*CELLULAR OR DIGITAL DEVICE IN LAW ENFORCEMENTS POSSESSION*

*eCrime Unit sample draft 12/7/15*

The sample search warrant affidavit and attachments listed below are designed to obtain evidence associated with the compelled production of communication service provider records or the search and seizure of a cellular device that relate to the investigation. SB 178 will require:

1. Face Sheet

2. Property/Location description

3. Affidavit

4. Notice, either contemporaneous or delayed

5. Delayed notice requires facts in the affidavit, an order by the court, and eventually

notice

6. Business Records Affidavit and Instructions

Attached Documents and Notes

***1. FACE SHEET***: When filling out the search warrant form, write “See Attachment A” in the section that asks for the location of the search and “See Attachment B” in the section that asks for a description of the items to be seized.

***2. LOCATION/PROPERTY DESCRIPTION*:** The location may be for a device previously seized and at your agency (“Cell Phone booked as evidence item 2015-001-001”) or may be an electronic communications service provider such as Facebook, Google, or eBay. The property description should describe the records that you have probable cause to believe will be recovered from the device. Describe the with particularity the information to be seized by specifying the time periods covered and, as appropriate and reasonable, the target individuals or accounts, the application of services covered, and the types of information sought. A copy of the warrant must be delivered to the forensic examiner that is processing the device. The forensic examiner would then give the requested data to the agent, who should cull through the data returned by the examiner and isolate material that is not called for by the warrant.

 The two sample property descriptions provided include:

 *2a. Call Detail Records Property Description* (service provider records)

 *2b. Cell Phone Handset Property Description* (accessing the physical device)

***3. AFFIDAVIT***: Investigators should edit the affidavit and attachments to remove requests for information that will not be needed in a particular case. In addition, please note that while the facts described in the “background” section of the affidavit are true for most digital devices, the affiant should be certain that they are true for the particular device that is the subject of the affidavit.

**4. NOTIFICATION OF SEARCH WARRANT** – Pursuant to the CAL-ECPA Penal Code section 1546.2 notification must be provided when any government entity executes a warrant that includes the production of or access to electronic communication or device information. The notice shall:

1. Be served upon the identified targets of the warrant,
	1. If there is no identified target of a warrant at the time of its issuance, the government entity shall submit to the Department of Justice within three days of the execution of the warrant
2. Inform the recipient that information about the recipient has been compelled or requested, and state with reasonable specificity the nature of the government investigation under which the information is sought.
3. Include a copy of the warrant.
4. Be provided contemporaneously with the execution of a warrant, absent an order delaying notification

 The four types of sample notifications provided include:

 *4a. Contemporaneous Notification ECP Search 1546.2(a)*

 *4b. Contemporaneous Notification Premises Search for ED 1546.2(a)*

*(Letter and Notice Format)*

 *4c. Emergency Circumstances Notification 1546.2(b)(1)*

 *4d. Notification following Court Ordered Delay 1546.2(a)(3)*

**5. Delayed Notification Order**: There must be a request in the affidavit justifying this delay (see paragraphs 11 and 12 of Document #3 *Affidavit for Search Warrant)*. A sample motion and order requesting an extension for the delayed notification is attached.

 *5a. Delayed Notification Order*

 *5b. Delayed Notification Extension Request*

 *5c. Extending Delayed Notification Order*

**6. BUSINESS RECORDS AFFIDAVIT REQUEST:** Penal Code section 1524.2 allows foreign corporations that provide electronic communication or remote computing services to verify the authenticity of the records it produces by providing an affidavit that complies with the requirements set forth in Evidence Code section 1561. (Pen. Code, § 1524.2 (b)(4).) Penal Code section 1546.1(e) allows any electronic communication service provider the same ability. Once the records are verified these records are then admissible as business records.

To facilitate this process the search warrant cover letter needs to direct the record holder to complete the “Declaration of Custodian” form that will accompany the search warrant. The second step is to enclose a "Declaration of Custodian" for the custodian to complete. (See Evid. Code, § 1561 (a); Cal. Civ. Prac. Procedure § 13:88.) Your local district attorney will have samples of these forms that they use of the production of business records pursuant to a subpoena. Most businesses are familiar with these forms and may have their own already prepared.

Attached is a sample cover letter and custodian declaration. Please note that this would only be used when obtaining records from a service provider.

The purpose of this document is to assist in the preparation of search warrants for digital evidence. Please consult with your local agencies and prosecutors for further information.