



# Training Bulletin

## SANTA BARBARA POLICE DEPARTMENT



Lori Luhnow, Police Chief

VOL. 2016, NO. 011

November 7, 2016

### Emergency Electronic Communication Search Phone Ping, Court Order

Senate Bill 178, also known as the California Electronic Communications Privacy Act generally prohibits a government entity from compelling the production of or access to electronic communication information or electronic device information, as defined, without a search warrant, wiretap order, order for electronic reader records, or subpoena issued pursuant under specified conditions, except for emergency situations, as defined. Senate Bill 178 specifies the conditions under which a government entity may access electronic device information by means of physical interaction or electronic communication with the device, such as pursuant to a search warrant, wiretap order, or consent of the owner of the device.

Subdivision (a) of 1546.4 any person in a trial, hearing, or proceeding may move to suppress any electronic information obtained or retained in violation of the Fourth Amendment to the United States Constitution or of this chapter.

A government entity may access electronic device information by means of physical interaction or electronic communication with the device only as follows:

- (1) Pursuant to a warrant
- (2) Pursuant to a wiretap
- (3) With the specific consent of the authorized possessor of the device.
- (4) With the specific consent of the owner of the device, only when the device has been reported as lost or stolen.
- (5) If the government entity, in good faith, believes that an **emergency involving danger of death or serious physical injury to any person** requires access to the electronic device information.
- (6) If the government entity, in good faith, believes the device to be lost, stolen, or abandoned, provided that the entity shall only access electronic device information in order to attempt to identify, verify, or contact the owner or authorized possessor of the device.
- (7) Except where prohibited by state or federal law, if the device is seized from an inmate's possession or found in an area of a correctional facility under the jurisdiction of the Department of Corrections and Rehabilitation where inmates have access and the device is not in the possession of an individual and the device is not known or believed to be the possession of an authorized visitor. Nothing in this paragraph shall be construed to supersede or override Section 4576.

If a court order is not obtained, the department is at risk of losing whatever evidence was gained by use of the phone pings (interviews, photos, items found at the scene, et cetera). Occurrences in which Officers or Dispatch “ping” an electronic devices location to respond to a call, there considerations an officer must now make:

- 1) An officer has three days to obtain a court order 1546.1(h) PC If a government entity obtains electronic information pursuant to an emergency involving danger of death or serious physical injury to a person, that requires access to the electronic information without delay, **the entity shall, within three days** after obtaining the electronic information, file with the appropriate court an application for a warrant or order authorizing obtaining the electronic information or a motion seeking approval of the emergency disclosures that shall set forth the facts giving rise to the emergency.
- 2) An officer is required to make notification to the subject whose phone was ‘pinged’ as soon as is practical (1546.2(a) PC). Any government entity that executes a warrant, or obtains electronic information in an emergency pursuant to Section 1546.1, shall serve upon, or deliver to by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective, the identified targets of the warrant or emergency request, a notice that informs the recipient that information about the recipient has been compelled or requested, and states with reasonable specificity the nature of the government investigation under which the information is sought. The notice shall include a copy of the warrant or a written statement setting forth facts giving rise to the emergency. The notice shall be provided contemporaneously with the execution of a warrant, or, in the case of an emergency, within three days after obtaining the electronic information.
- 3) Exception (1546.2(b)(1) PC). When a warrant is sought or electronic information is obtained in an emergency under Section 1546.1, the government entity may submit a request supported by a sworn affidavit for an order **delaying notification** and prohibiting any party providing information from notifying any other party that information has been sought. The court shall issue the order if the court determines that there is reason to believe that notification may have an adverse result, but only for the period of time that the court finds there is reason to believe that the notification may have that adverse result, and **not to exceed 90 days**.

**COURT ORDER**

Given that law enforcement is allowed 3 days after the fact to obtain an Emergency Electronic Communications Search Court Order, it is not our best practice to call an on call judge for this order during late night hours. A call to the on-call judge the next morning or following evening is more appropriate. Contacting the on call judge should be facilitated through supervisors and day shift officers, preferably during business hours. If evidence (in the form of statements, photographs, physical items, or virtually anything else falling under the "evidence" description) is collected based on the phone pings, the on call Deputy DA should be consulted while seeking the court order.

SUPERIOR COURT OF CALIFORNIA  
County of Santa Barbara

COURT ORDER (Post Hoc)  
Emergency Electronic Communications Search  
Penal Code §1546.1(h)

Order No. \_\_\_\_\_

The affidavit below, sworn to and subscribed before me, has established probable cause to believe the following: When the warrantless search described below occurred, the affiant was aware of the following: (1) facts that reasonably indicated that an immediate search was necessary to prevent death or serious bodily injury to a person, and (2) facts that established probable cause to search.

**Order for delayed notification:** For the reason(s) set forth in the affidavit, below, the affiant shall not be required to provide notice of the court order's execution pursuant to Penal Code section 1546.2(a) until (1) there is no longer sufficient reason to believe that the "adverse results" cited below will occur, or (2) the passage of 90 days from the date the order was executed, whichever comes first.

**Disposition of communications information:** All electronic communications information seized pursuant to this court order shall be retained in the affiant's custody pending further court order pursuant to Penal Code §§ 1528(a), 1536.

Date and time issued

Judge of the Superior Court

**AFFIDAVIT**

**Affiant's name:** \_\_\_\_\_, Santa Barbara Police Department

**Date of warrantless search:** \_\_\_\_\_

**Electronic communications device or provider that was searched:** \_\_\_\_\_

**Electronic communications information that was seized:** \_\_\_\_\_

**Basis of emergency declaration:** The following are the facts upon which I believed that an immediate warrantless search was necessary to prevent death or serious bodily injury: \_\_\_\_\_

**Request for delayed notification:** Pursuant to Penal Code § 1546.2(b)(1) I hereby request that notice of the execution of the warrantless search and the issuance of this post hoc court order be delayed on grounds that such notification would cause the following "adverse results" (if checked):  Endanger the life or physical safety of an individual.  Result in flight from prosecution.  Result in tampering or destruction of evidence.  Result in the intimidating of a potential witness.  Seriously jeopardize an investigation or unduly delaying a trial.

Written notice will be given upon the signing of this order pursuant to 1546.2(a) PC.

**Declaration:** I declare under penalty of perjury that the information within my personal knowledge contained in this affidavit, including all incorporated documents, is true.

Date

Affiant

**NOTIFICATION**

The law requires that the phone owner / user be notified “contemporaneously” (unless a 90 delay order is obtained). In most cases it will be most effective to provide the attached notification form while the officer is still with the phone user (be the victim, witness, or other).

Because of the requirement that an officer provide the phone user with “a copy of the warrant **or** a written statement setting forth facts giving rise to the emergency” it will usually be most effective for officers to keep the attached notification forms on hand so that an officer can provide this “statement” and therefore not have to locate the user again to provide notice after the court order is obtained a day or two later.

NOTICE OF COURT ORDER	
AGENCY NAME	_____
AGENCY ADDRESS	_____
Dear	_____
Records or information concerning your electronic communication / device information held the Santa Barbara Police Department.	
The facts giving rise to the emergency are: _____ _____	
These records were requested for a criminal investigation pertaining to: _____ _____	
If you wish further information, you may contact _____ at _____ _____	
Date	Name of Investigator
<b>Attachment</b> <i>Note: Pursuant to Penal Code § 1546.2 (a) Except as otherwise provided in this section, any government entity that executes a warrant, or obtains electronic information in an emergency pursuant to Section 1546.1, shall serve upon, or deliver to by registered or first-class mail, electronic mail, or other means reasonably calculated to be effective, the identified targets of the warrant or emergency request, a notice that informs the recipient that information about the recipient has been compelled or requested, and states with reasonable specificity the nature of the government investigation under which the information is sought. The notice shall include a copy of the warrant or a written statement setting forth facts giving rise to the emergency. The notice shall be provided contemporaneously with the execution of a warrant, or, in the case of an emergency, within three days after obtaining the electronic information.]</i>	

**DELAY**

The attached **Emergency Electronic Communications Search Court Order** includes a section for which the judge can approve a 90-day delay. The purpose of this section is to delay notifying the phone user that their information was used, in a situation in which this notification might harm the investigation, endanger a witness, or something similar. At the conclusion of the 90 day delay, the original reporting officer is responsible for providing notification to the user or owner that the order was served, along with the written statement or copy of court order.

**Request for delayed notification:** Pursuant to Penal Code § 1546.2(b)(1) I hereby request that notice of the execution of the warrantless search and the issuance of this post hoc court order be delayed on grounds that such notification would cause the following "adverse results" (if checked):  Endanger the life or physical safety of an individual.  Result in flight from prosecution.  Result in tampering or destruction of evidence.  Result in the intimidating of a potential witness.  Seriously jeopardize an investigation or unduly delaying a trial.