

STATE OF NEW YORK

2124

2019-2020 Regular Sessions

IN ASSEMBLY

January 22, 2019

Introduced by M. of A. M. G. MILLER -- read once and referred to the Committee on Codes

AN ACT to amend the penal law and the criminal procedure law, in relation to computer crimes and obscenities

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

1 Section 1. The penal law is amended by adding two new sections 156.41
2 and 156.42 to read as follows:

3 § 156.41 Criminal use of encryption in the second degree.

4 A person is guilty of criminal use of encryption in the second degree
5 when he or she intentionally uses or attempts to use encryption to:

6 1. commit, further, facilitate or promote conduct constituting a
7 crime;

8 2. conceal the commission of any crime;

9 3. conceal or protect the identity of a person who has committed any
10 crime; or

11 4. prevent, impede, delay or disrupt the normal operation or use of a
12 computer, computer program or computer system.

13 Criminal use of encryption in the second degree is a class A misdemea-
14 nor.

15 § 156.42 Criminal use of encryption in the first degree.

16 A person is guilty of criminal use of encryption in the first degree
17 when he or she commits the crime of criminal use of encryption in the
18 second degree and he or she:

19 1. does so with an intent to commit or attempt to commit or further
20 the commission of a felony;

21 2. does so with an intent to conceal the commission of any felony;

22 3. does so with the intent to protect the identity of a person who has
23 committed any felony; or

24 4. has been previously convicted of any crime under this article.

25 Criminal use of encryption in the first degree is a class E felony.

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

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§ 2. Section 156.00 of the penal law is amended by adding a new subdivision 10 to read as follows:

10. "Encryption" means any protective or disruptive measure, including, without limitation, cryptography, enciphering or encoding, which:

(a) causes or makes any data, information, image, program, signal or sound unintelligible or unusable; or

(b) prevents, impedes, delays or disrupts access to any data, information, image, program, signal or sound.

§ 3. Section 215.35 of the penal law is amended to read as follows:

§ 215.35 Tampering with physical evidence; definitions of terms.

The following definitions are applicable to section 215.40:

1. "Physical evidence" means any article, object, document, record, property of any kind, or other thing of physical substance ~~[which is or is about to be produced or used as evidence in an official proceeding]~~, including but not limited to computer programs, computer data and computer services as defined in section 156.00 of this part.

2. "Official proceeding" means any action or proceeding, investigation or inquiry conducted by or before a legally constituted judicial, legislative, administrative or other governmental agency or official, in which evidence may properly be received or gathered.

3. "Encryption" means any protective or disruptive measure, including but not limited to cryptography, enciphering or encoding, which: (a) causes or makes any data, information, image, program, signal or sound unintelligible or unusable; or (b) prevents, impedes, delays or disrupts access to any data, information, image, program, signal or sound.

§ 4. Section 215.40 of the penal law is amended to read as follows:

§ 215.40 Tampering with physical evidence.

A person is guilty of tampering with physical evidence when:

1. With intent that it be used or introduced in, or believing that it has been requested or may be gathered during or pursuant to an official proceeding or a prospective official proceeding, ~~[he]~~ such person: (a) knowingly makes, devises or prepares false physical evidence, or (b) produces or offers such evidence at such a proceeding knowing it to be false; or

2. Believing that certain physical evidence ~~[is about to]~~ has been or may be requested, gathered, produced or used in or pursuant to an official proceeding or a prospective official proceeding, and intending to prevent such production or use, ~~[he]~~ such person suppresses it by any act of concealment, alteration, encryption or destruction, or by employing force, intimidation or deception against any person.

3. No electronic communications service or remote computing service, as defined under the federal electronic communications privacy act, which is acting within the ordinary course of business, shall be obligated to retain customer information and/or content unless in receipt of an official request to retain physical evidence.

Tampering with physical evidence is a class ~~[E]~~ D felony.

§ 5. The penal law is amended by adding a new article 495 to read as follows:

ARTICLE 495

COMPUTER SEX CRIMES AGAINST CHILDREN

Section 495.00 Computer sex crimes.

495.05 Sentence of imprisonment for computer sex crimes.

§ 495.00 Computer sex crimes.

1. A person commits a computer sex crime when he or she commits a sex crime against a child and facilitated the commission of such offense by

1 using or causing to be used a computer or computer service to communi-
2 cate with the child against whom such offense is committed.

3 2. A "sex crime against a child" means a felony offense (a) the essen-
4 tial elements of which include the commission or attempted commission of
5 sexual conduct, as defined in subdivision ten of section 130.00 of this
6 chapter, or the use or promotion of a sexual or obscene sexual perform-
7 ance, as defined in section 263.00 of this chapter, (b) committed or
8 attempted to be committed against a child less than seventeen years old.
9 § 495.05 Sentence of imprisonment for computer sex crimes.

10 1. When a person is convicted of a computer sex crime pursuant to
11 section 495.00 of this article, and the underlying crime against a child
12 is a violent felony offense, as defined in section 70.02 of this chap-
13 ter, the computer sex crime shall be deemed a violent felony offense.

14 2. When a person is convicted of a computer sex crime pursuant to
15 section 495.00 of this article, and the underlying sex crime against a
16 child is a class C, D or E felony, the computer sex crime shall be
17 deemed to be one category higher than the sex crime against a child the
18 defendant committed, or one category higher than the offense level
19 applicable to the defendant's conviction for an attempt or conspiracy to
20 commit a sex crime against a child, whichever is applicable.

21 3. Notwithstanding any other provision of law, when a person is
22 convicted of a computer sex crime pursuant to section 495.00 of this
23 article and the underlying sex crime against a child is a class B felo-
24 ny:

25 (a) the term of the determinate sentence must be at least eight years
26 if the defendant is sentenced pursuant to section 70.02 of this chapter;

27 (b) the term of the determinate sentence must be at least twelve years
28 if the defendant is sentenced pursuant to section 70.04 of this chapter;
29 and

30 (c) the maximum term of the indeterminate sentence must be at least
31 four years if the defendant is sentenced pursuant to section 70.05 of
32 this chapter.

33 § 6. Subdivisions 4 and 7 of section 200.50 of the criminal procedure
34 law, subdivision 4 as amended by section 15 of subpart A of part H of
35 chapter 55 of the laws of 2014 and subdivision 7 as amended by chapter 7
36 of the laws of 2007, are amended to read as follows:

37 4. A statement in each count that the grand jury, or, where the accu-
38 satory instrument is a superior court information, the district attor-
39 ney, accuses the defendant or defendants of a designated offense,
40 provided that in any prosecution under article four hundred eighty-five
41 of the penal law, the designated offense shall be the specified offense,
42 as defined in subdivision three of section 485.05 of the penal law,
43 followed by the phrase "as a hate crime", and provided further that in
44 any prosecution under section 490.25 of the penal law, the designated
45 offense shall be the specified offense, as defined in subdivision three
46 of section 490.05 of the penal law, followed by the phrase "as a crime
47 of terrorism"; and provided further that in any prosecution under
48 section 130.91 of the penal law, the designated offense shall be the
49 specified offense, as defined in subdivision two of section 130.91 of
50 the penal law, followed by the phrase "as a sexually motivated felony";
51 and provided further that in any prosecution under section [496.06]
52 495.00 of the penal law, the designated offense shall be the [specified
53 offense, as defined in subdivision two of such section, followed by the
54 phrase "as a public corruption crime"] underlying sex crime against a
55 child, as defined in subdivision two of section 495.00 of the penal law,
56 followed by the phrase "as a computer sex crime"; and

1 7. A plain and concise factual statement in each count which, without
2 allegations of an evidentiary nature,

3 (a) asserts facts supporting every element of the offense charged and
4 the defendant's or defendants' commission thereof with sufficient preci-
5 sion to clearly apprise the defendant or defendants of the conduct which
6 is the subject of the accusation; and

7 (b) in the case of any armed felony, as defined in subdivision forty-
8 one of section 1.20, states that such offense is an armed felony and
9 specifies the particular implement the defendant or defendants
10 possessed, were armed with, used or displayed or, in the case of an
11 implement displayed, specifies what the implement appeared to be; and

12 (c) in the case of any hate crime, as defined in section 485.05 of the
13 penal law, specifies, as applicable, that the defendant or defendants
14 intentionally selected the person against whom the offense was committed
15 or intended to be committed; or intentionally committed the act or acts
16 constituting the offense, in whole or in substantial part because of a
17 belief or perception regarding the race, color, national origin, ances-
18 try, gender, religion, religious practice, age, disability or sexual
19 orientation of a person; and

20 (d) in the case of a crime of terrorism, as defined in section 490.25
21 of the penal law, specifies, as applicable, that the defendant or
22 defendants acted with intent to intimidate or coerce a civilian popu-
23 lation, influence the policy of a unit of government by intimidation or
24 coercion, or affect the conduct of a unit of government by murder,
25 assassination or kidnapping; and

26 (e) in the case of a sexually motivated felony, as defined in section
27 130.91 of the penal law, asserts facts supporting the allegation that
28 the offense was sexually motivated; and

29 (f) in the case of a computer sex crime, as defined in subdivision one
30 of section 495.00 of the penal law, specifies, as applicable, that the
31 defendant or defendants facilitated the commission of a sex crime
32 against a child, as defined in subdivision two of such section 495.00,
33 by using or causing to be used a computer or computer service to commu-
34 nicate with the child against whom such offense is committed; and

35 § 7. Paragraph (c) of subdivision 5 of section 156.00 of the penal
36 law, as amended by chapter 558 of the laws of 2006, is amended and a new
37 paragraph (d) is added to read as follows:

38 (c) is not and is not intended to be available to anyone other than
39 the person or persons rightfully in possession thereof or selected
40 persons having access thereto with his, her or their consent and which
41 accords or may accord such rightful possessors an advantage over compet-
42 itors or other persons who do not have knowledge or the benefit there-
43 of[-]; or

44 (d) contains records of the employment, salary, credit or other finan-
45 cial or personal information relating to another person and such records
46 are accessed after the time at which a person knows or reasonably should
47 know that he or she is without authorization to view the information
48 displayed.

49 § 8. Subdivision 2 of section 156.10 of the penal law, as amended by
50 chapter 558 of the laws of 2006, is amended to read as follows:

51 2. he or she thereby knowingly gains access to computer material[-];
52 or

53 § 9. Section 156.10 of the penal law is amended by adding a new subdi-
54 vision 3 to read as follows:

55 3. he or she gains access to such computer or computer service by
56 using a card, code or other means of access, or any combination thereof,

1 that he or she knows to be forged or stolen, or through use of a ficti-
2 tious identity.

3 § 10. The opening paragraph of section 156.20 of the penal law, as
4 amended by chapter 558 of the laws of 2006, is amended to read as
5 follows:

6 A person is guilty of computer tampering in the fourth degree when he
7 or she uses, causes to be used, or accesses a computer, computer
8 service, or computer network without authorization and he or she inten-
9 tionally alters in any manner or destroys, damages or conceals computer
10 data or a computer program of another person.

11 § 11. Subdivisions 3 and 4 of section 156.25 of the penal law, as
12 amended by chapter 89 of the laws of 1993, are amended to read as
13 follows:

14 3. [~~he~~] such person intentionally alters in any manner or destroys,
15 damages or conceals computer material; or

16 4. [~~he~~] such person intentionally alters in any manner or destroys,
17 damages or conceals computer data or a computer program so as to cause
18 damages in an aggregate amount exceeding one thousand dollars.

19 § 12. Section 156.26 of the penal law, as amended by chapter 590 of
20 the laws of 2008, is amended to read as follows:

21 § 156.26 Computer tampering in the second degree.

22 A person is guilty of computer tampering in the second degree when he
23 or she commits the crime of computer tampering in the fourth degree and
24 he or she intentionally alters in any manner or destroys, damages or
25 conceals:

26 1. computer data or a computer program: (a) so as to cause damages in
27 an aggregate amount exceeding three thousand dollars, or (b) does so
28 with the intent to endanger public safety, including, but not limited
29 to, interrupting or impairing the providing of services by any public or
30 private utility or by any state, county or local governmental agency,
31 public carrier or public communication service; or

32 2. computer material that contains records of the medical history or
33 medical treatment of an identified or readily identifiable individual or
34 individuals and as a result of such alteration or destruction, such
35 individual or individuals suffer serious physical injury, and he or she
36 is aware of and consciously disregards a substantial and unjustifiable
37 risk that such serious physical injury may occur.

38 Computer tampering in the second degree is a class D felony.

39 § 13. The opening paragraph of section 156.27 of the penal law, as
40 added by chapter 89 of the laws of 1993, is amended to read as follows:

41 A person is guilty of computer tampering in the first degree when [~~he~~]
42 such person commits the crime of computer tampering in the fourth degree
43 and [~~he~~] such person intentionally alters in any manner or destroys,
44 damages or conceals computer data or a computer program so as to cause
45 damages in an aggregate amount exceeding fifty thousand dollars.

46 § 14. Subdivision 2 of section 115.00 of the penal law, as added by
47 chapter 422 of the laws of 1978, is amended to read as follows:

48 2. to a person under sixteen years of age who intends to engage in
49 conduct which would constitute a crime, [~~he~~] such person, being over
50 eighteen years of age, engages in conduct which provides such person
51 with means or opportunity for the commission thereof and which in fact
52 aids such person to commit a crime[~~-~~]; or

53 § 15. Section 115.00 of the penal law is amended by adding a new
54 subdivision 3 to read as follows:

55 3. to a person who intends to commit a crime, he engages in conduct
56 which includes the intentional disclosure of a computer password, iden-

1 tifying code, personal information number, or other confidential infor-
2 mation about a computer security system which provides such person with
3 means or opportunity for the commission thereof and in fact aids such
4 person to commit a crime.

5 § 16. Subdivision 8 of section 700.05 of the criminal procedure law is
6 amended by adding two new paragraphs (w) and (x) to read as follows:

7 (w) Computer sex crimes as defined in section 495.00 of the penal law,
8 computer trespass as defined in section 156.10 of the penal law, comput-
9 er tampering in the third degree as defined in section 156.25 of the
10 penal law, computer tampering in the second degree as defined in section
11 156.26 of the penal law, computer tampering in the first degree as
12 defined in section 156.27 of the penal law, unlawful duplication of
13 computer related material as defined in section 156.30 of the penal law,
14 criminal possession of computer related material as defined in section
15 156.35 of the penal law, criminal use of encryption in the second degree
16 as defined in section 156.41 of the penal law, criminal use of
17 encryption in the first degree as defined in section 156.42 of the penal
18 law and disseminating indecent material to minors in the first degree as
19 defined in section 235.22 of the penal law.

20 (x) Use of a child in a sexual performance as defined in section
21 263.05 of the penal law, promoting an obscene sexual performance by a
22 child as defined in section 263.10 of the penal law, possessing an
23 obscene sexual performance by a child as defined in section 263.11 of
24 the penal law, promoting a sexual performance by a child as defined in
25 section 263.15 of the penal law, possessing a sexual performance by a
26 child as defined in section 263.16 of the penal law.

27 § 17. Paragraph (a) of subdivision 1 of section 460.10 of the penal
28 law, as amended by chapter 189 of the laws of 2018, is amended to read
29 as follows:

30 (a) Any of the felonies set forth in this chapter: sections 120.05,
31 120.10 and 120.11 relating to assault; sections 121.12 and 121.13 relat-
32 ing to strangulation; sections 125.10 to 125.27 relating to homicide;
33 sections 130.25, 130.30 and 130.35 relating to rape; sections 135.20 and
34 135.25 relating to kidnapping; sections 135.35 and 135.37 relating to
35 labor trafficking; section 135.65 relating to coercion; sections 140.20,
36 140.25 and 140.30 relating to burglary; sections 145.05, 145.10 and
37 145.12 relating to criminal mischief; article one hundred fifty relating
38 to arson; sections 155.30, 155.35, 155.40 and 155.42 relating to grand
39 larceny; section 156.10 relating to computer trespass; sections 156.25,
40 156.26, and 156.27 relating to computer tampering; section 156.30 relat-
41 ing to unlawful duplication of computer related material; section 156.35
42 relating to criminal possession of computer related material; section
43 156.41 relating to criminal use of encryption; sections 177.10, 177.15,
44 177.20 and 177.25 relating to health care fraud; article one hundred
45 sixty relating to robbery; sections 165.45, 165.50, 165.52 and 165.54
46 relating to criminal possession of stolen property; sections 165.72 and
47 165.73 relating to trademark counterfeiting; sections 170.10, 170.15,
48 170.25, 170.30, 170.40, 170.65 and 170.70 relating to forgery; sections
49 175.10, 175.25, 175.35, 175.40 and 210.40 relating to false statements;
50 sections 176.15, 176.20, 176.25 and 176.30 relating to insurance fraud;
51 sections 178.20 and 178.25 relating to criminal diversion of
52 prescription medications and prescriptions; sections 180.03, 180.08,
53 180.15, 180.25, 180.40, 180.45, 200.00, 200.03, 200.04, 200.10, 200.11,
54 200.12, 200.20, 200.22, 200.25, 200.27, 200.56, 215.00, 215.05 and
55 215.19; sections 187.10, 187.15, 187.20 and 187.25 relating to residen-
56 tial mortgage fraud, sections 190.40 and 190.42 relating to criminal

1 usury; section 190.65 relating to schemes to defraud; any felony defined
2 in article four hundred ninety-six; sections 205.60 and 205.65 relating
3 to hindering prosecution; sections 210.10, 210.15, and 215.51 relating
4 to perjury and contempt; section 215.40 relating to tampering with phys-
5 ical evidence; sections 220.06, 220.09, 220.16, 220.18, 220.21, 220.31,
6 220.34, 220.39, 220.41, 220.43, 220.46, 220.55, 220.60, 220.65 and
7 220.77 relating to controlled substances; sections 225.10 and 225.20
8 relating to gambling; sections 230.25, 230.30, and 230.32 relating to
9 promoting prostitution; section 230.34 relating to sex trafficking;
10 section 230.34-a relating to sex trafficking of a child; sections
11 235.06, 235.07, 235.21 and 235.22 relating to obscenity; sections
12 ~~263.05~~, 263.10 [~~and~~], ~~263.11~~, 263.15 and ~~263.16~~ relating to [~~promoting~~]
13 a sexual performance by a child; sections 265.02, 265.03, 265.04,
14 265.11, 265.12, 265.13 and the provisions of section 265.10 which
15 constitute a felony relating to firearms and other dangerous weapons;
16 sections 265.14 and 265.16 relating to criminal sale of a firearm;
17 section 275.10, 275.20, 275.30, or 275.40 relating to unauthorized
18 recordings; [~~and~~] sections 470.05, 470.10, 470.15 and 470.20 relating to
19 money laundering and section 495.00 relating to computer sex crimes; or
20 § 18. This act shall take effect on the first of November next
21 succeeding the date on which it shall have become a law.