

AMENDED IN SENATE APRIL 1, 2013

SENATE BILL

No. 467

Introduced by Senator Leno

February 21, 2013

An act to amend Section 1524.2 of, and to add Sections 1524.4, 1524.5, 1524.6, and 1524.7 to, the Penal Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 467, as amended, Leno. Privacy: electronic communications: warrant.

Existing law authorizes a court or magistrate to issue a warrant for the search of a place and the seizure of property or things identified in the warrant where there is probable cause to believe that specified grounds exist. Existing law also provides for a warrant procedure for the acquisition of stored communications *and other identifying information* in the possession of a *foreign corporation that is a provider of electronic communication service services or remote computing service services to the general public, and procedures for a California corporation that provides electronic communication services or remote computing services to the general public when served with a warrant issued by a court in another state.*

~~This bill would declare the intent of the Legislature to enact legislation prohibiting a government entity from obtaining the contents of a wire or electronic communication from a provider of electronic communication service or remote computing service that is stored, held, or maintained by that service without a valid search warrant.~~

This bill would delete the warrant requirement that the providers of electronic communication services or remote computing services be providing those services to the general public.

This bill would prohibit a governmental entity, as defined, from obtaining the contents of a wire or electronic communication from a provider of electronic communication services or remote computing services that is stored, held, or maintained by that service provider without a valid search warrant issued by a duly authorized magistrate, with jurisdiction over the offense under investigation, using established warrant procedures. The bill would require, within 3 days after a governmental entity receives those contents from a service provider pursuant to the warrant, the governmental entity to serve upon or deliver to the subscriber, customer, or user a copy of the warrant and a notice, as specified, including certain information. The bill would authorize a delay in serving the warrant notice, as provided.

This bill would prohibit, except as provided, a person or entity providing electronic communication services or remote computing services from knowingly divulging to any person or entity the contents of a wire or electronic communication that is stored, held, or maintained by that service provider.

Any knowing or intentional violation of these provisions, except as provided, would be subject to a civil action with appropriate relief, including, but not limited to, actual damages of not less than \$1,000, possible punitive damages, attorney's fees, and court costs.

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

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

1 SECTION 1. Section 1524.2 of the Penal Code is amended to
2 read:

3 1524.2. (a) As used in this section, the following terms have
4 the following meanings:

5 (1) The terms “electronic communication services” and “remote
6 computing services” shall be construed in accordance with the
7 Electronic Communications Privacy Act in Chapter 121
8 (commencing with Section 2701) of Part I of Title 18 of the United
9 State Code Annotated. ~~This section shall not apply to corporations
10 that do not provide those services to the general public.~~

11 (2) An “adverse result” occurs when notification of the existence
12 of a search warrant results in:

13 (A) Danger to the life or physical safety of an individual.

14 (B) A flight from prosecution.

- 1 (C) The destruction of or tampering with evidence.
- 2 (D) The intimidation of potential witnesses.
- 3 (E) Serious jeopardy to an investigation or undue delay of a
- 4 trial.

5 (3) “Applicant” refers to the peace officer to whom a search
6 warrant is issued pursuant to subdivision (a) of Section 1528.

7 (4) “California corporation” refers to any corporation or other
8 entity that is subject to Section 102 of the Corporations Code,
9 excluding foreign corporations.

10 (5) “Foreign corporation” refers to any corporation that is
11 qualified to do business in this state pursuant to Section 2105 of
12 the Corporations Code.

13 (6) “Properly served” means that a search warrant has been
14 delivered by hand, or in a manner reasonably allowing for proof
15 of delivery if delivered by United States mail, overnight delivery
16 service, or facsimile to a person or entity listed in Section 2110 of
17 the Corporations Code.

18 (b) The following provisions shall apply to any search warrant
19 issued pursuant to this chapter allowing a search for records that
20 are in the actual or constructive possession of a foreign corporation
21 that provides electronic communication services or remote
22 computing services ~~to the general public~~, where those records
23 would reveal the identity of the customers using those services,
24 data stored by, or on behalf of, the customer, the customer’s usage
25 of those services, the recipient or destination of communications
26 sent to or from those customers, or the content of those
27 communications.

28 (1) When properly served with a search warrant issued by the
29 California court, a foreign corporation subject to this section shall
30 provide to the applicant, all records sought pursuant to that warrant
31 within five business days of receipt, including those records
32 maintained or located outside this state.

33 (2) Where the applicant makes a showing and the magistrate
34 finds that failure to produce records within less than five business
35 days would cause an adverse result, the warrant may require
36 production of records within less than five business days. A court
37 may reasonably extend the time required for production of the
38 records upon finding that the foreign corporation has shown good
39 cause for that extension and that an extension of time would not
40 cause an adverse result.

1 (3) A foreign corporation seeking to quash the warrant must
2 seek relief from the court that issued the warrant within the time
3 required for production of records pursuant to this section. The
4 issuing court shall hear and decide that motion no later than five
5 court days after the motion is filed.

6 (4) The foreign corporation shall verify the authenticity of
7 records that it produces by providing an affidavit that complies
8 with the requirements set forth in Section 1561 of the Evidence
9 Code. Those records shall be admissible in evidence as set forth
10 in Section 1562 of the Evidence Code.

11 (c) A California corporation that provides electronic
12 communication services or remote computing services ~~to the~~
13 ~~general public~~, when served with a warrant issued by another state
14 to produce records that would reveal the identity of the customers
15 using those services, data stored by, or on behalf of, the customer,
16 the customer's usage of those services, the recipient or destination
17 of communications sent to or from those customers, or the content
18 of those communications, shall produce those records as if that
19 warrant had been issued by a California court.

20 (d) No cause of action shall lie against any foreign or California
21 corporation subject to this section, its officers, employees, agents,
22 or other specified persons for providing records, information,
23 facilities, or assistance in accordance with the terms of a warrant
24 issued pursuant to this chapter.

25 *SEC. 2. Section 1524.4 is added to the Penal Code, to read:*

26 *1524.4. (a) A governmental entity shall not obtain from a*
27 *provider of electronic communication services or remote computing*
28 *services the contents of a wire or electronic communication that*
29 *is stored, held, or maintained by that service provider without a*
30 *valid search warrant issued by a duly authorized magistrate, with*
31 *jurisdiction over the offense under investigation, using procedures*
32 *established pursuant to this chapter.*

33 *(b) Within three days after a governmental entity receives those*
34 *contents from a service provider, the governmental entity shall*
35 *serve upon, or deliver by registered or first-class mail, electronic*
36 *mail, or other means reasonably calculated to be effective as*
37 *specified by the court issuing the warrant, to the subscriber,*
38 *customer, or user a copy of the warrant and a notice that includes*
39 *the information specified in paragraph (1) of and subparagraph*

1 (A) of paragraph (2) of subdivision (c) of Section 1524.5, except
2 that delayed notice may be given pursuant to Section 1524.5.

3 (c) For purposes of this chapter, “governmental entity” means
4 a department or agency of the state or any political subdivision
5 thereof, or an individual acting for or on behalf of the state or any
6 political subdivision thereof.

7 SEC. 3. Section 1524.5 is added to the Penal Code, to read:

8 1524.5. (a) (1) A governmental entity acting under Section
9 1524.2 may, when a search warrant is sought, include in the
10 application a request, supported by sworn affidavit, for an order
11 delaying the warrant notification required under subdivision (b)
12 of Section 1524.4.

13 (2) The court shall grant the request if the court determines that
14 there is reason to believe that notification of the existence of the
15 warrant may have an adverse result as defined in paragraph (2)
16 of subdivision (a) of Section 1524.2, but only for the period of time
17 that the court finds there is reason to believe that the warrant
18 notification may have that adverse result, and in no event shall
19 the period of time for the delay exceed 90 days.

20 (b) The court may grant extensions of the delay of the warrant
21 notification, provided for in subdivision (b) of Section 1524.4, of
22 up to 90 days each on the same grounds as provided in subdivision
23 (a).

24 (c) Upon expiration of the period of delay of the warrant
25 notification under subdivision (a) or (b), the governmental entity
26 shall serve upon, or deliver by registered or first-class mail,
27 electronic mail, or other means reasonably calculated to be
28 effective as specified by the court issuing the warrant, the customer,
29 user, or subscriber a copy of the warrant together with a notice
30 that does both of the following:

31 (1) States with reasonable specificity the nature of the
32 governmental inquiry.

33 (2) Informs the customer, user, or subscriber all of the following:

34 (A) That information maintained for the customer or subscriber
35 by the service provider named in the process or request was
36 supplied to, or requested by, that governmental entity and the date
37 on which the supplying or request took place.

38 (B) That warrant notification to the customer or subscriber was
39 delayed.

40 (C) The grounds for the court’s determination to grant the delay.

1 (D) Which provisions of this chapter authorized the delay.

2 SEC. 4. Section 1524.6 is added to the Penal Code, to read:

3 1524.6. (a) Except as provided in subdivision (b), a person or
4 entity providing an electronic communication service or remote
5 computing service shall not knowingly divulge to any person or
6 entity the contents of a wire or electronic communication that is
7 stored, held, or maintained by that service.

8 (b) A service provider described in subdivision (a) may divulge
9 the contents of a communication under any of the following
10 circumstances:

11 (1) To an addressee or intended recipient of the communication
12 or an agent of the addressee or intended recipient.

13 (2) As otherwise authorized in Section 1524.2.

14 (3) With the lawful consent of the originator, an addressee, or
15 intended recipient of the communication, or the subscriber in the
16 case of remote computing service.

17 (4) To a person employed or authorized or whose facilities are
18 used to forward the communication to its destination.

19 (5) As may be necessary incident to the rendition of the service
20 or to the protection of the rights or property of the provider of that
21 service.

22 (6) To a law enforcement agency if the contents were
23 inadvertently obtained by the service provider and appear to
24 pertain to the commission of a crime.

25 (7) To a governmental entity, if the provider, in good faith,
26 believes that an emergency involving the danger of death or serious
27 physical injury to any person requires disclosure without delay of
28 communications relating to the emergency.

29 SEC. 5. Section 1524.7 is added to the Penal Code, to read:

30 1524.7. (a) Except as provided in subdivision (d) of Section
31 1524.2, any provider of electronic communication service or
32 remote computing service, subscriber, or other person aggrieved
33 by any knowing or intentional violation of this chapter may, in a
34 civil action, recover from the person, entity, or governmental entity
35 that committed the violation, relief as may be appropriate.

36 (b) In a civil action under this section, appropriate relief
37 includes, but is not limited to, all of the following:

38 (1) Preliminary and other equitable or declaratory relief.

39 (2) Damages under subdivision (c).

1 (3) Reasonable attorney's fees and other litigation costs
2 reasonably incurred.

3 (c) (1) The court may assess as damages, in a civil action, the
4 sum of the actual damages suffered by the plaintiff and any profits
5 made by the violator as a result of the violation, but in no case
6 shall a person be entitled to recover less than the sum of one
7 thousand dollars (\$1,000).

8 (2) If the violation is willful or intentional, the court may assess
9 punitive damages.

10 ~~SECTION 1. It is the intent of the Legislature to enact~~
11 ~~legislation prohibiting a government entity from obtaining the~~
12 ~~contents of a wire or electronic communication from a provider~~
13 ~~of electronic communication service or remote computing service~~
14 ~~that is stored, held, or maintained by that service without a valid~~
15 ~~search warrant.~~