
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 2669 **Hearing Date:** June 12, 2018
Author: Jones-Sawyer
Version: March 23, 2018
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Peace Officers: Communications*

HISTORY

Source: California Correctional Supervisors Organization

Prior Legislation: AB 1520 (Portantino) Failed Senate Public Safety 2007
AB 2356 (Negrete McLeod) Failed Senate Public Safety 2006
AB 1884 (Spitzer) Vetoed 2004
AB 1647 (John Campbell) Failed Assembly Public Safety 2001

Support: Association of Deputy District Attorneys; California Association of Code Enforcement Officers; the California College and University Police Chiefs Association; California District Attorneys Association; the California Narcotic Officers Association; California Police Chiefs Association; California State Sheriffs' Association; the Los Angeles County Professional Peace Officers

Opposition: American Civil Liberties Union; California Public Defenders Association

Assembly Floor Vote: 72 - 0

PURPOSE

The purpose of this bill is to authorize any peace officer of the Office of Correctional Safety of the Department of Corrections and Rehabilitation (CDCR), and any peace officer of the Office of Internal Affairs of CDCR acting in the scope of his or her authority, to overhear or record any communication they could lawfully hear prior to the enactment of unauthorized eavesdropping provisions.

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. 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 to 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. Provides that any evidence so obtained is admissible in a prosecution for such crimes. (Penal Code § 633.5.)

Existing law provides that notwithstanding prohibitions eavesdropping, etc., 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. Provides that any evidence so obtained is admissible in any judicial, administrative, or legislative proceeding. (Penal Code § 633.)

This bill adds a peace officer with the Office of Correctional Safety of the Department of Corrections and Rehabilitation and any peace officer of the Office of Internal Affairs of the Department of Corrections and Rehabilitation to the exemption allowing specified peace officers to record communications.

COMMENTS

1. Need for This Bill

According to the author:

Currently, the Peace Officers of Correctional Safety, (Special Services Unit, SSU) and the Office of Internal Affairs (OIA) within the California Department of Corrections and Rehabilitation (CDCR) is not listed in PC 633 but most peace officer agencies are. Therefore, much of the evidence gathered by SSU is subject to the local District Attorney after the fact the evidence was obtain while undercover or happenstance and therefore not legal evidence because SSU and OIA are not listed in PC 633. Many times evidence comes to these officers while performing their duties and this evidence just happened to be revealed accidentally, without pre-planning. Other agencies can use this type of evidence, because they are listed in PC 633. SSU and OIA are restricted from using this evidence because they needed the local District Attorney's warrant prior to gaining the evidence. This problem is why most Peace Officer agencies are listed in PC 633 and why SSU and OIA need to be added.

2. Legislative History and Intent

Current law declares that "advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and

techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society." (Penal Code § 630.) Current law also recognizes that "law enforcement agencies have a legitimate need to employ modern listening devices and techniques in the investigation of criminal conduct and the apprehension of lawbreakers." (Id.)

The legislative history of this provision indicates that the author of legislation that created Penal Code Section 633, Speaker Unruh, described his reasons for introducing the Invasion of Privacy Act, Penal Code Sections 631 *et seq.* in a letter to the editor of the *California Law Review* stating: "I introduced the measure primarily because of a strong personal concern over the growth of electronic eavesdropping equipment of a highly sophisticated and miniaturized nature, and its ready availability on the market. A personal experience which I had my office 'bugged' by an opponent during a political campaign initially interested me in this problem."

3. Exception to Prohibition on Unlawful 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. For example, a peace officer may authorize an informant to record conversations relating to purchasing or selling narcotics.

This bill would add a peace officer of the Office of Correctional Safety of the Department of Corrections and Rehabilitation and any peace officer of the Office of Internal Affairs of the Department of Corrections and Rehabilitation to the exemption allowing specified peace officers to record communications.

4. Argument in Support

According to the sponsor the California Correctional Supervisors Association:

Under current law, virtually all front line public safety officers are enumerated in Penal Code Section 633 as being able to directly or with any person acting pursuant to the direction of one of these law enforcement officers acting within the scope of his or her authority, to overhear or record any communication that they could lawfully overhear or record prior to the effective date of this chapter. Not included among this array of front line law enforcement officers, however, are peace officers of the office of Correctional Safety (Special Services Unit, SSU). As a result of this exclusion, much of the evidence gathered by peace officers of the office of Correctional Safety cannot be efficiently utilized by local prosecutorial agencies.

5. Argument in Opposition

The American Civil Liberties Union opposes this bill stating:

Fifty years ago, California put into place extensive protections for the privacy of its residents against non-consensual eavesdropping on or recording of confidential communications – such as the private conversations we all have every day, in person or by telephone. Many law enforcement officers, including police officers and deputy sheriffs, were expressly allowed under the statute to continue to overhear or record communications that they could lawfully overhear or record prior to the enactment of the new restrictions – but only those officers specified in statute were granted this exemption. (Penal Code §633).

The right to privacy is fundamental and preserved in both state and federal constitutions. It should not be restricted without a compelling justification. For fifty years, the peace officers of the CDCR's Office of Correctional Safety and Office of Internal Affairs, like many other kinds of peace officers not exempted under Penal Code §633, have been doing their jobs without the power to overhear or record conversations as proposed in this bill. There is simply no reason to chip away at California's statutory privacy protections by newly granting them this power after all this time.

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