
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 448 **Hearing Date:** April 21, 2015
Author: Galgiani
Version: April 15, 2015
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Law Enforcement: Communications*

HISTORY

Source: California Statewide Law Enforcement Association

Prior Legislation: SB 1454 (Gaines) Ch. 629, Stats 2014
AB 2623 (Allen) Vetoed 2012
AB 992 (Spitzer) failed Senate Public Safety 2005
AB 1884 (Spitzer) – 2004 vetoed
AB 1647 (Campbell) failed Assembly Public Safety 2001
AB 860 (Unruh) – Ch. 1509, Stats. 1967

Support: Fraternal Order of Police; California Lodge; Long Beach Police Officers Association; Los Angeles County Professional Peace Officers Association; Santa Ana Police Officers Association; Sacramento County Deputy Sheriffs' Association

Opposition: American Civil Liberties Union; California Attorneys for Criminal Justice

PURPOSE

The purpose of this bill is to add any peace officer of the Department of Fish and Wildlife, the Department of Parks and Recreation, or any peace officer of the Department of State Hospitals to the provision that permits specific peace officers to wiretap.

Existing law declares legislative intent to protect the right of privacy of the People of California and recognizes that law enforcement agencies have a legitimate need to employ modern listening devices and techniques to investigate criminal conduct. (Penal Code § 630.)

Existing law generally prohibits wiretapping, eavesdropping, and using electronic devices to record or amplify a confidential communication. It further provides that any evidence so obtained is inadmissible in any judicial, administrative, or legislative proceeding. (Penal Code §§ 631, 632, 632.5, 632.6, and 632.7.)

Existing law permits one party of a confidential communication to record the communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion, kidnapping, bribery, any felony involving

violence against the person, or a violation of the law against obscene, threatening, or annoying phone calls. Current law provides that any evidence so obtained is admissible in a prosecution for such crimes. (Penal Code § 633.5.)

Existing law provides that notwithstanding prohibitions regarding eavesdropping, etcetera, upon the request of a victim of domestic violence who is seeking a domestic violence restraining order, a judge issuing the order may include a provision in the order that permits the victim to record any prohibited communication made to him or her by the perpetrator. (Penal Code § 633.6.)

Existing law exempts the Attorney General, any district attorney, specified peace officers such as city police and county sheriffs, and a person acting under the direction of an exempt agency from the prohibitions against wiretapping and other related activities to the extent that they may overhear or record any communication that they were lawfully authorized to overhear or record prior to the enactment of the prohibitions. Current law provides that any evidence so obtained is admissible in any judicial, administrative, or legislative proceeding. (Penal Code § 633.)

This bill adds any peace officer of the Department of Fish and Wildlife, the Department of Parks and Recreation, or any peace officer of the Department of State Hospitals to the provision that permits specific peace officers to wiretap.

COMMENTS

1. Need for This Bill

According to the author:

The vast majority of peace officers employed in California are already permitted to overhear and/or record conversations with the public despite a general prohibition against recording conversations without permission. The peace officers who would gain this authority from this measure face many of the same situations seen by those currently with this authority. The public should have no expectation of privacy when interacting with a peace officer, especially since most peace officers already are permitted to record such conversations.

Recent events have demonstrated the value of such recordings in resolving issues that would otherwise degenerate to a struggle between two parties with different recalls of the interaction. In addition, modern technology has made such recordings more common place when recorded by third parties. This measure promotes additional transparency for interactions between the public and California's peace officers.

2. Eavesdropping

Penal Code section 631 *et seq.* sets forth a comprehensive statutory scheme protecting the right of privacy by prohibiting unlawful wiretapping and other forms of illegal electronic eavesdropping. Unless a specific exception applies, persons may not intercept, record, or listen to confidential communications whether on a conventional, cordless, or cellular telephone.

A significant exception is described in Penal Code section 633. The Attorney General, any district attorney, specified peace officers, and any person acting pursuant to the direction of a law enforcement officer may lawfully overhear or record certain communications.

3. Addition of More Peace Officers

The eavesdropping section has been limited to those peace officers who had the authority to eavesdrop when the general prohibition was adopted in 1968. In spite of several attempts over the years to add officers to this section, it has not been expanded. This bill would add a number of peace officers. The policy question is whether each of these types of peace officers should have broad authority to eavesdrop or would there be a more limited approach to meeting the needs of these officers if such authority is necessary.

a. Peace Officers with the Department of Fish and Game

Should a peace officer with the Department of Fish and Wildlife have the authority to eavesdrop?

According to the author, officers from the Department of Fish and Wildlife have to “face the same day to day interactions with the public as the majority of sworn peace officers” and:

- They are uniformed sworn peace officers.
- These officers operate on Patrol in marked cars.
- These officers police crimes, perform traffic stops. Make arrests. Take statements and make reports.
- These officers initiate 120,000-230,000 law enforcement contacts a year.
- These officers issue btw 7000 and 18,000 citations a year.
- These officers execute over 100 search warrants a year.
- These officers enter rough terrain interfacing with armed poachers.

Under Fish and Game Code Section 856.5 which was added last year by SB 1454 (Gaines), peace officers of the Department of Fish and Wildlife were given the authority to use dashboard cameras as an exception to the prohibition on eavesdropping. Before installing dash board cameras the Department of Fish and Game must develop a policy on their use and retention. Do these officers need a broader exception than the one that was created last year? Do they have a need to surreptitiously listen to phone calls? Do they have a need to surreptitiously wear a body wire?

b. Peace Officers with the Department of Parks and Recreation

Should a peace officer with the Department of Parks and Recreation have the authority to eavesdrop?

According to the author officers from the Department of Fish and Wildlife have the “face the same day to day interactions with the public as the majority of sworn peace officers” and:

- They are uniformed sworn peace officers.
- These officers operate outside on Patrol in marked cars.

- These officers police crimes, perform traffic stops. Make arrests. Take statements and make reports.
- These officers report to the scene of accidents.
- These officers intervene in fights.
- These officers frequently encounter intoxicated members of the public.

Do these officers need to surreptitiously listen to phone calls or surreptitiously tape encounters? Would less than a full exception, like the dash board camera authority given to the Fish and Game officers last year take care of their needs?

c . Officers of the State Hospital

This bill would also add the limited authority peace officers of a state hospital under the jurisdiction of the Department of State Hospitals or the State Department of Developmental Services to the list of peace officers that can eavesdrop. These officers have authority limited these as follows: “peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest as to any public offense to which there is immediate danger to person or property or of the escape of the perpetrator of the offense. These peace officers may carry firearms only if authorized and under those terms and conditions as specified by their employing agencies.” These officers have not been authorized to carry guns.

According to the author officers from the Department of Fish and Wildlife have the “ face the same day to day interactions with the public as the majority of sworn peace officers” and:

- They are uniformed sworn peace officers
- These officers operate outside on Patrol in marked cars.
- These officers police crimes, perform traffic stops. Make arrests. Take statements and make reports.
- Some individual facilities see in excess of 40,000 people a day.
- Many of these facilities are open campuses and in residential neighborhoods.
- These facilities have dealt with murders and shootings.
- Some of these facilities are 1500-2000 acre facilities.
- File 1000’s of police reports a year

Do these officers need to surreptitiously listen to phone calls or surreptitiously tape encounters? Would less than a full exception, like the dash board camera authority given to the Fish and Game officers last year take care of their needs?

4. Opposition

The ACLU opposes this bill stating:

We do not believe the authority to engage in eavesdropping should be extended. Restrictions on the use of eavesdropping apparatus were originally enacted to ensure that such activities would be undertaken only in absolutely justifiable situations and under strict control. We have consistently opposed all previous efforts to expand this authority.

The officers included in SB 448 – officers not typically in the business of high-level electronic surveillance – lack the specific training, supervision, and accountability to help ensure that the broad powers granted by SB 448 would be used in a constitutionally acceptable manner. If an investigation is of sufficient importance as to merit electronic eavesdropping, these officers should seek the cooperation and assistance of those agencies that presently have the authority to do so. Creating further encouragement and incentive to engage in electronic surveillance is inconsistent with the legitimate expectation of privacy surrounding our personal and confidential communications.

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