* at 1377–78; see also *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (observing that the “[v]arious guarantees [of the First, Third, Fourth, Fifth, and Ninth Amendments] create zones of privacy” that fall under constitutional protection).

unbounded. Instead, a person's interest in maintaining the privacy of personal information is balanced against the government's legitimate need to acquire or disclose that information.¹⁰ Part II of this Comment explores the competing interests at issue in the context of Silver Alert programs, weighing an older adult's right to informational privacy against the government's interest in protecting its constituents. Applying factors from *United States v. Westinghouse*,¹¹ this Comment concludes that many Silver Alert statutes, in their current form, unreasonably—and unconstitutionally—risk violating an older adult's right to informational privacy.

Finally, Part III presents several proposals for better protecting an absent older adult's right to informational privacy in situations in which a Silver Alert may be issued. These proposals include providing opportunities for advanced consent, restricting the types of personal information shared with the public in an Alert, limiting the audience to which the information is shared, and more clearly prescribing the eligibility requirements for an Alert. By implementing these sensible measures, states may safeguard the fundamental privacy rights of older adults without compromising efforts to locate and protect vulnerable, older members of the community.

I. Background: The Establishment, Contours, and Effectiveness of Silver Alert Programs

Building on existing AMBER Alert laws, state legislation establishing systems to alert the public to “missing older adults with dementia or other disabilities” first emerged in the early 2000s.¹² Since that time, Silver Alert programs have proliferated throughout the nation,¹³ with such programs

¹⁰ See *Whalen v. Roe*, 429 U.S. 589, 602 (1977).

¹¹ 638 F.2d 570 (3d Cir. 1980).

¹² Gergerich & Davis, *supra* note 5, at 233; see Dawn Carr et al., *Silver Alerts and the Problem of Missing Adults with Dementia*, 50 *THE GERONTOLOGIST* 149, 152–53 (2010); Gina Petonito et al., *Programs to Locate Missing and Critically Wandering Elders: A Critical Review and a Call for Multiphasic Evaluation*, 53 *THE GERONTOLOGIST* 17, 21 (2013).

¹³ States use different nomenclature for their missing older adult Alert programs. For example, Maryland's Alert program, like most across the nation, is referred to as a “Silver Alert” program. MD. CODE ANN., PUB. SAFETY § 3-604(b)(1) (LexisNexis 2020). Virginia's program is referred to as a “Senior Alert” program. VA. CODE ANN. § 52-34.5 (2019). Delaware's Alert program, which applies more broadly to vulnerable adults of all ages, is referred to as a “Gold Alert” program. DEL. CODE ANN. tit. 11, § 8581 (2020). Unless otherwise indicated, this Comment uses the term “Silver Alert” to refer to any state program that provides public notifications for missing older adults, regardless of the state's own terminology.

now present in forty-seven of the fifty states¹⁴ and the District of Columbia.¹⁵

A. *Establishment of Silver Alert Programs*

Silver Alert programs are most often established through the passage of state enabling legislation that empowers state police or other local agencies to develop an appropriate system for notifying the public of an absent older adult.¹⁶ Given the local nature of the programs, the statutes enacted by states vary substantially in scope and content, with some states simply directing an agency to establish an appropriate notification program¹⁷ and other states enacting laws that provide considerably more operational and application guidance.¹⁸ Bills proposing to establish a nationwide Silver Alert communications network have been introduced multiple times in Congress—most recently during the 2013–14 session¹⁹—

¹⁴ Of the fifty states, only Hawaii, Idaho, and Vermont have not established statewide Silver Alert programs or similar initiatives. See Gergerich & Davis, *supra* note 5, at 233. Note that since the Gergerich and Davis study, North Dakota has enacted Silver Alert legislation, N.D. CENT. CODE § 39-03-13.2 (2019), and Nebraska, like Iowa, has established an Endangered Missing Persons Advisory that is similar to typical Silver Alert programs. See *Endangered Missing Advisory*, NEB. ST. PATROL, <https://perma.cc/AU9U-WWXP>; Riley Johnson, *Nebraska State Patrol Launches New Alert System to Help Find Missing Adults*, LINCOLN J. STAR (Jan. 23, 2018), <https://perma.cc/EEQ2-EU8L>; see also *infra* note 25 and accompanying text.

¹⁵ *Gray's Silver Alert Program Joins Forces to Find Missing Seniors*, WJLA (May 10, 2013) [hereinafter *Gray's Silver Alert*], <https://perma.cc/K3P4-L5WX>.

¹⁶ See, e.g., DEL. CODE ANN. tit. 11, § 8581; MD. CODE ANN., PUB. SAFETY § 3-604(b)(1); N.D. CENT. CODE § 39-03-13.2; TEX. GOV'T CODE ANN. § 411.382 (West 2019); VA. CODE ANN. § 52-34.5.

¹⁷ For example, the Texas enabling statute simply directs the Texas Department of Transportation to “develop and implement a statewide silver alert to be activated on behalf of a missing senior citizen or person with Alzheimer’s disease,” with no further instructional framework. TEX. GOV'T CODE ANN. § 411.382.

¹⁸ For example, the California enabling statute specifies: (1) those who are eligible subjects of an alert (persons who are “65 years of age or older, developmentally disabled, or cognitively impaired, and who [are] reported missing,” with references to additional state codes defining “developmentally disabled” and “cognitively impaired”); (2) law-enforcement determinations that must be made before issuing an Alert (that the person is eligible for an Alert, that “the person has gone missing under unexplained or suspicious circumstances,” and that the investigating agency “has utilized all available local resources,” among other determinations); and (3) the actions that may result from activation of an Alert (issuance by the California Highway Patrol of “a be-on-the lookout alert, an Emergency Digital Information Service message, an electronic flyer, or a changeable message sign”). CAL. GOV'T CODE § 8594.10 (West 2020). For a more in-depth discussion of the scope and coverage of typical Silver Alert statutes, see *infra* Part I.B.

¹⁹ National Silver Alert Act of 2014, H.R. 5361, 113th Cong. (2014), <https://perma.cc/NK3C-387V>; National Silver Alert Act of 2013, S. 1814, 113th Cong. (2013), <https://perma.cc/44AB-J8T8>.

but federal legislation instituting a national program for locating missing older adults has not yet been enacted.²⁰

While Silver Alert programs are most often established through enabling legislation, the programs are sometimes implemented through other means like executive initiatives.²¹ And while such programs have been adopted by a majority of states, several jurisdictions have expressly rejected the implementation of Alert programs targeted towards absent older adults. For example, though Hawaii state legislators have introduced Silver Alert legislation in four recent legislative sessions, an enabling statute has yet to pass both state houses.²² Opponents of the legislation cited insufficient privacy protections for seniors, questionable effectiveness of current programs, and the potential for public confusion with existing AMBER Alert systems for kidnapped children.²³ After considering the potential benefits, Idaho also declined to implement a Silver Alert program, finding that local media outlets already sufficiently disseminate information related to absent older adults in the community.²⁴ Iowa also expressly opted not to target a program at older adults, and instead implemented approaches that apply more generally.²⁵

B. *Contours of Silver Alert Statutes*

Though most states have enacted Silver Alert-related legislation, the statutes are not uniform and the contours of the enabling laws—including the eligibility requirements and the actions that result from issuing a Silver Alert—vary from state to state. This Section first provides an overview of state-level Silver Alert statutes, focusing on Alert eligibility requirements and the actions that result from the issuance of an Alert. To

²⁰ Gergerich & Davis, *supra* note 5, at 234–35; *see also* Tobias D. Wasser & Patrick K. Fox, *For Whom the Bell Tolls: Silver Alerts Raise Concerns Regarding Individual Rights and Governmental Interests*, 41 J. AM. ACAD. PSYCHIATRY L. 421, 422–24 (2013).

²¹ *E.g.*, *Gray's Silver Alert*, *supra* note 15; *see also* Gergerich & Davis, *supra* note 5, at 234.

²² *See, e.g.*, S.B. 929, 28th Leg. (Haw. 2015); H.B. 1983, 27th Leg. (Haw. 2014); H.B. 2222, 26th Leg. (Haw. 2012); H.B. 1614, 26th Leg. (Haw. 2011); S.B. 2097, 25th Leg. (Haw. 2010); H.B. 744, 25th Leg. (Haw. 2009). *See also* Gergerich & Davis, *supra* note 5, at 240.

²³ *See, e.g.*, Jim Mendoza, *House Committee Tables Silver Alert Bill*, HAW. NEWS NOW (Feb. 3, 2011, 10:32 PM), <https://perma.cc/ZVW5-R5MS>.

²⁴ Taylor Vydo, *Why Idaho Doesn't Use Silver Alerts*, KREM2 (July 1, 2016, 4:01 PM), <https://perma.cc/5ZA6-X45V>.

²⁵ For example, though legislation was proposed in 2009 and 2013, the Iowa legislature opted not to establish a Silver Alert program, finding it similar to an already existing but little-used program available generally for endangered persons. *See* H. File 146, 85th Gen. Assemb., 1st Sess. (Iowa 2013); H. File 369, 83d Gen. Assemb., 1st Sess. (Iowa 2009); Mike Wisner, *Iowa Silver Alert Bill Leads to Changes, Frustration*, THE GAZETTE (Mar. 20, 2014), <https://perma.cc/F3MX-TQ34>.

demonstrate the variation in state statutes, the sections below compare the Silver Alert frameworks in three mid-Atlantic states: Delaware, Maryland, and Virginia. In some cases, the practices of certain other states are also highlighted to underscore the wide variations that exist nationwide. This Section then reviews the available studies that have evaluated the effectiveness of Silver Alert programs in locating absent older adults, which show that public dissemination of the older adult's personal information plays a surprisingly small role in the successful recovery of Silver Alert subjects.

1. Silver Alert Eligibility Requirements

Though Silver Alert statutes share a common purpose of quickly locating missing, vulnerable adults, the statutory requirements for Silver Alert eligibility vary from state to state.²⁶ Typically, an Alert may only be issued if the subject meets certain age and cognitive capacity conditions, though states define those conditions differently and often loosely.²⁷

a. Age Threshold

In a majority of states, eligibility for Silver Alerts is limited to those adults over a certain age threshold.²⁸ Many states, including Delaware and Virginia, permit Silver Alerts for residents who are at least sixty years of age.²⁹ Other states have established different age thresholds³⁰ or have drafted statutes that apply the program generally to "senior citizens" without specifying a particular age range.³¹ Some states, like Maryland, apply their Alert program to individuals of any age who are deemed to be vulnerable (e.g., mentally disabled or cognitively impaired).³²

²⁶ See, e.g., Carr et al., *supra* note 12, at 153-54.

²⁷ Wasser & Fox, *supra* note 20, at 422-23.

²⁸ *Id.*

²⁹ DEL. CODE ANN. tit. 11, § 8580(5) (2020); VA. CODE ANN. § 52-34.4 (2019).

³⁰ In California, for instance, a person must be at least sixty-five years old to be eligible for a Silver Alert. CAL. GOV'T CODE § 8594.10(a) (West 2020).

³¹ In Maine, the enabling statute directs state agencies to develop a program for missing "senior citizens" without a precise definition of the term. ME. STAT. tit. 25, § 2202 (2019).

³² Wasser & Fox, *supra* note 20, at 422-23; see MD. CODE ANN., PUB. SAFETY § 3-604 (LexisNexis 2020). Note that Delaware's Alert program also has special sections that apply to individuals of any age that have a disability or may be suicidal. DEL. CODE ANN. tit. 11, §§ 8580-81.

b. *Cognitive Impairment and Credible Threat to Health and Safety*

In addition to age thresholds, most, but not all, state statutes require that the subject of the Silver Alert exhibit a mental disability or cognitive impairment.³³ However, the level of documentation or proof required to establish impairment varies widely from state to state.³⁴ In many states, the enabling statutes themselves provide wide latitude to law enforcement or other agencies to determine whether an individual's mental capacity satisfies the requirements for Silver Alert eligibility.³⁵ For example, Maryland's statute requires that the absent person "suffer[] a cognitive impairment including a diagnosis of Alzheimer's disease or dementia to the extent that the individual requires assistance from a caregiver."³⁶ The statute does not specify, however, how the threshold level of cognitive impairment is established.³⁷ Furthermore, even though the Maryland statute specifies that only those "whose disappearance poses a credible threat to the health and safety of the individual" are eligible for a Silver Alert, it provides no guidance for determining whether a "credible threat" exists.³⁸ Instead, that determination is simply left to the state or local "law enforcement agency."³⁹

The Virginia statute similarly requires that an adult eligible for Silver Alerts must "suffer[] a cognitive impairment to the extent that he is unable to provide care to himself without assistance from a caregiver, including a diagnosis of Alzheimer's Disease or dementia," and that his "disappearance [must] pose[] a credible threat . . . to [his] health and safety."⁴⁰ But, as in Maryland, the Virginia statute provides no standards for establishing cognitive impairment or credible threat.⁴¹

Delaware's Alert program applies more broadly to "missing senior citizens, missing suicidal persons, and missing persons with disabilities."⁴² When applied to senior citizens, the Delaware statute requires no finding of cognitive impairment, specifying only that the person must be sixty

³³ Wasser & Fox, *supra* note 20, at 422.

³⁴ Gergerich & Davis, *supra* note 5, at 234.

³⁵ See, e.g., DEL. CODE ANN. tit. 11, § 8580(d); MD. CODE ANN., PUB. SAFETY § 3-604(a)(4)(iii); VA. CODE ANN. § 52-34.4 (2019).

³⁶ MD. CODE ANN., PUB. SAFETY § 3-604(a)(4)(ii).

³⁷ See *id.*

³⁸ *Id.* § 3-604(a)(4)(iii).

³⁹ *Id.*

⁴⁰ VA. CODE ANN. § 52-34.4.

⁴¹ See *id.*

⁴² DEL. CODE ANN. tit. 11, § 8581(a) (2020). Indeed, the breadth of the program is indicated by its designation as a "Gold Alert" rather than a "Silver Alert." *Id.* § 8580(2).

years or older and his disappearance “pose[] a credible threat to [his] health or safety” to be eligible for an Alert.⁴³ Again, the determination of the existence of a credible threat is left to law-enforcement personnel.⁴⁴

In the absence of statutory guidance, it is natural to ask what the standard is to establish the cognitive impairment and credible threat required for Silver Alert eligibility. Is a statement of mental incapacity given by a caregiver or family member sufficient? Is evidence of a clinical diagnosis of dementia, Alzheimer’s disease, or another disability required?⁴⁵ If a diagnosis is required, must a qualified medical professional perform the assessment? The statutes offer no clear answer, suggesting that Silver Alerts may be issued in some cases without verification of mental disability or cognitive impairment of the absent adult.⁴⁶

Not only do Silver Alert statutes fail to articulate clear standards for cognitive impairment or credible threat, but they also generally fail to provide guidance regarding the type of evidence that law-enforcement personnel may consider when evaluating the capacity of the absent adult and the circumstances surrounding her absence. For example, while the Delaware statute states that a law-enforcement agency must “solicit information from the missing person’s family or legal guardian,”⁴⁷ it does not specify what type of information should be requested and considered (e.g., medical reports, observations of a trained caregiver, anecdotal stories of a neighbor or family member). Nor does the statute indicate the weight given to different types of information or the minimum threshold of information required to determine that an absent adult is cognitively impaired and that her absence poses a credible threat to her safety or health.⁴⁸

The Maryland and Virginia statutes provide even less guidance to law-enforcement personnel who make determinations of Silver Alert eligibility. Maryland’s law provides no guidance to law enforcement,⁴⁹ while the Virginia statute requires the Virginia State Police to “confirm the

⁴³ *Id.* § 8580(5)(d).

⁴⁴ *Id.*

⁴⁵ Even clinical diagnoses of dementia and Alzheimer’s may be subjective, as they typically rely on observations of changes in a patient’s behavior and function over time and may not be readily apparent to a medical professional who sees the patient for only a short period of time at infrequent intervals. See, e.g., *What is Dementia?*, ALZHEIMER’S ASS’N, <https://perma.cc/HX69-J8AR>.

⁴⁶ See Carr et al., *supra* note 12, at 153 (noting that Texas’s requirement of a dementia diagnosis by a medical professional is the exception rather than the rule); Gergerich & Davis, *supra* note 5, at 234.

⁴⁷ DEL. CODE ANN. tit. 11, § 8582(a).

⁴⁸ See *id.*

⁴⁹ See MD. CODE ANN., PUB. SAFETY § 3-604 (LexisNexis 2020).

accuracy of the information” contained in the missing-person report,⁵⁰ and directs the State Police or other law-enforcement agencies to “establish procedures and standards by which a local law enforcement agency shall verify that a senior adult is missing.”⁵¹

Though Silver Alert enabling statutes are often vague, in some states, local law-enforcement agencies have issued publicly available protocols that provide additional guidance for Silver Alert eligibility determinations. For example, in Virginia, State Police protocols state that an absent adult’s Silver Alert eligibility may be established, without further corroboration, by an affidavit asserting that the adult’s guardian or caregiver “reasonably believe[s]” the absent adult is cognitively impaired and “in danger of serious bodily harm or death.”⁵²

Virginia’s protocol includes some safeguards to limit the issuance of Silver Alerts for absent adults that are not truly at risk. For example, the protocol requires that the law-enforcement agency, before issuing an Alert, confirm that “[a] law enforcement investigation has taken place that verified the senior adult is missing,” and “eliminate[] alternative explanations by a thorough search of the immediate area if vehicular travel is not involved as a mode of travel for the adult.”⁵³ Additionally, the Virginia Alert Request Form requires that the requesting individual—presumably the caregiver, guardian, or other family member—expressly authorize release of the absent adult’s personal information and acknowledges potential criminal liability for providing false information related to the absent adult’s mental or physical health or the situations surrounding the adult’s disappearance.⁵⁴

Despite these safeguards, the wording in many publicly issued Silver Alerts suggests that the threshold for cognitive impairment is low, if it exists at all. Many Alerts simply state that the absent adult “may” have

⁵⁰ VA. CODE ANN. § 52-34.6(A) (2019).

⁵¹ *Id.* § 52-34.5.

⁵² Virginia “Senior Alert” Request Form, VA. SENIOR ALERT 3, <https://perma.cc/363C-5TSN>.

⁵³ Plan Components, VA. SENIOR / ASHANTI (CRITICALLY MISSING ADULT) / ENDANGERED CHILD ALERT SYS., <https://perma.cc/4SUW-J9JS>.

⁵⁴ Virginia “Senior Alert” Request Form, *supra* note 52, at 3. Electronic searches of various databases (e.g., Westlaw, LexisNexis) and the internet uncovered no similar publicly accessible regulations for the Maryland and Delaware Silver Alert programs.

dementia.⁵⁵ Other Alerts qualify that the absent adult is only “believed” to have a mental ailment.⁵⁶

The lack of clear, rigorous standards for establishing the cognitive impairment and credible threat to health or safety required for Silver Alert eligibility leaves these programs ripe for misuse or abuse. Without clear standards, a cognitively capable older adult could easily be subject to a Silver Alert simply by failing to inform a family member of her travel plans. Failing to inform others of one’s whereabouts may not be advisable, but, without more corroboration, poses no credible threat to that person’s health or safety, and does not necessarily warrant disclosure of personal information, including potentially speculative medical diagnoses, to the public.

2. Actions Following Issuance of a Silver Alert

While the enabling statutes often do not specify the precise actions that follow issuance of a Silver Alert, in practice an Alert puts in motion a common set of events. Typically, issuing a Silver Alert triggers the posting of information about the absent adult to internal law-enforcement notification systems, as well as the broadcast of that information to the public through local media outlets.⁵⁷ For example, an audio message of the Alert may be aired on local radio stations or a message may be broadcast during a local television program.⁵⁸ In some cases, vehicular and other information are displayed on highway signs.⁵⁹ In many cases, Silver Alert information is posted to the internet, for instance, on a webpage for a local media outlet.⁶⁰ Increasingly, Silver Alert notifications are disseminated

⁵⁵ See, e.g., *Silver Alert Issued for Missing Woman Who May Have Dementia*, WMBF NEWS (July 4, 2018, 7:34 PM), <https://perma.cc/UZG8-78TM> (Silver Alert posted to webpage of local news station for a fifty-five-year-old North Carolina woman. The Alert discloses the woman’s name, physical description, an indication that “[s]he was wearing pink pajamas and [a] floral pink night gown,” and notes that she “*may* be suffering from dementia or another cognitive impairment.” (emphasis added)).

⁵⁶ See, e.g., *Silver Alert Canceled for Southwestern Wisconsin Man*, FOX 11 NEWS (May 27, 2019), <https://perma.cc/KE3P-MXMR> (Silver Alert posted to webpage of local news station for a seventy-five-year-old Wisconsin man “*believed* to have dementia or another cognitive impairment.” (emphasis added)).

⁵⁷ See, e.g., CAL. GOV’T CODE § 8594.10(b)(3) (West 2020) (listing the various actions that may result from activation of a Silver Alert, including the issuance of “a be-on-the-lookout alert, an Emergency Digital Information Service message, an electronic flyer, or a changeable message sign”).

⁵⁸ *Id.* § 8594.10(b)(2).

⁵⁹ See *id.* § 8594.10(b)(3)–(4).

⁶⁰ See, e.g., Silver Alerts cited *supra* notes 55–56.

through social media, for example, through a Twitter account or Facebook page associated with the law-enforcement agency issuing the Alert.⁶¹

Silver Alert statutes generally fail to specify the information either required to be or restricted from being disclosed in an Alert. A brief survey of recent Alerts indicates, however, that the messages often include the absent person's name, photograph, vehicle information, and last known location,⁶² as well as the person's age and medical condition or cognitive state.⁶³ As noted above, Alerts often indicate suspected, rather than confirmed, conditions.⁶⁴ In some cases, the information shared in an Alert includes additional intimate details of the absent person's behavior, for instance, indicating that the person is not taking prescribed medication,⁶⁵ or pinpointing the last location that his credit card was used.⁶⁶ These personal details, particularly those indicating potentially diminished cognitive abilities, could later make the person a target for swindlers seeking to take advantage of vulnerable adults.⁶⁷

In other cases, a Silver Alert discloses information that could make the absent older adult a target for thieves, pick-pockets, or other criminals before the adult is located.⁶⁸ For example, recent Alerts disclosed that an absent older adult was "known to wear black onyx rings with gold settings

⁶¹ See, e.g., Maryland Center for Missing and Unidentified Persons (MCMUP), FACEBOOK, <https://perma.cc/3WWW-NYQ7>; Wisconsin Department of Justice Silver Alert, FACEBOOK, <https://perma.cc/2D88-QAZ4>.

⁶² See, e.g., Nadia Judith Enchassi, *Update: Silver Alert Canceled for Missing 79-Year-Old Oklahoma City Woman with Diabetes*, KFOR OKLAHOMA'S NEWS 4 (Apr. 17, 2018, 8:56 AM), <https://perma.cc/7LBL-MJTB> (Silver Alert issued for a missing seventy-nine-year-old woman in Oklahoma City. The Alert discloses her name, age, last-known location, and vehicle information. The Alert also discloses that the woman has diabetes and was "showing early signs of Alzheimer's and may not be taking regular medications."); *Silver Alert Canceled After Hays Resident Found*, KSN.COM (Sept. 25, 2018, 9:18 PM), <https://perma.cc/M4GQ-4XZU> (Silver Alert issued for an absent sixty-seven-year-old man in the Kansas City area. The Alert discloses the man's name, age, last-known location, and vehicle information. The Alert also discloses that the man "has dementia and has not taken his medications" and that "[h]e does not have his medications or his cell phone with him.").

⁶³ See, e.g., Silver Alerts cited *supra* notes 56, 62.

⁶⁴ See, e.g., *supra* notes 55–56 and accompanying text.

⁶⁵ See, e.g., Silver Alerts cited *supra* note 62.

⁶⁶ See, e.g., *Largo Silver Alert Cancelled for 81-Year-Old Man with Dementia in Need of Medication*, ABC ACTION NEWS (Dec. 7, 2017, 10:16 AM), <https://perma.cc/SHH3-2PT4> (Silver Alert issued for Florida man. The Alert discloses the man's name, age, last-known location, vehicle information, and physical description, including his height and weight. The Alert also discloses the last location his credit card was used and that he "suffers from dementia and is in need of his medication.").

⁶⁷ See Carr et al., *supra* note 12, at 155; Petonito et al., *supra* note 12, at 23.

⁶⁸ See Petonito et al., *supra* note 12, at 23.

on both hands,”⁶⁹ wore “a silver watch,”⁷⁰ or “may . . . possess[] a handgun.”⁷¹ Broadcasting that a potentially cognitively impaired person may be carrying valuable items risks making that person a target for would-be thieves and other wrongdoers.

C. Effectiveness of Silver Alerts in Locating Absent Older Adults

While Silver Alert programs are often touted as a highly effective means for locating absent older adults,⁷² recent studies suggest that publicly disseminated Alerts typically play a minimal role in the adult’s location and recovery.⁷³ Instead, the limited available data suggests that the vast majority of absent older adults simply return on their own or are located by law enforcement, family members, or members of the public unaware of the Alert.⁷⁴

A 2012 article surveyed the effectiveness of various programs for locating absent older adults.⁷⁵ Reporting on the use of Silver Alerts in Florida between 2006 and 2011, the authors observed that, though 367 of the 377 (ninety-seven percent) adult subjects of Alerts were safely located, the Alert itself—presumably issued to both police and the public—was directly responsible for only fifty-one (13.9%) of those locations.⁷⁶ This observation is consistent with those of a 2017 study that reviewed data related to Silver Alert programs in North Carolina, Florida, and New Mexico, as well as a 2009 congressional report that surveyed Silver Alert usage in eleven states.⁷⁷ The 2017 study’s authors observed that, while recovery rates for subjects of Silver Alerts generally exceeded ninety

⁶⁹ Chris Watkins, *Update on Rothschild Silver Alert Subject*, WAOW.COM (Oct. 12, 2018, 12:43 PM), <https://perma.cc/TC56-6PF4> (Silver Alert posted to webpage of local news station for an eighty-four-year-old Wisconsin man).

⁷⁰ Nancy DeGennaro, *Update on Silver Alert: 78-Year-Old Missing Man Has Been Found*, DAILY NEWS J. (Mar. 21, 2018, 8:16 AM), <https://perma.cc/NNE5-MEJC> (Silver Alert posted to webpage of local news station for a seventy-eight-year-old Tennessee man).

⁷¹ *Id.*

⁷² *The Silver Alert System: Finding Our Missing Elderly*, PARENTGIVING, <https://perma.cc/5HDR-2VB2>.

⁷³ Petonito et al., *supra* note 12, at 22.

⁷⁴ An analysis of 136 reports of missing Florida drivers with dementia indicated that nearly ninety-five percent were found alive. Of those for whom location data was available, 64.1% were found by law enforcement, 3.8% by family members, 20.7% by a member of the public unaware of a Silver Alert, and 9.2% returned home on their own. Rowe et al., *supra* note 6, at 2066 tbl.3.

⁷⁵ Petonito et al., *supra* note 12, at 17–18.

⁷⁶ *Id.* at 22.

⁷⁷ See Gergerich & Davis, *supra* note 5, at 235–38.

percent,⁷⁸ the number of recoveries actually attributable to an Alert was typically much smaller.⁷⁹ Specifically, while several states reported that Silver Alerts contributed to positive outcomes in up to nearly thirty percent of cases, other states reported that “Silver Alerts did not play a role in the discovery of any of their missing persons.”⁸⁰

Even when Silver Alerts contribute to the recovery of an absent older adult, they do so primarily by making law enforcement aware of the adult’s absence, not by alerting the public. One 2012 study evaluated outcome-reports of Silver Alerts issued in Florida for adults with dementia who went missing in their vehicles between October 2008 to May 2010.⁸¹ Of 133 outcome-reports analyzed, eighty-nine percent concluded with successful location of those missing within one day.⁸² Though Silver Alerts were found to contribute to locating nearly twenty-four percent of the missing drivers for whom location data was available, the vast majority of drivers were found by law enforcement, for example when the drivers were stopped for “irregular driving,” or otherwise identified by the police as needing assistance.⁸³ Only three individuals—2.3% of the missing drivers for whom an Alert was issued—were located by private citizens and, of those, in only two cases was the older adult recognized because of an Alert.⁸⁴ Indeed, several states have declined to establish Silver Alert programs at least in part because existing programs are already successful at locating missing older adults.⁸⁵ The very small number of missing older adults located by the public as a result of a Silver Alert calls into question the necessity of publicly disseminating the older adult’s personal information in all cases. Instead, the data suggests that comparable safe-location outcomes could be achieved in the vast majority of cases by limiting dissemination of the older adult’s personal information to a more relevant population (i.e., law enforcement, the local department of transportation, adult protective services, etc.).

⁷⁸ *Id.*

⁷⁹ *Id.* at 236, 238, 240.

⁸⁰ *Id.* at 238, 240.

⁸¹ Rowe et al., *supra* note 6, at 2063.

⁸² *Id.* at 2066 tbl.3.

⁸³ *Id.* at 2066.

⁸⁴ *Id.*

⁸⁵ *See, e.g.,* Mendoza, *supra* note 23 (observing that the Honolulu Police Department testified against a measure to establish a new Silver Alert system in Hawaii because all “141 reported cases of missing seniors in the past two years . . . were found within 24 hours” using the present system); Viydo, *supra* note 24 (stating that Idaho state officials determined Silver Alerts were unnecessary because “local media outlets already do a good enough job of getting the word out about missing people”).

II. Silver Alerts and the Older Adult's Right to Informational Privacy

While Silver Alert programs address a legitimate government concern for the safety of vulnerable older adults, in the context of publicly disclosing personal information, the state's interest in the safety of its constituents must be balanced against an individual's right to informational privacy.⁸⁶ Section A of this Part provides an overview of the individual right to informational privacy and introduces the balancing test articulated in *United States v. Westinghouse* for weighing an individual's right to privacy of their personal information against the government's interest in public disclosure of that information.⁸⁷ Section B applies the *Westinghouse* factors to local governments' use of Silver Alerts and concludes that, even though established in good faith, Silver Alert programs risk violating an older adult's right to informational privacy if not implemented with appropriate safeguards.⁸⁸

A. *The Older Adult's Right to Informational Privacy*

The right to informational privacy can be described as "a person's right to control, limit access to, or determine for themselves when, how, and to what extent information about them is to be communicated to others."⁸⁹ More succinctly, it is the right to "control the acquisition or dissemination of information about [oneself]."⁹⁰ In the United States, an individual's right to informational privacy finds its source in a patchwork of common law, statutes, and constitutional protections.⁹¹ Though several states have incorporated privacy provisions into their state constitutions,⁹² arguably the most fundamental protections of informational privacy stem

⁸⁶ See Wasser & Fox, *supra* note 20, at 425–26.

⁸⁷ *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d. Cir. 1980).

⁸⁸ This evaluation agrees with a 2013 assessment of the privacy risks of Silver Alerts. See Wasser & Fox, *supra* note 20, at 424.

⁸⁹ Turkington, *supra* note 7, at 487 (internal quotation marks and footnote omitted).

⁹⁰ Nina A. Kohn, *Outliving Civil Rights*, 86 WASH U. L. REV. 1053, 1067–68 (2009).

⁹¹ Turkington, *supra* note 7, at 487; William J. Fenrich, Note, *Common Law Protection of Individuals' Rights in Personal Information*, 65 FORDHAM L. REV. 951, 972 (1996).

⁹² Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public School Children*, 108 W. VA. L. REV. 361, 365 (2005) ("[T]en states have constitutions providing explicit privacy rights that could afford protection to personal information."). These states include Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. *Id.* at 365–66. Furthermore, at least four other states (Minnesota, New Jersey, Pennsylvania, and Texas) have implicit constitutional privacy provisions that may protect an individual's right to informational privacy. *Id.* at 375. See also Turkington, *supra* note 7, at 501.

from the natural law view of “privacy as a condition and right that is essentially tied to human dignity.”⁹³

While infringement of personal privacy by private individuals may be protected by common law torts,⁹⁴ protection from disclosure of personal information by the government generally stems from statutory and constitutional provisions.⁹⁵ Though there may be no “general constitutional right to privacy,”⁹⁶ scholars and the Supreme Court agree that individuals may possess a legally enforceable reasonable expectation of privacy in their personal information.⁹⁷

After stating in *Griswold v. Connecticut*⁹⁸ that the “penumbras” and “emanations” of the Bill of Rights create and guarantee certain “zones of privacy” for individuals,⁹⁹ the Supreme Court addressed more directly an individual’s right to *informational* privacy in *Whalen v. Roe*.¹⁰⁰ In that case, the Court considered whether a New York statute requiring medical doctors to report to the state the names and addresses of those patients prescribed certain potent drugs—drugs that also were often used illicitly— infringed the patients’ constitutional right to privacy.¹⁰¹ There, the Court “recognize[d] that an individual’s interest in avoiding disclosure of personal matters is an aspect of the right of privacy.”¹⁰²

The right to avoid disclosure of personal information—central to the right to informational privacy—is not, however, unbounded. Rather, like other individual rights, a person’s guarantee against disclosure of personal information can be overcome if there is a sufficiently important government interest for disclosure.¹⁰³ In *Whalen*, the Supreme Court found that the state of New York did have an important interest in collecting information about drugs that may find their way to the illegal

⁹³ Turkington, *supra* note 7, at 484.

⁹⁴ See *id.* at 490–91; see generally William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) (discussing the development of common law torts protecting privacy interests).

⁹⁵ See Turkington, *supra* note 7, at 490.

⁹⁶ *Katz v. United States*, 389 U.S. 347, 350 (1967) (internal quotation marks omitted).

⁹⁷ See, e.g., *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965); Turkington, *supra* note 7, at 487–88, 490. For a review of the constitutional origins of the individual right to informational privacy, see Caitlin M. Cullitan, *Please Don’t Tell My Mom! A Minor’s Right to Informational Privacy*, 40 J.L. & EDUC. 417, 422–26 (2011); Gilbert, *supra* note 8, at 1377–88.

⁹⁸ 381 U.S. 479 (1965).

⁹⁹ *Id.* at 484.

¹⁰⁰ 429 U.S. 589 (1977).

¹⁰¹ *Id.* at 591.

¹⁰² *Id.* at 606 (Brennan, J., concurring) (internal quotation marks omitted) (summarizing the majority opinion).

¹⁰³ *Id.* at 602 (majority opinion).

market, and the Court emphasized that the statute included proper safeguards to prevent public disclosure of the collected information.¹⁰⁴ But, as Justice Brennan highlighted in his concurring opinion, “[b]road dissemination [of the information] by state officials . . . would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests.”¹⁰⁵

Following the Supreme Court’s decision in *Whalen*, lower federal courts have more explicitly “embraced the notion that informational privacy is protected from governmental encroachments.”¹⁰⁶ Indeed, as of 2007 “[e]very circuit court but the D.C. Circuit recognize[d] *Whalen* as establishing a separate constitutional right to informational privacy.”¹⁰⁷ While different circuits have adopted different standards to determine whether a particular government interest outweighs an individual’s interest in the privacy of his personal information,¹⁰⁸ most have incorporated, to some degree, the detailed balancing test articulated by the Court of Appeals for the Third Circuit in *United States v. Westinghouse*.¹⁰⁹

In *Westinghouse*, the Third Circuit Court of Appeals considered a challenge to a request by the National Institute for Occupational Safety and Health (“NIOSH”) for employee medical records to support their efforts in researching potentially hazardous workplace chemicals.¹¹⁰ Though noting that “the full measure of the constitutional protection of the right to privacy has not yet been delineated,”¹¹¹ the court observed that the individual right to privacy extended to at least “two types of privacy interests: ‘One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.’”¹¹² The court noted that the first of these rights includes “the right not to have an individual’s private affairs made public by the government.”¹¹³

To determine whether the company was required to provide employee records to NIOSH, the Third Circuit Court of Appeals engaged in “the delicate task of weighing competing interests.”¹¹⁴ In considering

¹⁰⁴ *Id.* at 597–98, 600–01; *id.* at 606–07 (Brennan, J., concurring).

¹⁰⁵ *Id.* at 606 (Brennan, J., concurring) (citing *Roe v. Wade*, 410 U.S. 113, 155–56 (1973)).

¹⁰⁶ Turkington, *supra* note 7, at 501; *see also* Kohn, *supra* note 90, at 1068.

¹⁰⁷ Gilbert, *supra* note 8, at 1375.

¹⁰⁸ *Id.* at 1385–87.

¹⁰⁹ *Id.* at 1387; *see also* *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980).

¹¹⁰ *Westinghouse*, 638 F.2d. at 572–73.

¹¹¹ *Id.* at 577.

¹¹² *Id.* (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).

¹¹³ *Id.*

¹¹⁴ *Id.* at 578.

the competing claims of the government's need for the information and the employees' right to privacy, the court identified six relevant factors:

[1] the type of record requested [and] the information it does or might contain, [2] the potential for harm in any subsequent nonconsensual disclosure, [3] the injury from disclosure to the relationship in which the record was generated, [4] the adequacy of safeguards to prevent unauthorized disclosure, [5] the degree of need for access, and [6] whether there is an express statutory mandate, articulated public policy, or other recognizable public interest [in favor of access].¹¹⁵

Based on the six identified factors, the Third Circuit Court of Appeals found that NIOSH's substantial interest in providing for the occupational health of current and future employees outweighed the "general privacy interests" of the employees in their medical data.¹¹⁶ The court did place several restrictions on NIOSH's acquisition of those records, requiring the agency "to give prior notice to the employees whose medical records it seeks to examine" to enable individual employees to assert their personal right to privacy for particular information contained within their records.¹¹⁷

As noted by the *Whalen* Court and *Westinghouse* court, however, an individual's right to informational privacy is not unlimited.¹¹⁸ Indeed, several important limitations to the right to informational privacy have been recognized, including when a person consents to the disclosure of their personal information as well as when it is in the public's interest to know the information.¹¹⁹

B. *Balancing the Older Adult's Right to Informational Privacy and the Government's Interest in Protecting the Health and Safety of Vulnerable Persons: Applying the Westinghouse Factors*

The government surely has a legitimate interest in protecting the health and safety of its citizenry, particularly its most vulnerable members. In many instances, the unexpected absence of an older adult may indicate that the adult's health and safety is at risk. Silver Alert programs were undoubtedly established to address this potential danger. In advancing that interest, however, the government's need to disseminate personal information must be balanced against the older adult's right to keep personal information private.¹²⁰ Given the broad reach of the notifications

¹¹⁵ *Id.*

¹¹⁶ *Westinghouse*, 638 F.2d at 580.

¹¹⁷ *Id.* at 581.

¹¹⁸ *Whalen v. Roe*, 429 U.S. 589, 600-02 (1977); *Westinghouse*, 638 F.2d at 577-78.

¹¹⁹ *Turkington*, *supra* note 7, at 489; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214-19 (1890).

¹²⁰ *See Westinghouse*, 638 F.2d at 578.

generated by a Silver Alert, as well as the highly personal nature of the information that is disclosed, a careful examination of the government interests and individual rights at stake is warranted to ensure that issuing an Alert does not unnecessarily violate a person's right to informational privacy. As many courts have adopted some version of the *Westinghouse* analysis,¹²¹ evaluation of Silver Alert statutes in the context of the six *Westinghouse* factors is a sensible starting point for assessing the constitutional implications of these programs.

1. Factor One: The Type of Information Disclosed

The first factor identified by the *Westinghouse* Court is the type of record requested and the type of information the record contains.¹²² As described in Part I.B.2, Silver Alerts typically broadcast not only seemingly innocuous information about an absent older adult—such as her name and photograph—but also sensitive personal information, including statements about the older adult's medical history, mental state, or physical capabilities.¹²³ In some cases, the Alerts include information identifying a medical diagnosis, prescribed medication, and other sensitive medical details.¹²⁴ Such intimate information provides neighbors and strangers alike a window into the mental and physical condition of the older adult. This information is intensely personal and it is reasonable to assume that a person would not want such personal medical information shared with her community when not truly necessary.

The analysis of the *Westinghouse* factors in the context of Silver Alert statutes is similar to Professor Nina Kohn's analysis of those factors for mandatory elder-abuse reporting statutes.¹²⁵ In evaluating the first factor, Kohn notes that courts have typically held that "individuals have uncommonly strong privacy interests" in their personal medical data and that an individual's "potential victim status . . . does not diminish this interest."¹²⁶ Furthermore, she notes that in the case of mandatory reporting laws for suspicions of self-neglect, the statutes generally require disclosure of not only medical information but also sensitive observations of the older adult's "personal habits and intimate behavior," which can violate an individual's right to informational privacy.¹²⁷

¹²¹ Gilbert, *supra* note 8, at 1387.

¹²² *Westinghouse*, 638 F.2d at 578; Gilbert, *supra* note 8, at 1387.

¹²³ See, e.g., Silver Alerts cited *supra* notes 55–56, 62, 66, 69–70.

¹²⁴ See, e.g., Enchassi, *supra* note 62 (Silver Alert for missing woman with diabetes).

¹²⁵ See Kohn, *supra* note 90, at 1070–87.

¹²⁶ *Id.* at 1071–72.

¹²⁷ *Id.* at 1075.

Though the medical information disclosed by Silver Alerts is often more generalized than that related to mandatory reporting laws (e.g., stating that a person “may have dementia” rather than providing a definitive diagnosis of a particular medical condition), it is nonetheless still personal medical information that an older adult has a strong interest in keeping private. Moreover, Silver Alerts can also disclose sensitive observations of an absent older adult’s behavior—for example, a suspected failure to take medication¹²⁸ or a listing of personal effects the adult may be carrying¹²⁹—that the older adult may strongly desire to protect from disclosure.

2. Factor Two: The Potential for Harm by Disclosure

The second *Westinghouse* factor concerns the “potential for harm” from disclosure of the information.¹³⁰ Though no one has yet brought a legal suit alleging injury from disclosure of personal information in a Silver Alert,¹³¹ the disclosure of intensely personal information to a broad public audience unnecessarily risks harming the subject of the Silver Alert in several ways.

First, the subject of the Silver Alert is likely harmed by suffering embarrassment over the public disclosure of his cognitive impairment or medical condition. Imagine the mortification of seeing one’s medical condition and prescribed medications (not to mention unflattering characterizations of personal behavior) permanently emblazoned on the internet for family, friends, and strangers to peruse for all time.¹³² Such disclosures present a real and substantial risk that the older adult’s reputation and standing in the community will be irreparably diminished. In considering the potential harm from laws mandating reporting of suspected elder abuse, Kohn notes that required disclosure of personal information may “result in reputational injury or stigma” which “may, in turn, affect [a person’s] social standing and the respect and treatment received from others.”¹³³ The reputational risk to the older adult subject of

¹²⁸ See, e.g., Silver Alerts cited *supra* note 62.

¹²⁹ See, e.g., Silver Alerts cited *supra* notes 69–70.

¹³⁰ *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980).

¹³¹ Upon searching on Westlaw, LexisNexis, and Google, the author could not locate any instance of a legal action alleging injury from the broadcast of information in a Silver Alert.

¹³² The posting of Silver Alerts on the internet introduces another interesting aspect of potential privacy violations by Silver Alerts. Internet Alerts are typically available for years after they are first posted, allowing personal information to be available long after the person has been recovered and any emergency need to locate them has passed. The indefinite availability of intimate personal information may pose additional unaddressed privacy concerns.

¹³³ Kohn, *supra* note 90, at 1078.

a Silver Alert is even greater, as the personal information released by an Alert reaches a much wider audience (i.e., the general public) than the disclosures in a mandatory abuse report to government authorities.

Second, as noted in Part I.B.2, advertising that a person may suffer from dementia risks bringing him to the attention of thieves and swindlers who target the elderly. By broadcasting that an absent older adult is carrying valuable property,¹³⁴ a Silver Alert may inadvertently place the adult at risk of assault or theft. Not only is the older adult's physical safety put at risk, but his financial security may be as well. Financial scams directed toward older Americans are a serious and growing problem in the United States. One recent study estimates that America's senior citizens now lose over \$36.5 billion to financial fraud each year.¹³⁵ Despite federal efforts to combat such practices,¹³⁶ fraudsters continue to target older adults, believing them to be "more trusting than younger" people and thus more susceptible to deceitful schemes.¹³⁷ Scammers may use information provided in Silver Alerts to identify potential targets for financial fraud or identity theft,¹³⁸ as those who may suffer from dementia or other cognitive impairment make particularly attractive victims. Indeed, such targeting may already occur and go unreported, as does much of the elder fraud in the United States.¹³⁹

Finally, the Silver Alert's widespread public disclosure of personal, often unflattering, information may undermine society's perception of the dignity of older adults. Disregarding an older adult's right to informational privacy suggests that "society views [older adults] as something less than full members of the community,"¹⁴⁰ risking further erosion of their fundamental rights and perpetuation of negative

¹³⁴ See, e.g., Silver Alerts cited *supra* notes 69–70.

¹³⁵ Nick Leiber, *How Criminals Steal \$37 Billion a Year from America's Elderly*, BLOOMBERG (May 3, 2018, 4:00 AM), <https://perma.cc/5DYE-Y5GA>.

¹³⁶ In 2018, the Federal Bureau of Investigation announced a coordinated effort to identify and prosecute those engaged in elder fraud, charging 200 individuals in an initial sweep. Press Release, U.S. Dep't of Justice, Justice Department Coordinates Nationwide Elder Fraud Sweep of More Than 250 Defendants (Feb. 22, 2018), <https://perma.cc/R5NZ-6PPX>.

¹³⁷ *Elderly Fraud Scams: How They're Being Targeted and How to Prevent It*, ASS'N OF CERTIFIED FRAUD EXAMINERS, <https://perma.cc/JBN7-YRB4>.

¹³⁸ Petonito et al., *supra* note 12, at 23.

¹³⁹ See Stephen Deane, SEC. & EXCH. COMM'N, ELDER FINANCIAL EXPLOITATION: WHY IT IS A CONCERN, WHAT REGULATORS ARE DOING ABOUT IT, AND LOOKING AHEAD 9 (2018), <https://perma.cc/4AYJ-6AG9> (stating that "[t]he overwhelming majority of incidents of elder financial exploitation go unreported to authorities," referencing a New York study that "found that, for every documented case of elder financial exploitation, 43.9[%] went unreported").

¹⁴⁰ Kohn, *supra* note 90, at 1107.

stereotypes.¹⁴¹ Clearly, the potential for harm from unwarranted disclosure of personal information in Silver Alerts is substantial.

3. Factor Three: Injury to Relationship Through Which Information was Generated

The third *Westinghouse* factor relates to potential for injury to the relationship through which the information disclosed was generated.¹⁴² Presumably, this factor would be more important in cases where medical information about a patient that is provided by a physician, psychiatrist, therapist, or other medical provider has been released. Kohn notes that, in the context of laws mandating reporting of suspected elder abuse, the “consequence[] to [the] relationships [between the patient and the provider] could be devastating,” as the disclosure may severely strain the bonds of trust that exist between the older adult patient and his doctor.¹⁴³ While an older adult who is the subject of a Silver Alert may resent the individual who requested the Alert—presumably a family member or caregiver who provided observations of the older adult to the local law-enforcement agency that issued the Alert—the consequences for an adult-caregiver relationship do not seem nearly so significant as do the consequences to the patient-physician relationship, where proper medical care relies critically on trust. In the case of Silver Alerts, the risk of relationship injury seems low.

4. Factor Four: The Presence of Adequate Safeguards

The fourth *Westinghouse* factor focuses on the presence of adequate safeguards to prevent unnecessary disclosure of private information to unauthorized individuals.¹⁴⁴ Because Silver Alert statutes permit disclosure of certain information to the public, the safeguards against unnecessary disclosure must be evaluated in two contexts: (1) safeguards related to the information disclosed (whether there are sufficient

¹⁴¹ Carr et al., *supra* note 12, at 155 (“[The] unquestioned institution of Silver Alert plans might do harm to elders by removing the civil liberties of those who are the subjects of such alerts and reinforce negative stereotypes of elders.”). See generally Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818 (1992) (explaining that “vague” statutes on guardianship and conservatorship risk “dehumanizing” the elderly and eroding their “[f]undamental liberty interests”).

¹⁴² United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d. Cir. 1980).

¹⁴³ Kohn, *supra* note 90, at 1079.

¹⁴⁴ *Westinghouse*, 638 F.2d at 578.

safeguards to ensure that *only necessary information* is disclosed to the public) and (2) safeguards related to the audience that receives the disclosure (whether there are sufficient safeguards to ensure that information is disclosed *only to the necessary audience*).

In both contexts current Silver Alert statutes fall short, with most laws failing to provide any assurance that only necessary personal information about an absent older adult will be disclosed to the limited audience that requires it. Similar to the mandatory elder-abuse reporting laws evaluated by Kohn, the information included in a Silver Alert varies from state to state.¹⁴⁵ As described in Part I.B.2, however, many state enabling statutes are silent on the information that may or may not be included in Silver Alerts broadcast to the public, granting local law enforcement significant leeway in determining those personal details that are contained in a public Alert.¹⁴⁶ Indeed, other authors have suggested that Silver Alerts indicating an otherwise undetectable mental condition may violate the Health Insurance Portability and Accountability Act (“HIPAA”) by disclosing more information than necessary for the purpose of locating the absent individual.¹⁴⁷ This lack of specificity requires that absent older adults rely on the judgment of local law-enforcement personnel, often without state-provided guidance, to determine what personal information is necessary to aid in their location. Such a scheme is hardly an “adequate safeguard” against unnecessary disclosure of personal information to the public.

Additionally, some Silver Alert programs require that Alerts be posted on electronic road signs and distributed to local media outlets for broadcast.¹⁴⁸ While posting an Alert on road signs and local news broadcasts may focus disclosure to those within the community where the absent person is most likely to be found, it does not limit the disclosure to those who are most likely to locate the absent person: local law-enforcement personnel. Indeed, as noted previously, the available efficacy data indicates that members of the public (those unrelated to law enforcement) locate less than three percent of absent adults as a result of a Silver Alert.¹⁴⁹ Furthermore, the trend of posting Silver Alert notifications on the internet, which makes them available to individuals across the globe, dramatically broadens the reach of the Alerts, spreading an absent older adult’s personal information far beyond those who are

¹⁴⁵ See Kohn, *supra* note 90, at 1074–78.

¹⁴⁶ See, e.g., TEX. GOV'T CODE ANN. § 411.388 (West 2019).

¹⁴⁷ See, e.g., Wasser & Fox, *supra* note 20, at 425.

¹⁴⁸ See, e.g., CAL. GOV'T CODE § 8594.10(b)(2) (West 2020) (“Radio, television, and cable and satellite systems are encouraged to, but not required to, cooperate with disseminating the information contained in a Silver Alert.”); *id.* § 8594.10(b)(3) (“Upon activation of a Silver Alert, the Department of the California Highway Patrol shall . . . issu[e] . . . an electronic flyer, or a changeable message sign.”).

¹⁴⁹ See Rowe et al., *supra* note 6, at 2066 tbl.3; *supra* Part I.C.

most likely to be involved in his recovery. Examined in this light, it appears that most Silver Alert programs permit, in many cases, the disclosure of unnecessary personal information to an unnecessarily broad public audience.

5. Factors Five and Six: The Need for Access and the Public Policy Motivation

The final two *Westinghouse* factors examine “the degree of need for [government] access” to the information and whether there is a compelling public policy motivating that access.¹⁵⁰ Protecting the health and safety of vulnerable older adults is certainly a legitimate local government interest and recovering those adults who, as a result of their cognitive impairment, have become lost or missing falls within that protective mission. Furthermore, access to the information included in Silver Alert notifications and provided by family members or caregivers is necessary for law-enforcement agents to locate an absent older adult. As noted in the previous section, however, the need for the *public* to access such information is far weaker.¹⁵¹

Additionally, as Kohn points out in relation to mandatory elder-abuse reporting laws, the government’s need to access and publicly disseminate an older adult’s personal information is “not equally compelling” for all individual cases considered.¹⁵² While the government may have a compelling interest to collect and disseminate personal information of a missing older adult who is truly at risk—e.g., one who has been diagnosed with Alzheimer’s disease and who has a history of wandering—the government’s interest is significantly less compelling when an absent older adult’s cognitive impairment is merely speculative and the adult is thus less likely to be truly at risk.

6. Aggregate Analysis of the *Westinghouse* Factors

Evaluating the six *Westinghouse* factors in aggregate, Silver Alert statutes and the programs that result from them have a strong potential to unconstitutionally impair the informational privacy rights of older adults. Silver Alert notifications often disclose intensely personal information—including confirmed or suspected medical conditions and treatments—and risk substantially harming the subject of the Alert by embarrassing the older adult, injuring the adult’s reputation, or making

¹⁵⁰ *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d. Cir. 1980).

¹⁵¹ *See supra* Part II.B.4.

¹⁵² Kohn, *supra* note 90, at 1081.

the older adult a target for elder-focused fraudulent schemes. The state statutes establishing Silver Alert programs often provide minimal safeguards to prevent disclosure of unnecessary information to the public or disclosure of information to an unnecessarily broad audience. Though the government has a strong interest in protecting the health and safety of absent older adults, the Silver Alert programs are not crafted carefully enough to ensure that the government pursues that interest in a way that adequately protects an older adult's right to informational privacy.

The determination that Silver Alert programs, as currently structured, may impair the constitutional rights of older adults under the *Westinghouse* analysis agrees with the conclusions of other authors who have considered the issue.¹⁵³ And Silver Alert statutes are not the only constitutionally suspect laws directed toward older adults—based on her *Westinghouse* analysis, Kohn suggested that “at least a subset of state mandatory elder mistreatment reporting statutes contain unconstitutional provisions.”¹⁵⁴

C. Comparison to Other “Color” Alerts

As noted previously, Silver Alert programs were first modeled on AMBER Alert programs to locate kidnapped children¹⁵⁵ and many states have subsequently expanded their programs to provide for further “Color” Alerts to warn the community of other missing individuals (e.g., Blue Alerts to notify the public that a dangerous individual may be on the loose).¹⁵⁶ Given the similarity of these “Color” Alerts to Silver Alert programs, some discussion of the differences in the informational privacy implications is warranted. Notably, the different subject of each type of Alert—older adults in Silver Alerts, kidnapped children in AMBER Alerts, and dangerous at-large suspects in Blue Alerts—gives rise to a distinctive balance between the government's interest in public disclosure and the subject's informational privacy rights for each Alert.

Silver Alert programs are distinct from AMBER Alert programs, as an older adult subject of the Silver Alert is generally agreed to have a broader claim to informational privacy than a minor-child subject of the AMBER Alert.¹⁵⁷ Furthermore, the person requesting the AMBER Alert is often the

¹⁵³ See Gergerich & Davis, *supra* note 5, at 239; Wasser & Fox, *supra* note 20, at 424–26.

¹⁵⁴ Kohn, *supra* note 90, at 1084.

¹⁵⁵ Gergerich & Davis, *supra* note 5, at 233.

¹⁵⁶ See, e.g., DEL. CODE ANN. tit. 11, § 8586 (2020); MD. CODE ANN., PUB. SAFETY §§ 3-605–3-606 (LexisNexis 2020); VA. CODE ANN. §§ 52-34.8–.9 (2019).

¹⁵⁷ Cullitan, *supra* note 97, at 426 (“[M]inors’ constitutional rights are not as extensive as adults.”); Gilbert, *supra* note 8, at 1394 (“While minors do enjoy robust constitutional protections, their rights are not completely coextensive with those of adults—and with good reason. These limitations on

child's parent or legal guardian and, as such, can consent to the public disclosure of the child's personal information on the child's behalf. In contrast, the person requesting the Silver Alert need not be the older adult's legal guardian, so such proxy consent may not be possible.¹⁵⁸ Additionally, the government has a stronger interest in locating a presumed-to-be kidnapped child, who is likely more vulnerable than an older adult, even an older adult that may suffers from dementia. As a result, when issuing an AMBER Alert, the government has a more compelling need to broadly disseminate information related to the child than when issuing a Silver Alert.¹⁵⁹

Silver Alert programs may also be distinguished from Blue Alerts, in which the missing individual is an at-large suspect whom law enforcement believes poses a grave danger to the public.¹⁶⁰ As a result, the government's interest in protecting the community's safety by locating the missing suspect as soon as possible is extraordinarily strong and outweighs any right to informational privacy retained by the suspect.¹⁶¹ The government's interest is not as strong in the case of a Silver Alert, as the absent older adult rarely poses a serious threat to the wider community.

constitutional rights are configured to protect minors and recognize their uniquely vulnerable places in society.”).

¹⁵⁸ Silver Alert statutes are not the only elder-focused laws that are modeled on similar measures for children. Kohn, *supra* note 90, at 1057–58. Other examples include mandatory reporting laws, the creation of adult protective services systems, elder-abuse registries, and elder-abuse fatality review teams, all of which grew out of similar services and mandates centered on children. *Id.* at 1057 & n.13. This close relationship with child-focused law imbues strong paternalistic tendencies to many laws directed towards older adults. *Id.* at 1057–58.

¹⁵⁹ AMBER Alerts typically do not include the types of embarrassing or intimate medical information often included in Silver Alerts. *See, e.g.,* Amber Ruch, *AMBER ALERT Canceled; 6-Month-Old Boy Found Safe*, KFVS12 (Dec. 28, 2018, 1:29 PM), <https://perma.cc/7ARL-4QET>.

¹⁶⁰ *See, e.g.,* DEL. CODE ANN. tit. 11, § 8586; MD. CODE ANN., PUB. SAFETY § 3-605; VA. CODE ANN. § 52-34.8.

¹⁶¹ Professor Sadiq Reza has expressed concern that, even for suspects who pose a potential public safety risk, there is no “established standard for determining when a suspect constitutes enough of a public safety concern to justify publicly naming him.” Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 802 (2005). Reza further suggests that at least a probable cause standard should be required to publicly name a suspect. *Id.* at 803. One would think that an even higher standard would be required to release more intimate personal details about an absent older adult who poses far less risk to public safety.

III. Proposals for Safeguarding the Privacy Rights of Missing Older Adults Eligible for Silver Alerts

While Silver Alerts are undoubtedly well-intentioned, the broad language of the enabling statutes and the lack of standards for local officials give rise to significant potential for infringing the informational privacy rights of the older adult who is the subject of an Alert. There are, however, several relatively straightforward steps that states could take to limit an Alert's potential to unnecessarily impair the rights of older adults or put them at risk of being targeted by bad actors. This Part presents four proposals for reducing the impact of Silver Alerts on the informational privacy rights of older adults while still enabling local agencies to use Alerts in appropriate situations: (1) providing the older adult with the opportunity to provide advanced consent for public disclosure; (2) restricting the information shared with the public; (3) limiting the audience to which the information is shared; and (4) more clearly prescribing the eligibility requirements for an Alert.

A. *Require Advanced Consent*

In an effort to lessen the likelihood of infringing an older adult's informational privacy rights, states could take the relatively easy step of providing older adults an opportunity to consent in advance to the issuance of a Silver Alert and the corresponding disclosure of their personal information in the event of their disappearance. For example, the state could allow all drivers over the age of sixty (or some other selected age) to indicate their consent when they renew their driver's license or through a periodic mailing. In this way, the state could maintain a registry of older adults who have consented to have their personal information released in a Silver Alert notification should the need arise.

Tying consent to driver's license renewal is a sensible solution for several reasons. First, Silver Alerts are often issued for older adults who have gone absent with a vehicle, and key items of information in the Alerts can be sourced from the state Department of Motor Vehicles ("DMV"). Because the DMV stores key information often disseminated in Alerts—driver's license photograph, vehicle license plate number—it may be the most natural agency to implement and maintain a Silver Alert registry. Second, the older adult is presumed to be mentally and cognitively competent when he renews his license, ensuring that his consent will be legally valid. Third, special procedures are already in place in many states

for renewing driver's licenses of older adults.¹⁶² Adding one more simple review would not substantially burden the renewal process for older individuals. Indeed, many states require more frequent, in-person driver's license renewals for older adults, providing numerous opportunities for the state to obtain consent for inclusion in a Silver Alert registry.¹⁶³

States could implement these systems as opt-in programs, requiring an older adult to affirmatively give her consent for public disclosure of certain personal information should the need for a Silver Alert arise in the future (e.g., by checking a box on a driver's license renewal form). States could also implement opt-out programs, where an older adult presumptively consents to public disclosure of private information in the event a Silver Alert is issued, but may withdraw his consent during the license renewal process.

By obtaining the older adult's consent in advance, the state dramatically lessens the potential for violating the privacy rights of those adults who are sensitive to it. Older adults who prefer not to release such information are free to withdraw their consent, while those who are less sensitive to dissemination can provide consent for future Silver Alerts. This consent is in some ways analogous to advance directives, which are common in the health care field for aging adults and enable an adult to indicate his desires in advance of an unexpected event.¹⁶⁴

While, to the author's knowledge, no state has yet implemented a statewide Silver Alert registry, several local agencies and organizations have adopted similar systems to ensure that Silver Alerts are issued only for those who have agreed to such disclosures in advance. For example, the District of Columbia's Department of Disability Services allows its clients—disabled adults within the District receiving municipal services—to consent to disclosure for Silver Alerts as part of their individual service

¹⁶² For example, in Virginia, drivers aged seventy-five and older must renew their license in person rather than electronically or by mail, the license renewal cycle is shortened from once every eight years to once every five years, and such drivers must pass a vision test or provide a recent report from an optometrist or ophthalmologist. VA. CODE ANN. § 46.2-330(A), (C); *New Senior Driver's License Renewal Law in Effect in Virginia on Jan. 1*, AUGUSTA FREE PRESS (Dec. 22, 2014, 4:35 PM), <https://perma.cc/VZA8-TM8N>. In Delaware, drivers aged sixty-five and older also must renew their license in person and take a vision and Highway Sign and Signal Test. *Senior Drivers in Delaware*, DEL. DMV, <https://perma.cc/LW9U-356L>.

¹⁶³ See, e.g., Virginia law and Delaware procedures cited *supra* note 162.

¹⁶⁴ GEORGE P. SMITH, II, LEGAL AND HEALTHCARE ETHICS FOR THE ELDERLY 55–67 (1996). The advance directive has also been proposed to address other issues related to aging, including the use of GPS technology to monitor the location of dementia patients. See Karen Eltis, *Predicating Dignity on Autonomy? The Need for Further Inquiry into the Ethics of Tagging and Tracking Dementia Patients with GPS Technology*, 13 ELDER L.J. 387, 411–13 (2005).

plans.¹⁶⁵ In the consent process, the disabled adult or his guardian is informed of the nature of the Alert program and given the opportunity to enroll.¹⁶⁶ Similarly, the Rockland County Sheriff's Office in New York has established an enrollment program for "at risk" adults, maintaining a registry for those who have agreed to be subjects of Silver Alerts should they go missing.¹⁶⁷ The University of Massachusetts Medical School has also established a registry for vulnerable residents in their community to aid in their recovery if necessary.¹⁶⁸ Similar statewide registries for older adults would enable those adults to better control the information released to the public in the event of their unexpected absence.

B. *Limit Information Disclosed to the Public*

States could also better protect the older adult's right to informational privacy by more carefully limiting what may be disclosed in a Silver Alert. Rather than allowing local law enforcement significant latitude in determining what personal details to distribute to the public, the state could instead specify and standardize the type of information disseminated by a Silver Alert. For instance, a state could limit the information shared to personal identifying information (i.e., name, vehicle information, and generic physical description) and prohibit a more detailed description of the older adult's appearance or catalog of items that the older adult may be carrying (e.g., jewelry, credit cards, etc.).

The state could also bar disclosure of information that indicates a suspected medical impairment, like an unconfirmed suspicion of dementia. Instead, the statute could prescribe standard language for an Alert indicating merely that the absent adult may be at risk, which would convey the urgency of the person's absence without divulging personal details of the person's confirmed or suspected medical or mental condition. In some cases, the statute could allow an Alert to reveal limited information related to a diagnosed medical condition if law enforcement believes such information is necessary to protect the health of the older adult.

A state could also consider allowing an older adult to consent in advance to the type of information the state may release and who may request an Alert. For example, if the state implements an advanced

¹⁶⁵ DEP'T ON DISABILITY SERVS., PROCEDURE NUMBER 2014-DDA-PR002, at 2 (2014) [hereinafter PROCEDURE], <https://perma.cc/F8GZ-5SKA>; DEP'T ON DISABILITY SERVS., SILVER ALERT INFORMATION SHEET AND CONSENT FORM, <https://perma.cc/YZ3F-K4G5>.

¹⁶⁶ PROCEDURE, *supra* note 165, at 2.

¹⁶⁷ See *Silver Alert Protocol*, ROCKLAND COUNTY SHERIFF'S OFF., <https://perma.cc/X8H2-EWCA>.

¹⁶⁸ Ellen Moran, 'Silver Alert' Registry Aids Police in Search for Missing Elders with Dementia, U. MASS. MED. SCH. (Jan. 15, 2015), <https://perma.cc/Z2CX-566X>.

consent system like that described in the previous section, the consent form could provide the older adult options for the types of information he permits to be disclosed (e.g., allowing a person to specify that his name, driver's license photograph, and vehicle information may be disclosed, but that any suspected, unconfirmed medical condition may not).

Disseminating general identifying information while restricting the disclosure of more personal medical information, or allowing the older adult to specify what information is shared, still enables law enforcement to notify the public of the adult's absence but better honors the adult's right to maintain the privacy of the personal information that she does not wish to share.

C. *Limit the Audience to Whom Information is Disclosed*

To further prevent violation of an older adult's informational privacy rights, states could limit to whom the information contained in a Silver Alert is distributed.¹⁶⁹ For example, states could specify that Silver Alerts are sent only to law-enforcement systems, or first to law-enforcement systems and later to public sources (e.g., the local media, posting to the internet, etc.) after the older adult has been absent for a specified time period (e.g., 24 hours). Given that most missing older adults are located relatively quickly by law enforcement,¹⁷⁰ limiting dissemination to the police should not substantially decrease the effectiveness the search, but should significantly increase privacy protections for the absent older adult.

Though such a change may initially generate concern among family members or caregivers, they can be reassured that their absent loved one's information is still in the hands of those most likely to locate him (the police) and that limiting public disclosure of his personal information reduces the risk that the absent adult will be embarrassed or targeted by wrongdoers.

D. *Clearly Define Eligibility Requirements*

Finally, as others have suggested, states could more clearly define the eligibility requirements for Silver Alerts and thus reduce the risk that cognitively competent older adults are subject to privacy invasions.¹⁷¹ For instance, the enabling statutes could require evidence of a clinical

¹⁶⁹ See, e.g., Wasser & Fox, *supra* note 20, at 426 (proposing limiting dissemination of information to geographically relevant regions).

¹⁷⁰ See Gergerich & Davis, *supra* note 5, at 240; Rowe et al., *supra* note 6, at 2066 & tbl.3.

¹⁷¹ See, e.g., Wasser & Fox, *supra* note 20, at 425–26, 428.

diagnosis of dementia or other cognitive impairment before a Silver Alert may be issued.¹⁷² Alternatively, or additionally, the statutes could more clearly define the standard required to establish cognitive impairment or credible threat (e.g., probable cause or reasonable suspicion), providing examples of the types of evidence that meet the threshold (e.g., medical treatment for memory loss or cognitive decline, other diagnosed frailty, evidence of a chronic condition that requires ongoing care, etc.). By more clearly articulating the eligibility requirements, states can better ensure that personal information is publicly disclosed only in those cases where the missing older adult is truly vulnerable and at risk.¹⁷³

Conclusion

While Silver Alerts can be a useful tool for locating absent older adults, the current structure of Silver Alert laws in many states risks considerably impairing an older adult's right to informational privacy by disclosing intimate, personal information to a broad, public audience. States could lessen the risk of privacy invasion by implementing relatively straightforward safeguards, including: (1) requiring advanced consent to the public disclosure of information in a Silver Alert; (2) limiting the extent of personal information shared with the public; (3) sharing personal information only—or at least initially—with law enforcement; and (4) more clearly articulating the eligibility requirements for an Alert. By implementing these or other safeguards, states can honor the informational privacy rights of older adults like Betty, who despite (or perhaps even because of) their age wish to keep certain personal information private. And they can do so without seriously compromising the state's ability to help locate absent older adults, like Walter, who are truly vulnerable. More generally, by pursuing policies that reflect the dual aims of preserving civil rights and protecting personal safety, we can more effectively support the older adults in our communities as they seek to live healthy, independent, and meaningful lives in their later years.

¹⁷² In cases where a clinical medical diagnosis is not available, statutes could alternatively provide that the individual requesting the Silver Alert could attest to multiple, specific examples of events that support the subject's "at-risk" status.

¹⁷³ See Wasser & Fox, *supra* note 20, at 425–26.