Date of Hearing: May 17, 2023

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Chris Holden, Chair
AB 522 (Kalra) – As Introduced February 7, 2023

Policy Committee:	Privacy and Consumer Protection	Vote:	11 - 0
	Public Safety		8 - 0

Urgency: No State Mandated Local Program: No Reimbursable: No

SUMMARY:

This bill establishes a process a state agency must follow when serving a subpoena on a provider of electronic communication services to obtain a customer's electronic communication information.

Specifically, this bill requires the following when a state agency serves a subpoena to a service provider to obtain a customer's electronic information:

1) The state agency has served notice of the administrative subpoena on the customer.

2) A copy of the administrative subpoena is attached to the notice.

3) The administrative subpoena includes the name of the state agency that issued it and the statutory purpose for which the electronic communication information is to be obtained.

4) 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.

5) The state agency has served a proof of service on the service provider stating the agency's compliance with all of the preceding requirements.

The subpoena requires the service provider make and retain a copy of the requested records for five years. The service provider must receive from the state agency proof of service of the notice to the customer. Unless the customer first moves to quash the subpoena and notifies the service provider of that fact, the service provider must produce the records within 10 days after the proof of service is served on the communication service provider.

FISCAL EFFECT:

Costs of an unknown, but significant amount, likely in the high hundreds of thousands of dollars to low millions of dollars annually, for the Department of Justice (DOJ) to perform consumer and privacy protection investigations to obtain the information necessary to satisfy the bill's proposed notice requirements. For its part, the DOJ estimates these costs to be approximately $3 million annually to fund four deputy attorney generals, four legal analysts, two investigators, five legal secretaries and $200,000 in consultant costs.

Collective costs of an unknown, but presumably significant amount, for state agencies to produce notice documents, notify customers of requests for records and present proof of such notice to service providers (various funds).

COMMENTS:

Background and Purpose. The California Electronic Communications Privacy Act (CalECPA) established a legal framework governing how state and local law enforcement agencies could lawfully obtain nearly every form of electronic communications and related data, whether stored in a physical device belonging to a person or in equipment owned or operated by a service provider. Generally, CalECPA requires law enforcement agencies to have a search warrant in order to obtain such information. CalECPA also requires that the person who is the target of the warrant be given adequate notice and authorizes that person to petition to void or modify the warrant, as well as to move to suppress evidence obtained in violation of the law's requirements.

In 2103, statute directed the California Law Revision Commission to study the constitutional and statutory law on state and local agency access to customer records of communication service providers and to prepare statutory reforms to protect customers' constitutional rights. The commission reports that, before it could begin to develop statutory reforms, the Legislature enacted the CalECPA (SB 178, Leno, Chapter 651, Statutes of 2015), which, according to the commission, "addressed nearly all of the legal deficiencies the Commission had identified in its study." (See the commission's "State and Local Agency Access to Electronic Communications: Notice of Administrative Subpoena," March 2022.)

The commission cited one issue not addressed by the CalECPA, that is, when a subpoena is served on a communication service provider for access to a customer's records. According to the commission, in such a circumstance:

> the customer may not be notified of the subpoena and might have no real opportunity to object before records are produced. That would undermine or negate the above argument for the constitutionality of a search by administrative subpoena.

For this reason, the commission recommended enactment law to require notice to the affected customer when an administrative subpoena is served on a communication service provider to obtain the customer's records. This bill creates such law. According to the author:

> AB 522 would provide greater protection to consumers when the government subpoenas their electronic records via a communications company. Although consumers are in their right to exercise the Fourth Amendment, administrative subpoenas do not grant the consumer adequate time to seek judicial review of the reasonableness of the search before any records are produced. By extending these protections already

applied to financial institutions, AB 522 will further protect consumers' constitutional rights before the state intrudes on their privacy

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