
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 448 **Hearing Date:** April 14, 2015
Author: Galgiani
Version: February 25, 2015
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Law Enforcement: Communications*

HISTORY

Source: California Statewide Law Enforcement Association

Prior Legislation: 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: Unknown

Opposition: American Civil Liberties Union

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, the Department of Forestry and Fire Protection, the Department of Alcoholic and Beverage Control or the California Exposition and State Fair and any peace officer identified in Penal Code Section 830.3, 830.37 or 830.38 to the provision that allows specific peace officers to eavesdrop.

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, the Department of Forestry and Fire Protection, the Department of Alcoholic and Beverage Control or the California Exposition and State Fair and any peace officer identified in Penal Code Section 830.3, 830.37 or 830.38 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? What purpose would eavesdropping serve for these peace officers? Would a member of the public expect that a peace officer with the Department of Fish and Wildlife to be potentially taping their statements without their knowledge?

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; do these officers need a broader exception than the one that was created last year?

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? What purpose would eavesdropping serve for these peace officers? Would a member of the public expect that a peace officer with the Department of Parks and Recreation to be potentially taping their statements without their knowledge?

c. Peace Officers with the Department of Forestry and Fire Protection

Should a peace officer with the Department of Forestry and Fire Protection have the authority to eavesdrop? What purpose would eavesdropping serve for these peace officers? Would a member of the public expect that a peace officer with the Department of Forestry and Fire Protection to be potentially taping their statements without their knowledge?

d. Peace Officers with the Department of Alcoholic and Beverage Control

Should a peace officer with the Department of Alcoholic and Beverage Control have the authority to eavesdrop? What purpose would eavesdropping serve for these peace officers? Would a member of the public expect that a peace officer with the Department of Alcoholic and Beverage Control to be potentially taping their statements without their knowledge?

e. Peace Officers with the California Exposition and State Fair

Should a peace officer with the California Exposition and State Fair have the authority to eavesdrop? What purpose would eavesdropping serve for these peace officers? Would a member of the public expect that a peace officer with the California Exposition and State Fair to be potentially taping their statements without their knowledge?

4. Addition of Limited Authority Peace Officers Under Penal Code § 830.3

This bill would add any peace officer with limited peace officer status for the purpose of enforcing the regulatory laws pertaining to various departments of state government to conduct the eavesdropping provisions. (Peace officers under Penal Code Section 830.3.) Under existing law these officers can partner with a peace officer who has the authority to eavesdrop if that investigative tool is necessary.

According to Penal Code Section 830.3 these are “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.” Penal Code 830.3 includes the following peace officers.

Is it appropriate and necessary for each of these to have the authority to eavesdrop? What types of cases would eavesdropping be used for by each of these agencies? Are these the types of peace officers the general public would expect to be secretly taping them?

- Persons employed by the Division of Investigation of the Department of Consumer Affairs and investigators of the Medical Board of California and the Board of Dental Examiners;
- Voluntary fire wardens designated by the Director of Forestry and Fire Protection;
- Employees of the Department of Motor Vehicles provided that the primary duty of these peace officers shall be the enforcement of the law;
- Investigators of the California Horse Racing Board designated by the Board;
- The State Fire Marshal and assistant or deputy state fire marshals;
- Inspectors of the food and drug section designated by the chief of the section;
- All investigators of the Division of Labor Standards
- Enforcement designated by the Labor Commissioner;
- All investigators of the Departments of Health Care Services, Public Health, Social Services, the Department of Toxic Substances Control; the Office of Statewide Health Planning and Development; and the Public Employees' Retirement System;
- The Chief of the Bureau of Fraudulent Claims of the Department of Insurance and those investigators designated by the chief;
- Employees of the Department of Housing and Community Development designated under Health and Safety Code Section 18023;
- Investigators of the Office of the Controller;
- Investigators of the Department of Business Oversight designated by the Commissioner of Business Oversight;
- Persons employed by the Contractors' State License Board designated by the Director of Consumer Affairs;
- The chief and coordinators of the Law Enforcement Division of the Office of Emergency Services;
- Investigators of the office of the Secretary of State designated by the Secretary of State;

- The Deputy Director for Security designated by Government Code Section 8880.38 and all lottery security personnel assigned to the California State Lottery and designated by the director;
- Investigators employed by the Investigation Division of the Employment Development Department designated by the director of the department;
- The chief and assistant chief of museum security and safety of the California Science Center; and,
- Employees of the Franchise Tax Board designated by the Board.

5. Fire Department Arson Investigators and Other Fire Department Personnel

This bill would expand the eavesdropping provisions to limited authority peace officers under Penal Code Section 830.37. As with those listed in Comment 4, these are 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” Penal Code Section 830.7 includes:

- Members of an arson-investigating unit of a fire department or fire protection agency if the primary duty is detection and apprehension of persons who have violated any fire law or committed insurance fraud.
- Members other than members of an arson-investigating unit regularly paid and employed in that capacity of a fire department or fire protection agency if the primary duty, when acting in that capacity, is the enforcement of laws relating to fire prevention or fire suppression.
- Voluntary fire wardens as designated by the Director of Forestry and Fire Protection provided that the primary duty shall be enforcement of the law as that duty is set forth in the Public Resources Code.
- Firefighter/security guards by the Military Department, if the primary duty is the enforcement of the law in or about properties owned, operated or administered by the employing agency or when performing necessary duties with respect to patrons, employees and properties of the employing agency.

Should each of these limited authority peace officers have the authority to eavesdrop? Is such authority necessary and appropriate in the cases that these officers investigate? Are these the types of peace officers the general public would expect to be secretly taping them?

6. 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 in the same manner as those in Comments 4 and 5, to any place for the purpose of performing their primary duty, arrest powers when there is immediate danger and firearms only with authorization of their employing agencies.

Should each of these limited authority peace officers have the authority to eavesdrop? Is such authority necessary and appropriate in the cases that these officers investigate? Are these the types of peace officers the general public would expect to be secretly taping them?

7. 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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