California Attorney General's Opinion
No. 03-406

SUMMARY

On December 18, 2003, the California Attorney General's office issued a published opinion in which it concluded that California judges may not authorize the release of pen register and phone trap data by means of a court order per 18 U.S.C. §3121 *et seq*.[1] The basis of the Attorney General's opinion is set forth in the DA's COMMENT.

DA's COMMENT

We believe the conclusion of the Attorney General's office is incorrect. In 1979, the United States Supreme Court determined that, under the Fourth Amendment, telephone subscribers cannot reasonably expect privacy as to data obtained by means of a pen register and, inferentially, a phone trap.[2] Congress later determined that telephone subscribers have a sufficient privacy interest in such data to warrant at least some legal restrictions on its release to law enforcement. Consequently, in 1986 it enacted 18 U.S.C. §3121-3127 which established a procedure by which federal law enforcement officers may obtain pen register and phone trap data.

Per 18 U.S.C. §3122, such information may be obtained by means of a court order based on a declaration signed by the applicant under penalty of perjury "that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency."[3] Congress added a provision that city police officers and other state law enforcement officers may utilize this procedure in state courts "[u]nless prohibited by State law."[4] The issue before the Attorney General was whether California state law "prohibited" California law enforcement officers from utilizing this procedure.

At the outset, it should be noted that the Attorney General framed the issue incorrectly. Although it acknowledged that state judges and officers can utilize the federal procedure "unless prohibited by State law," it said, "Accordingly, we must look to California law to determine if federal statutes *may provide authority* for state law enforcement officers to obtain telephone calling records in the circumstances presented." Emphasis added. This is plainly incorrect. The issue is not whether state law expressly authorizes the procedure. The issue is whether state law expressly *prohibits* it.

In any event, the Attorney General was unable to find any statutes or cases that expressly prohibit utilization of the federal procedure. This should have ended the discussion. But in the process of researching the issue, the Attorney General found two pre-Proposition 8 cases—both decided on independent state grounds—that contain

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[1] NOTE: A pen register, also known as a "dialed number recorder," is a device that records the telephone numbers that are dialed on a phone *as* the call is being made. See 18 USC § 3124(a), 3127(3); *Smith* v. *Maryland* (1979) 442 US 735, 736, fn.1; *United States* v. *New York Telephone Co*. (1977) 434 US 159, 161, fn.1, 167; *People* v. *Blair* (1979) 25 Cal.3d 640, 654, fn.11; *People* v. *Larkin* (1987) 194 Cal.App.3d 650, 653; *People* v. *Andrino* (1989) 210 Cal.App.3d 1395, 1399, fn.2. A "phone trap" or "trap and trace device" compiles a record of the telephone numbers of the phones from which calls to a certain phone are being made. See 18 USC §§ 3124(c), 3125(d); *People* v. *Suite* (1980) 101 Cal.App.3d 680, 685-7. NOTE: Opinions of the Attorney General are not binding authority but are entitled to great weight. *People* v. *Gar*th (1991) 234 Cal.App.3d 1797, 1800; *State of Cal. ex rel. State Lands Com.* v. *Superior Court* (1995) 11 Cal.4th 50, 71.

[2] *Smith* v. *Maryland* (1979) 442 US 736, 744 ["When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and exposed that information to its equipment in the ordinary course of business. In doing so, petitioner assumed the risk that the company would reveal to police the numbers he dialed."].

[3] 18 U.S.C. §3122(b)(2).

[4] 18 U.S.C. §3122(a)(2).

language (mostly *dicta*) that could, if sufficiently stretched and overanalyzed, provide a plausible but weak argument that the procedure is prohibited. The cases were *Burrows* v. *Superior Court* from 1974,[5] and *People* v. *Blair* from 1979.[6]

The facts and rulings in these cases are straightforward. In *Burrows*, police obtained the defendant's bank records by simply requesting them from bank officers. The court ruled the officers acquired the records unlawfully because they did so "without benefit of legal process." In *Blair*, FBI agents in Philadelphia obtained the defendant's phone records by means of a grand jury subpoena. This procedure, said the court, "rendered the telephone records inadmissible in evidence in [California]" because "an agent of the Federal Bureau of Investigation issued the subpoena under the authority of the United States Attorney, who was in turn authorized to do so by the grand jury."

Thus, at most, *Burrows* and *Blair* stand for the proposition that, under California law, officers must obtain a court order or other "legal process" to obtain telephone records—subpoenas and verbal requests are insufficient. As noted, the federal procedure requires a court order which seems to constitute "legal process." Thus, if anything, *Burrows* and *Blair* support the conclusion that the federal procedure is not prohibited by California law.

The Attorney General, however, concluded that the federal "legal process" is "inadequate" under California law. This is because, said the Attorney General, the federal procedure *requires* that the judge issue the court order if the officer declares under penalty of perjury that the information is relevant to an ongoing criminal investigation. According to the Attorney General, this offends *Burrows* and *Blair* because there is "no judicial determination that the issuer was entitled to obtain the information."

Thus, the Attorney General reads *Burrows* and *Blair* as not only requiring a court order, but as establishing the required procedure for obtaining one. The language it relies upon, however, is plainly dicta because, as noted, court orders were not issued in either of these cases.[7] In any event, because the records in *Burrows* or *Blair* were obtained without a court authorization, it is apparent that neither case supports the Attorney General's conclusion that these cases established the minimum procedural requirements for the issuance of court orders.

Nevertheless, the Attorney General takes the position that *Burrows* and *Blair* did so—and that they determined a court order is unlawful unless officers present the judge with an affidavit or declaration containing facts that demonstrate the sought-after data is relevant to an ongoing criminal investigation. Even though "relevance" is an exceedingly low standard of proof,[8] the Attorney General would require that judges read the affidavit and make a determination that at least some of the requested telephone data is "relevant."

Congress had a better idea. It concluded there is built-in assurance that the data is relevant because law enforcement officers would not normally subject themselves to criminal prosecution and the loss of their jobs by seeking irrelevant telephone data. It is also apparent that Congress determined that such an expedited procedure is reasonable because the data that is obtained by means of pen registers and phone traps is not private under the Fourth Amendment and is not subject to suppression.[9]

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[5] (1974) 13 Cal.3d 238.
[6] (1979) 25 Cal.3d 640.
[7] See *People* v. *Mendoza* (2000) 23 Cal.4th 896, 915 ["A decision is not authority for everything said in the opinion but only for the points actually involved and actually decided."].
[8] See Ev. Code §210 [Evidence is "relevant" if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence in the determination of the action."].
[9] See *Smith* v. *Maryland* (1979) 442 US 736.

A final note. Officers who are seeking pen register and phone trap data will often need subscriber information for the phone numbers that are reported. If so, a search warrant will be required inasmuch as the federal statute does not provide for the release of such information via court order. Consequently, officers will often seek a search warrant when they want pen register and phone trap data.

But for those officers who, for one reason or another, need phone trap and pen register data only, and do not have probable cause for a warrant, the Attorney General's opinion may cause problems unless the issuing judge determines its reasoning and conclusions are faulty.