

**ASSEMBLY BILL**

**No. 1924**

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**Introduced by Assembly Members Bigelow and Low**

February 11, 2016

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An act to amend Sections 638.52 and 1546.1 of the Penal Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

AB 1924, as introduced, Bigelow. Pen registers: track and trace devices: orders.

(1) Existing law generally makes it a crime to install or use a pen register or trap and trace device without court approval. Existing law allows a peace officer to make an application to a magistrate for an order authorizing or approving the installation and use of a pen register or trap and trace device and requires a provider of wire or electronic communication service, landlord, custodian, or other person, upon presentation of an order, to provide the peace officer with all information, facilities, and technical assistance necessary to accomplish the installation, as specified, if the assistance is directed by the order.

This bill would require the requesting peace officer's law enforcement agency to compensate a provider of a wire or electronic communication service, landlord, custodian, or other person who provides facilities or technical assistance pursuant to these provisions for the reasonable expenses incurred in providing the facilities and assistance.

(2) Existing law only permits a government entity to compel the production of, or access to, electronic communication from a service provider or access to electronic device information pursuant to a warrant, wiretap order, order for electronic reader records, or subpoena.

This bill would additionally allow a government entity to compel production of the above communications and information pursuant to an order for a pen register or trap and trace device.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 638.52 of the Penal Code is amended to  
2 read:

3 638.52. (a) A peace officer may make an application to a  
4 magistrate for an order or an extension of an order authorizing or  
5 approving the installation and use of a pen register or a trap and  
6 trace device. The application shall be in writing under oath or  
7 equivalent affirmation, and shall include the identity of the peace  
8 officer making the application and the identity of the law  
9 enforcement agency conducting the investigation. The applicant  
10 shall certify that the information likely to be obtained is relevant  
11 to an ongoing criminal investigation and shall include a statement  
12 of the offense to which the information likely to be obtained by  
13 the pen register or trap and trace device relates.

14 (b) The magistrate shall enter an ex parte order authorizing the  
15 installation and use of a pen register or a trap and trace device if  
16 he or she finds that the information likely to be obtained by the  
17 installation and use of a pen register or a trap and trace device is  
18 relevant to an ongoing investigation and that there is probable  
19 cause to believe that the pen register or trap and trace device will  
20 lead to any of the following:

- 21 (1) Recovery of stolen or embezzled property.  
22 (2) Property or things used as the means of committing a felony.  
23 (3) Property or things in the possession of a person with the  
24 intent to use them as a means of committing a public offense, or  
25 in the possession of another to whom he or she may have delivered  
26 them for the purpose of concealing them or preventing them from  
27 being discovered.  
28 (4) Evidence that tends to show a felony has been committed,  
29 or tends to show that a particular person has committed or is  
30 committing a felony.  
31 (5) Evidence that tends to show that sexual exploitation of a  
32 child, in violation of Section 311.3, or possession of matter

1 depicting sexual conduct of a person under 18 years of age, in  
2 violation of Section 311.11, has occurred or is occurring.

3 (6) The location of a person who is unlawfully restrained or  
4 reasonably believed to be a witness in a criminal investigation or  
5 for whose arrest there is probable cause.

6 (7) Evidence that tends to show a violation of Section 3700.5  
7 of the Labor Code, or tends to show that a particular person has  
8 violated Section 3700.5 of the Labor Code.

9 (8) Evidence that does any of the following:

10 (A) Tends to show that a felony, a misdemeanor violation of  
11 the Fish and Game Code, or a misdemeanor violation of the Public  
12 Resources Code, has been committed or is being committed.

13 (B) Tends to show that a particular person has committed or is  
14 committing a felony, a misdemeanor violation of the Fish and  
15 Game Code, or a misdemeanor violation of the Public Resources  
16 Code.

17 (C) Will assist in locating an individual who has committed or  
18 is committing a felony, a misdemeanor violation of the Fish and  
19 Game Code, or a misdemeanor violation of the Public Resources  
20 Code.

21 (c) Information acquired solely pursuant to the authority for a  
22 pen register or a trap and trace device shall not include any  
23 information that may disclose the physical location of the  
24 subscriber, except to the extent that the location may be determined  
25 from the telephone number. Upon the request of the person seeking  
26 the pen register or trap and trace device, the magistrate may seal  
27 portions of the application pursuant to *People v. Hobbs* (1994) 7  
28 Cal.4th 948, and Sections 1040, 1041, and 1042 of the Evidence  
29 Code.

30 (d) An order issued pursuant to subdivision (b) shall specify all  
31 of the following:

32 (1) The identity, if known, of the person to whom is leased or  
33 in whose name is listed the telephone line to which the pen register  
34 or trap and trace device is to be attached.

35 (2) The identity, if known, of the person who is the subject of  
36 the criminal investigation.

37 (3) The number and, if known, physical location of the telephone  
38 line to which the pen register or trap and trace device is to be  
39 attached and, in the case of a trap and trace device, the geographic  
40 limits of the trap and trace order.

1 (4) A statement of the offense to which the information likely  
2 to be obtained by the pen register or trap and trace device relates.

3 (5) The order shall direct, if the applicant has requested, the  
4 furnishing of information, facilities, and technical assistance  
5 necessary to accomplish the installation of the pen register or trap  
6 and trace device.

7 (e) An order issued under this section shall authorize the  
8 installation and use of a pen register or a trap and trace device for  
9 a period not to exceed 60 days.

10 (f) Extensions of the original order may be granted upon a new  
11 application for an order under subdivisions (a) and (b) if the officer  
12 shows that there is a continued probable cause that the information  
13 or items sought under this subdivision are likely to be obtained  
14 under the extension. The period of an extension shall not exceed  
15 60 days.

16 (g) An order or extension order authorizing or approving the  
17 installation and use of a pen register or a trap and trace device shall  
18 direct that the order be sealed until otherwise ordered by the  
19 magistrate who issued the order, or a judge of the superior court,  
20 and that the person owning or leasing the line to which the pen  
21 register or trap and trace device is attached, or who has been  
22 ordered by the court to provide assistance to the applicant, not  
23 disclose the existence of the pen register or trap and trace device  
24 or the existence of the investigation to the listed subscriber or to  
25 any other person, unless or until otherwise ordered by the  
26 magistrate or a judge of the superior court, or for compliance with  
27 Sections 1054.1 and 1054.7.

28 (h) Upon the presentation of an order, entered under subdivisions  
29 (b) or (f), by a peace officer authorized to install and use a pen  
30 register, a provider of wire or electronic communication service,  
31 landlord, custodian, or other person shall immediately provide the  
32 peace officer all information, facilities, and technical assistance  
33 necessary to accomplish the installation of the pen register  
34 unobtrusively and with a minimum of interference with the services  
35 provided to the party with respect to whom the installation and  
36 use is to take place, if the assistance is directed by the order.

37 (i) Upon the request of a peace officer authorized to receive the  
38 results of a trap and trace device, a provider of a wire or electronic  
39 communication service, landlord, custodian, or other person shall  
40 immediately install the device on the appropriate line and provide

1 the peace officer all information, facilities, and technical assistance,  
2 including installation and operation of the device unobtrusively  
3 and with a minimum of interference with the services provided to  
4 the party with respect to whom the installation and use is to take  
5 place, if the installation and assistance is directed by the order.

6 *(j) A provider of a wire or electronic communication service,*  
7 *landlord, custodian, or other person who provides facilities or*  
8 *technical assistance pursuant to this section shall be reasonably*  
9 *compensated by the requesting peace officer's law enforcement*  
10 *agency for the reasonable expenses incurred in providing the*  
11 *facilities and assistance.*

12 ~~(j)~~  
13 *(k)* Unless otherwise ordered by the magistrate, the results of  
14 the pen register or trap and trace device shall be provided to the  
15 peace officer at reasonable intervals during regular business hours  
16 for the duration of the order.

17 ~~(k)~~  
18 *(l)* The magistrate, before issuing the order pursuant to  
19 subdivision (b), may examine on oath the person seeking the pen  
20 register or the trap and trace device, and any witnesses the person  
21 may produce, and shall take his or her affidavit or their affidavits  
22 in writing, and cause the affidavit or affidavits to be subscribed  
23 by the parties making them.

24 SEC. 2. Section 1546.1 of the Penal Code is amended to read:  
25 1546.1. (a) Except as provided in this section, a government  
26 entity shall not do any of the following:

27 (1) Compel the production of or access to electronic  
28 communication information from a service provider.

29 (2) Compel the production of or access to electronic device  
30 information from any person or entity other than the authorized  
31 possessor of the device.

32 (3) Access electronic device information by means of physical  
33 interaction or electronic communication with the electronic device.  
34 This section does not prohibit the intended recipient of an electronic  
35 communication from voluntarily disclosing electronic  
36 communication information concerning that communication to a  
37 government entity.

38 (b) A government entity may compel the production of or access  
39 to electronic communication information from a service provider,  
40 or compel the production of or access to electronic device

1 information from any person or entity other than the authorized  
2 possessor of the device only under the following circumstances:

3 (1) Pursuant to a warrant issued pursuant to Chapter 3  
4 (commencing with Section 1523) and subject to subdivision (d).

5 (2) Pursuant to a wiretap order issued pursuant to Chapter 1.4  
6 (commencing with Section 629.50) of Title 15 of Part 1.

7 (3) Pursuant to an order for electronic reader records issued  
8 pursuant to Section 1798.90 of the Civil Code.

9 (4) Pursuant to a subpoena issued pursuant to existing state law,  
10 provided that the information is not sought for the purpose of  
11 investigating or prosecuting a criminal offense, and compelling  
12 the production of or access to the information via the subpoena is  
13 not otherwise prohibited by state or federal law. Nothing in this  
14 paragraph shall be construed to expand any authority under state  
15 law to compel the production of or access to electronic information.

16 (5) *Pursuant to an order for a pen register or trap and trace*  
17 *device, or both, issued pursuant to Sections 638.50 to 638.53,*  
18 *inclusive, and subject to subdivision (d).*

19 (c) A government entity may access electronic device  
20 information by means of physical interaction or electronic  
21 communication with the device only as follows:

22 (1) Pursuant to a warrant issued pursuant to Chapter 3  
23 (commencing with Section 1523) and subject to subdivision (d).

24 (2) Pursuant to a wiretap order issued pursuant to Chapter 1.4  
25 (commencing with Section 629.50) of Title 15 of Part 1.

26 (3) With the specific consent of the authorized possessor of the  
27 device.

28 (4) With the specific consent of the owner of the device, only  
29 when the device has been reported as lost or stolen.

30 (5) If the government entity, in good faith, believes that an  
31 emergency involving danger of death or serious physical injury to  
32 any person requires access to the electronic device information.

33 (6) If the government entity, in good faith, believes the device  
34 to be lost, stolen, or abandoned, provided that the entity shall only  
35 access electronic device information in order to attempt to identify,  
36 verify, or contact the owner or authorized possessor of the device.

37 (7) Except where prohibited by state or federal law, if the device  
38 is seized from an inmate's possession or found in an area of a  
39 correctional facility under the jurisdiction of the Department of  
40 Corrections and Rehabilitation where inmates have access and the

1 device is not in the possession of an individual and the device is  
2 not known or believed to be the possession of an authorized visitor.  
3 Nothing in this paragraph shall be construed to supersede or  
4 override Section 4576.

5 (d) Any warrant for electronic information shall comply with  
6 the following:

7 (1) The warrant shall describe with particularity the information  
8 to be seized by specifying the time periods covered and, as  
9 appropriate and reasonable, the target individuals or accounts, the  
10 applications or services covered, and the types of information  
11 sought.

12 (2) The warrant shall require that any information obtained  
13 through the execution of the warrant that is unrelated to the  
14 objective of the warrant shall be sealed and not subject to further  
15 review, use, or disclosure without a court order. A court shall issue  
16 such an order upon a finding that there is probable cause to believe  
17 that the information is relevant to an active investigation, or review,  
18 use, or disclosure is required by state or federal law.

19 (3) The warrant shall comply with all other provisions of  
20 California and federal law, including any provisions prohibiting,  
21 limiting, or imposing additional requirements on the use of search  
22 warrants. If directed to a service provider, the warrant shall be  
23 accompanied by an order requiring the service provider to verify  
24 the authenticity of electronic information that it produces by  
25 providing an affidavit that complies with the requirements set forth  
26 in Section 1561 of the Evidence Code. Admission of that  
27 information into evidence shall be subject to Section 1562 of the  
28 Evidence Code.

29 (e) When issuing any warrant or order for electronic information,  
30 or upon the petition from the target or recipient of the warrant or  
31 order, a court may, at its discretion, do any or all of the following:

32 (1) Appoint a special master, as described in subdivision (d) of  
33 Section 1524, charged with ensuring that only information  
34 necessary to achieve the objective of the warrant or order is  
35 produced or accessed.

36 (2) Require that any information obtained through the execution  
37 of the warrant or order that is unrelated to the objective of the  
38 warrant be destroyed as soon as feasible after the termination of  
39 the current investigation and any related investigations or  
40 proceedings.

1 (f) A service provider may voluntarily disclose electronic  
2 communication information or subscriber information when that  
3 disclosure is not otherwise prohibited by state or federal law.

4 (g) If a government entity receives electronic communication  
5 information voluntarily provided pursuant to subdivision (f), it  
6 shall destroy that information within 90 days unless one or more  
7 of the following circumstances apply:

8 (1) The entity has or obtains the specific consent of the sender  
9 or recipient of the electronic communications about which  
10 information was disclosed.

11 (2) The entity obtains a court order authorizing the retention of  
12 the information. A court shall issue a retention order upon a finding  
13 that the conditions justifying the initial voluntary disclosure persist,  
14 in which case the court shall authorize the retention of the  
15 information only for so long as those conditions persist, or there  
16 is probable cause to believe that the information constitutes  
17 evidence that a crime has been committed.

18 (3) The entity reasonably believes that the information relates  
19 to child pornography and the information is retained as part of a  
20 multiagency database used in the investigation of child  
21 pornography and related crimes.

22 (h) If a government entity obtains electronic information  
23 pursuant to an emergency involving danger of death or serious  
24 physical injury to a person, that requires access to the electronic  
25 information without delay, the entity shall, within three days after  
26 obtaining the electronic information, file with the appropriate court  
27 an application for a warrant or order authorizing obtaining the  
28 electronic information or a motion seeking approval of the  
29 emergency disclosures that shall set forth the facts giving rise to  
30 the emergency, and if applicable, a request supported by a sworn  
31 affidavit for an order delaying notification under paragraph (1) of  
32 subdivision (b) of Section 1546.2. The court shall promptly rule  
33 on the application or motion and shall order the immediate  
34 destruction of all information obtained, and immediate notification  
35 pursuant to subdivision (a) of Section 1546.2 if such notice has  
36 not already been given, upon a finding that the facts did not give  
37 rise to an emergency or upon rejecting the warrant or order  
38 application on any other ground.



1 (i) This section does not limit the authority of a government  
2 entity to use an administrative, grand jury, trial, or civil discovery  
3 subpoena to do any of the following:

4 (1) Require an originator, addressee, or intended recipient of  
5 an electronic communication to disclose any electronic  
6 communication information associated with that communication.

7 (2) Require an entity that provides electronic communications  
8 services to its officers, directors, employees, or agents for the  
9 purpose of carrying out their duties, to disclose electronic  
10 communication information associated with an electronic  
11 communication to or from an officer, director, employee, or agent  
12 of the entity.

13 (3) Require a service provider to provide subscriber information.