

STATE OF NEW YORK

654--A

2017-2018 Regular Sessions

IN ASSEMBLY

January 9, 2017

Introduced by M. of A. RODRIGUEZ, BLAKE, PEOPLES-STOKES -- Multi-Sponsored by -- M. of A. COOK -- read once and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the criminal procedure law, in relation to establishing the EMAIL privacy act (electronic messaging and individual location)

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. This act shall be known and may be cited as the "EMAIL
2 privacy act (electronic messaging and individual location)".

3 § 2. Paragraph (c) of subdivision 1 of section 690.15 of the criminal
4 procedure law is amended and a new paragraph (d) is added to read as
5 follows:

6 (c) A designated or described person~~[-]~~;

7 (d) Designated or described electronic customer data or electronic
8 location information held in electronic storage, including the contents
9 of and records and other information related to a wire communication or
10 electronic communication held in electronic storage. For purposes of
11 this paragraph, "electronic communication" has the meaning assigned by
12 section 250.00 of the penal law, "electronic storage", "wire communi-
13 cation", "electronic customer data" and "electronic location informa-
14 tion" have the meaning assigned by section 690.05 of this article.

15 § 3. Subdivision 2 of section 690.05 of the criminal procedure law, as
16 amended by chapter 504 of the laws of 1991, the opening paragraph as
17 amended by chapter 424 of the laws of 1998, is amended and a new subdi-
18 vision 3 is added to read as follows:

19 2. A search warrant is a court order and process directing a police
20 officer to conduct:

21 (a) a search of designated premises, or of a designated vehicle, or of
22 a designated person, for the purpose of seizing designated property or

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 kinds of property, and to deliver any property so obtained to the court
2 which issued the warrant; or

3 (b) a search of a designated premises for the purpose of searching for
4 and arresting a person who is the subject of: (i) a warrant of arrest
5 issued pursuant to this chapter, a superior court warrant of arrest
6 issued pursuant to this chapter, or a bench warrant for a felony issued
7 pursuant to this chapter, where the designated premises is the dwelling
8 of a third party who is not the subject of the arrest warrant; or

9 (ii) a warrant of arrest issued by any other state or federal court
10 for an offense which would constitute a felony under the laws of this
11 state, where the designated premises is the dwelling of a third party
12 who is not the subject of the arrest warrant[-]; or

13 (c) a search of designated or described electronic customer data or
14 electronic location information held in electronic storage or mobile
15 device, including the contents of, and records and other information
16 related to a wire communication or electronic communication held in
17 electronic storage or mobile device.

18 3. The following definitions are applicable to this article:

19 (a) "Electronic storage" means any storage of electronic customer data
20 in a computer, computer network, or computer system, regardless of
21 whether the data is subject to recall, further manipulation, deletion,
22 or transmission, and includes any storage of a wire or electronic commu-
23 nication by an electronic communications service or a remote computing
24 service.

25 (b) "Wire communication" means an aural transfer made in whole or in
26 part through the use of facilities for the transmission of communi-
27 cations by the aid of wire, cable, or other like connection between the
28 point of origin and the point of reception, including the use of such a
29 connection in a switching station, furnished or operated by a person
30 authorized to engage in providing or operating the facilities for the
31 transmission of communications as a communications common carrier. The
32 term includes the electronic storage of a wire communication.

33 (c) "Electronic customer data" means data or records that:

34 (i) are in the possession, care, custody, or control of a provider of
35 an electronic communications service or a remote computing service; and

36 (ii) contain: (1) information revealing the identity of customers of
37 the applicable service;

38 (2) information about a customer's use of the applicable service;

39 (3) information that identifies the recipient or destination of a wire
40 communication or electronic communication sent to or by the customer;

41 (4) the content of a wire communication or electronic communication
42 sent to or by the customer; and

43 (5) any data stored by or on behalf of the customer with the applica-
44 ble service provider.

45 (d) "Electronic location information" means any information that
46 relates to: (i) the location of a cellular telephone, mobile or other
47 wireless communications device; and (ii) is wholly or partly generated
48 by or derived from the operation of the device.

49 § 4. The criminal procedure law is amended by adding a new section
50 690.60 to read as follows:

51 § 690.60 Search warrants; government access to stored customer data,
52 communications and electronic location information.

53 1. An authorized police officer may require a provider of electronic
54 communications service or a provider of a remote computing service to
55 disclose electronic customer data or electronic location information
56 that is in electronic storage by obtaining a warrant.

2. In executing a search warrant directing a provider of an electronic communications service or a provider of a remote computing service to disclose only electronic customer data that is information revealing the identity of customers of the applicable service or information about a customer's use of the applicable service a police officer need not give notice to the subscriber or customer:

(a) by obtaining an administrative subpoena authorized by statute;

(b) by obtaining a grand jury subpoena;

(c) by obtaining a warrant;

(d) by obtaining the consent of the subscriber or customer to the disclosure of the data;

(e) by obtaining a court order; or

(f) as otherwise permitted by applicable federal law.

3. A provider of telephonic communications service shall disclose to an authorized police officer, without any form of legal process, subscriber listing information, including name, address, and telephone number or similar access code that:

(a) the service provides to others in the course of providing publicly available directory or similar assistance; or

(b) is solely for use in the dispatch of emergency vehicles and personnel responding to a distress call directed to an emergency dispatch system or when the information is reasonably necessary to aid in the dispatching of emergency vehicles and personnel for the immediate prevention of death, personal injury, or destruction of property.

4. A provider of telephonic communications service shall provide an authorized police officer with the name of the subscriber of record whose published telephone number is provided to the service by an authorized police officer.

5. Electronic location information may be obtained by an authorized police officer without any form of legal process, if:

(a) the device is reported stolen by the owner; or

(b) there exists an immediate life-threatening situation.

§ 5. The criminal procedure law is amended by adding a new section 690.65 to read as follows:

§ 690.65 Search warrants; warrant issued in this state for stored customer data, communications or electronic location information.

1. This section applies to a warrant required under section 690.60 of this article to obtain electronic customer data, including the contents of a wire communication, electronic communication or electronic location information.

2. On the filing of an application by an authorized police officer, a district judge may issue a search warrant under this section for electronic customer data held in electronic storage, including the contents of and records and other information related to a wire communication or electronic communication held in electronic storage or electronic location information, by a provider of an electronic communications service or a provider of a remote computing service described by subdivision eight of this section, regardless of whether the customer data is held at a location in this state or at a location in another state. An application made under this subdivision must demonstrate probable cause for the issuance of the warrant and must be supported by the oath or affirmation of the authorized police officer.

3. A search warrant may not be issued under this section unless the application required by section 690.35 of this article sets forth sufficient and substantial facts to establish probable cause that:

1 (a) a specific offense has been committed; and
2 (b) the electronic customer data or electronic location information
3 sought;

4 (i) constitutes evidence of that offense or evidence that a particular
5 person committed that offense; and

6 (ii) is held in electronic storage by the service provider on which
7 the warrant is served under subdivision seven of this section.

8 4. Only the electronic customer data or electronic location informa-
9 tion described in the application required by section 690.35 of this
10 article may be seized under the warrant.

11 5. The police officer shall execute the warrant not later than the
12 tenth day after the date of issuance, except that the officer shall
13 execute the warrant within a shorter period if so directed in the
14 warrant by the district judge. For purposes of this subdivision, a
15 warrant is executed when the warrant is served in the manner described
16 by subdivision seven of this section.

17 6. A warrant under this section may be served only on a service
18 provider that is a domestic entity or a company or entity otherwise
19 doing business in this state under a contract or a terms of service
20 agreement with a resident of this state, if any part of that contract or
21 agreement is to be performed in this state. The service provider shall
22 produce all electronic customer data, contents of communications, elec-
23 tronic location information, and other information sought, regardless of
24 where the information is held in the United States and within the period
25 allowed for compliance with the warrant, as provided by subdivision
26 eight of this section. A court may find any designated officer, desig-
27 nated director, or designated owner of a company or entity in contempt
28 of court if the person by act or omission is responsible for the failure
29 of the company or entity to comply with the warrant within the period
30 allowed for compliance. The failure of a company or entity to timely
31 deliver the information sought in the warrant does not affect the admis-
32 sibility of that evidence in a criminal proceeding.

33 7. A search warrant issued under this section is served when the
34 authorized police officer delivers the warrant by hand, by facsimile
35 transmission, or, in a manner allowing proof of delivery, by means of
36 the United States mail or a private delivery service to:

37 (a) a person specified by section three hundred five of the business
38 corporation law;

39 (b) the secretary of state in the case of a company or entity to which
40 section three hundred six of the business corporation law applies; or

41 (c) any other person or entity designated to receive the service of
42 process.

43 8. The district judge shall indicate in the warrant that the deadline
44 for compliance by the provider of an electronic communications service
45 or the provider of a remote computing service is the fifteenth business
46 day after the date the warrant is served if the warrant is to be served
47 on a domestic entity or a company or entity otherwise doing business in
48 this state, except that the deadline for compliance with a warrant
49 served in accordance with section three hundred six of the business
50 corporation law, may be extended to a date that is not later than the
51 thirtieth day after the date the warrant is served. The judge may indi-
52 cate in a warrant that the deadline for compliance is earlier than the
53 fifteenth business day after the date the warrant is served if the offi-
54 cer makes a showing and the judge finds that failure to comply with the
55 warrant by the earlier deadline would cause serious jeopardy to an

1 investigation, cause undue delay of a trial, or create a material risk
2 of:

- 3 (a) danger to the life or physical safety of any person;
- 4 (b) flight from prosecution;
- 5 (c) the tampering with or destruction of evidence; or
- 6 (d) intimidation of potential witnesses.

7 9. If the authorized police officer serving the warrant under this
8 section also delivers an application form to the provider of an elec-
9 tronic communications service or the provider of a remote computing
10 service responding to the warrant, and the police officer also notifies
11 the provider in writing that an executed application is required, then
12 the provider shall verify the authenticity of the customer data,
13 contents of communications, electronic location information, and other
14 information produced in compliance with the warrant by including with
15 the information the application form completed and sworn to by a person
16 who is a custodian of the information or a person otherwise qualified to
17 attest to its authenticity that states that the information was stored
18 in the course of regularly conducted business of the provider and speci-
19 fies whether it is the regular practice of the provider to store that
20 information.

21 10. On a service provider's compliance with a warrant under this
22 section, an authorized police officer shall file a return of the warrant
23 and a copy of the inventory of the seized property as required under
24 section 690.50 of this article.

25 11. The district judge shall hear and decide any motion to quash the
26 warrant not later than the fifth business day after the date the service
27 provider files the motion. The judge may allow the service provider to
28 appear at the hearing by teleconference.

29 12. A provider of an electronic communications service or a provider
30 of a remote computing service responding to a warrant issued under this
31 section may request an extension of the period for compliance with the
32 warrant if extenuating circumstances exist to justify the extension. The
33 district judge shall grant a request for an extension based on those
34 circumstances if:

35 (a) the authorized police officer who applied for the warrant or
36 another appropriate authorized police officer agrees to the extension;
37 or

38 (b) the district judge finds that the need for the extension outweighs
39 the likelihood that the extension will cause an adverse circumstance
40 described by subdivision eight of this section.

41 § 6. The criminal procedure law is amended by adding a new section
42 690.70 to read as follows:

43 § 690.70 Search warrants; warrant issued in another state for stored
44 customer data, communications or electronic location informa-
45 tion.

46 Any domestic entity that provides electronic communications services
47 or remote computing services to the public shall comply with a warrant
48 issued in another state and seeking information described in subdivision
49 two of section 690.65 of this article, if the warrant is served on the
50 entity in a manner equivalent to service of process required by subdivi-
51 sion eight of section 690.65 of this article.

52 § 7. The criminal procedure law is amended by adding a new section
53 690.75 to read as follows:

54 § 690.75 Search warrants; back-up preservation for stored customer data,
55 communications or electronic location information.

1 1. A subpoena or court order for disclosure of certain electronic
2 customer data or electronic location information held in electronic
3 storage by a provider of an electronic communications service or a
4 provider of a remote computing service may require that provider to
5 create a copy of the customer data or electronic location information
6 sought by the subpoena or court order for the purpose of preserving that
7 data. The provider may not inform the subscriber or customer whose data
8 is being sought that the subpoena or court order has been issued. The
9 provider shall create the copy within a reasonable time as determined by
10 the court issuing the subpoena or court order.

11 2. The provider of an electronic communications service or the provid-
12 er of a remote computing service shall immediately notify the authorized
13 police officer who presented the subpoena or court order requesting the
14 copy when the copy has been created.

15 3. The authorized police officer shall notify the subscriber or
16 customer whose electronic customer data or electronic location informa-
17 tion is the subject of the subpoena or court order of the creation of
18 the copy not later than three days after the date of the receipt of the
19 notification from the applicable provider that the copy was created.

20 4. The provider of an electronic communications service or the provid-
21 er of a remote computing service shall release the copy to the request-
22 ing authorized police officer not earlier than the fourteenth day after
23 the date of the police officer's notice to the subscriber or customer if
24 the provider has not:

25 (a) initiated proceedings to challenge the request of the police offi-
26 cer for the copy; or

27 (b) received notice from the subscriber or customer that the subscrib-
28 er or customer has initiated proceedings to challenge the request.

29 5. The provider of an electronic communications service or the provid-
30 er of a remote computing service may not destroy or permit the
31 destruction of the copy until the electronic customer data or electronic
32 location information has been delivered to the applicable law enforce-
33 ment agency or until the resolution of any court proceedings, including
34 appeals of any proceedings, relating to the subpoena or court order
35 requesting the creation of the copy, whichever occurs last.

36 6. An authorized police officer who reasonably believes that notifica-
37 tion to the subscriber or customer of the subpoena or court order would
38 result in the destruction of or tampering with electronic customer data
39 or electronic location information sought may request the creation of a
40 copy of the data. The police officer's belief is not subject to chal-
41 lenge by the subscriber or customer or by a provider of an electronic
42 communications service or a provider of a remote computing service.

43 7. (a) A subscriber or customer who receives notification as described
44 in subdivision three of this section may file a written motion to quash
45 the subpoena or vacate the court order in the court that issued the
46 subpoena or court order not later than the fourteenth day after the date
47 of the receipt of the notice. The motion must contain an affidavit or
48 sworn statement stating:

49 (i) that the applicant is a subscriber or customer of the provider of
50 an electronic communications service or the provider of a remote comput-
51 ing service from which the electronic customer data or electronic
52 location information held in electronic storage for the subscriber or
53 customer has been sought; and

54 (ii) the applicant's reasons for believing that the customer data or
55 electronic location information sought is not relevant to a legitimate

1 law enforcement inquiry or that there has not been substantial compli-
2 ance with the provisions of this article in some other respect.

3 (b) The subscriber or customer shall give written notice to the
4 provider of an electronic communications service or the provider of a
5 remote computing service of the challenge to the subpoena or court
6 order. The authorized police officer requesting the subpoena or court
7 order must be served a copy of the papers filed by personal delivery or
8 by registered or certified mail.

9 8. (a) The court shall order the authorized police officer to file a
10 sworn response to the motion filed by the subscriber or customer if the
11 court determines that the subscriber or customer has complied with the
12 requirements of subdivision seven of this section. On request of the
13 police officer, the court may permit the response to be filed in camera.
14 The court may conduct any additional proceedings the court considers
15 appropriate if the court is unable to make a determination on the motion
16 on the basis of the parties' initial allegations and response.

17 (b) The court shall rule on the motion as soon after the filing of the
18 officer's response as practicable. The court shall deny the motion if
19 the court finds that the applicant is not the subscriber or customer
20 whose electronic customer data or electronic location information held
21 in electronic storage is the subject of the subpoena or court order or
22 that there is reason to believe that the police officer's inquiry is
23 legitimate and that the customer data sought is relevant to that
24 inquiry. The court shall quash the subpoena or vacate the order if the
25 court finds that the applicant is the subscriber or customer whose data
26 is the subject of the subpoena or court order and that there is not a
27 reason to believe that the data is relevant to a legitimate law enforce-
28 ment inquiry or that there has not been substantial compliance with the
29 provisions of this article.

30 (c) A court order denying a motion or application under this section
31 is not a final order and no interlocutory appeal may be taken from the
32 denial.

33 § 8. The criminal procedure law is amended by adding a new section
34 690.80 to read as follows:

35 § 690.80 Search warrants; preclusion of notification for stored customer
36 data, communications or electronic location information.

37 1. An authorized police officer seeking electronic customer data or
38 electronic location information may apply to the court for an order
39 commanding the service provider to whom a warrant, subpoena, or court
40 order is directed not to disclose to any person the existence of the
41 warrant, subpoena, or court order. The order is effective for the period
42 the court considers appropriate. The court shall enter the order if the
43 court determines that there is reason to believe that notification of
44 the existence of the warrant, subpoena, or court order will have an
45 adverse result.

46 2. In this section, an "adverse result" means:

47 (a) endangering the life or physical safety of an individual;

48 (b) flight from prosecution;

49 (c) destruction of or tampering with evidence;

50 (d) intimidation of a potential witness; or

51 (e) otherwise seriously jeopardizing an investigation or unduly delay-
52 ing a trial.

53 § 9. The criminal procedure law is amended by adding a new section
54 690.85 to read as follows:

55 § 690.85 Search warrants; reimbursement of costs for stored customer
56 data, communications or electronic location information.

1 1. Except as provided by subdivision three of this section, an author-
2 ized police officer who obtains information under this article shall
3 reimburse the person assembling or providing the information for all
4 costs that are reasonably necessary and that have been directly incurred
5 in searching for, assembling, reproducing, or otherwise providing the
6 information. These costs include costs arising from necessary disruption
7 of normal operations of an electronic communications service or remote
8 computing service in which the information may be stored.

9 2. The authorized police officer and the person providing the informa-
10 tion may agree on the amount of reimbursement. If there is no agreement,
11 the court that issued the order for production of the information shall
12 determine the amount. If no court order was issued for production of
13 the information, the court before which the criminal prosecution relat-
14 ing to the information would be brought shall determine the amount.

15 3. Subdivision one of this section does not apply to records or other
16 information maintained by a communications common carrier that relate to
17 telephone toll records or telephone listings unless the court determines
18 that the amount of information required was unusually voluminous or that
19 an undue burden was imposed on the provider.

20 § 10. The criminal procedure law is amended by adding a new section
21 690.90 to read as follows:

22 § 690.90 Search warrants; stored customer data, communications or elec-
23 tronic location information; no cause of action.

24 A subscriber or customer of a provider of an electronic communications
25 service or a provider of a remote computing service does not have a
26 cause of action against a provider or its officers, employees, or agents
27 or against other specified persons for providing information, facili-
28 ties, or assistance as required by a court order, warrant, subpoena, or
29 certification under this article.

30 § 11. The criminal procedure law is amended by adding a new section
31 690.95 to read as follows:

32 § 690.95 Search warrants; stored customer data, communications or elec-
33 tronic location information; cause of action.

34 Except as provided by section 690.90 of this article, a provider of an
35 electronic communications service or a provider of a remote computing
36 service, or a subscriber or customer of that provider, that is aggrieved
37 by a violation of this article has a civil cause of action if the
38 conduct constituting the violation was committed knowingly or inten-
39 tionally and is entitled to:

- 40 1. injunctive relief;
- 41 2. a reasonable attorney's fee and other litigation costs reasonably
42 incurred; and
- 43 3. the sum of the actual damages suffered and any profits made by the
44 violation as a result of the violation or one thousand dollars, whichever
45 is more.

46 § 12. The criminal procedure law is amended by adding a new section
47 690.96 to read as follows:

48 § 690.96 Search warrants; annual report of warrants and orders.

49 1. No later than January fifteenth of each year, a provider of an
50 electronic communication service or a provider of a remote computing
51 service doing business in this state shall report to the office of
52 public safety the following information for the preceding calendar year,
53 disaggregated by each law enforcement agency in this state making the
54 applicable requests:

- 55 (a) the number of requests made for pen register or trap and trace
56 information;

1 (b) the number of requests made for ESN reader information;
2 (c) the number of requests made for location information;
3 (d) the number of individuals whose location information was
4 disclosed; and

5 (e) the amount that each law enforcement agency was billed by the
6 communication common carrier or electronic communications service for
7 each request made under paragraph (a), (b) or (c) of this subdivision.

8 2. No later than the thirtieth day after the date of expiration of a
9 warrant or order issued under this article or an order extending the
10 period of a warrant or order issued under this article, or no later than
11 the thirtieth day after the date the court denies an application for a
12 warrant or order under this article, the court shall submit to the
13 office of public safety the following information, as applicable:

14 (a) the receipt of an application for a warrant or order under this
15 article;

16 (b) the type of warrant or order for which the application was made;

17 (c) whether any application for an order of extension was granted,
18 granted as modified by the court, or denied;

19 (d) the period of monitoring authorized by the warrant or order and
20 the number and duration of any extensions of the warrant or order;

21 (e) the offense under investigation, as specified in the application
22 for the warrant or order or an extension of the warrant or order; and

23 (f) the law enforcement agency or prosecutor that submitted an appli-
24 cation for the warrant or order or an extension of the warrant or order.

25 3. No later than January fifteenth of each year, each prosecutor that
26 submits an application for a warrant or order or an extension of a
27 warrant or order under this article shall submit to the office of public
28 safety the following information for the preceding calendar year;

29 (a) the information required to be submitted by a court with respect
30 to each application submitted by the prosecutor for the warrant or order
31 or an extension of the warrant or order;

32 (b) a general description of information collected under each warrant
33 or order that was issued by the court, including the approximate number
34 of individuals for whom location information was intercepted and the
35 approximate duration of the monitoring of the location information of
36 those individuals;

37 (c) the number of arrests made as a result of information obtained
38 under a warrant or order issued under this article;

39 (d) the number of criminal trials commenced as a result of information
40 obtained under a warrant or order issued under this article; and

41 (e) the number of convictions obtained as a result of information
42 obtained under a warrant or order issued under this article.

43 4. Information submitted to the office of public safety under this
44 section is public information and subject to disclosure.

45 5. No later than March first of each year, the office of public safety
46 shall submit a report to the governor, the state attorney general, the
47 speaker of the assembly, and the chairs of the standing committees of
48 the senate and assembly with primary jurisdiction over criminal justice.
49 The report must contain the following information for the preceding
50 calendar year:

51 (a) an assessment of the extent of tracking or monitoring by law
52 enforcement agencies of pen register, trap and trace, ESN reader, and
53 location information;

54 (b) a comparison of the ratio of the number of applications for
55 warrants or orders made under this article to the number of arrests and

1 convictions resulting from information obtained under a warrant or order
2 issued under this article;

3 (c) identification of the types of offenses investigated under a
4 warrant or order issued under this article; and

5 (d) with respect to both state and local jurisdictions, an estimate of
6 the total cost of conducting investigations under a warrant or order
7 issued under this article.

8 § 13. The criminal procedure law is amended by adding a new section
9 690.97 to read as follows:

10 § 690.97 Search warrants; stored customer data, communications and elec-
11 tronic location information and use in a court of law.

12 Stored customer data, communications and electronic location informa-
13 tion obtained without any form of legal process and not pursuant to
14 section 690.60 of this article shall be inadmissible in a court of law.

15 § 14. This act shall take effect immediately.