
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 413 **Hearing Date:** June 6, 2017
Author: Eggman
Version: March 22, 2017
Urgency: No **Fiscal:** No
Consultant: SJ

Subject: *Confidential Communications: Domestic Violence*

HISTORY

Source: McGeorge Legislative and Public Policy Clinic

Prior Legislation: AB 1671 (Gomez) Ch. 855, Stats. of 2016
SB 424 (Pan) Ch. 159, Stats. of 2015
SB 1010 (Furtani) Ch. 659, Stats. of 2011

Support: Association for Los Angeles Deputy Sheriffs; California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California Federation of Teachers, AFT, AFL-CIO; California Narcotic Officers Association; Empower Yolo; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Police Officers Research Association of California; Riverside Sheriffs' Association; 1 individual

Opposition: None known

Assembly Floor Vote: 74 - 0

PURPOSE

The purpose of this bill is to allow a party to a confidential communication to record the conversation for the purpose of obtaining information reasonably believed to relate to the crime of domestic violence. This bill also allows a victim of domestic violence seeking a domestic violence restraining order to record a confidential communication made to him or her by the perpetrator for the purpose of providing that evidence to the court.

Existing law defines “domestic violence” as abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. (Pen. Code § 13700.)

Existing law provides that a person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one

year, or in the state prison, or by both that fine and imprisonment. (Pen. Code § 632.)

- a) Defines a “person” as an individual, business association, partnership, corporation, limited liability company, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording the communication. (Pen. Code § 632, subd. (b).)
- b) Defines a “confidential communication” as any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded. (Pen. Code § 632, subd. (c).)
- c) Provides that except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding. (Pen. Code § 632, subd. (d).)
- d) States that this section does not apply to:
 - i) Any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited by this section are for the purpose of construction, maintenance, conduct or operation of the services and facilities of the public utility; or
 - ii) To the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility; or
 - iii) To any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility. (Pen. Code § 632, subd. (e).)

Existing law provides that every person who, without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. (Pen. Code § 632.7.) The following are exempted from these provisions:

- a) Any public utility engaged in the business of providing communications services and facilities, or to the officers, employees, or agents thereof, where the acts otherwise prohibited are for the purpose of construction, maintenance, conduct, or operation of the services and facilities of the public utility;

- b) The use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of the public utility; and
- c) Any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

Existing law exempts the recording of a confidential communication made for the purpose of obtaining evidence reasonably believed to be related to the commission by another party to the communication of certain crimes, including extortion, kidnapping, bribery, and any felony involving violence against the person from the general prohibition against recording a person without the person's consent. Existing law provides that this evidence is admissible in a prosecution for these crimes. (Pen. Code § 633.5.)

Existing law allows a judge to include a provision in a domestic violence restraining order permitting a victim of domestic violence to record any prohibited communication made to him or her by the perpetrator. (Pen. Code § 633.6.)

This bill would add domestic violence to this section to allow a party to a confidential communication to record the communication for the purpose of obtaining evidence reasonably believed to relate to the commission of domestic violence by another party to the communication. The recordings would be admissible in court.

This bill would also permit a victim of domestic violence who is seeking a domestic restraining order from a court, and who reasonably believes that a confidential communication made to him or her by the perpetrator may contain evidence germane to that restraining order, to record that communication for the exclusive purpose and use of providing that evidence to the court.

COMMENTS

1. Need for This Bill

According to the author:

California does not allow a domestic violence survivor to use recorded evidence of abuse in a courtroom unless the abuser gives consent to being recorded. When a survivor tries to admit these recordings into evidence the survivor can be sued in civil court by the abusive party and charged criminally by the state under the current eavesdropping statute. This bill will allow survivors of domestic violence to record their abuse and submit those recordings as evidence in a court proceeding without fear of being sued by the abusive party for invasion of privacy. It also allows a judge to use her discretion to determine the relevance and admissibility of the recording.

2. Existing Exceptions to Recording a Confidential Communication

Under existing law, exceptions to recording a confidential communication exist for communicating with another party regarding to following criminal offenses:

- Extortion;
- Kidnapping;
- Bribery; and
- Any felony involving violence against the person, including, but not limited to specified offenses. (Pen. Code § 633.5.)

Additionally, Penal Code section 633.5 does not render any evidence obtained by those recordings inadmissible in a prosecution for the above referenced offenses.

3. Argument in Support

Empower Yolo supports this bill stating:

California is one of only eleven states that prohibit a domestic violence survivor from using recorded evidence of abuse unless the abuser consents to being recorded. If a survivor tries to submit ex parte recordings into evidence, she could be sued in civil court by the abusive party and charged criminally by the state.

Current criminal law in California allows a survivor to introduce recordings of domestic violence abuse to support evidence of a violent felony; however, most domestic violence crimes, such as battery and assault, are charged as misdemeanors (Penal Code §§ 630-638).

AB 413 is intended to close a loophole in current two-party consent exceptions. Courts can allow a two-party consent exception for recordings of domestic violence abuse as evidence of a DVRO violation. However, domestic violence survivors are not allowed to use the recording of domestic violence as evidence to obtain the initial restraining order. AB 413 closes that loophole by allowing all recordings of domestic violence abuse to be offered as evidence, not just those in violation of an existing restraining order.

...We believe that AB 413 solves an obvious problem that will continue to cause harm to victims of domestic violence unless they are allowed to present ex parte recorded evidence of the abuse. It makes sense that such recordings could provide useful evidence to support the initial restraining order. The majority of states allow this type of evidence in domestic violence cases. California should be a leader in this regard.

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