
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 844 **Hearing Date:** June 9, 2015
Author: Bloom
Version: February 26, 2015
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Search Warrants: Foreign Corporations and Foreign Limited Liability Companies*

HISTORY

Source: Los Angeles District Attorney's Office

Prior Legislation: SB 1980 (McPherson) Ch. 864, Statutes of 2002
SB 662 (Figueroa) Ch. 896, Statutes of 1999

Support: California Bankers Association; California District Attorneys Association;
California State Sheriffs' Association

Opposition: None known

Assembly Floor Vote: 77 - 0

PURPOSE

The purpose of this bill is to authorize a foreign corporation and foreign limited liability company to consent to service of process for a search warrant by email or submission to a designated Internet Web portal.

Existing law requires when properly served with a search warrant issued by the California court, a foreign corporation subject to this section to provide to the applicant, all records sought pursuant to that warrant within five business days of receipt, including those records maintained or located outside this state. (Penal Code, § 1524.2, subd. (b)(1).)

Existing law defines a "search warrant" as an order in writing 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. (Penal Code, § 1523.)

Existing law states that a California corporation that provides electronic communication services or remote computing services to the general public, when served with a warrant issued by another state to produce records that would reveal the identity of the customers using those services, data stored by, or on behalf of, the customer, the customer's usage of those services, the recipient or destination of communications sent to or from those customers, or the content of those communications, shall produce those records as if that warrant had been issued by a California court. (Penal Code, § 1524.2, subd. (c).)

Existing law provides that the terms "electronic communication services" and "remote computing services" shall be construed in accordance with applicable federal law. (Penal Code, § 1524.2, subd. (a)(1).)

Existing law defines "properly served" as a search warrant has been delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile to a person or entity listed. (Penal Code, § 1524.2, subd. (a)(6).)

Existing law states that a provider of wire or electronic communication services or a remote computing service, upon the request of a peace officer, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a search warrant or a request in writing and an affidavit declaring an intent to file a warrant to the provider. Records shall be retained for a period of 90 days which shall be extended for an additional 90-day upon a renewed request by the peace officer. (Penal Code, § 1524.3, subd. (d).)

Existing law requires any domestic or foreign corporation, before it may be designated as the agent for the purpose of service of process of any entity, to file a certificate executed in the name of the corporation by an officer thereof stating all of the following:

- The complete street address of its office or offices in this state, wherein any entity designating it as such agent may be served with process;
- The name of each person employed by it at each such office to whom it authorizes the delivery of a copy of any such process; and
- Its consent that delivery thereof to any such person at the office where the person is employed shall constitute delivery of any such copy to it, as such agent. (Corporations Code, § 1505.)

Existing law provides that delivery by hand of a copy of any process against the corporation (a) to any natural person designated by it as agent or (b), if a corporate agent has been designated, to any person named in the latest certificate of the corporate agent filed with the Secretary of State at the office of such corporate agent shall constitute valid service on the corporation. (Corporations Code, § 1701.)

Existing law prohibits a foreign corporation from transacting intrastate business without having first obtained from the Secretary of State a certificate of qualification. To obtain that certificate it shall file, on a form prescribed by the Secretary of State, a statement and designation signed by a corporate officer or, in the case of a foreign association that has no officers, signed by a trustee stating:

- Its name and the state or place of its incorporation or organization;
- The street address of its principal executive office;
- The street address of its principal office within this state, if any;
- The mailing address of its principal executive office, if different from the addresses specified above;
- The name of an agent upon whom process directed to the corporation may be served within this state, as specified;

- Its irrevocable consent to service of process directed to it upon the agent designated and to service of process on the Secretary of State if the agent so designated or the agent's successor is no longer authorized to act or cannot be found at the address given; and
- If it is a corporation which will be subject to the Insurance Code as an insurer, it shall so state that fact. (Corp. Code, § 2105, subd. (a).)

Existing law specifies that consent extends to service of process directed to the foreign corporation's agent in California for a search warrant issued pursuant to Section 1524.2 of the Penal Code, or for any other validly issued and properly served search warrant, for records or documents that are in the possession of the foreign corporation and are located inside or outside of this state. This subparagraph shall apply to a foreign corporation that is a party or a nonparty to the matter for which the search warrant is sought. For purposes of this subparagraph, "properly served" means delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile to a person or entity listed as specified. (Corporations Code, § 2105, subd. (a)(6)(B).)

Existing law states that delivery by hand of a copy of any process against a foreign corporation (a) to any officer of the corporation or its general manager in this state, or if the corporation is a bank to a cashier or an assistant cashier, (b) to any natural person designated by it as agent for the service of process, or (c), if the corporation has designated a corporate agent, to any person named in the latest certificate of the corporate agent filed with the Secretary of State shall constitute valid service on the corporation. (Corporations Code, § 2110.)

Existing law provides that a foreign limited liability company may apply for a certificate of registration to transact business in this state by delivering an application to the Secretary of State for filing on a form prescribed by the Secretary of State. The application shall state all of the following:

- The name of the foreign limited liability company, or an alternate name, as specified;
- The state or other jurisdiction under whose law the foreign limited liability company is organized and the date of its organization in that state or other jurisdiction, and a statement that the foreign limited liability company is authorized to exercise its powers and privileges in that state or other jurisdiction;
- The street address of the foreign limited liability company's principal office and of its principal business office in this state, if any;
- The name and street address of the foreign limited liability company's initial agent for service of process in this state who meets the qualifications specified. If a corporate agent is designated, only the name of the agent shall be set forth;
- A statement that the Secretary of State is appointed the agent of the foreign limited liability company for service of process if the agent has resigned and has not been replaced or if the agent cannot be found or served with the exercise of reasonable diligence; and

- The mailing address of the foreign limited liability company if different than the street address of the principal office, or principal business office in this state. (Corp. Code, § 17708.02, subd. (a).)

Existing federal law, the Stored Communications Act regulates access to electronic communications from providers of electronic communications services. Under the Act a person is prohibited from (1) intentionally accessing without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeding an authorization to access that facility; and thereby obtaining, altering or preventing the authorized access to a wire or electronic communication while in electronic storage in such a system. The Act requires governmental entities to obtain a warrant prior to requiring a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service. (18 U.S.C. § 2701 et seq.)

This bill would allow a foreign corporation or foreign limited liability company to consent to service of process for a search warrant by email or submission to a designated Internet Web portal.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity." (Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14)). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

AB 844 would amend the definition of “properly served” in PC§1524.2(a)(6) to reflect the common and increasingly prevalent practice of communications and computing service companies to insist on electronic service of process. Such policies may request that service be by email, or via a web portal provided by the company.

2. Service of Process

Existing law requires both a domestic and foreign corporation to designate an agent for the purpose of service of process when the corporation files a certificate in the office of the Secretary of State to transact business in California. (Corporations Code, §§ 1505 and 2105.) An agent for service of process is an individual who resides in the state, or a corporation, designated to accept court documents if the business entity is sued. Designating a person or an entity to receive service of process ensures that the corporation has formal notice of a law suit and any related court documents. The designated agent for service of process is also the entity upon whom a search warrant would be served for records or documents that are in the possession of the foreign corporation. In order to be "properly served," the applicable statutes require the court documents to be "delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile to a person or entity listed as specified." (Pen. Code, § 1524.2, subd. (a)(6); Corp. Code, § 2105, subd. (a)(6)(B).)

This bill adds other means of notice as specified by the foreign corporation or the foreign limited liability company, including email or submission via an Internet web portal designated by the corporation for the purpose of service of process.

3. Support

According to the sponsor, the Los Angeles County District Attorney’s Office:

Evidence such as text messages, email, mobile app data, IP logs, photos and documents stored in the cloud, and countless other kinds of electronically stored information have become vital sources of evidence for criminal prosecutions. This evidence is in the hands of third party companies that are often located

outside of California. Fortunately, there are state and federal laws that work in tandem to give us authority not only to obtain this evidence but also to admit in it court expediently. Unfortunately, however, the enabling state statute has not kept up with new methods for service of process. The California law does not explicitly recognize electronic service of process other than by facsimile.

Federal law governs the collection of electronic communications¹ from providers of electronic communications services (ECS) and remote computing services (RCS). The Stored Communications Act governs the collection of such evidence when it is in storage (i.e., in situations other than a wiretap)². The SCA requires covered entities to honor government requests to preserve and turn over information about subscribers and their transactions and stored communications.³ The SCA requires that a covered entity honor a properly issued search warrant from any state court of “general criminal jurisdiction” “authorized by the law of that State to issue search warrants”.⁴

California has a complementary statute governing the collection of such evidence from remote computing and electronic communications services. Cal. Pen. Code § 1524.2 requires that California corporations and foreign corporations qualified to business in our state honor search warrants for information about subscribers and their transactions and stored communications, wherever those records are stored.⁵ For good measure, Cal. Corp. Code § 2105 specifically requires foreign corporations to consent to service pursuant to PC§1524.2.

A problem is that the statute’s definition of “properly served” is out-of-date. The following forms of service are permitted: “delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile...”⁶ It is becoming increasingly common for ISP’s and others to insist on electronic service, either by email or via a web portal established for this purpose.⁷

The proposed legislation would update the definition of “properly served” to comport with today’s technological innovations and modern business practices.

--END --

¹ ECPA broadened the definition of “electronic communications” to include just about any electronically stored information, with a few exceptions. 18 U.S. Code § 2510(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include [voice, tone-only pagers, tracking devices, electronic funds transfers].

² 18 U.S. Code § 2703

³ 18 U.S. Code § 2703(a), 18 U.S. Code § 2703(d)

⁴ 18 U.S. Code § 2711(3)(B)

⁵ Cal. Pen. Code § 1524.2. Cal. Corp. Code § 102. Cal. Corp. Code § 2105.

⁶ PC§1524.2(a)(6)

⁷ Facebook and Ebay/PayPal are two companies that have established web portals for the exclusive use of law enforcement. Yahoo!, T-Mobile, Pinger, and CapitalOne are examples of the new norm, which is service by email.