



## Bill Analysis

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Sponsor:

Bill Number: AB 522

Related Bills: See Legislative  
History

Introduced: February 7, 2023

### SUBJECT

Administrative Subpoenas

### SUMMARY

This bill, under the Government Code (GOV), would establish procedures that state departments must follow to administratively subpoena a person's or entity's electronic communication information from a communications service provider.

### RECOMMENDATION

No position.

### SUMMARY OF AMENDMENTS

Not applicable.

### REASON FOR THE BILL

The reason for the bill is to provide greater protection to consumers when their electronic records are subpoenaed.

### ANALYSIS

This bill would authorize the use of an administrative subpoena by a state department to obtain a customer's electronic communication information from a service provider only if the state department followed the process established in this bill.

An administrative subpoena could be used to obtain a customer's electronic communication information from a service provider only if all the following conditions are satisfied:

- The state department serves notice of the administrative subpoena on the customer under Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.
- A copy of the administrative subpoena is attached to the notice.

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- The administrative subpoena includes the name of the state department that issued it and the statutory purpose for which the electronic communication information is to be obtained.
- The notice includes a statement in substantially the following form: “The attached subpoena was served on a communication service provider to obtain your electronic communication information. The service provider has made a copy of the information specified in the subpoena. Unless you (1) move to quash or modify the subpoena within 10 days of service of this notice, and (2) notify the service provider that you have done so, the service provider will disclose the information pursuant to the subpoena.”
- The state department has served a proof of service on the service provider stating its compliance with the above 1) to 4), inclusive.

Unless the customer notifies the service provider that a motion to quash or modify the subpoena has been filed, the service provider would be required to produce the electronic communication information specified in the subpoena no sooner than 10 days after the state department serves a proof of service.

If the customer files a motion to quash or modify an administrative subpoena, the proceeding would be given priority on the court calendar, and the matter would be heard within 10 days from the filing of the motion to quash or modify.

A service provider would be required to maintain a record of any disclosure of its customers’ electronic communication information, including a copy of the administrative subpoena, for five years. If the customer requests and pays the reasonable cost of reproduction and delivery, a service provider would be required to provide a copy of the record provided.

If served, the service provider must promptly provide a copy of any electronic communication information that is within the scope of the subpoena and within the possession of the service provider at the time that the subpoena was served.

For purposes of this bill:

- “Customer” would mean a person or entity that receives an electronic communication service from a service provider.
- “Electronic communication information” would mean any information about an electronic communication or the use of an electronic communication service, including, but not limited to, the contents, sender, recipients, format, or location of the sender or recipients at any point during the communication, the time or date the communication was created, sent, or received, or any information pertaining to any individual or device participating in the communication, including, but not limited to, an internet protocol (IP) address. This would not include subscriber information, which is

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the name, street address, telephone number, email address, or similar contact information provided by the subscriber to the service provider to establish or maintain an account or communication channel, a subscriber or account number or identifier, the length of service, and the types of services used by a user of or subscriber to a service provider.

- “Electronic communication service” would mean a service that provides to its subscribers or users the ability to send or receive electronic communications, including any service that acts as an intermediary in the transmission of electronic communications, or stores electronic communication information.
- “Service provider” would mean a person or entity offering an electronic communication service.

#### *Effective/Operative Date*

This bill would be effective and operative January 1, 2024.

#### *Federal/State Law*

##### *Federal Law*

For purposes of ascertaining the correctness of any return, making a return where none has been made, and determining the tax liability of any person, or collecting any such liability, the Internal Revenue Code (IRC) authorizes the Secretary of the Treasury to examine any books, papers, records, or other data that may be relevant or material to such inquiry. In addition, the IRC authorizes the Secretary of the Treasury to summon taxpayers and third parties to testify and to provide books and records.

##### *State Law*

In connection with any investigation or action authorized under the GOV, state departments are granted general authority to issue administrative subpoenas under GOV section 11181(e) for the attendance of witnesses and the production of papers, books, accounts, documents, any writing, tangible things, and testimony pertinent or material to any inquiry, investigation, hearing, proceeding, or action conducted in any part of the state.

In addition, pursuant to Penal Code (PEN) section 1546.1, a government entity may compel the production of or access to electronic communication information from a service provider or compel the production of or access to electronic device information from any person or entity other than the authorized possessor of the device only under certain circumstances unless pursuant to existing state law, the information is not sought for the purpose of investigating or prosecuting a criminal offense, and compelling the production of or access to the information via the

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subpoena is not otherwise prohibited by state or federal law. The section further provides that the section cannot be construed to expand any authority under state law to compel the production of or access to electronic information.

For purposes of ascertaining the correctness of any return, making a return where none has been made, and determining the tax liability of any person, or collecting any such liability, the Revenue and Taxation Code (RTC) authorizes the Franchise Tax Board (FTB) to require by demand, that an entity of any kind including, but not limited to, employers, persons, or financial institutions provide information or make available for examination or copying at a specified time and place, or both, any relevant book, papers, or other data. Any demand to a financial institution must comply with the California Right to Financial Privacy Act under Chapter 20 (commencing with Section 7460) Division 7 of Title 1 of GOV.

Information that may be required upon demand includes, but is not limited to, any of the following:

- Addresses and telephone numbers of persons designated by the FTB.
- Information contained on Federal Form W-2 (Wage and Tax Statement), Federal Form W-4 (Employee's Withholding Allowance Certificate), or State Form DE-4 (Employee's Withholding Allowance Certificate).

In addition, the FTB can require the attendance of the taxpayer or any other person having knowledge in the premises, and may take testimony and require material proof for its information and administer oaths to carry out the Administration of Franchise and Income Tax Laws. Furthermore, the FTB can issue subpoenas or subpoenas duces tecum, which must be signed by any member of the FTB.

Subpoenas or subpoenas duces tecum may be enforced by application to a superior court in accordance with Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the GOV. However, a subpoena cannot be issued to produce or analyze any tax-related computer software source code.

#### *Implementation Considerations*

None noted.

#### *Technical Considerations*

None noted.

#### *Policy Considerations*

None noted.

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## **LEGISLATIVE HISTORY**

SB 178 (Leno, Chapter 651, Statutes of 2015), under the PEN, established the California Electronic Privacy Act (CalECPA), a comprehensive digital privacy law that became effective on January 1, 2016.

## **PROGRAM BACKGROUND**

Per the Senate Public Safety Committee Analysis of AB 522, dated July 7, 2023, in 2013, the Legislature enacted Senate Concurrent Resolution 54 (Padilla, Chapter 115, Statutes of 2013) (SCR 54), which directed the California Law Revision Commission (Commission) to recommend to the Legislature how best to “revise statutes governing access by state and local government agencies to customer information from communications service providers” so that these statutes met specified requirements, including safeguarding customers’ constitutional rights, accommodating mobile and Internet-based technologies, and enabling state and local government agencies to protect public safety.

The Commission issued a report last year making recommendations to address the one issue that was not resolved by CalECPA, specifically the need for notice to a customer when an administrative subpoena is served on a communication service provider to obtain the customer’s information. This bill adopts the Commission’s recommendations to provide adequate notice to customers and the opportunity to challenge the subpoena in court before the customer’s records are produced.

FTB uses administrative tools to collect delinquent tax and nontax debt liabilities. Collection actions include, but are not limited to, attaching bank accounts, garnishing wages, issuing warrants to seize property, and issuing subpoenas to obtain bank record, employer, or payor information. In addition, subpoenas are used to obtain needed information related to criminal investigations.

## **FISCAL IMPACT**

This bill would not significantly impact the FTB’s costs.

## **ECONOMIC IMPACT**

### *Revenue Estimate*

This bill, as introduced on February 7, 2023, would not impact state income or franchise tax revenue.

## **LEGAL IMPACT**

None noted.

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## **APPOINTMENTS**

None noted.

## **SUPPORT/OPPOSITION**

Per the Senate Public Safety Committee Analysis of AB 522, dated July 7, 2023, there was no support or opposition identified.

## **ARGUMENTS**

Per the same analysis dated July 7, 2023, according to the Commission, the bill sponsor, the following argument in support of the bill was provided:

Assembly Bill 522 would implement a recommendation of the California Law Revision Commission (<http://clrc.ca.gov/pub/PrintedReports/Pub244-G300.pdf>).

The proposed law would require that a customer of a communication service provider be given notice when a state agency seeks to obtain the customer's electronic communication information, by serving an administrative subpoena on the service provider. This requirement provides a meaningful opportunity for the customer to object to the search in court, before records are provided to the agency.

As the Commission's recommendation explains, service of the administrative subpoena on the service provider without notice to the customer would likely violate the customer's Fourth Amendment right against unreasonable search and seizure.

Such a requirement already exists in other areas of the law. For example:

- Under the California Right to Financial Privacy Act a customer must be given notice when a financial institution is served with an administrative subpoena requesting the customer's records (see Gov't Code § 7474).
- In pretrial discovery, a "consumer" must be given notice when a subpoena is used to obtain the personal records of the "consumer" from a wide range of third parties who hold such records (see Code Civ. Proc. § 1985.3(b)).

## **LEGISLATIVE CONTACT**

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