

Date of Hearing: April 5, 2017

ASSEMBLY COMMITTEE ON COMMUNICATIONS AND CONVEYANCE

Miguel Santiago, Chair

AB 1034 (Chau) – As Introduced February 16, 2017

SUBJECT: Government interruption of communications

SUMMARY: Implements various recommendations by the California Law Revision Commission (CLRC) related to government interruption of communication service statutes. Specifically, **this bill:**

- 1) Authorizes a government entity to interrupt a communication service to prevent the service from being used for an illegal purpose or to protect public health, safety, or welfare, in any of the following circumstances:
 - a) The interruption is authorized by a court order, as specified; or,
 - b) The government entity reasonably determines that:
 - i) The interruption is required to address an extreme emergency situation that involves immediate danger of death or great bodily injury;
 - ii) There is insufficient time, with due diligence, to first obtain a court order, as specified; and,
 - iii) The interruption meets the grounds for issuance of a court order, as specified.
- 2) Authorizes a supervising law enforcement official with jurisdiction to require that a service provider interrupt a communication service that is available to a person if:
 - a) The law enforcement official has probable cause to believe that the person is holding hostages and is committing a crime, or is barricaded and is resisting apprehension through the use or threatened use of force; and,
 - b) The purpose of the interruption is to prevent the person from communicating with anyone other than a peace officer or a person authorized by a peace officer.
- 3) Requires an application by a government entity for a court order authorizing the interruption of a communication service to be made in writing, as specified, to the presiding judge of the superior court or a judicial officer designated by the presiding judge for that purpose. Requires each application to include all of the following information:
 - a) The identity of the government entity making the application;
 - b) A statement attesting to a review of the application and the circumstances in support of the application by the chief executive officer of the government entity making the application, or his or her designee. Requires the statement to state the name and office of

the person who effected this review;

- c) A full and complete statement of the facts and circumstances relied on by the government entity to justify a reasonable belief that the order should be issued, including the facts and circumstances that support the statements made, as specified;
 - d) A statement that probable cause exists to believe that the communication service to be interrupted is being used or will be used for an unlawful purpose or to assist in a violation of the law. Requires the statement to expressly identify the unlawful purpose or violation of the law;
 - e) A statement that immediate and summary action is needed to avoid serious, direct, and immediate danger to public health, safety, or welfare;
 - f) A statement that the proposed interruption is narrowly tailored to the specific circumstances under which the order is made and would not interfere with more communication than is necessary to achieve the purposes of the order;
 - g) A statement that the proposed interruption would leave open ample alternative means of communication;
 - h) A statement that the government entity has considered the practical disadvantages of the proposed interruption, including any disruption of emergency communication service; and,
 - i) A description of the scope and duration of the proposed interruption. The application shall clearly describe the specific communication service to be interrupted with sufficient detail as to customer, cell sector, central office, or geographical area affected.
- 4) Authorizes a judicial officer to enter an ex parte order, as requested or modified, authorizing interruption of a communication service in the territorial jurisdiction in which the judicial officer is sitting, if the judicial officer determines, on the basis of the facts submitted by the applicant, that all of the following requirements are satisfied:
- a) There is probable cause that the communication service is being or will be used for an unlawful purpose or to assist in a violation of the law;
 - b) Absent immediate and summary action to interrupt the communication service, serious, direct, and immediate danger to public health, safety, or welfare will result;
 - c) The interruption of communication service is narrowly tailored to prevent unlawful infringement of speech that is protected, as specified; and,
 - d) The interruption of a communication service would leave open ample alternative means of communication.
- 5) Requires an order authorizing an interruption of a communication service to include all of the following:

- a) A statement of the court's findings, as specified;
 - b) A clear description of the communication service to be interrupted, with specific detail as to the affected service, service provider, and customer or geographical area;
 - c) A statement of the period of time during which the interception is authorized, as specified; and,
 - d) A requirement that the government entity immediately serve notice on the service provider when the interruption is to cease.
- 6) Requires a government entity that interrupts a specified communication service to take all of the following steps:
- a) Apply for a court order without delay, as specified;
 - b) Prepare a signed statement of intent to apply for a court order, as specified; and,
 - c) Provide conspicuous notice of the application for a court order on the government entity's Internet Web site without delay, unless the circumstances that justify an interruption of a communication service without first obtaining a court order also justify not providing the notice.
- 7) Requires the government entity to serve the order or statement authorize the interruption of a communication service for all customers of the interrupted communication service within a geographical area to the Governor's Office of Emergency Services.
- 8) Requires the government entity to serve the specified order or statement on both of the following persons:
- a) The appropriate service provider's contact for receiving requests from law enforcement, including receipt of state or federal warrants, orders, or subpoenas; and,
 - b) The affected customer, if the identity of the customer is known, as specified.
- 9) Specifies that a good faith reliance by a service provider on a specified court, signed statement of intent, or the instruction of a supervising law enforcement officer shall constitute a complete defense for the service provider against any action brought as a result of the interruption of a communication service authorized by that court order, statement of intent, or instruction.
- 10) Requires a service provider to designate a security employee and an alternate security employee, to provide all required assistance to law enforcement officials to carry out the specified purposes.
- 11) Requires a service provider that intentionally interrupts specified communication service to comply with any rule or notification requirement of the Public Utilities Commission or Federal Communications Commission, or both, and any other applicable provision or requirement of state or federal law.

- 12) Authorizes a person whose communication service has been interrupted to petition the superior court to contest the grounds for the interruption and restore the interrupted service, as specified.
- 13) Exempts the following actions from the specified processes to interrupt communication services:
 - a) The interruption of a communication service with the consent of the affected customer;
 - b) The interruption of a communication service pursuant to a customer service agreement, contract, or tariff;
 - c) The interruption of a communication service to protect the security of the communication network or other computing resources of a government entity or service provider;
 - d) The interruption of a communication service to prevent unauthorized wireless communication by a prisoner in a state or local correctional facility, including a juvenile facility;
 - e) The interruption of a communication service to transmit an emergency notice, as specified;
 - f) An interruption of a communication service pursuant to a statute that expressly authorizes an interruption of a communication service, as specified; and,
 - g) An interruption of communication that results from the execution of a search warrant.

EXISTING LAW:

- 1) Establishes the CLRC and authorizes it to study topics approved by concurrent resolution of the Legislature. (Government Code Section 8280 and 8293)
- 2) Authorizes a supervising law enforcement official with jurisdiction and has probable cause to believe that a person is holding hostages and is committing a crime, or is barricaded and is resisting apprehension through the use or threatened use of force, to order a previously designated telephone corporation security employee to arrange to cut, reroute, or divert telephone lines for the purpose of preventing telephone communication by such suspected person with any person other than a peace officer or a person authorized by the peace officer. (Public Utilities Code (PUC) Section 7907)
- 3) Prohibits a governmental entity or provider of communications service, acting at the request of a governmental entity, to interrupt communications service for the purpose of protecting public safety or preventing the use of communications service for an illegal purpose, except pursuant to an order signed by a judicial officer obtained prior to the interruption. (PUC Section 7908)
- 4) Authorizes a governmental entity that reasonably determines that an extreme emergency situation exists that involves immediate danger of death or great bodily injury and there is

insufficient time, with due diligence, to first obtain a court order, to interrupt communications service without first obtaining a court order, as specified. (PUC Section 7908)

- 5) Requires an order to interrupt communications service, or a specified signed statement of intent, that falls within the federal Emergency Wireless Protocol (EWP) to be served on the California Governor's Office of Emergency Services (Cal OES). All other orders to interrupt communications service or statements of intent shall be served on the communications service provider's contact for receiving requests from law enforcement, including receipt of and responding to state or federal warrants, orders, or subpoenas. (PUC Section 7908)

FISCAL EFFECT: Unknown. This bill is keyed fiscal by the Legislative Counsel.

COMMENTS:

- 1) **Author Statement:** "AB 1034 would implement a number of reforms recommended by the CLRC to address problems they identified with the government interruption of communications services process. First, the bill extends the sunset on [Public Utilities Code] Section 7908. Second, to protect a customer's due process rights, it would establish an opportunity for post-interruption judicial review. Third, it would replace the existing reference to an interruption that 'falls within the federal Emergency Wireless Protocol' with a reference to an interruption of 'communication service for all customers of the interrupted communications service within a geographical area' in order to minimize confusion about the role of the Office of Emergency Services in this process. Fourth, AB 1034 would add exceptions to the court authorization requirements, to minimize unnecessary burdens on law enforcement and the courts, for [specified] interruptions. Finally, the bill would borrow procedural language from the wiretap law to provide details and procedural clarity on how to apply for a court order authorizing an interruption of communication service."
- 2) **Background:** The CLRC is an independent state agency created in 1953 to examine California law and recommend needed reforms to the Legislature and Governor. The CLRC is required to establish a report containing a calendar of topics that it wishes to study and to study any topic that the Legislature refers to it, through concurrent resolution or statute. As such, in 2013, the Legislature enacted SCR 54 (Padilla) Chapter 115, Statutes of 2013, which directed the CLRC to study the constitutionality of government interruption of communication service and propose reforms to improve procedures used to take such actions.

SCR 54 argued that revising and updating statutes related to the governance of state and local agency access to customer information from communications service providers is necessary to reflect modern technologies and clarify the rights and responsibilities of customers, communications service providers, and government agencies seeking to access customer information. Existing law includes an array of restrictions, authorizations, and exemptions, related to government interruption of communication services scattered across California Code. Providing greater coherence and consistency may very well provide state and local government agencies with a clearer framework and legal standard for when government can obtain customer information and from whom. The CLRC completed its study required under SCR 54 and provided their recommendations in December 2016.

- 3) ***Goldin v. Public Utilities Commission***: In 1979, the California Supreme Court held in *Goldin v. Public Utilities Commission*, 23 Cal. 3d 638 (1979) that a government may constitutionally deprive a person of telephone service without prior notice and an opportunity to be heard, so long as certain facts are found by a judge and certain procedures consistent with the requirements of due process were followed. These procedures including, obtaining a court order, having probable cause, finding that the absent of immediate interruption of the communication service could result in significant dangers to public health, safety, or welfare, and that the customer have a prompt post-interruption opportunity for judicial review of the governments allegations.

SB 380 (Padilla) Chapter 371, Statutes of 2013 largely codified *Goldin v. Public Utilities Commission* under Public Utilities Code Section 7908 by establishing a process by which state and local government may interrupt a communication service. However, the provisions in Section 7908 are set to sunset in 2020. This bill removes that sunset. In addition, this bill moves the provisions in Section 7908 over to a new Penal Code Section. Seeing that the process established under Section 7908 do not require any special action upon the California Public Utilities Commissions, moving the provisions from the Public Utilities Code to the Penal Code is consistent with the goals of consolidating statutes to relevant code sections related to government action to abate unlawful activities.

Furthermore, although Section 7908 prohibits a government interruption of communications unless the government entity obtains a court order signed by a judicial officer prior to the interruption, Section 7908 does not specified any procedural guidance on how a government entity would apply for such an order, what criteria a judicial officers should consider in determining whether to issue such an order, and what form the order should take. This bill would create such a procedure that is consistent with existing laws on applying for court orders authorizing wiretaps. Doing so would provide clearer guidance and help reduce procedural uncertainty or confusion in times of emergency.

- 4) **Post-Interruption Judicial Review and Notice**: As part of the process established under *Goldin v. Public Utilities Commission*, the California Supreme Court made clear that an affected customer must be given a prompt post-interruption opportunity to review the government's allegations for justifying the interruption of communications service and, if not borne out, the interrupted service should be restored. While it is possible for a person to obtain judicial review under other laws, Section 7908 does not specifically provide post-interruption judicial review for customers to challenge the government's allegations. In addition, Section 7908 does not require notice to be served upon affected customers. While in certain situations, serving a notice might not be feasible, proving notice to a specifically-identified customer when their communication service is interrupted would greater protect the due process rights of customers and provide them avenues for challenge. This bill would provide a post-interruption judicial review and notice for customers.
- 5) **Cal OES Guidance**: The EWP is a federal process established by the Department of Homeland Security's National Coordinating Center for Communications following the 2005 London terrorist bombings. The EWP establishes a process for interruption and restoring wireless communications service during times of national emergency. Current law requires an order to interrupt communications service, or a specified signed statement of intent, that falls within the EWP to be served on the Cal OES. However, details of the EWP, although not classified, are not widely disclosed and only shared with federal law enforcement

officials, state homeland security officials, and national cellular carriers. This causes confusion and burdens Cal OES when reviewing routine law enforcement actions, when the intent of the EWP seems to apply only to interruption of communications over a large geographic area. This bill makes clarifying changes to provide more guidance to the OES in reviewing EWP and other law enforcement actions.

6) **Exceptions:** Current law provides a number of narrow exceptions to following the court authorization process to interrupt communication services. These exceptions generally apply to interruptions of communication service for purpose of protecting public safety or preventing the use of communication service for illegal purpose, including interruptions pursuant to a customer service agreement, interruptions pursuant to a service provider's practices to protect its networks, and interruptions authorized by other laws such as during a hostage situation. This bill proposes several new exceptions including interruptions in a correctional facility to stop unlawful purposes, interruptions to broadcast emergency alerts, interruptions to execute a search warrant, and interruptions with the consent of the customer. Such new exceptions do not preclude anyone from challenging the lawfulness of an interruption, but it does provide greater clarity in what could be considered arguably standard situations.

7) **Prior Legislation:** SCR 54 (Padilla) of 2013 requires the CLRC to report to the Legislature recommendations to revise statutes governing state and local agency access to customer information from communications service providers. *Status: Chaptered by the Secretary of State, Resolution Chapter 115, Statutes of 2013.*

SB 380 (Padilla) of 2013 generally requires a governmental entity to obtain an order, signed by a judicial officer, before communication services may be lawfully interrupted. *Status: Chaptered by the Secretary of State, Chapter 371, Statutes of 2013.*

8) **Double-referral:** *This bill is double referred, and if passed by this Committee, will be referred to the Assembly Committee on Judiciary.*

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

None on file.

Analysis Prepared by: Edmond Cheung / C. & C. /