



# LEGAL DEFENSE TRUST TRAINING BULLETIN

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## **CAN A SECRET RECORDING OF YOUR CONVERSATION BE USED AGAINST YOU IN AN ADMINISTRATIVE HEARING?**

A guide to what the law is, and how to protect yourself.

By  
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### Overview

The recent appellate court decision in *Telish v. California State Personnel Board* involves a peace officer who was investigated by his employer because of alleged criminal conduct. As part of the investigation, the officer's employer asked the victim-employee to secretly record eight conversations between the victim and Telish in effort to obtain incriminating evidence against him. Despite obtaining the statements desired, no criminal charges were ever filed by the District Attorney. Instead, these secret recordings were used as evidence against Telish in his disciplinary appeal. Telish ended up losing his job. How is this possible? In the recent decision of *Telish v. California State Personnel Board*, the

court held that so long as 1) the recorded conversation is at the direction of law enforcement for a criminal investigation, 2) the criminal investigation is not a "sham" investigation for an administrative or civil investigation, then 3) these recordings can be used against an officer in a subsequent administrative or civil action.

### Facts of the Telish Case

In June of 2006, while working as Senior Special Agent in Charge at the Bureau of Narcotics Enforcement LA IMPACT, Telish, engaged in a consensual sexual relationship with a subordinate employee working as an administrative assistant and financial

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analyst, L.D. By October of 2007, rumors about this relationship began in part because L.D. told other coworkers about her relationship. Telish then confronted L.D. and threatened that if L.D. did not recant her statements about the relationship, he would post sexually explicit photographs of her online, or email them to her son in retaliation. In a later dispute between the two, Telish saw a risqué text on L.D.'s phone and inquired about it. L.D. struggled to regain possession of her phone, and in doing so Telish held down L.D.'s arm to prevent her from reaching for the phone.

L.D. changed jobs, and eventually began working at the Placentia Police Department. She told her boss, Chief of Police James Anderson about the incidents with Telish. Anderson believed the conduct amounted to assault and battery, and extortion. Chief Anderson then called DOJ and asked them to begin a criminal investigation into one of their employees – Special Agent Telish.

The criminal investigation consisted of the following: At the direction of the DOJ, L.D. was to call Telish, and try to obtain incriminating information regarding the extortion and assault and battery allegations. This conversation would be recorded without Telish's knowledge. The DOJ recorded eight calls until they

were satisfied with what information they had obtained. And that is where anything related to a criminal investigation stopped. The Orange County District Attorney's office declined to prosecute.

These calls were then used against Telish in his disciplinary appeal hearing and his termination was upheld. He pursued a petition for writ of mandate which affirmed the termination. Telish appealed and argued that using the recorded conversations as evidence against him in the administrative hearing was improper. The Court of Appeal disagreed. Why they did is explained below.

**The recorded conversation was at the direction of law enforcement for a *criminal* investigation.**

*Telish tried to argue that these recordings violated the Invasion of Privacy Act.*

Penal Code § 630, known as the Invasion of Privacy Act, prevents one member of a conversation from recording it without the other person's consent. Violators may be fined up to \$2,500.00 or imprisoned for up to a year. (See § 632). But, § 633 allows law enforcement to record a conversation without both parties' knowledge so long as it is being used in a *criminal* investigation. Section

633 also allows a party acting “at the direction of law enforcement” to do the same.

Here, in *Telish’s* case, L.D. was directed by DOJ to record the conversations between Telish and L.D. Thus, she was acting “at the direction of law enforcement.” According to the court, L.D. did not violate the Invasion of Privacy Act. Additionally, even though no criminal charges were ever filed against Telish, these recordings were still part of a criminal investigation as DOJ said it was investigating the assault, battery, and extortion.

**The criminal investigation was not a “sham” investigation.**

*Telish argued that this criminal investigation was a “sham” and was really an administrative investigation.*

Whether a criminal investigation is a “sham” is determined by the facts of the case. (*Van Winkle v. County of Ventura* (2007) 158 Cal.App.4<sup>th</sup> 492). This means that a court will look at all of the circumstances surrounding the case, and determine whether the investigating body was really conducting a criminal investigation to prosecute a crime, or whether they were investigating to bring disciplinary or civil charges against a peace officer. The *Telish* court concluded that if the criminal

investigation is conducted *before* an administrative investigation, that is good evidence that there is no “sham” criminal investigation going on.

In the *Telish* case, the court believed that the evidence to support a charge for assault, battery, and extortion was plausible, and thus the facts weighed against a finding that this was a “sham” criminal investigation. The District Attorney declination to prosecute was not enough to prove that it was a “sham” investigation. The court also explained that because the criminal investigation came before any administrative proceedings, this was strong evidence that the criminal investigation was actually conducted to prosecute a crime.

**Recorded conversations from a criminal investigation can also be used as evidence in other hearings.**

*Telish argued that because the secret recordings were conducted as part of a criminal investigation, they cannot be used against him in an administrative hearing.*

So long as a recorded conversation was recorded in compliance with the law (§632 or §633), the recordings can be used as evidence in ANY type of hearing. This means that evidence obtained via secret recordings for a criminal investigation can ALSO be used in an administrative or civil

hearing. Boiled down, anything you say that is recorded at the direction of law enforcement, will come back to haunt you in any investigation – criminal, administrative, or civil.

In *Telish's* case, the court held that it did not matter that Telish was never prosecuted criminally. This information was obtained *with the intent* to prosecute him criminally, and that was all that mattered. So long as the intent behind obtaining the recorded evidence was proper, it could be used in a termination proceeding against Telish.

### **How to protect yourself?**

**Do not assume a confidential conversation about your own conduct is actually confidential.**

Although trust and confidence in fellow partners and employees is essential to a well-run group, you must keep the *Telish* case in the back of your mind. If you have done something that may be teetering on the legal/illegal line, it is best not to discuss it with anyone. This article was not written to create paranoia that every person you speak with is recording your conversation, but be mindful that if you make an incriminating statement to another person you work with; it is possible

that it could be used against you in multiple forums.

**If a conversation sounds like it might be an attempt to obtain incriminating information about you – stop talking.**

Somewhat obvious advice is to use your common sense. If a conversation with a fellow employee begins to sound anything like an attempt to get you to make an incriminating statement – you should stop talking. Once again, you should keep in the back of your mind that whatever incriminating statements you make may be used against you in the future. And, of course, could even cost you your job.

*Telish v. California State Personnel Bd.*, 2015 Cal. App. LEXIS 235 (Cal. App. 2d Dist. Mar. 13, 2015)

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