
CONSENT

Bill No: AB 904
Author: Chau (D)
Amended: 6/29/20 in Senate
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 7-0, 7/31/20
AYES: Skinner, Moorlach, Bradford, Jackson, Mitchell, Morrell, Wiener

ASSEMBLY FLOOR: 78-0, 1/27/20 - See last page for vote

SUBJECT: Search warrants: tracking devices

SOURCE: Author

DIGEST: This bill clarifies that if a law enforcement agency utilizes software to track a person's movements, whether in conjunction with a third party or by interacting with a person's electronic device, the provisions for obtaining a tracking device search warrant apply.

ANALYSIS:

Existing law:

- 1) 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 seized. (U.S. Const., 4th Amend.; Cal. Const., Art. I, § 13.)
- 2) 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. (Pen. Code, § 1523.)

- 3) Provides that a search warrant may be issued for specified grounds. (Pen. Code § 1524 (a)(1)- (19).)
- 4) Permits a tracking device search warrant to be issued when the information to be received from the use of a tracking device constitutes evidence that tends to show that either a felony, or a misdemeanor violation of the Fish and Game Code and the Public Resources Code, and the device will assist in locating an individual who has committed or is committing a felony, or a misdemeanor violation of the Fish and Game Code or Public Resources Code. (Pen. Code § 1534.)
- 5) Provides that a tracking device search warrant may be issued as specified, and that the warrant shall identify the person or property to be tracked, and shall specify a reasonable length of time, not to exceed 30 days from the date the warrant is issued, that the device may be used. Permits the court to, for good cause, grant one or more extensions for the time that the device may be used. (Pen. Code § 1534 (b).)
- 6) Requires that the search warrant command the officer to execute the warrant by installing a tracking device or serving a warrant on a third-party possessor of the tracking data, and requires the officer to perform any installation authorized by the warrant during the daytime unless the magistrate, for good cause, expressly authorizes installation at another time. Requires execution of the warrant be completed no later than 10 days immediately after the date of issuance. (Pen. Code, § 1534 (b).)
- 7) Provides that an officer executing a tracking device search warrant shall not be required to knock and announce his or her presence before executing the warrant. (Pen. Code § 1534 (b)(2).)
- 8) Requires, no later than 10 calendar days after the use of the tracking device has ended, the officer executing the warrant to file a return to the warrant. (Pen. Code § 1534 (b) (3).)
- 9) Requires, no later than 10 calendar days after the use of the tracking device has ended, the officer who executed the tracking device warrant to notify the person who was tracked or whose property was tracked as specified, and permits delay as specified. (Pen. Code § 1534 (b)(4).)
- 10) Authorizes an officer installing a device authorized by a tracking device search warrant to install and use the device only within California. (Pen. Code § 1534 (b)(5).)

- 11) Defines “tracking device” to mean any electronic or mechanical device that permits the tracking of the movement of a person or object. (Pen. Code § 1534 (b)(6).)
- 12) Enacts the California Electronic Communications Privacy Act (CalECPA), which generally prohibits a government entity from compelling the production of or access to electronic communication information or electronic device information without a search warrant, wiretap order, order for electronic reader records, or subpoena issued pursuant to specified conditions, except for emergency situations. (Pen. Code §§ 1546-1546.4.)
- 13) Provides that a government entity may access electronic device information by means of a physical interaction or electronic communication device only: pursuant to a warrant; wiretap; with authorization of the possessor of the device; with consent of the owner of the device; in an emergency; if seized from an inmate. (Pen. Code § 1546.1(b).)
- 14) Specifies the conditions under which a government entity may access electronic device information by means of physical interaction or electronic communication with the device, such as pursuant to a search warrant, wiretap order, tracking device search warrant, or consent of the owner of the device. (Pen. Code § 1546.1 (c).)
- 15) Allows a service provider to voluntarily disclose electronic communication information or subscriber information, when the disclosure is not otherwise prohibited under state or federal law. (Pen. Code § 1546.1 (f).)
- 16) Provides that if a government entity receives electronic communication voluntarily it shall destroy that information within 90 days except under specified circumstances. (Pen. Code, § 1546.1 (g).)
- 17) Provides for notice to the target of a warrant or an emergency obtaining electronic information to be provided either contemporaneously with the service of the warrant or within three days in an emergency situation. (Pen. Code, § 1546.2 (a).)
- 18) Allows a person in a trial, hearing, or proceeding to move to suppress any electronic information obtained or retained in violation of the Fourth Amendment or the CalECPA. (Pen. Code, § 1546.4 (a).)
- 19) Makes it a public offense to knowingly access and without permission take, copy, or make use of any data from a computer, computer system, or computer network, or take or copy any supporting documentation, whether existing or

residing internal or external to a computer, computer system, or computer network. (Pen. Code § 502 (b)(2).)

This bill:

- 1) Clarifies that the definition of “tracking device” includes the software used in tracking.
- 2) Provides that it shall not be construed to authorize the use of any device or software for the purpose of tracking the movement of a person or object.

Background

Existing Law Requires a Warrant to Track a Person’s Movements

In 2012, the United States Supreme Court held in *United States v. Jones* that the use of a self-contained GPS tracking device (“slap-on”) on a motor vehicle to monitor the vehicle’s movements constituted a “search.” Thus a warrant is required to utilize such technology. That year, California passed AB 2055 (Fuentes) Chapter 818 to codify and expand the case, and require a warrant when a government entity utilizes such tracking device. Now, Pen. Code, §1534 sets forth specific procedures for obtaining a tracking device search warrant. Tracking devices may only be used to investigate felony violations, or misdemeanor violations of the Public Resources Code and the Fish and Game Code. A tracking device warrant is not authorized for other misdemeanor conduct for which a warrant for historical information is permitted, like to investigate a misdemeanor offense involving a motor vehicle.¹

After CalECPA was passed by the Legislature in 2015, there was concern that the law nullified existing provisions of law permitting the use of pen registers and tracking devices. The next year, the Legislature passed AB 1924 (Low) Chapter 511 to incorporate existing laws permitting the use of pen registers and tracking devices into CalECPA. The result of amending CalECPA to include the tracking device search warrant procedures was to establish that any time a law enforcement agent seeks to obtain a person’s real-time location data, that a warrant complying with Pen. Code, §1534 is required, whether the tracking occurs by utilizing a “slap-on” device or by compelling production of that information from a service provider through CalECPA, or by physically interacting with an electronic device, or by electronically communicating with an electronic device.

CalECPA sets forth rules when a government agency seeks to access a person’s information from a third party, like Google, or when an official seeks to seize a

¹ Pen. Code, § 1524, subd.(a)(19).

person's cellphone and search it. The plain language of CalECPA encompasses activity that may arguably constitute certain types of hacking activity of an electronic device by specifying that the law's dictates apply when government engages in "physical interaction or electronic communication with the device." Pen. Code, § 1546.1, subd. (c).

Cellphones, vehicle computer systems, and other electronic devices are susceptible to being hacked, and also to receiving malware, a virus, or software which exploit a vulnerability in a device's operating system and provide the entity exploiting the vulnerability the ability to access, among other things, a person's location data.

This bill clarifies that the procedures for employing a tracking device, including heightened and specified warrant requirements, must be complied with if a law enforcement agency uses software by means of physical interaction or electronic communication with an electronic device, to track a person's movements. The most recent amendments clarify that it is not intended to authorize the use of a device to track an individual.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 7/31/20)

California Attorneys for Criminal Justice

OPPOSITION: (Verified 7/31/20)

None received

ASSEMBLY FLOOR: 78-0, 1/27/20

AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Berman, Bigelow, Bloom, Boerner Horvath, Bonta, Brough, Burke, Calderon, Carrillo, Chau, Chen, Chiu, Choi, Chu, Cooley, Cooper, Cunningham, Megan Dahle, Daly, Diep, Eggman, Flora, Fong, Frazier, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Gloria, Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kamlager, Kiley, Lackey, Levine, Limón, Low, Maienschein, Mathis, Mayes, McCarty, Medina, Melendez, Mullin, Muratsuchi, Nazarian, Obernolte, O'Donnell, Patterson, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Smith, Mark Stone, Ting, Voepel, Waldron, Weber, Wicks, Wood

NO VOTE RECORDED: Cervantes, Rendon

Prepared by: Mary Kennedy / PUB. S. /
8/5/20 12:01:35

**** **END** ****