
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: AB 2726 **Hearing Date:** June 28, 2022
Author: Lackey
Version: February 18, 2022
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Peace officers: communications*

HISTORY

Source: The California Correctional Supervisors Organization

Prior Legislation: AB 2669 (Jones-Sawyer), Chapter 175, Stats. 2018
AB 1520 (Portantino) Failed Senate Public Safety 2007
AB 2356 (Negrete McLeod) Failed Senate Public Safety 2006
AB 1884 (Spitzer) Vetoed 2004
AB 1647 (John Campbell) Failed Assembly Public Safety 2001

Support: California District Attorneys Association

Opposition: ACLU California Action; California Public Defenders Association; the Young Women's Freedom Center

Assembly Floor Vote: 56 - 4

Analysis reflects author's amendments to be offered in Committee see Comment # 4

PURPOSE

The purpose of this bill is to authorize any peace officer of the Office of Correctional Safety of the Department of Corrections and Rehabilitation (CDCR), to overhear or record any communication related to a serious or violent felony that they could lawfully hear prior to the enactment of unauthorized eavesdropping provisions.

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. 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 to 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. Provides that any evidence so obtained is admissible in a prosecution for such crimes. (Penal Code § 633.5.)

Existing law provides that notwithstanding prohibitions eavesdropping, etc., 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 including a peace officers of the Office of Internal Affairs of the Department of Corrections and Rehabilitation, 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. Provides that any evidence so obtained is admissible in any judicial, administrative, or legislative proceeding. (Penal Code § 633.)

This bill adds a peace officer with the Office of Correctional Safety of the Department of Corrections and Rehabilitation to the exemption allowing specified peace officers to record communications related to the investigation of a serious or violent felony.

COMMENTS

1. Need for This Bill

According to the author:

Currently, the Peace Officers of Correctional Safety, (Special Services Unit, SSU) and the Office of Internal Affairs (OIA) within the California Department of Corrections and Rehabilitation (CDCR) are not listed in PC 633 but most peace officer agencies are. Therefore, much of the evidence gathered by SSU is subject to the local District Attorney after the fact the evidence was obtained while undercover or happenstance and therefore not legal evidence because SSU and OIA are not listed in PC 633. Other agencies can use this type of evidence because they are listed in PC 633. SSU and OIA are restricted from using this evidence because they needed the local District Attorney's warrant prior to gaining the evidence. This problem is why most Peace Officer agencies are listed in PC 633 and why SSU and OIA need to be added.

2. Legislative History and Intent

Current law declares that "advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society." (Penal Code § 630.) Current law also recognizes that "law enforcement agencies have a legitimate need to employ modern listening devices and techniques in the investigation of criminal conduct and the apprehension of lawbreakers." (Id.)

The legislative history of this provision indicates that the author of legislation that created Penal Code Section 633, Speaker Unruh, described his reasons for introducing the Invasion of Privacy Act, Penal Code Sections 631 *et seq.* in a letter to the editor of the *California Law Review* stating: "I introduced the measure primarily because of a strong personal concern over the growth of electronic eavesdropping equipment of a highly sophisticated and miniaturized nature, and its ready availability on the market. A personal experience which I had my office 'bugged' by an opponent during a political campaign initially interested me in this problem."

3. Exception to Prohibition on Unlawful 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, including a peace officer of the Office of Internal Affairs of CDCR, and any person acting pursuant to the direction of a law enforcement officer may lawfully overhear or record certain communications. For example, a peace officer may authorize an informant to record conversations relating to purchasing or selling narcotics.

A peace officer with the Office of Internal Affairs at CDCR was added to this exception to the prohibition of intercepting communications was added by AB 2669 (Jones-Sawyer), Chapter 175, Stats. 2018. As that bill came to this Committee it also included an exception for a peace officer of the Office of Correctional Safety at CDCR that is added by this bill. At the request of the Committee, the exception for the peace officer of the Office of Correctional Safety was removed from that bill.

4. Author's amendments

Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits any peace officer of the *Office of Correctional Safety of the Department of Corrections and Rehabilitation* acting within the scope of his or her authority, from overhearing or recording any communication that he or she could lawfully overhear or record prior to January 1, 1968, in any criminal investigation *related to a serious or violent felony*.

5. Argument in Support

The California Correctional Supervisor's Organizations supports this bill stating:

In practice, the benefit of PC 633 is that it allows sworn officers to record the statements of suspects without notifying them. This is most often utilized during suspect interviews/interrogations, in-car recordings of suspects in custody, and in a pretext phone call situation. A pretext phone call is the recording of a conversation between a victim and a known suspect arranged by law enforcement to gain admissions or other incriminating statements. This technique provides some of the best evidence in cases of date rape and other crimes involving no independent witnesses.

Currently, the peace officers of the Office of Correctional Safety within CDCR are not afforded this authority; and since their investigations occur mainly outside of

CDCR's institutions and while undercover, the benefit of PC 633 will provide these officers with an effective tool that can assist with their investigations. In practice, AB 2726 will make prisons safer, since conversations that take place with this class of officers will inevitably involve planned violence directed to or emanating from correctional institutions. This bill would add peace officers of the Office of Correctional Safety of the Department of Corrections and Rehabilitation to the list of law enforcement officers, who are not prohibited by those provisions from overhearing or recording any communication that they could lawfully overhear or record prior January 1, 1968

6. Argument in Opposition

The ACLU California Action oppose this bill stating:

Fifty years ago, California put into place extensive protections for the privacy of its residents against non-consensual eavesdropping on or recording of confidential communications – such as the private conversations we all have every day, in person or by telephone. Many law enforcement officers, including police officers and deputy sheriffs, were expressly allowed under the statute to continue to overhear or record communications that they could lawfully overhear or record prior to the enactment of the new restrictions – but only those officers specified in statute were granted this exemption. (Penal Code §633.) The original restrictions on the use of eavesdropping were enacted to ensure that such activities would be undertaken only in absolutely justifiable situations and under strict control. There have been several previous efforts to expand this authority. We have consistently opposed all such efforts, and all have either been rejected by the legislature or vetoed by the Governor.

If an investigation is of sufficient importance to merit electronic eavesdropping, these officers may seek the cooperation and assistance of those peace officers and agencies that currently have the authority for it. Creating further encouragement and incentive to engage in this practice is inconsistent with the legitimate expectation of privacy surrounding confidential communication. For fifty years, the peace officers of the CDCR's Office of Correctional Safety and Office of Internal Affairs, like many other kinds of peace officers not exempted under Penal Code §633, have been doing their jobs without the power to overhear or record conversations as proposed. There is simply no reason to chip away at California's statutory privacy protections by newly granting them this power after all this time. For these reasons, ACLU California Action opposes AB 2726.

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