



## **AB 358 – Technology Reform for Access to Crime Evidence (TRACE) Amendment**

### **Bill Summary**

Assembly Bill 358 allows law enforcement to examine devices belonging to deceased victims in order to investigate their death. AB 358 also allows law enforcement to examine devices used by stalkers and criminals who spy on others.

### **Problem**

In recognizing the pervasiveness of electronic devices and electronic information, the California Electronic Protection Act (CalECPA) was passed in 2016. CalECPA expanded traditional Fourth Amendment Search protections and limited the ability for law enforcement to conduct searches of electronic devices and electronic information without a warrant. In recognizing the pervasiveness of electronic devices and electronic information in every person's life, CalECPA sought to protect individuals from overreach of law enforcement by expanding who has legal standing to suppress evidence in court, the requirements to limit the scope of warrants related to these items, and the associated notice requirements to targets of these types of warrants. With only very narrow exceptions, the default is that law enforcement must obtain a warrant when targeting electronic devices or information.

As a consequence of CalECPA, there have been times when important competing interests, namely those of victims, are frustrated. These are narrowly discussed herein as: (1) when a device is located with a dead body and law enforcement reasonably believes that the device belongs to the decedent; and (2) when an individual finds a recording or tracking device in an area that they have a reasonable expectation of privacy, and it appears that recording and/or tracking device is being used to record/track them.

(1) Prior to CalECPA, under traditional Fourth Amendment analysis, legal standing would end with the decedent in the first scenario above, and therefore, law enforcement could immediately start investigating the death via the decedent's device. CalECPA expands legal standing and gives anyone the right to challenge evidence found in a decedent's phone. This results in the need for law enforcement to obtain a warrant for the decedent's device and electronic information, which frustrates the decedent's rights to have their death expeditiously investigated. Additionally, delaying such an investigation endangers society at large as it delays the apprehension of suspects.

Examples of the need for change are abundant but perhaps no better highlighted than with the fentanyl overdose epidemic. With over 5,502 overdose deaths in California in 2020<sup>1</sup>, the need to expeditiously and immediately begin overdose investigations is clear. Not only does the victim have a fundamental right to have their death investigated, but society at large has an interest in getting the poison off the street as fast as possible. Many times, users of fentanyl, including high school and college students, are unaware that they are even taking the poison and instead believe that they are taking prescription medications.<sup>2</sup> Although an emergency exception exists already in Penal Code section 1546.1(c), this exception is narrow and prone to legal challenge, leaving law enforcement in limbo as to whether to immediately search the device or delay and obtain a warrant. In any death investigation, time is critical, and any amount of delay can be detrimental to the investigation.

(2) Prior to CalECPA, under traditional Fourth Amendment analysis, an individual using electronic

<sup>1</sup> <https://oag.ca.gov/fentanyl>

<sup>2</sup> <https://www.dea.gov/sites/default/files/2021-05/Counterfeit%20Pills%20fact%20SHEET-5-13-21-FINAL.pdf>



devices to spy on or track another individual in an area where the individual does not have a reasonable expectation of privacy themselves, would not have standing to challenge the search of such a device. Under CalECPA's expanded legal standing doctrine, an individual spying on or tracking another individual using an electronic device has legal standing to challenge the search of such a device without a warrant, even when that individual has no right to privacy within the space where the device is located.

An example of this would be a contractor setting up spy cameras inside of a home that they are working on and surreptitiously recording the individuals within. Even with the consent of the residents, law enforcement is not empowered to search the device to determine what has been captured, if anything, or to try to determine who left the device within their home.

Similarly, a domestic abuser can use CalECPA as a sword to use tracking devices to track the abused. This problem was highlighted last year when Governor Newsom signed numerous bipartisan bills to support domestic violence victims.<sup>3</sup> In passing the legislation, California specifically addressed protecting victims from being tracked while within their vehicles.<sup>4</sup> The current state of CalECPA is inconsistent with the ongoing efforts to protect victims of domestic abuse.

### **Solution**

AB 358 narrowly expands the exceptions provided under Penal Code section 1546.1(c) to allow law enforcement to access electronic devices and search electronic information in limited circumstances and for limited purposes, without the need of a warrant, in the following scenarios:

- If the government entity locates the device with a deceased person, and in good faith believes that the device belongs to the decedent,

provided that the government entity shall only access electronic information in order to attempt to determine cause, and surrounding circumstances, of death;

- With the specific consent from an individual who locates the device within an area where they have a reasonable expectation of privacy, such as their residence, automobile, or personal property, and the device is reasonably believed to have been used for the purpose of recording or tracking the individual without their permission.

### **Support**

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- San Diego District Attorney

### **For More Information**

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<sup>3</sup> <https://www.gov.ca.gov/2024/09/27/governor-newsom-signs-bipartisan-bills-to-support-domestic-violence-victims/>

<sup>4</sup> [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202320240SB1394](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB1394)