

ANALYSIS OF AMENDED BILL

Franchise Tax Board

Author: Leno Analyst: Janet Jennings Bill Number: SB 467
Related Bills: None Telephone: 845-3495 Introduced and Amended Dates: February 21, April 1, June 20, & July 3, 2013
Attorney: Patrick Kusiak Sponsor: _____

SUBJECT: Privacy/Electronic Communication/Warrants

SUMMARY

The bill would require the department to obtain a warrant to seek the contents of a wire or electronic communication that is stored, held, or maintained by a provider of electronic communication or remote computing services.

RECOMMENDATION

No position.

Summary of Amendments

On February 21, 2013, this bill was introduced and included intent language that would prohibit a government entity from obtaining the contents of a wire or electronic communication. The bill was amended on April 1, June 20, and July 3, 2013. This analysis only addresses the provisions of the bill that impact the department's programs and operations.

This is the department's first analysis of the bill.

REASON FOR THE BILL

The reason for the bill is to update California's electronic privacy law, ensuring emails and other electronic communications content are protected from warrantless government action.

EFFECTIVE/OPERATIVE DATE

This bill would be effective and operative on January 1, 2014.

ANALYSIS

FEDERAL/STATE LAW

If the contents of a wire or electronic communication have been in storage for 180 days or less, current federal law authorizes a governmental entity to require the disclosure only pursuant to a warrant under the Federal Rules or under an equivalent state warrant. If the contents of a wire or electronic communication have been in electronic storage in an electronic communications system for more than 180 days, a governmental entity may require its disclosure through other means such as a subpoena or a court order. Federal law also includes notification procedures¹.

¹ 18 USCS Section 2701 *et seq*

Board Position:

_____ S _____ NA X NP
_____ SA _____ O _____ NAR
_____ N _____ OUA

Executive Officer

Date

Selvi Stanislaus

8/23/13

Current federal and state law provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized².

The California Penal Code:³

- Provides that a search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and, in the case of a thing or things or personal property, bring the same before the magistrate.
- Provides that a search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched.
- Provides that a search warrant may be issued upon any of the specified grounds, including when a provider of electronic communication service or remote computing service has records or evidence, as specified, showing that property was stolen or embezzled constituting a misdemeanor, or that property or things are in the possession of any person with the intent to use them as a means of committing a misdemeanor public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing their discovery.
- Requires a provider of electronic communication service or remote computing service to disclose to a governmental prosecuting or investigating agency the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length of service of a subscriber to or customer of that service, and the types of services the subscriber or customer utilized, when the governmental entity is granted a search warrant.
- Provides that a governmental entity receiving subscriber records or information is not required to provide notice to a subscriber or customer of the warrant.
- Authorizes a court issuing a search warrant, on a motion made promptly by the service provider, to quash or modify the warrant if the information or records requested are unusually voluminous in nature or compliance with the warrant otherwise would cause an undue burden on the provider.
- Requires a provider of wire or electronic communication services or a remote computing service, upon the request of a peace officer, to take all necessary steps to preserve records and other evidence in its possession pending the issuance of a search warrant or a request in writing and an affidavit declaring an intent to file a warrant to the provider. Records shall be retained for a period of 90 days, which shall be extended for an additional 90 day period upon a renewed request by the peace officer.
- Specifies that no cause of action shall be brought against any provider, its officers, employees, or agents for providing information, facilities, or assistance in good faith compliance with a search warrant.

² U.S. Const., 4th Amend; Cal. Const., art. I, § 13

³ Sections 1523 – 1525

- Provides for a process for a search warrant for records that are in the actual or constructive possession of a foreign corporation that provides electronic communication services or remote computing services to the general public, where the records would reveal the identity of the customers using those services, data stored by, or on behalf of, the customer, the customer's usage of those services, the recipient or destination of communications sent or from those customers, or the content of those communications.
- Defines an adverse result as:
 - Danger to the life or physical safety of an individual.
 - A flight from prosecution.
 - The destruction of or tampering with evidence.
 - The intimidation of potential witnesses.
 - Serious jeopardy to an investigation or undue delay of a trial.

THIS BILL

This bill would remove the requirement that to be subject to these warrant procedures the corporation must provide services to the general public. In addition, the bill would specify that no cause of action would be brought against any foreign or California corporation, as defined, or its officers, employees, or agents, for providing information, facilities, or assistance in accordance with statutory authorization.

This bill would accomplish the following:

- Define a "governmental entity" as a department or agency of California or any political subdivision thereof, or an individual acting for or on behalf of California or any political subdivision thereof, which would include the Franchise Tax Board (FTB).
- Require the department within three days, or 90 days, if a delay has been granted, after the department receives the contents from a service provider, to serve upon, or deliver by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective as specified by the court issuing the warrant, to the subscriber, customer, or user, a copy of the warrant and together with a notice that does both of the following:
 - The nature of the department's inquiry;
 - Informs the customer, user, or subscriber all of the following:
 - That information maintained for the customer or subscriber by the service provider named in the warrant that was supplied to, or requested by, the department and the date on which the supply of or request took place;
 - That the warrant notification to the customer or subscriber was delayed;
 - The grounds for the court's determination to grant the delay; and
 - The provisions that authorized the delay.

- Allow the department, when a search warrant is sought, to include in the application a request, supported by sworn affidavit, for an order delaying the warrant notification required under this bill's provisions if the notification would have an adverse result.
- Allow the court to grant the request to delay notification if the court determines that there is reason to believe that notification of the existence of the warrant may have an adverse result as defined, but only for the period of time that the court finds there is reason to believe that the warrant notification may have that adverse result, and in no event shall the period of time for the delay exceed 90 days. The court may grant extensions of the delay of the warrant notification of up to 90 days each on the same grounds.
- Allow any provider of electronic communication service or remote computing service, subscriber, or other person aggrieved by the department's, knowing or intentional violation of this chapter may, in a civil action, recover from the department, relief as may be appropriate including but not limited to all of the following:
 - Preliminary and other equitable or declaratory relief.
 - Actual damages suffered by the plaintiff and any profits made by the department as a result of the violation, but in no case shall a person be entitled to recover less than the sum of \$1,000.
 - Reasonable attorney fees and other litigation costs reasonably incurred.
- All the court to assess as damages, in a civil action, the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person be entitled to recover less than the sum of one thousand dollars (\$1,000). If the violation is willful or intentional, the court may assess punitive damages.
- Define the terms "electronic communication service" and "remote computing service" would have the same meanings as they have in the Electronic Communications Privacy Act in Chapter 121 (commencing with Section 2701) of Part I of Title 18 of the United State Code.

PROGRAM BACKGROUND

The FTB's Criminal Investigation Bureau employs special agents and forensic auditors. Special agents (Agents) hold full peace officer status with the power to investigate alleged criminal violations of the Revenue and Taxation Code, principally income tax fraud and evasion. Agents gather evidence, locate and examine assets and liabilities, interview witnesses, interrogate suspects, plan and execute search and arrest warrants, and work in conjunction with the department's audit and collections staff, and other local, state, and federal organizations and law enforcement agencies. When a case moves into the prosecution phase, agents serve as expert witnesses and assist with prosecution of the case. In addition to working the FTB cases, agents also partner with city, county, state, and federal agencies when other charges exist. Forensic auditors evaluate available evidentiary leads and recommend and explore possible avenues in the investigative process to gather additional facts. Forensic auditors apply accounting and auditing skills to examine and analyze documents and records to detect and trace fraudulent transactions. Forensic auditors prepare extensive self-explanatory schedules that list detail analysis and show forms of transactional tracing and factual conclusions and other documents to present at court proceedings.

IMPLEMENTATION CONSIDERATIONS

The department has identified the following implementation concern. Department staff is available to work with the author's office to resolve this and other concerns that may be identified.

The bill's noticing requirement would impede investigation cases that require warrants served on electronic communication or remote computing services providers. By requiring the department to put suspected criminals on notice prior to the department's completion of an investigation, the suspected criminal would have the opportunity to dispose of or transfer assets and materials, and notify known or suspected co-conspirators of a pending investigation. The nature of investigating suspected tax evasion or fraud cases are complex and time consuming. Seldom is a forensic analysis completed within 90 days and never within the bill's three-day noticing requirement.

OTHER STATES' INFORMATION

Since this bill only relates to California's warrant requirement and notification process, a comparison to other states' tax information would not be relevant.

FISCAL IMPACT

This bill would not significantly impact the department's costs.

ECONOMIC IMPACT

Estimated Revenue Impact of SB 467 As Amended July 3, 2013 For Taxable Years Beginning On or After January 1, 2014 Enactment Assumed After June 30, 2013		
2013-14	2014-15	2015-16
- \$4,000	- \$10,000	- \$20,000

This analysis does not account for changes in employment, personal income, or gross state product that could result from this bill.

SUPPORT/OPPOSITION⁴

Support:

Electronic Frontier Foundation
American Civil Liberties Union
California Newspaper Publishers Association
California Public Defenders Association

⁴ As listed in the Assembly Committee on Public Safety analysis of the bill as amended April 1, 2013

Opposition:

Association for Los Angeles Deputy Sheriffs
California District Attorneys Association
California Police Chiefs Association
California State Sheriffs' Association
Los Angeles County District Attorney's Office
Los Angeles Police Protective League
Riverside Sheriffs' Association

ARGUMENTS

Proponents: Some would argue that this bill would address privacy concerns by requiring a search warrant to obtain the content of electronic communication.

Opponents: Some would argue that this bill would impede investigations by requiring a copy of the warrant and specified notice be provided to suspected tax evaders.

LEGISLATIVE STAFF CONTACT

Janet Jennings

Legislative Analyst, FTB

(916) 845-3495

janet.jennings@ftb.ca.gov

Mandy Hayes

Revenue Manager, FTB

(916) 845-5125

mandy.hayes@ftb.ca.gov

Gail Hall

Legislative Director, FTB

(916) 845-6333

gail.hall@ftb.ca.gov