
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: AB 1638 **Hearing Date:** July 2, 2019
Author: Obernolte
Version: April 11, 2019
Urgency: No **Fiscal:** No
Consultant: SC

Subject: *Search Warrants: Vehicle Recording Devices*

HISTORY

Source: Author

Prior Legislation: AB 539 (Acosta), Ch. 342, Stats. 2017
AB 1924 (Low), Ch. 511, Stats. 2016
SB 178 (Leno), Ch. 651, Stats. 2015
AB 929 (Chau), Ch. 204, Stats. 2015
AB 539 (Levine), Ch. 118, Stats. 2015
AB 1104 (Rodriguez), Ch. 124, Stats. 2015
SB 467 (Leno), 2013, vetoed
SB 1424 (Leno), 2012, vetoed
SB 914 (Leno), 2011, vetoed

Support: California Association of Highway Patrolmen; California District Attorneys Association; Peace Officers Research Association of California; San Diego County District Attorney's Office

Opposition: American Civil Liberties Union of California

Assembly Floor Vote: 60 - 7

PURPOSE

The purpose of this bill is to authorize the issuance of a search warrant from a recording device installed by the manufacturer of a motor vehicle that constitutes evidence that tends to show the commission of a public offense involving a motor vehicle resulting in death or "serious bodily injury" as defined.

Existing law provides, pursuant to the U.S. Constitution, that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched an the persons or things to be seized." (U.S. Const., Fourth Amend; see also Cal. Const. art. 1, Sec. 13.)

Existing law governs search warrants, including the grounds upon which a search warrant may be issued. (Pen. Code, § 1523 et seq.)

Existing law defines a “search warrant” as a written order in the name of the people, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and, in the case of a thing or things or personal property, bring the same before the magistrate. (Pen. Code, § 1523.)

Existing law authorizes a search warrant to be issued upon any of the following grounds:

- 1) When the property was stolen or embezzled.
- 2) When the property or things were used as the means of committing a felony.
- 3) When the property or things are in the possession of any person with the intent to use them as a means of committing a public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing them from being discovered.
- 4) When the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony.
- 5) When the property or things to be seized consist of evidence that tends to show that sexual exploitation of a child, or possession of matter depicting sexual conduct of a person under the age of 18 years, has occurred or is occurring.
- 6) When there is a warrant to arrest a person.
- 7) When a provider of electronic communication service or remote computing service has records or evidence, showing that property was stolen or embezzled constituting a misdemeanor, or that property or things are in the possession of any person with the intent to use them as a means of committing a misdemeanor public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing their discovery.
- 8) When a provider of electronic communication service or remote computing service has records or evidence showing that property was stolen or embezzled constituting a misdemeanor, or that property or things are in the possession of any person with the intent to use them as a means of committing a misdemeanor public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing their discovery.
- 9) When the property or things to be seized include an item or any evidence that tends to show a violation of the Labor Code, as specified.
- 10) When the property or things to be seized include a firearm or any other deadly weapon at the scene of, or at the premises occupied or under the control of the person arrested in connection with, a domestic violence incident involving a threat to human life or a physical assault.
- 11) When the property or things to be seized include a firearm or any other deadly weapon that is owned by, or in the possession of, or in the custody or control of, a person described in subdivision (a) of Section 8102 of the Welfare and Institutions Code.

- 12) When the property or things to be seized include a firearm that is owned by, or in the possession of, or in the custody or control of, a person who is subject to the prohibitions regarding firearms under specified provisions of the Family Code.
- 13) When the information to be received from the use of a tracking device constitutes evidence that tends to show that either a felony or a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code.
- 14) When a sample of the blood of a person constitutes evidence that tends to show a violation of misdemeanor driving under the influence and the person from whom the sample is being sought has refused an officer's request to submit to, or has failed to complete, a blood test.
- 15) When the property or things to be seized are firearms or ammunition or both that are owned by, in the possession of, or in the custody or control of a person who is the subject of a gun violence restraining order. This final provision does not go into effect until January 1, 2016;
- 16) When the property or things to be seized are controlled substances or a device, contrivance, instrument or paraphernalia used for unlawfully administering a controlled substance as provided.
- 17) When the warrant is for a blood sample of a person that tends to show a violations related to the operation of a vessel, or manipulating water skis, an aquaplane, or a similar device, while under the influence of alcohol or drugs.
- 18) When the property or things to be seized consist of evidence that tends to show that a violation of the crime of disorderly conduct related to invasion of privacy has occurred or is occurring.

(Pen. Code, § 1524, subd. (a).)

Existing law provides that a search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person to be searched or searched for, and particularly describing the property, thing, or things and the place to be searched. (Pen. Code, § 1525.)

Existing law requires a magistrate to issue a search warrant if he or she is satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence. (Pen. Code, § 1528, subd. (a).)

Existing law enacts the California Electronic Communications Privacy Act (CalECPA), which generally prohibits a government entity from compelling the production of or access to electronic communication information from a service provider or to electronic device information from any person or entity other than the authorized possessor of the device, absent a search warrant, wiretap order, order for electronic reader records, or subpoena issued pursuant to specified conditions, or pursuant to an order for a pen register or trap and trace device, as specified. CalECPA also generally specifies the only conditions under which a government entity may access electronic device information by means of physical interaction or electronic communication with the device, such as pursuant to a search warrant, wiretap order, consent of the owner of the device, or emergency situations, as specified. (Pen. Code, § 1546 et seq.)

Existing law defines “serious bodily injury” to mean a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement. (Pen. Code, § 243, subd. (f)(4).)

Existing law requires owner’s manuals to disclose to the owner when a car is installed with event data recorders (EDRs) or sensing and diagnostic modules and defines “recording device” for these purposes to mean a device that is installed by the manufacturer of the vehicle and does one or more of the following, for the purpose of retrieving data after an accident:

- 1) records how fast and in which direction the motor vehicle is traveling;
- 2) records a history of where the motor vehicle travels;
- 3) records steering performance;
- 4) records brake performance, including, but not limited to, whether brakes were applied before an accident;
- 5) records the driver’s seatbelt status; and/or,
- 6) has the ability to transmit information concerning an accident in which the motor vehicle has been involved to a central communications system when an accident occurs. (Veh. Code, § 9951, subd. (b).)

Existing law specifies that such data from a “recording device,” identified above, can only be accessed under certain circumstances, including where the registered owner of the motor vehicle consents to the retrieval of the information, or in response to an order of a court having jurisdiction to issue the order. (Veh. Code, § 9951, subd. (c).)

This bill expands the grounds for issuance of a search warrant to include when the property or things to be seized are data from an EDR that constitutes evidence that tends to show the commission of a public offense involving a motor vehicle, resulting in death or serious bodily injury to any person.

This bill states that the data accessed by a warrant pursuant to this paragraph shall not exceed the scope of the data that is directly related to the public offense for which the warrant is issued.

This bill provides that the scope of the data accessible by a warrant pursuant to this paragraph shall be limited to the specified information listed in Vehicle Code section 9951, subdivision (b).

This bill provides that “recording device” has the same meaning as defined in Vehicle Code Section 9951, subdivision (b).

This bill states that “serious bodily injury” has the same meaning as defined in Penal Code Section 243, subdivision (f)(4).

COMMENTS

1. Need for This Bill

According to the author of this bill:

This bill would give law enforcement statutory authority to obtain a search warrant in order to access EDR data in limited cases when an accident results in death or serious bodily injury. EDR technology is installed in most newer motor vehicle models and generally captures data from a period of approximately five seconds before until one second after a collision. This data can include information regarding the vehicle's braking, steering, airbag deployment, seat belt use, seat belt pre-tensioners, speed, engine throttle, time between crash events, and other pertinent factors, which is crucial in aiding an officer during an accident investigation. However, EDR data cannot be legally obtained by law enforcement without a court order or the consent of the vehicle's registered owner (VC 9951). Unfortunately, there are many solo vehicle accidents where the driver is deceased or has been critically injured and, therefore, is unable to give consent. In those cases, there is no statutory "court order" available to law enforcement, making it impossible for the officer to use the EDR data to help with the accident investigation. The statute authorizing courts to issue search warrants (Penal Code 1524) applies to EDR data only for felonies. While VC 9951 also allows EDR data to be downloaded with consent of the vehicle's registered owner, it is not always possible in fatality accidents.

2. Background on Event Data Recorders

An EDR is defined by the National Highway Traffic Safety Administration (NHTSA) "a device installed in a motor vehicle to record technical vehicle and occupant information for a brief period of time (seconds, not minutes) before, during and after a crash. For instance, EDRs may record (1) pre-crash vehicle dynamics and system status, (2) driver inputs, (3) vehicle crash signature, (4) restraint usage/deployment status, and (5) post-crash data such as the activation of an automatic collision notification (ACN) system." (NHTSA, *Event Data Recorder* <<https://www.nhtsa.gov/research-data/event-data-recorder>> [as of June 24, 2019].)

NHTSA determined that for model year 2017, 99.6 percent of new "light vehicles" sold were equipped with EDRs. "Light vehicles" includes passenger cars, multipurpose passenger vehicles, trucks, and buses with a gross vehicle weight rating (GVWR) of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less, except for walk-in van-type trucks or vehicles designed to be sold exclusively to the U.S. Postal Service. (Federal Motor Vehicle Safety Standards; Event Data Recorders <<https://www.federalregister.gov/documents/2019/02/08/2019-01651/federal-motor-vehicle-safety-standards-event-data-recorders>> [as of June 24, 2019].)

According to Edmunds.com, an online automobile resource:

Event data recorders aren't actually black boxes but tiny microcomputer chip sets. In most vehicles, they're part of the airbag control module, and originally were included to ensure airbags deployed when they were supposed to.

Over the years, as electronics got cheaper, smaller and smarter, event data recorders became capable of doing more than simply monitoring airbags. Automakers realized the devices could be used to provide information about the seriousness of an accident, and if a car was being operated properly when a crash occurred. Based on a separate NHTSA regulation passed in 2012, if a vehicle today does have an event data recorder, it must track 15 specific data points, including speed, steering, braking, acceleration, seatbelt use, and, in the event of a crash, force of impact and whether airbags deployed.

Depending on the automaker and car model, an event data recorder may capture many more functions, though car companies aren't required to disclose exactly what those are. The language many use to explain black boxes in owner's manuals also is purposely general to cover technology updates and to save space.

Put everything the devices do in an owner's guide and "instead of one paragraph, you'd have potentially another 20 or 30 pages. That really wouldn't be realistic," says Richard Ruth, a black box equipment trainer, expert witness and consultant who worked at Ford Motor Co. for 33 years, including a stint evaluating event data recorders and other safety equipment. "It's not going to change whether or not you're going to buy the car."

Most event data recorders are programmed to record data in a continuous loop, writing over information again and again until a vehicle is in a front-end collision or other crash. When an accident occurs, the device automatically saves up to 5 seconds of data from immediately before, during and after an incident.

(Raftar, *Decoding What's in Your Car's Black Box: Who owns the data and who can tap it?* (July 22, 2014) <<https://www.edmunds.com/car-technology/car-black-box-recorders-capture-crash-data.html>> [as of June 24, 2019].)

3. Fourth Amendment and Search Warrant Requirements

Both the United States and the California constitution's guarantee the right of all persons to be secure from unreasonable searches and seizures. (U.S. Const., amend. IV; Cal. Const., art. 1, sec. 13.) This protection applies to all unreasonable government intrusions into legitimate expectations of privacy. (*United States v. Chadwick* (1977) 433 U.S. 1, 7, overruled on other grounds by *California v. Acevedo* (1991) 500 U.S. 565.) In general, a search is not valid unless it is conducted pursuant to a warrant. A search warrant may not be issued without probable cause. "Reasonable and probable cause exists if a man of ordinary care and prudence would be led to conscientiously entertain an honest and strong suspicion that the accused is guilty." (*People v. Alvarado* (1967) 250 Cal.App.2d 584, 591.) The mere reasonableness of a search, assessed in light of the surrounding circumstances, is not a substitute for the warrant required by the Constitution. (*Arkansas v. Sanders* (1979) 442 U.S. 753, 758, overruled on other grounds by *California v. Acevedo*, supra.) There are exceptions to the warrant requirement, but the burden of establishing an exception is on the party seeking one. (*Arkansas v. Sanders* (1979) 442 U.S. 753, 760, overruled on other grounds by *California v. Acevedo*, supra.)

Penal Code section 1524 provides the statutory grounds for the issuance of warrants. Under these provisions, a search warrant may be issued for a variety of reasons, some being as broad as "[w]hen property or things were used as the means to commit a felony." (Pen. Code, § 1524,

subd. (a)(2).) There are 18 specified grounds upon which a warrant may be issued under that section.

Existing law also contains specific procedures for accessing electronic communication and electronic device information under CalECPA (SB 178, Leno, Ch. 651, Stats. 2015). CalECPA requires the government to obtain a search warrant, subpoena, or wiretap order before accessing electronic information on a cell phone or similar electronic device and contains additional specified requirements for such warrants and the handling of electronic information obtained through the warrant including retention, sealing, and disclosure. Specifically, it requires a demonstration of probable cause to obtain electronic communications information from a third party service provider and verification by affidavit of the authenticity of electronic information produced. CalECPA provides specified ways for a government entity to access electronic communication information including when that entity has obtained a valid search warrant pursuant to the existing statutory authorization for search warrants (Pen. Code, § 1523 et seq.).

This bill would expand that statutory authority for search warrants by allowing law enforcement to obtain a search warrant on the grounds that data from a recording device installed by a vehicle manufacturer constitutes evidence that tends to show the commission of a public offense involving a motor vehicle that resulted in death or serious bodily injury. The bill defines “recording device” to have the same meaning as under Vehicle Code section 9951 which generally requires owner’s manuals to disclose to the owner when a car is installed with an EDR or sensing and diagnostic modules. Under that Vehicle Code definition, “recording device” means a device installed by a vehicle manufacturer that records or has the ability to transmit certain data for purposes of retrieving data after an accident. This includes recording information regarding, for example: (1) how fast and in which direction the motor vehicle is traveling; (2) a history of where the motor vehicle travels; (3) records steering performance; and (4) brake performance, including, but not limited to, whether brakes were applied before an accident, and the driver’s seatbelt status. This bill limits the information made accessible from an EDR under a warrant to the information listed in that Vehicle Code definition and the scope of information that may be obtained from the EDR to “data that is directly related to the public offense for which the warrant is issued.”

Under existing law, “public offense” includes felonies, misdemeanors and infractions. (Pen. Code, § 16.) An infraction is not punishable by imprisonment, thus a person is not entitled to a trial by jury or to be appointed a public defender. (Pen. Code, § 19.6.) Unless otherwise specified, an infraction is punishable by a maximum fine of \$250. (Pen. Code, § 19.8.) Common examples of infractions are moving violations, such as speeding. (Veh. Code, §§ 22350, 40000.1.)

In order to meet the probable cause requirement for a search warrant, the officer must reasonably believe that a person is guilty of a crime and that the search would turn up evidence of the crime. The crimes that would qualify for the search warrant authority created by this bill could be any infraction, misdemeanor, or felony involving a motor vehicle that resulted in death or serious bodily injury. It is unclear whether an injury or death involving a motor vehicle in itself would be enough to establish probable cause that a crime occurred, but arguably depending on the damage to a vehicle or the impact to the person injured, an officer could opine that the driver was violating several laws enumerated in the Vehicle Code.

In light of the privacy interests that are implicated by the issuance of a search warrant and considering that infractions are minor offenses, should the bill's application to infractions be removed from the bill?

4. Argument in Support

According to San Diego County District Attorney's Office:

When someone is killed or suffers serious bodily injury as the result of a vehicle crash, law enforcement traffic investigators are tasked with conducting an investigation to ascertain what happened and whether any laws were violated. EDR data is akin to the so-called "black box" used in commercial aviation disasters. In both airline crashes and serious vehicle crashes, trained investigators can retrieve and utilize scientific data which tells the investigator what was happening with the aircraft or vehicle, in the time leading up to and during a crash. The scientific data is analyzed and considered by the expert investigators, along with the physical evidence and any witness statements, to get answers to the critical questions: What happened; and why?

Traffic investigators need available vehicular EDR data to properly do their jobs in crashes resulting in death or serious bodily injury. However, current California law does not allow law enforcement to obtain the EDR data unless law enforcement has probable cause to believe a felony was committed (basis for a search warrant.) Lack of access to EDR data results in incomplete law enforcement investigations. Incomplete investigations lead to conclusions which, at best, cannot be considered as reliable as conclusions which are corroborated and verified by scientific data. AB 1638 will remedy this.

5. Argument in Opposition

The American Civil Liberties Union of California opposes the bill:

In accordance with fundamental constitutional principles, California's search warrant statute operates to curb governmental overreach, and to protect the privacy and personal security of those within our state. In order to balance these privacy concerns with the legitimate public safety concerns, our existing law is designed to permit the issuance of a search warrant only under narrow circumstances, for the most serious offenses, and only when governmental needs have been determined to outweigh those of private individuals.

Privacy concerns are heightened when it is electronic information that is sought. Because the electronic information routinely collected by our phones, devices and cars is so extensive and contains such a wealth of highly private information, California's Electronic Communications Privacy Act puts in place additional protections when the government seeks access to this type of information. The kinds of information available from a motor vehicle recording device provide a good example of why additional protection is needed for electronic information: the data may include records of where the vehicle has been and the speeds at which it has been driven as well as steering and braking information and other information.

AB 1638 would contravene the carefully crafted balance of our search warrant statute by allowing the issuance of a warrant for the extensive data available from a motor vehicle recording device when the crime under investigation is a misdemeanor. The bill would allow the privacy rights of the individual to be violated when the governmental interest, in investigating a less-serious offense, does not warrant that violation.”

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