

MEMORANDUM 2024-48

Notice of Administrative Subpoena

This memorandum¹ provides a brief history of the study, *State and Local Agency Access to Electronic Communications: Notice of Administrative Subpoena*,² an analysis of the Department of Justice’s concerns with [Assembly Bill 522](#), authored by Assembly Member Kalra from the 2023-24 legislative session, which contained the Commission’s proposed legislation, and a discussion of proposed revisions to the legislation.

Brief Timeline

In 2013, the Legislature directed the Commission to recommend revisions to statutes controlling state and local government access to customer information from communications service providers.³ The following year, the staff prepared a series of memoranda analyzing the statutory and constitutional law governing surveillance by California state and local agencies. Before the Commission could develop proposed legislation, [Senate Bill 178](#), the California Electronic Communications Privacy Act (hereafter “CalECPA”), authored by Senator Leno, was introduced. This bill proposed to resolve many of the issues within the scope of the original Legislative mandate to the Commission by heightening requirements for governmental access to electronic communications information. In 2015, the Commission produced a final report based on its research, though it provided no legislative recommendations.⁴ Following CalECPA’s enactment,⁵ the Commission waited several years for the law to take effect before proposing new changes.⁶ The staff presented several options to the Commission for further

¹ Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

² [State and Local Agency Access to Electronic Communications: Notice of Administrative Subpoena](#) (Preprint – March 2022).

³ [2013 Cal. Stat. res. Ch. 115](#). See also [Memorandum 2014-5](#).

⁴ [State and Local Agency Access to Electronic Communications: Constitutional and Statutory Requirements](#) (August 2015).

⁵ [SB 178](#) (Leno) (2015).

⁶ Memorandum [2021-44](#), p. 1.

action in 2020,⁷ and the Commission chose to study and propose reforms relating to the use of administrative subpoenas on third party communications providers in non-criminal investigations.⁸ At the June 24, 2021 meeting, the Commission directed the staff to prepare proposed legislation.⁹ A draft tentative recommendation was prepared¹⁰ and sent out for public comment after the September 23, 2021 Commission meeting, with comments due by February 14, 2022.¹¹ The staff received no comments on the tentative recommendation.¹² Following minor amendments to the Commission’s recommendation to reflect technical drafting changes by Legislative Counsel,¹³ Assembly Member (and Commissioner) Kalra introduced [Assembly Bill 522](#) on February 7, 2023. The bill received no formal opposition and no “no” votes, but the California Department of Justice (hereafter “DOJ”) raised concerns with Assembly Member Kalra’s office in June 2023.¹⁴ In 2024, Asm. Kalra decided not to move the bill off the Senate Appropriations Committee suspense file because the DOJ’s concerns were unable to be resolved within legislative deadlines.¹⁵

ADDRESSING PRIOR CONCERNS ABOUT AB 522

The DOJ noted two main issues with AB 522:

- (1) DOJ proposes that the effect of the bill be limited to targets who are natural persons. As presently drafted, it would apply to all persons, including legal entities such as corporations.
- (2) DOJ proposes that the communication service provider be required to notify the target of an administrative subpoena, rather than the agency that issued the administrative subpoena.¹⁶

AB 522 was modeled on the California Right to Financial Privacy Act (CRFPA)¹⁷ and incorporates definitions from CalECPA¹⁸ and the federal Stored Communications Act,¹⁹ which the staff noted “simplifies the drafting of the proposed law, improves its readability, and would create useful uniformity between this statute and CalECPA.”²⁰

⁷ See Memoranda [2015-51](#), [2020-20](#), [2020-31](#), [2020-36](#), [2020-54](#), [2020-55](#).

⁸ Minutes ([October 15, 2020](#)), p. 4.

⁹ Minutes ([October 24, 2021](#)), p.4; see also Memorandum [2021-32](#).

¹⁰ Memorandum [2021-44](#).

¹¹ Minutes ([September 23, 2021](#)), p. 3.

¹² Memorandum [2022-20](#), p.1.

¹³ Memorandum [2023-4](#), pp. 1-2.

¹⁴ Memorandum [2023-42](#), pp. 2-3.

¹⁵ Memorandum [2024-27](#), pp. 1-2.

¹⁶ Memorandum [2023-42](#), pp. 1-2.

¹⁷ Memorandum [2021-32](#) and Gov’t Code §§ [7460-7493](#).

¹⁸ Penal Code §§ [1546-1546.5](#).

¹⁹ [18 U.S.C. §§ 2701](#) et seq.

²⁰ Memorandum [2021-38](#), p. 2.

Limiting to “Natural Persons”

The DOJ suggested the bill be limited in scope to “natural persons.” Neither CRFPA or CalECPA distinguish between natural persons and businesses,²¹ nor does the Commission’s resolution requiring the study.²² There is also no business exception to California Constitution Article 1, Section 13²³ or the U.S. Constitution’s Fourth Amendment,²⁴ which protect against unreasonable searches and seizures.

The staff suggested that the request limiting the notice requirement to natural persons is possibly related to the principle that highly regulated businesses have a reduced expectation of privacy in their records.²⁵ Not all businesses are highly regulated, however, and many “natural persons” are highly regulated – for example, physicians and attorneys.²⁶

The staff previously posited the possibility of a narrowly tailored exception for certain types of businesses. For example, the law could exempt businesses that are subject to the inspection of their records by the agency that served the subpoena.²⁷ However, if a business’ records are subject to inspection pursuant to current law, it is unclear why a subpoena would be needed to access electronic communications.

Absent further clarification and justification, the staff does not recommend narrowing the proposed legislation to natural persons.

²¹ CRFPA, Gov’t Code [7465\(c\)](#) defines “person” to mean an individual, partnership, corporation, limited liability company, association, trust, or any other legal entity. Gov’t Code [7465\(d\)](#) defines “customer” to mean any person who has transacted business with or has used the services of a financial institution or for whom a financial institution has acted as a fiduciary. CalECPA, Penal Code [1546\(l\)](#) defines “subscriber information” as “the name, street address, telephone number, email address, or similar contact information provided by the subscriber to the service provider to establish or maintain an account or communication channel, a subscriber or account number or identifier, the length of service, and the types of services used by a user of or subscriber to a service provider.” CalECPA does not define a “subscriber,” but it does not appear to differentiate between a natural person and a business entity. California Penal Code § 7 states a “person” includes a corporation as well as a natural person.”

²² [SCR 54](#) (Padilla) (2013) directed the Commission to undertake this study to “protect customers’ constitutional rights, including, but not limited to, the rights of privacy and free speech, and the freedom from unlawful searches and seizures.” “Customers” was not defined.

²³ Cal. Const. [art. I, § 13](#) states “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.”

²⁴ U.S. Const. [amend. IV](#) states “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, and the persons or things to be seized.”

²⁵ Memorandum [2023-42](#), p. 2.

²⁶ See e.g., Bus. & Prof. Code §§ [2000-2529.6](#) governing the Medical Board of California, which regulates physicians and surgeons, and Bus. & Prof. Code §§ [6000-6243.1](#) is the State Bar Act, which regulates attorneys.

²⁷ Memorandum [2023-42](#), pp. 2-3.

Switching Notice Requirement

The DOJ noted that a customer's identity may not be known when requesting electronic communications, and therefore the service provider is better positioned to give notice of the subpoena to the customer than the government entity. This recommendation was grounded in the assumption the service provider would have a greater ability to reach the customer through the information provided by the customer to establish service. While a customer may block receipt from unknown senders, a service provider may be able to circumvent those preferences.²⁸

AB 522 was modeled on CFRPA, which requires a government entity to serve notice of a subpoena pursuant to existing general service of summons requirements.²⁹ These requirements give multiple options for service, including handing the documents directly to the individual,³⁰ by mail,³¹ leaving the documents with a responsible party,³² or service by publication.³³ However, all of the options require knowledge of an individual's identity and general whereabouts. Traditional service of process in the financial services context makes sense because an individual is generally required to provide more detailed personal information when establishing a bank account than when creating an electronic communications account, some of which may be established with merely an email address. Requiring a government entity to find the information necessary to serve notice to a customer pursuant to general service of summons requirements would be very difficult; this may be why the DOJ's fiscal estimate to the Senate and Assembly's Appropriations Committee was \$1.7 million in implementation costs and \$3 million annually.³⁴

CalECPA navigated these concerns by establishing alternative methods of providing

²⁸ Memorandum [2023-42](#), p. 3.

²⁹ [AB 522](#) states "The department has served notice of the administrative subpoena on the customer pursuant to Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure."

³⁰ Code Civ. Proc. § [415.10](#)

³¹ Code Civ. Proc. § [415.30](#).

³² Code Civ. Proc. § [415.20](#)

³³ Code Civ. Proc. § [415.50](#). California law requires publication in "a named newspaper, published in this state, that is most likely to give actual notice to the party to be served."

³⁴ Senate Appropriations Committee [Analysis](#) of AB 522 (August 11, 2023) noted "DOJ reports [implementation] costs of approximately \$1.7 million in 2023-24 and \$3 million annually thereafter for additional staff and resources to effectively perform consumer and privacy protection investigations, including additional investigative work to obtain the information necessary to satisfy the proposed notice requirements in the bill (General Fund)." Appropriations Committee staff noted further that "Existing law provides the attorney general with the authority to issue subpoenas to advance consumer and privacy protection investigations. AB 522 would significantly restrict that authority, as applied to electronic communications, requiring additional staff and resources. The DOJ anticipates needing 4.0 Deputy Attorneys General, 4.0 senior Legal Analysts, 2.0 investigators, and 5.0 legal secretaries, as well as \$200,000 per year in expert consulting fees. These additional staff would be placed within the Public Rights Division, in the Consumer Protection Section."

notice, including by email.³⁵ Acknowledging the difficulty of reaching a subscriber through traditional means, the staff recommends requiring notice of the subpoena by the service provider. The government entity would still be required to serve the subpoena on the service provider according to existing law, but the service provider would be allowed to provide notice to the subscriber in alternate ways, as is done in CalECPA.

ADDITIONAL PROPOSED CHANGES

Add a definition to include local agencies

The Legislature³⁶ originally directed the Commission to develop recommendations for both state and local government agencies. As written, AB 522 is placed within the Government Code in the chapter relating to state departments. Without further amendment, the bill only applies to local governments in narrow circumstances.³⁷

CalECPA and CFRPA both extend its consumer protections against state and local government through their definitions.³⁸

The staff recommends replacing the term “department” with “government entity” and defining “government entity” in the same manner as CalECPA.

The staff also recommends placing the provisions in a new chapter in Division 7, where CFRPA is located, titled “Governmental Access to Electronic Communications Information.”

Other recommended technical changes

The staff also recommends removing the adjective “administrative” in the proposed legislation. Both “subpoena” and “administrative subpoena” are currently used throughout, but “administrative subpoena” is not defined. An “administrative subpoena” is merely descriptive of a subpoena issued by a governmental agency and using the term “subpoena” would make the legislation cleaner.

The staff also recommends changing “customer” to “subscriber” to more closely track

³⁵ Penal Code § [1546.2 \(a\)\(1\)](#).

³⁶ 2013 Cal. Stat. res. Ch. 115 ([SCR 54](#) (Padilla)).

³⁷ Bus. & Prof. Code § [16759](#) grants the powers of the Attorney General as a department head to district attorneys and certain city attorneys when prosecuting certain business practice violations.

³⁸ Penal Code § [1546\(i\)](#) “Government entity” means a department or agency of the state or a political subdivision thereof, or an individual acting for or on behalf of the state or a political subdivision thereof. Gov’t Code § [7465 \(e\)](#) defines “state agency” as every state office, officer, department, division, bureau, board, and commission or other state agency, including the Legislature. Gov’t Code § [7465\(f\)](#) defines “local agency” to include a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; of other local public agency. Gov’t Code § [7474\(a\)](#) authorizes access to financial records to “An officer, employee, or agent of a state or local agency or department thereof....”

the language of CalECPA³⁹ and adopting a definition consistent with its use.

The Commission should examine the draft and consider whether to proceed with that approach for purposes of a revised tentative recommendation. Does the Commission approve the proposed changes?

Respectfully submitted,

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³⁹ Penal Code § 1546(l) defines “subscriber information” as “the name, street address, telephone number, email address, or similar contact information provided by the subscriber to the service provider to establish or maintain an account or communication channel, a subscriber or account number or identifier, the length of service, and the types of services used by a user of or subscriber to a service provider.” CalECPA does not define “subscriber,” however.

New Chapter 19.5 is added to Division 7 (Miscellaneous) of Title 1 the Gov't Code, titled "Governmental Access to Electronic Communication Information"

Section 7455:

(a) For purposes of this section:

~~(1) "Customer" means a person or entity that receives an electronic communication service from a service provider.~~

(2) "Electronic communication information" has the meaning provided in subdivision (d) of Section 1546 of the Penal Code. [means the transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system.]

(3) "Electronic communication service" has the meaning provided in subdivision (e) of Section 1546 of the Penal Code.

(4) "Government entity" has the meaning provided in subdivision (i) of Section 1546 of the Penal Code.

~~(45)~~ (5) "Service provider" has the meaning provided in subdivision (j) of Section 1546 of the Penal Code.

~~(6) "Subscriber" means a person who has an account with a service provider.~~

(b) In addition to any other requirements that govern the use of an administrative subpoena by a government entity, ~~an administrative subpoena~~ may be used to obtain a customer-subscriber's electronic communication information from a service provider only if all of the following conditions are satisfied:

(1) The ~~department~~ service provider has served upon, or delivered to by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective, notice of the ~~administrative subpoena on to the customer-subscriber pursuant to Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure~~ within 5 days of receiving the government entity's subpoena.

(2) A copy of the ~~administrative~~ subpoena is attached to the notice.

(3) The ~~administrative~~ subpoena includes the name of the ~~department~~ government entity that issued it and the statutory purpose for which the electronic communication information is to be obtained.

(4) The notice includes contact information for the service provider and a statement in substantially the following form:

"The attached subpoena was served on a communication service provider to obtain your electronic communication information. The service provider was required to make ~~has made~~ a copy of the information specified in the subpoena. Unless you (1) move to quash or modify the subpoena within 10 days of service of this notice, and (2) notify the service provider that you have done so, the service provider will disclose the information pursuant to the subpoena."

~~(5) The department service provider has sent a proof of service delivery on to the service provider-government entity~~ stating its compliance with paragraphs (1) to (4), inclusive.

(c) Unless the subscriber ~~customer~~ has notified the service provider that a motion to quash or modify the subpoena has been filed, the service provider shall produce the electronic

communication information specified in the subpoena no sooner than 10 days after the ~~department service provider sent notice of the subpoena to the subscriber. served the proof of service required by paragraph (5) of subdivision (b).~~

(d) If a ~~subscriber~~ customer files a motion to quash or modify an administrative subpoena issued pursuant to subdivision (b), the proceeding shall be afforded priority on the court calendar, and the matter shall be heard within 10 days from the filing of the motion to quash or modify.

~~(e) This section does not require a service provider to inquire whether, or to determine that, the department has complied with the requirements of this section if the documents served on the service provider facially show compliance.~~

~~(f) This section does not preclude a service provider from notifying a customer of the receipt of an administrative subpoena pursuant to subdivision (b).~~

~~(g) (1) A service provider shall maintain, for a period of five years, a record of any disclosure of its subscriber's customer's electronic communication information pursuant to this section.~~

~~(2) The record maintained pursuant to this subdivision shall include a copy of the administrative subpoena.~~

~~(3) Upon subscriber customer request and the payment of the reasonable cost of reproduction and delivery, a service provider shall provide to the subscriber customer any part of the record maintained pursuant to this subdivision that relates to the subscriber customer.~~

~~(h) (1) If an administrative subpoena is served on a service provider pursuant to this section, the service provider shall promptly make a copy of any electronic communication information that is within the scope of the subpoena and within the possession of the service provider at the time that the subpoena was served prior to giving notice to the subscriber.~~

~~(2) The copy made pursuant to this subdivision shall be preserved only until it is disclosed pursuant to the subpoena, or the subpoena is quashed or modified, or until the subpoena is withdrawn and no other subpoena requesting the information remains pending, or until any action to enforce the subpoena, or any other subpoena requesting the information is fully resolved. This subdivision does not prevent a service provider from preserving electronic communication information as otherwise provided by law.~~

~~(f) This chapter shall not apply to any subpoenas issued in connection with a pretrial investigation.~~