

AMENDED IN ASSEMBLY APRIL 5, 2016

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 1924

Introduced by Assembly Members Bigelow and Low

February 11, 2016

An act to amend Sections 638.52 and 1546.1 ~~of~~ *of*, and to add Section 638.55 to, the Penal Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

AB 1924, as amended, 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. *Under existing law, an order or extension order authorizing or approving the installation and use of a pen register or a trap and trace device is required to direct that the order be sealed until otherwise ordered by the magistrate who issued the order, or a judge of the superior court, and that the person owning or leasing the line to which the pen register or trap and trace device is attached, or who has been ordered by the court to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence*

of the investigation to the listed subscriber or to any other person, except as specified.

This bill would instead require an order or extension order authorizing or approving the installation and use of a pen register or a trap and trace device direct that the order be sealed until the order, including any extensions, expires, and would require that the order or extension direct that the person owning or leasing the line to which the pen register or trap and trace device is attached not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber or to any other person. The 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~~ authorizes a government entity to compel the production of, or access to, electronic communication from a service provider or access to electronic device information only pursuant to a warrant, wiretap order, order for electronic reader records, or subpoena.

This bill would additionally ~~allow~~ authorize 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.

(3) Existing law authorizes a government entity to access electronic device information by means of physical interaction or electronic communication with the device only in specified circumstances, including, among others, pursuant to a warrant or wiretap order, or with the specific consent of the authorized possessor of the device.

This bill would additionally authorize a government entity to access electronic device information by means of physical interaction or electronic communication with the device pursuant to an order for a pen register or trap and trace device.

(4) The California Constitution provides for the Right to Truth in Evidence, which requires a 2/3 vote of the Legislature to enact a statute that would exclude any relevant evidence from any criminal proceeding, as specified.

This bill would authorize any person in a trial, hearing, or proceeding to move to suppress wire or electronic information obtained or retained in violation of the 4th Amendment to the United States Constitution or of the pen register and trap and trace device provisions described above,

as specified, and would authorize the Attorney General to commence a civil action to compel any government entity to comply with those provisions. The bill would also authorize an individual whose information is targeted by a warrant, order, or other legal process that is inconsistent with those provisions, the California Constitution, or the United States Constitution, or a service provider or any other recipient of the warrant, order, or other legal process to petition the issuing court to void or modify the warrant, order, or process, or to order the destruction of any information obtained in violation of those provisions, the California Constitution, or the United States Constitution. Because this bill would authorize the exclusion of relevant evidence obtained or retained in violation of those pen register and trap and trace device provisions in a criminal proceeding, it requires a 2/3 vote of the Legislature.

Vote: ~~majority~~^{2/3}. 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.

- 1 (2) Property or things used as the means of committing a felony.
- 2 (3) Property or things in the possession of a person with the
- 3 intent to use them as a means of committing a public offense, or
- 4 in the possession of another to whom he or she may have delivered
- 5 them for the purpose of concealing them or preventing them from
- 6 being discovered.
- 7 (4) Evidence that tends to show a felony has been committed,
- 8 or tends to show that a particular person has committed or is
- 9 committing a felony.
- 10 (5) Evidence that tends to show that sexual exploitation of a
- 11 child, in violation of Section 311.3, or possession of matter
- 12 depicting sexual conduct of a person under 18 years of age, in
- 13 violation of Section 311.11, has occurred or is occurring.
- 14 (6) The location of a person who is unlawfully restrained or
- 15 reasonably believed to be a witness in a criminal investigation or
- 16 for whose arrest there is probable cause.
- 17 (7) Evidence that tends to show a violation of Section 3700.5
- 18 of the Labor Code, or tends to show that a particular person has
- 19 violated Section 3700.5 of the Labor Code.
- 20 (8) Evidence that does any of the following:
- 21 (A) Tends to show that a felony, a misdemeanor violation of
- 22 the Fish and Game Code, or a misdemeanor violation of the Public
- 23 Resources Code, has been committed or is being committed.
- 24 (B) Tends to show that a particular person has committed or is
- 25 committing a felony, a misdemeanor violation of the Fish and
- 26 Game Code, or a misdemeanor violation of the Public Resources
- 27 Code.
- 28 (C) Will assist in locating an individual who has committed or
- 29 is committing a felony, a misdemeanor violation of the Fish and
- 30 Game Code, or a misdemeanor violation of the Public Resources
- 31 Code.
- 32 (c) Information acquired solely pursuant to the authority for a
- 33 pen register or a trap and trace device shall not include any
- 34 information that may disclose the physical location of the
- 35 subscriber, except to the extent that the location may be determined
- 36 from the telephone number. Upon the request of the person seeking
- 37 the pen register or trap and trace device, the magistrate may seal
- 38 portions of the application pursuant to *People v. Hobbs* (1994) 7
- 39 Cal.4th 948, and Sections 1040, 1041, and 1042 of the Evidence
- 40 Code.

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

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

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

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

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

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

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

21 (f) Extensions of the original order may be granted upon a new
22 application for an order under subdivisions (a) and (b) if the officer
23 shows that there is a continued probable cause that the information
24 or items sought under this subdivision are likely to be obtained
25 under the extension. The period of an extension shall not exceed
26 60 days.

27 (g) An order or extension order authorizing or approving the
28 installation and use of a pen register or a trap and trace device shall
29 direct that the order be sealed until ~~otherwise ordered by the~~
30 ~~magistrate who issued the order, or a judge of the superior court,~~
31 *the order, including any extensions, expires,* and that the person
32 owning or leasing the line to which the pen register or trap and
33 trace device is attached, ~~or who has been ordered by the court to~~
34 ~~provide assistance to the applicant, attached~~ not disclose the
35 existence of the pen register or trap and trace device or the
36 existence of the investigation to the listed subscriber or to any
37 other person, ~~unless or until otherwise ordered by the magistrate~~
38 ~~or a judge of the superior court, or for compliance with Sections~~
39 ~~1054.1 and 1054.7.~~ *person.*

1 (h) Upon the presentation of an order, entered under subdivisions
2 (b) or (f), by a peace officer authorized to install and use a pen
3 register, a provider of wire or electronic communication service,
4 landlord, custodian, or other person shall immediately provide the
5 peace officer all information, facilities, and technical assistance
6 necessary to accomplish the installation of the pen register
7 unobtrusively and with a minimum of interference with the services
8 provided to the party with respect to whom the installation and
9 use is to take place, if the assistance is directed by the order.

10 (i) Upon the request of a peace officer authorized to receive the
11 results of a trap and trace device, a provider of a wire or electronic
12 communication service, landlord, custodian, or other person shall
13 immediately install the device on the appropriate line and provide
14 the peace officer all information, facilities, and technical assistance,
15 including installation and operation of the device unobtrusively
16 and with a minimum of interference with the services provided to
17 the party with respect to whom the installation and use is to take
18 place, if the installation and assistance is directed by the order.

19 (j) A provider of a wire or electronic communication service,
20 landlord, custodian, or other person who provides facilities or
21 technical assistance pursuant to this section shall be reasonably
22 compensated by the requesting peace officer's law enforcement
23 agency for the reasonable expenses incurred in providing the
24 facilities and assistance.

25 (k) Unless otherwise ordered by the magistrate, the results of
26 the pen register or trap and trace device shall be provided to the
27 peace officer at reasonable intervals during regular business hours
28 for the duration of the order.

29 (l) The magistrate, before issuing the order pursuant to
30 subdivision (b), may examine on oath the person seeking the pen
31 register or the trap and trace device, and any witnesses the person
32 may produce, and shall take his or her affidavit or their affidavits
33 in writing, and cause the affidavit or affidavits to be subscribed
34 by the parties making them.

35 *SEC. 2. Section 638.55 is added to the Penal Code, immediately*
36 *following Section 638.53, to read:*

37 *638.55. (a) Any person in a trial, hearing, or proceeding may*
38 *move to suppress wire or electronic information obtained or*
39 *retained in violation of the Fourth Amendment to the United States*
40 *Constitution or of this chapter. The motion shall be made,*

1 *determined, and be subject to review in accordance with the*
2 *procedures set forth in subdivisions (b) to (q), inclusive, of Section*
3 *1538.5.*

4 *(b) The Attorney General may commence a civil action to compel*
5 *any government entity to comply with the provisions of this chapter.*

6 *(c) An individual whose information is targeted by a warrant,*
7 *order, or other legal process that is not in compliance with this*
8 *chapter, the California Constitution, or the United States*
9 *Constitution, or a service provider or any other recipient of the*
10 *warrant, order, or other legal process may petition the issuing*
11 *court to void or modify the warrant, order, or process, or to order*
12 *the destruction of any information obtained in violation of this*
13 *chapter, the California Constitution, or the United States*
14 *Constitution.*

15 ~~SEC. 2.~~

16 *SEC. 3.* Section 1546.1 of the Penal Code is amended to read:

17 1546.1. (a) Except as provided in this section, a government
18 entity shall not do any of the following:

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

21 (2) Compel the production of or access to electronic device
22 information from any person or entity other than the authorized
23 possessor of the device.

24 (3) Access electronic device information by means of physical
25 interaction or electronic communication with the electronic device.
26 This section does not prohibit the intended recipient of an electronic
27 communication from voluntarily disclosing electronic
28 communication information concerning that communication to a
29 government entity.

30 (b) A government entity may compel the production of or access
31 to electronic communication information from a service provider,
32 or compel the production of or access to electronic device
33 information from any person or entity other than the authorized
34 possessor of the device only under the following circumstances:

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

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

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

- 1 (4) Pursuant to a subpoena issued pursuant to existing state law,
 2 provided that the information is not sought for the purpose of
 3 investigating or prosecuting a criminal offense, and compelling
 4 the production of or access to the information via the subpoena is
 5 not otherwise prohibited by state or federal law. Nothing in this
 6 paragraph shall be construed to expand any authority under state
 7 law to compel the production of or access to electronic information.
- 8 (5) Pursuant to an order for a pen register or trap and trace
 9 device, or both, issued pursuant to ~~Sections 638.50 to 638.53,~~
 10 ~~inclusive, and subject to subdivision (d): Chapter 1.5 (commencing~~
 11 ~~with Section 630) of Title 15 of Part 1.~~
- 12 (c) A government entity may access electronic device
 13 information by means of physical interaction or electronic
 14 communication with the device only as follows:
- 15 (1) Pursuant to a warrant issued pursuant to Chapter 3
 16 (commencing with Section 1523) and subject to subdivision (d).
- 17 (2) Pursuant to a wiretap order issued pursuant to Chapter 1.4
 18 (commencing with Section 629.50) of Title 15 of Part 1.
- 19 (3) With the specific consent of the authorized possessor of the
 20 device.
- 21 (4) With the specific consent of the owner of the device, only
 22 when the device has been reported as lost or stolen.
- 23 (5) If the government entity, in good faith, believes that an
 24 emergency involving danger of death or serious physical injury to
 25 any person requires access to the electronic device information.
- 26 (6) If the government entity, in good faith, believes the device
 27 to be lost, stolen, or abandoned, provided that the entity shall only
 28 access electronic device information in order to attempt to identify,
 29 verify, or contact the owner or authorized possessor of the device.
- 30 (7) Except where prohibited by state or federal law, if the device
 31 is seized from an inmate's possession or found in an area of a
 32 correctional facility under the jurisdiction of the Department of
 33 Corrections and Rehabilitation where inmates have access and the
 34 device is not in the possession of an individual and the device is
 35 not known or believed to be the possession of an authorized visitor.
 36 Nothing in this paragraph shall be construed to supersede or
 37 override Section 4576.
- 38 (8) Pursuant to an order for a pen register or trap and trace
 39 device, or both, issued pursuant to Chapter 1.5 (commencing with
 40 Section 630) of Title 15 of Part 1.

1 (d) Any warrant for electronic information shall comply with
2 the following:

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

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

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

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

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

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

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

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

5 (1) The entity has or obtains the specific consent of the sender
6 or recipient of the electronic communications about which
7 information was disclosed.

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

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

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

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

- 1 (1) Require an originator, addressee, or intended recipient of
2 an electronic communication to disclose any electronic
3 communication information associated with that communication.
- 4 (2) Require an entity that provides electronic communications
5 services to its officers, directors, employees, or agents for the
6 purpose of carrying out their duties, to disclose electronic
7 communication information associated with an electronic
8 communication to or from an officer, director, employee, or agent
9 of the entity.
- 10 (3) Require a service provider to provide subscriber information.

O