

BILL ANALYSIS

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Department, Board, Or Commission	Author	Bill Number
Franchise Tax Board	Evans	AB 5

SUBJECT

Electronic Discovery Act

SUMMARY

This bill would expand existing discovery procedures for a demand for inspection to include copying, testing, or sampling documents or electronically stored information (ESI).

PURPOSE OF BILL

According to the author's staff, the purpose of the bill is to clarify ambiguities in the law relating to ESI and discovery and bring the process into the 21st century.

EFFECTIVE/OPERATIVE DATE

As specified by its own terms as an urgency measure, the provisions of this bill would take effect immediately and be operative as of the date of enactment.

ANALYSIS

FEDERAL/STATE LAW

Federal law generally requires a party to civil litigation to provide the other party with certain information (discovery) for inspection that supports or defends that party's position in the lawsuit. Required information includes the following:

- Name and contact information of each individual likely to have discoverable information,
- Copies of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control,
- Identity of any witness that will be used to present evidence, and
- Documents or other evidentiary material that supports damage calculations for inspection or copying, unless privileged or protected from disclosure.

Certain proceedings are exempt from initial discovery requirements and generally disclosure is required within 30 days after being served.

Current federal and state law provides that income tax returns and income tax information is confidential and prohibited from disclosure unless specifically authorized by statute. Any Franchise Tax Board (FTB) employee or member responsible for the improper disclosure of federal or state tax information is subject to criminal prosecution that could result in fines or imprisonment, or both fines and imprisonment. Improper disclosure of federal tax information is punishable as a felony and improper disclosure of state tax information is punishable as a misdemeanor. FTB is in possession of federal tax information as well as state tax information.

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State law authorizes any party involved in civil litigation to obtain discovery regarding any matter not privileged that is relevant to the subject matter involved in the claim or defense of a pending action. Courts can limit the scope of discovery if it is determined that the burden, expense, or intrusiveness of the discovery demand clearly outweighs the likelihood that the information sought would lead to the discovery of admissible evidence. Parties must respond within 30 days to a request for discovery by a statement that indicates one of the following for each item requested in the demand:

- The party will comply with the particular demand for inspection,
- The party lacks the ability to comply with the particular demand for inspection, or
- The party objects to the particular demand for inspection.

Parties that have had a demand for inspection served may petition the court for a protective order to preclude them from complying with the demand.

Documents produced in response to a demand must be produced as they are kept in the usual course of business or be organized and labeled to correspond with the categories in the demand. Failure to respond timely to a discovery demand could result in the party losing the ability to object to the demand including objections based on privilege or on the protection of work product. The party making the demand can move for a court order to compel a response to the inspection demand and the courts can impose monetary sanctions.

In specified cases, a court may authorize the use of technology in conducting discovery. Technology can be used upon express findings of the court or stipulation of the parties that the procedures adopted in the order would do the following:

- Promote cost effective and efficient discovery,
- Imposes or requires no undue expenditure of time or money,
- Creates no undue economic burden or hardship on any person.

THIS BILL

This bill would add the following definitions to the Code of Civil Procedure:

- “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- “Electronically Stored Information” (ESI) means information that is stored in an electronic medium.

The bill would expand existing discovery procedures for a demand for inspection to include copying, testing, or sampling documents or ESI. A party may demand that another party produce and permit the party making the demand, or someone acting on that party’s behalf, to inspect, copy, test, or sample ESI in the possession, custody, or control of the party when a discovery demand is made.

The bill would provide that a party demanding inspection, copying, testing, or sampling of ESI may specify the form or forms in which each type of ESI is to be produced. If a party objects to a specified form for producing the information or if no form is specified in the demand, the responding party must state in its response the form in which it intends to produce each type of information. Unless the parties otherwise agree or the court otherwise orders, the following applies:

- If a demand for production does not specify a form or forms for producing a type of ESI, the responding party shall produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable,
- A party need not produce the same ESI in more than one form.

The bill would provide that the party seeking a protective order regarding a demand for ESI on the basis that information is from a source that is not reasonably accessible bears the burden of demonstrating that the information is from a source that is not reasonably accessible. The court could order discovery if the demanding party shows good cause and may set conditions for the discovery of the ESI including allocation for the expense of discovery. The court can limit the frequency or extent of discovery of ESI if the court determines that any of the following conditions exist:

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive,
- The discovery sought is unreasonable, cumulative, or duplicative,
- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought,
- The likely burden or expense of the proposed discovery outweighs the likely benefits, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

As an exception to ordering sanctions for noncompliance, the bill would provide that absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide ESI that has been lost, damaged, altered, or overwritten as the result of the routine good faith operation of an electronic information system; nevertheless, the party is obligated to preserve discoverable information.

The bill would provide that the court is required to impose a monetary sanction against anyone who unsuccessfully makes or opposes a motion to compel a response to a demand unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

If a party objects to the discovery of ESI on the grounds that it is from a source that is not reasonably accessible, the responding party must identify in its response the types of categories of sources of ESI that it asserts are not reasonably accessible which will preserve any objections it may have had relating to that ESI.

ESI produced in discovery is subject to a claim of privilege or protection as attorney work product. After being notified of a claim of privilege or protection, any party that received the information must immediately sequester the information and either return the specified information and any copies that may exist or present the information to the court conditionally under seal for the determination of the claim. A party is precluded from using or disclosing the specified information until the claim of privilege is resolved. The party who received and disclosed the information before being notified of a claim of privilege or of protection shall after that notification immediately take reasonable steps to retrieve the information. If the receiving party contests the legitimacy of the claim of privilege or protection, he or she may seek determination of the claim from the court by making a motion within 30 days of receiving the claim.

The bill would provide that the act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of article IV of the constitution to eliminate uncertainty and confusion regarding the discovery of ESI and thereby minimize unnecessary and costly litigation that adversely impacts access to the courts it is necessary for the act to take effective immediately.

IMPLEMENTATION CONSIDERATIONS

Implementing this bill would not significantly impact department programs or operations.

LEGISLATIVE HISTORY

AB 926 (Evans, 2008) would have established procedures for a person to obtain discovery of electronically stored information, as defined. Governor Schwarzenegger vetoed this bill. The complete veto message can be found in Appendix A of this analysis.

PROGRAM BACKGROUND

The department currently complies with discovery requests made in federal lawsuits by reviewing systems containing ESI using ad-hoc inquiries. Use of ad-hoc inquiries has been the economical approach because the department is involved in few federal lawsuits, and the resources needed to comply are minimal.

FISCAL IMPACT

The provisions of this bill would not impact department costs.

ECONOMIC IMPACT

The provisions of this bill would not impact state income tax revenues.

Support/Opposition

Support: According to the Assembly Committee analysis of March 2, 2009, the following support has been noted:

California Defense Counsel (co-sponsor)
Consumer Attorneys (co-sponsor)
Judicial Council of California (so-sponsor)
American Federation of State, County and Municipal Employees
Civil Justice Association of California

According to the Senate Committee analysis of June 8, 2009, the following support is noted:

California Chamber of Commerce
Association of California Insurance Companies
Civil Justice Association of California

Opposition: No opposition on file.

VOTES

Assembly Floor – Ayes: 74, Noes: 0
Senate Floor – Ayes: 36 , Noes: 0

LEGISLATIVE STAFF CONTACT

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Appendix A
Veto messages from prior legislation

BILL NUMBER: AB 926
VETOED DATE: 09/27/2008

To the Members of the California State Assembly:

I am returning Assembly Bill 926 without my signature.

The historic delay in passing the 2008-2009 State Budget has forced me to prioritize the bills sent to my desk at the end of the year's legislative session. Given the delay, I am only signing bills that are the highest priority for California. This bill does not meet that standard and I cannot sign it at this time.

Sincerely,

Arnold Schwarzenegger